

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION No.3767 of 2017

ORDER:

This Revision is filed assailing the order dt.20-04-2017 in I.A.No.186 of 2016 in O.S.No.3 of 2016 of the Senior Civil Judge, Sircilla.

2. Petitioners are defendants in the suit.
3. Respondent filed the said suit against petitioners for partition and separate possession of her ½ share in the suit 'A' and 'B' schedule properties.
4. After receiving summons in the suit, petitioners/defendants did not file written statement and so they were set *ex parte* and an *ex parte* decree was passed on 26-02-2016.
5. Petitioners then filed I.A.No.186 of 2016 under Section 5 of the Limitation Act, 1963 to condone the delay of 35 days in filing application under Order IX Rule 13 C.P.C. and also another application under Order IX Rule 13 C.P.C. to set aside the *ex parte* decree.
6. In the affidavit filed in support of the said application, it was mentioned that after receiving summons, petitioners had approached the counsel and he asked them to produce documents, but some of the documents such as title deed and pattadar pass book had been mortgaged to a private person; so he had to make arrangements for payment of the loan to clear the mortgage and so could not handover to his counsel the documents within the time specified; and he could not prepare written

statement in the suit. He also stated that on 22-03-2016 he suffered fever and was hospitalized till 02-04-2016; that thereafter he was advised bed rest for 30 days; and consequently there was a delay of 35 days in filing application under Order IX Rule 13 C.P.C. Medical certificate issued by the local hospital was also filed.

7. Counter-affidavit was filed by respondent opposing the condonation of delay and denying the contentions of the petitioners that petitioner had difficulty in filing written statement in time and that he was unwell between 22-03-2016 and 02-04-2016.

8. By order dt.20-04-2017, the Court below dismissed I.A. No.186 of 2016. It mentioned that the Court had not forfeited the right of petitioners to file written statement at all, but the petitioners had not at all appeared in the Court on the date of first appearance and so they were set *ex parte*. It observed that petitioners could have instructed their counsel to file vakalat, but they did not do so and therefore their contention that they approached a counsel to prepare written statement is false. It also took note of the fact that the affidavit in I.A.No.186 of 2016 is filed by the 2nd petitioner, that he stated in the affidavit that he was in fact the 1st petitioner, and the fact that 1st petitioner was also suffering from fever is not supported by any medical certificate.

9. Assailing the same, this Revision is filed.

10. Sri M.Rajamalla Reddy, learned counsel for petitioners contended that the Court below erred in dismissing I.A.No.186 of 2016 and that the delay being a very short delay of 35 days and sufficient cause having

been shown for its condonation as a medical certificate was also filed, the Court below ought not to have dismissed it. It was also pointed out that in the affidavit filed in I.A.No.186 of 2016, there was a typographical mistake inasmuch as the person who signed it is the 2nd petitioner but in para-1 it was erroneously mentioned as 1st petitioner.

11. Learned counsel for respondent refuted the above contentions and supported the order passed by the Court below.

12. In the instant case, no doubt petitioners, who are defendants in the suit, did receive summons but they were set *ex parte* and an *ex parte* decree was passed on 26-02-2016.

13. I.A.No.186 of 2016 was filed on 30-04-2016 under Section 5 of Limitation Act, 1963 to condone the delay of 35 days in filing application under Order IX Rule 13 C.P.C.

14. No doubt the affidavit in support of I.A.No.186 of 2016 is filed by 2nd petitioner, but there appears to be a typographical mistake in the para-1 in the said affidavit where it is stated that he is the 1st defendant. The Court below gave too much importance to this typographical mistake and felt that the 1st petitioner, who is the wife of 2nd petitioner also should have filed medical certificate about her illness. The Court below ought to have seen that mentioning in I.A.No.186 of 2016 that it was filed by 1st petitioner is a typographical mistake and the 2nd petitioner being the husband of 1st petitioner, would be normally handling the proceedings and there is no necessity for the petitioners to

produce the medical certificate of 1st petitioner also showing that she was also suffering from illness.

15. That apart, petitioners have explained that the documents required to prepare written statement were in the custody of a third party from whom they had borrowed hand loan and that they had to take back the documents and therefore he could not contact his counsel. I therefore hold that petitioners had shown sufficient cause for condonation of that very short period of delay involved in the matter and it had acted unreasonably and perversely in refusing to condone the said delay in filing application under Order IX Rule 13 C.P.C.

16. Therefore, the Civil Revision Petition is allowed; the order dt.20-04-2017 in I.A.No.186 of 2016 in O.S.No.3 of 2016 of the Senior Civil Judge, Sircilla is set aside; and I.A.No.186 of 2016 is allowed. The Court below is directed to allow application filed under Order IX Rule 13 C.P.C. and proceed to dispose of the suit as expeditiously as possible preferably within a period of six (06) months from the date of receipt of a copy of this order. No costs.

17. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 08-02-2019
Vsv