

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION Nos.3014 and 3058 of 2018

COMMON ORDER:

These two Revisions arise between the same parties out of the same suit and therefore they are being disposed of by this common order.

2. Petitioners herein are defendant Nos.1 and 2 in the suit.
3. Respondent Nos.1 to 4 filed the suit against petitioners for recovery of possession and for mandatory injunction.
4. The petitioners and their mother 5th respondent received summons, which stated that they have to appear on 07-10-2009 and file written statement. They did not file written statement and so they were set *ex parte* and an *ex prate* decree was passed on 24-03-2011.
5. Thereafter respondent Nos.1 to 4/D.Hrs. filed E.P.No.1 of 2012 under Order XXI Rule 36 C.P.C. for delivery of possession of the E.P. schedule property.
6. Petitioners and 5th respondent engaged a counsel, who filed vakalat in the E.P. on 29-11-2012. They filed counter after several adjournments in E.P. on 11-09-2014. Thereafter, in the E.P., respondents led evidence and got marked documents and matter was posted for cross-examination of P.W.1 on 20-01-2015.

7. Thereafter the petitioners and 5th respondent filed I.A.No.296 of 2015 on 22-02-2015 under Section 5 of the Limitation Act, 1963 to condone the delay of 1468 days in filing application under Order IX Rule 13 C.P.C.

8. In the affidavit filed in support of the said application, they contended that 5th respondent was suffering from ill-health due to old age ailments and could not appear on 07-09-2010 resulting in passing of the *ex parte* decree on 24-03-2011; that because of her ill-health she could not furnish case details and documents to her counsel to enable him to contest the case; and therefore she could not file application under Order IX Rule 13 C.P.C. within time and this resulted in the delay of 1468 days in filing the Order IX Rule 13 C.P.C. petition. She contended that she had engaged a counsel in E.P.No.1 of 2012 and filed counter-affidavit, but she was not advised to file an application to set aside the *ex parte* decree within time.

9. Counter-affidavit was filed by respondent Nos.1 to 4 opposing this application. They contended that even assuming for the sake of argument that 5th respondent/3rd defendant was unwell, petitioners herein, who are her sons and who are staying with her, could have ensured that written statement is filed and contested the suit but they failed to do so and there is no explanation for their inaction. It was also pointed out that in I.A.No.296 of 2015, 5th respondent did not state what was the illness she was suffering from. It was pointed out that petitioners, having filed vakalat through counsel on 29-11-2012

and having secured several adjournments in the E.P., and then filed counter, cannot contend that they were not aware of the decree. It is therefore contended that there is no sufficient case for condonation of inordinate long delay of 1468 days in filing application under Order IX Rule 13 C.P.C.

10. By order dt.07-03-2018, the Court below dismissed I.A.No.296 of 2015 recording that petitioners were aware of the *ex parte* decree on 29-11-2012 itself when they got filed vakalat in E.P.No.1 of 2012; there is no evidence of ill-health of 5th respondent/3rd defendant and no medical certificate had also been filed; even in the E.P., they took 3 years to file counter-affidavit and had not provided any valid reason to condone the inordinate delay of 1468 days in filing application under Order IX Rule 13 C.P.C. It therefore concluded that the explanation of the petitioners is not *bona fide* and there was utter negligence on their part.

11. Challenging the same, C.R.P.No.3014 of 2018 is filed by petitioners.

12. Later, on 12-03-2018, the Court below allowed E.P.No.1 of 2012 in view of the dismissal of I.A.No.296 of 2015 and directed issuance of delivery warrant. After considering the evidence adduced in the E.P by respondent Nos.1 to 4 and petitioners, it opined that petitioners did not file any scrap of evidence to show that Municipal authorities had directed them to occupy the E.P. schedule property and

so possession of the petitioners was illegal and they are bound by the decree of eviction passed against them.

13. Assailing the same, C.R.P.No.3058 of 2018 is filed.

14. Learned counsel for petitioners contended that the Court below ought to have condoned the delay of 1468 days and allowed I.A.No.296 of 2015 accepting the explanation of petitioners for the said delay. It is further contended that judgment in the suit is cryptic and no valid reasons are assigned in it for decreeing the suit. Learned counsel for petitioners further contended that the orders passed by the Court below in I.A.No.296 of 2015 and E.P.No.1 of 2012 be set aside in the interest of justice and opportunity be given to the petitioners to contest the suit on merits.

15. Learned counsel for petitioners also contended that petitioners had in fact given vakalat to the Advocate not for filing in the E.P. but to file application under Order IX Rule 13 C.P.C./Section 5 of Limitation Act and for the fault of the Advocate, petitioners cannot be made to suffer.

16. Learned counsel for respondent Nos.1 to 4 refuted the above contentions and supported the orders passed by the Court below. He contended that no valid and satisfactory explanation is offered by the petitioners to condone the delay of 1468 days in filing the application under Order IX Rule 13 C.P.C.

17. I have noted the contentions of both sides.

18. The 5th respondent is admittedly 3rd defendant and is mother of petitioners, who are defendant Nos.1 and 2 in the suit. All the petitioners admittedly received summons in the suit, but did not file written statement on 07-10-2010. So they were set *ex parte* and *ex parte* decree was passed on 24-03-2011.

19. E.P.No.1 of 2012 was filed by respondent Nos.1 to 4 for execution of the decree and the petitioners admittedly filed vakalat through a counsel on 29-11-2012 in the E.P.

20. The affidavit filed in I.A.No.296 of 2015 filed by 5th respondent/3rd defendant indicates that she suffered from old age ailments and could not contact her counsel and could not file petition to set aside the *ex parte* decree dt.24-03-2011 within time. Though she engaged the counsel and filed counter in E.P.No.1 of 2012, no details about the alleged ill-health of 5th respondent are mentioned in the affidavit nor any medical certificate is filed about the same.

21. Moreover, the petitioners are sons of 5th respondent and they have not given any reason why did not contact the Advocate and get the written statement filed to contest the suit and remained *ex parte*. They did not also give reasons what they were doing from 24-03-2011 to 20-01-2015 without filing application under Order IX Rule 13 C.P.C. Petitioners, being majors, cannot hide behind the excuse that their mother, who was aged 88 years was unwell, and could not contact her counsel.

22. The plea of the petitioners that their counsel was asked to file vakalat and get the *ex parte* decree set aside, but instead he filed vakalat in the E.P., cannot be countenanced because that is not the plea taken in I.A.No.296 of 2015 and in fact the same Advocate argued for petitioners in I.A.No.296 of 2015 and in E.P.No.1 of 2012. When petitioners were aware about proceedings in E.P.No.1 of 2012 even by 29-11-2012, no satisfactory reason is assigned as to why they kept quiet till 20-01-2015 to file application under Order IX Rule 13 C.P.C. to set aside the *ex parte* decree. Thus it is clear that petitioners were totally negligent in taking steps to defend their interests in the suit. Therefore the Court below did not commit any error of jurisdiction in rejecting I.A.No.296 of 2015.

23. Accordingly, C.R.P.No.3014 of 2018 is dismissed. No costs.

24. Coming to C.R.P.No.3058 of 2018, once I.A.No.296 of 2015 was dismissed, the decree in the suit had attained finality and the Court below had served notice on petitioners in the E.P. also and examined P.W.1 and R.W.1 and rightly concluded that the decree binds the petitioners and so execution of the decree cannot be stalled. The reasoning given by the Court below is unexceptional and warrants no interference by this Court under Section 115 C.P.C.

25. Accordingly, C.R.P.No.3058 of 2018 is also dismissed. No costs.

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

JUSTICE M.S.RAMACHANDRA RAO

Date: 18-02-2019
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