

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION NO.2089 OF 2015

ORDER:

This Revision is filed challenging the order dt.16.02.2015 in I.A. No.4484 of 2009 in O.S. No.350 of 2005 on the file of III Additional Chief Judge, City Civil Court, Hyderabad.

2. The petitioners herein are plaintiffs in the said suit. They filed the said suit against the respondents for partition of plaint schedule properties and for separate possession of 14/40 to share therein.

3. The 2nd defendant/1st respondent was set *ex parte* and an *ex parte* decree was passed on 21.08.2009.

4. The 1st respondent then filed I.A. No.4484 of 2009 under Section 5 of the Limitation Act, 1963 to condone the delay of 84 days in filing the application to set aside the *ex parte* decree and another application to set aside the *ex parte* decree.

5. In the affidavit filed in support of the said application, she contended that she is a married woman residing along with her husband at Dubai; that the petitioners knew about it; but inspite of the same, they showed her address in the suit as a resident of Ramachandrapuram village and Mandal, Medak District. She contended that, since a wrong address was furnished in the suit, it cannot be said that there is proper service of summons on her. She contended that nobody informed her about the pendency of the case, that she was kept totally in dark, and on 12.11.2009, some person claiming to be bailiff of the court and a surveyor came to her residence and measured the physical features and boundaries of her property at Red Hills where she was residing and

informed her that there is a court decree passed. She contended that she immediately consulted her advocate who in turn enquired into the matter and came to know that an *ex parte* decree had been passed on 21.08.2009.

6. She therefore contended that the delay of 84 days in filing the application to set aside the *ex parte* decree be condoned and the *ex parte* decree be set aside.

7. Counter-affidavit was filed by the petitioners opposing the said application. It is contended in the counter-affidavit that the 1st respondent received summons from the court and so also did the other defendants who were the petitioners' mother and brother; that all three were residing in one house; that petitioners' mother and brother filed vakalat and that on behalf of the petitioner, vakalat was offered by Sri V.V. Patil on 22.03.2007. It is contended that thereafter written statement was filed by defendants 1 and 3, but petitioner did not file vakalat and so she was set *ex parte* on 21.07.2007; thereafter the trial proceeded; and after considering the evidence of the other defendants and that of the petitioners, the suit was decreed on 21.08.2009.

8. It is also alleged that the petitioner had filed Transfer CMP No.519 of 2005 for transfer of the suit O.S. No.350 of 2005 to the court of District Judge, Medak at Sanga Reddy, but it was dismissed.

9. In para 7 of the counter-affidavit, it is admitted that the petitioner got married in 1990 and stayed with her husband for a limited time at Saudi Arabia; and it is stated that petitioner was very much present at Hyderabad along with her mother at Red Hills, Hyderabad, at the time of issuance of summons and

subsequently also she stayed along with her mother pending trial of the suit, and so she had full knowledge regarding proceedings of the suit. A request was made to the court to summon the petitioner to produce her passport also. The plea of the petitioner that she was not having knowledge about the suit proceedings is denied and a prayer was made to dismiss the application.

10. By order dated 16.02.2015, the court below allowed the said application. After considering the contentions of both sides and Exs.R-1 to R-14 filed by the 1st respondent, the court below held that petitioner No.1 failed to establish the fact that respondent No.1 had knowledge of the suit proceedings; and though the petitioner relied on Ex.R-1 order in Tr.CMP No.519 of 2005, the affidavit in the Transfer Application was not signed by the 1st respondent but by one Ahmed Muzamil Hussain. The court below therefore held that the 1st respondent did not have knowledge about the suit and the petitioners failed to establish that the 1st respondent had knowledge of the suit; and the delay in filing petition to set aside the *ex parte* decree showed be condoned.

11. Assailing the same, this revision is filed.

12. Counsel for the petitioners contended that in the suit, the address of the 1st respondent was correctly shown as resident of Ramachandrapuram; that summons were received by the 1st respondent at Ramachandrapuram, as can be seen from the acknowledgment card for the summons sent through court; and on 28.10.2011, the 1st respondent herself filed a vakalat of her counsel giving Ramachandrapuram address shown in the plaint. He also contended that a notice was got issued on 05.01.2012 to the counsel Sri C.N. Murthy engaged by the 1st respondent, to

produce the passport of the 1st respondent, and that the said Sri C.N. Murthy had filed vakalat on behalf of the 1st respondent on 12.11.2009 in the suit. He contended that non-production of the passport of the 1st respondent should be construed as deliberate action of the 1st respondent proving the case of the petitioners that she was a resident of India at that point of time. He also placed reliance on the decisions in **Mst. Bhabia Devi v. Permanand PD. Yadav**¹ and **Chadalavada Kishan Kumar v. Commissioner of Endowments**².

13. Sri Abhishek Reddy, Counsel appearing for the 1st respondent however refuted the said contention and pointed out that the 1st respondent was not in India at that point of time when the summons were sought to be served on her; that she was living with her husband in Dubai; and even according to the counter-affidavit filed by the petitioners, though the 1st respondent was present in Hyderabad, she was residing with her mother at Red Hills in Hyderabad at the time of issuance of summons; and, therefore, she could not have received the summons at Ramachandrapuram address shown in the plaint by the petitioners. He contended that Sri V.V. Patil had not been instructed by the 1st respondent to offer vakalat on behalf of the 1st respondent and the docket orders passed by the court below on 22.03.2007 and 21.06.2007 themselves show that even by the date of passing of the said orders, the 1st respondent had been set *ex parte*. He supported the order passed by the court below.

14. Noted the submissions of both sides.

¹ (1997) 3 SCC 631

² 2018 (6) ALD 394 (DB)

15. The question which arises for consideration is “whether summons were served on the 1st respondent in the suit or not”?

16. It is important to note that in the vakalatnama filed on 12.09.2009 on behalf of the 1st respondent by Sri C.N. Murthy, the address of the 1st respondent was shown as a resident of the Republic of Saudi Arabia and also at H.No.11-6-823, Red Hills, Hyderabad.

17. It is not in dispute that H.No.23-33 in Jyothinagar colony in Ramachandrapuram village and Mandal, Medak District is also the property belonging to the family and is item No.2 of the plaint schedule in the suit, but the premises H.No.11-6-823 at Red Hills, Hyderabad is also included in the plaint schedule and is shown as item No.1 of the plaint schedule; and both properties, according to the petitioners, belong to the family and are required to be partitioned.

18. In para 7 of the counter-affidavit filed in I.A. No.4484 of 2009, the petitioners had stated that the 1st respondent was very much present at Hyderabad along with her mother at Red Hills, Hyderabad at the time of issuance of summons and subsequently also she stayed along with her mother pending trial of the suit and she had full knowledge regarding proceedings of the case.

19. If the petitioners were aware that the 1st respondent was residing at the premises H.No.11-6-823 at Red Hills at Hyderabad at the time of issuance of summons, the petitioners ought to have explained why they showed H.No.23-33 at Jyothinagar colony, Ramachandrapuram village & Mandal, Medak District as the address where the 1st respondent was residing and took out

summons to the Ramachandrapuram address and not to the Red Hills address.

20. In the Transfer CMP No.519 of 2005 filed by the 1st respondent, the 1st respondent was represented by her brother in whose favour GPA was executed by the 1st respondent, and there is nothing to show that she was residing at Ramachandrapuram at that point of time.

21. The fact that the 1st respondent did not respond to the notice issued under Order XII Rule 8 CPC by the counsel for the petitioners on 05.01.2012, in my considered opinion is not significant, since it is the admission of the petitioners themselves that she was not residing in Ramachandrapuram, but she was residing at Red Hills, Hyderabad on the date of issuance of summons.

22. In **Mst. Bhabia Devi** (1 supra) cited by the counsel for the petitioners there was a finding of fact on the basis of the merits in that particular case that summons sent by Registered Post to a party were refused, and therefore the presumption of service was drawn. Such is not the situation in the present case.

23. In **Chadalavada Kishan Kumar** (2 supra), a presumption under Section 27 of the General Clauses Act, 1897 (for short 'the Act') was drawn on the ground that the notice in a disciplinary proceeding was sent by RPAD to the petitioner therein which had been returned with endorsement 'left', and so the court applied the presumption under Section 27 of the Act and held that there is deemed service of notice. The court rejected the plea of the petitioner that he did not receive it as the petitioner therein did not inform his employer about his place of residence. It observed that

he cannot be allowed to take advantage of his own wrong. The fact situation in the instant case is entirely different.

24. As stated above, the petitioners themselves admit that at the time of issuance of summons, the 1st respondent was residing at Red Hills at Hyderabad and not at Ramachandrapuram address. Therefore, the court below did not commit any error of jurisdiction in condoning the delay of 84 days in filing the application to set aside the *ex parte* decree.

25. Accordingly, the Civil Revision Petition is dismissed. The suit shall stand restored to file on the file of the III Additional Chief Judge, City Civil Court, Hyderabad; the 1st respondent shall file written statement in the suit within three weeks from the date of receipt of a copy of this order; the witnesses produced by the petitioners shall be recalled by the court below and the 1st respondent be permitted to cross-examine them; the 1st respondent shall also be permitted to lead evidence in support of her case, the court below shall allow the petitioners to cross-examine the 1st respondent and her witnesses. Any fresh evidence which the petitioners wish to adduce may also be permitted; and the suit shall then be decided in accordance with law.

26. Since the suit is of the year 2005, the court below shall endeavour to decide the suit as expeditiously as possible preferably within a period of six months from the date of receipt of a copy of this order. No costs.

27. Miscellaneous petitions pending, if any, shall stand closed.

M.S. RAMACHANDRA RAO, J

Date: 19.07.2019.

MRKR

