

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

C.R.P.No.4892 of 2018

ORDER:

Heard Sri N.V.Sumanth, learned counsel for the petitioner as well as Sri K.Nandaiah, learned counsel for the respondent.

2. This Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.30-06-2018 in I.A.No.2667 of 2013 in A.S.No.178 of 2007 of the I Additional Chief Judge, City Civil Court, Secunderabad.

3. Petitioner herein and her husband were defendants in O.S.No.1392 of 2000 filed for perpetual injunction against them by the respondents. The suit was decreed on 12-10-2004. Challenging the same, the petitioner and her husband filed A.S.No.178 of 2007 before the Additional Chief Judge, City Civil Court, Secunderabad.

4. Though the appeal was filed with a delay of 41 days and the delay was condoned and it was numbered in 2007, when the petitioner and her husband did not proceed with the arguments in the appeal, the appeal was dismissed for default on 02-06-2011.

5. Petitioner then filed I.A.No.2667 of 2013 invoking Order 41 Rule 19 CPC to condone the delay of 908 days in filing application under Order 41 Rule 19 CPC to set aside the dismissal order dt.02-06-2011.

6. In the said application, petitioner stated that her husband was looking after the appeal and he died on 21-11-2009 leaving behind the

petitioner and her son; and her son was looking after the affairs in the case; in April 2003; that petitioner underwent open heart surgery in KIMS Hospital, Secunderabad; and on 23-08-2012, her son, who was looking after the appeal after the death of her husband, also passed away. She stated that prior thereto, her mother passed away on 16-09-2011 and none was available to look after the case which resulted in dismissal of appeal for default on 02-06-2011. She stated that though her counsel was requesting her to come to office for giving instructions in the case for bringing legal heirs of the deceased 2nd respondent, due to ill health and series of deaths in her family, she could not go to her counsel and was filing application to condonation of delay of 908 days in seeking to set aside the order dt.02-06-2011 dismissing the appeal for default.

7. Counter affidavit was filed by the respondents opposing the said application. They contended that if the husband of the petitioner had died on 21-11-2009 and he was the 2nd appellant in the appeal, the appeal itself had abated because no steps were taken to bring other legal heirs of the deceased on record. They also contended that the petitioner did not produce any proof of undergoing open heart surgery in KIMS Hospital, Secunderabad. A further plea was taken by the respondents that petitioner did not file any proof of the date of death of her son or of her mother. They therefore contended that no sufficient cause was shown for condonation of inordinate delay of 908 days in filing the application to restore the appeal which was dismissed for default on 02-06-2011.

8. By order dt.30-06-2018, the Court below dismissed the said application. It noted that trial Court records were received by it in 2010 itself and since 16-12-2010, the petitioner did not make any efforts to submit arguments in spite of being given several opportunities, that the Court got vexed and dismissed appeal for default on 02-06-2011. It also held that petitioner did not file any document to support her alleged illness or to show that unfortunate events took place in the relevant period.

9. Assailing the same, this Revision Petition is filed.

10.Learned counsel for the petitioner contended that valuable rights of the petitioner would be affected, if the delay of 908 days in filing the restoration petition to restore the appeal A.S.No.178 of 2017 which was dismissed for default on 02-06-2011, is not condoned. He also reiterated that petitioner's husband, son and mother died and the petitioner herself underwent open heart surgery and sympathetic view be taken and the delay of 908 days be condoned.

11.Learned counsel for the respondents refuted the said contentions and supported the order passed by the Court below.

12.The petitioner has also filed documents relating to the death of her husband on 21-11-2009, death of her son on 23-08-2012 and her mother on 16-09-2011. She has also filed a Certificate issued by the A.P. State Social Welfare Board showing that petitioner, who was a retired Senior Assistant of the said organization, had undergone Coronary

Artery Bypass surgery in Krishna Institute of Medical Sciences Limited, Secunderabad on 04-04-2009. Though these documents had not been filed before the Court below, it is important to note that the case dismissed was an “appeal” under Section 96 of the CPC filed challenging the judgment 12-10-2004 in O.S.No.1392 of 2000 filed by the respondent against the petitioner and her husband. The appeal was admittedly filed through counsel and would have to be argued by the petitioner’s counsel. The petitioner was only to provide instructions to her counsel and pay requisite fee to the counsel so that the counsel would proceed with the arguments in the case. There was no necessity for the petitioner to be physically present when the appeal is argued.

13.The Court below had noted that from December 2010 till June 2011, no attempt was made by the counsel to proceed with the arguments in the appeal in spite of several opportunities being given.

14.The petitioner cannot state that her husband died on 21-11-2009 and claim that she was disabled from proceeding with the arguments in the appeal because such death has occurred one year seven months before 02-06-2011, when the Court got vexed and dismissed the appeal for default. She cannot also claim that the death of her son on 23-08-2012 had any bearing because the death of the petitioner’s son occurred more than one year after the appeal was dismissed for default and the son was alive on 02-06-2011. The mother of the petitioner had also died three months after the appeal was dismissed for default and that also cannot be

an excuse for not proceeding with the arguments in the appeal on 02-06-2011.

15.The bypass surgery of the petitioner was two years prior to the dismissal of the appeal for default on 02-06-2011 in April 2009.

16.After 02-06-2011, the petitioner could have immediately approached the Court and also got application filed for restoration of the appeal which was dismissed for default but she waited for 908 days and filed the said application only on 27-11-2013.

17.Petitioner is a retired Government servant and not an illiterate villager and is expected to understand the consequences of dismissal of an appeal for default and take steps expeditiously to get the appeal restored. She cannot blame events which occurred much before 02-06-2011 or long afterwards as justification for the delay in seeking restoration of the appeal

18.Petitioner, having been negligent in taking steps to approach the Court to set aside the order dismissing the appeal for default on 02-06-2011, is not entitled to any indulgence. Therefore, I do not find any merit in the Civil Revision Petition. It is accordingly dismissed. No costs.

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

JUSTICE M.S.RAMACHANDRA RAO

Date: 28-02-2019
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