

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Civil Revision Petition No.5965 of 2018

ORDER :

This Civil Revision Petition is filed challenging the order dt.20.07.2018 passed in I.A.No.96 of 2016 in O.S.No.488 of 2008 on the file of the Additional Judge-cum-VI Senior Civil Judge, Hyderabad.

2. The petitioners herein are defendant nos.6 to 10 in the above suit.
3. The said suit was filed for partition and separate possession of 1/8th share in plaint 'A' Schedule property, and 1/5th share in item Nos.1 and 2 of plaint 'B' and 'C' Schedule properties.
4. The petitioners received summons and filed Written Statement.
5. Thereafter, issues were framed and trial commenced.
6. The petitioners did not cross-examine P.W.1.
7. Ultimately, judgment was pronounced on 28.10.2014 since the petitioners did not lead evidence.
8. Thereafter, I.A.No.96 of 2016 was filed on 23.12.2015 by the petitioners to set aside the *ex parte* decree stating that at the time when the matter was posted for cross-examination of PW.1, marriage talks of 4th petitioner were going on in which the 1st respondent / plaintiff also participated, and he assured that the suit would be withdrawn by him and settled out-of-Court. It is alleged that in view

of the assurance given by 1st respondent and respondent nos.2 and 3, petitioners did not contact their counsel. It is stated that the marriage of 4th petitioner took place on 28.05.2015, and thereafter, petitioners received notice in the application filed to appoint an Advocate-Commissioner in the final decree proceedings; that petitioners then approached the 1st respondent / plaintiff; that he then assured them nothing would happen. It is stated that thereupon they contacted the counsel on 21.12.2015 who advised filing of an application to set aside the *ex parte* judgment and decree dt.28.10.2014, and thus, the present I.A. came to be filed for condonation of delay of (391) days in seeking to setting aside the *ex parte* decree dt.28.10.2014. It is contended that valuable rights of petitioners in immovable property would be lost if they are not given an opportunity to contest the suit.

9. Counter-affidavit was filed opposing this application by the 1st respondent.

10. It is contended that the decree is not an *ex parte* decree and that it was passed on merits as per Order XVII Rule 2 and 3(b) of Civil Procedure Code, 1908, and so the petition under Section 5 of the Limitation Act, 1963 is not maintainable. The allegation leveled by petitioners that during marriage talks of 4th petitioner, assurance was allegedly given by 1st respondent / plaintiff that he would withdraw the suit and they need not worry in the case, was specifically denied in para no.6. It was also alleged that petitioners had violated the interim injunction, prohibiting alienation which was passed pending the suit in I.A.No.445 of 2008 and alienated portion of the suit schedule 'B' item

No.2 in favour of defendant nos.14 to 16. It is alleged that 1st respondent is a handicapped person and petitioners harassed him by failing to proceed with the suit on several days when the matter was listed for his cross-examination, and they are not entitled to any indulgence. Details of the several dates on which the matter was listed in the Court below before judgment was pronounced are given.

11. On 20.07.2018, the Court below dismissed the said application.

12. It referred to the several dates of adjournment in the suit given for accommodating petitioners to cross-examine PW.1 and to lead evidence, which were not availed of by petitioners. It noted that the record reveals that even on the date of closure of cross-examination of PW.1 on 16.06.2014, the 2nd petitioner / 7th defendant who gave affidavit in the delay condonation petition on behalf of petitioners was present in Court and failed to pay costs imposed by the Court and again requested time for cross-examination, but the Court recorded that petitioners were protracting the proceedings and treated the cross-examination as nil. It held that the entire version of petitioners that they did not contact their counsel because of the assurance given by plaintiff / 1st respondent and were unaware about the passing of the decree, therefore cannot be believed. It also noted that on several dates of adjournment, the 2nd petitioner / 7th defendant was present and he had knowledge about what was happening in the Court. It held that since petitioners have come to the Court only after receipt of notices in the I.A. filed for appointment of an Advocate-Commissioner in the final decree proceedings, their only intention is to stall further

proceedings in the suit, and they are not entitled to any indulgence; because even after the closure of P.W.1's cross-examination on 16.06.2014, the matter underwent fourteen adjournments in three months. But, petitioners did not do anything to contest the suit.

13. Assailing the same, the present Civil Revision Petition is filed.

14. The counsel for petitioners sought to contend that valuable rights to immovable property of petitioners are subject matter of the suit, and petitioners would suffer grave and irreparable loss if the delay of (391) days in filing the application to set aside the *ex parte* decree dt.28.10.2014 is not condoned and the decree is not set aside. He reiterated the contentions of petitioners that there was an assurance by 1st respondent / plaintiff at the time of the marriage proposal discussions of marriage of the 4th petitioner; and *bona fidely* believing the same, petitioners did not bother to contest the suit.

15. It is important to note that petitioners have not adduced any evidence in I.A.No.96 of 2016 about the alleged assurance given by the 1st respondent / plaintiff in the suit about the withdrawing of the suit during the marriage proposal discussions relating to the marriage of 4th petitioner. None of the petitioners entered the witness box nor did they examine any third-party to substantiate this allegation. When the petitioners had received summons in the suit, engaged counsel and even filed Written Statement, petitioners ought to have been diligent in contesting the proceedings in the suit, and kept regularly in touch with their legal advisor, but the petitioners have been grossly

negligent in that regard. Also, the Trial Court noted that 2nd petitioner / 7th defendant was present before the Court on most of dates of hearing / evidence in the suit.

16. In my considered opinion, the Court below was right in not accepting the petitioners' plea as regards the delay in filing the application under Order IX Rule 13 of Civil Procedure Code, 1908, more particularly, because the 2nd petitioner / 7th defendant was present before the court on several occasions before the suit was decreed. Thus, it was clear that the petitioners are merely watching the proceedings without participating in them for reasons best known to them.

17. Therefore, I do not find any error of jurisdiction in the order passed by the Court below warranting interference by this Court in exercise of its jurisdiction under Article 227 of the Constitution of India.

18. Accordingly, the Civil Revision Petition fails, and it is dismissed at the stage of admission. No order as to costs.

19. As a sequel, miscellaneous petitions pending if any in this Civil Revision Petition, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 27.03.2019

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