

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Civil Miscellaneous Appeal No.1201 of 2017

And

Civil Revision Petition No.5913 of 2017

COMMON ORDER :

Since these matters are between the same parties and arise out of the same suit, they are therefore being disposed of by this Common Order.

2. The petitioner in the Civil Revision Petition and the appellant in the Civil Miscellaneous Appeal is defendant in O.S.No.1442 of 2014 on the file of the XVI Additional District and Sessions Judge-cum-XVI Additional Metropolitan Sessions Judge-cum-Judge, Family Court-III, Ranga Reddy District, Malkajgiri.

3. The said suit was filed by respondent against petitioner / appellant for specific performance of an agreement of sale allegedly executed by petitioner / appellant in favour of respondent on 08.03.2014.

4. Though the petitioner / appellant received summons in the suit, she did not file written statement. She was set *ex parte* on 24.04.2015 and on 05.08.2015 the respondent was examined, and *ex parte* decree was passed on 07.09.2015.

5. The petitioner / appellant then filed I.A.No.489 of 2016 on 22.07.2016 under IX Rule 13 read with Section 151 of Civil

Procedure Code, 1908 to set aside the *ex parte* decree without filing an application for condonation of delay in filing the petition for setting aside the *ex parte* decree.

6. When the said I.A. was posted for hearing, the petitioner then filed I.A.No.123 of 2017 on 15.02.2017 to condone the delay of (264) days in filing I.A.No.489 of 2016.

7. In the affidavit filed in support of the said application, the only reason assigned by respondent for non-appearance before the Court was that her husband was lodged in a jail in connection with criminal cases, and it is not possible for her to appear before the Court and prosecute the suit.

8. Counter-affidavit was filed by respondent in I.A.No.123 of 2017 denying that petitioner's husband was in jail as on the date of passing of the decree or after the service of summons, and pointing out that the petitioner did receive suit summons and notices but failed to appear and contest the case.

9. The respondent also denied petitioner's contention that the suit agreement of sale was fabricated. It was also pointed out that the actual delay was (473) days and not (264) days, as is contended by petitioner.

10. By order dt.09.08.2017, the Court below dismissed I.A.No.123 of 2017, and consequently dismissed I.A.No.489 of 2016.

11. Challenging order dt.09.08.2017 passed in I.A.No.123 of 2017 in O.S.No.1442 of 2014, the petitioner filed Civil Revision Petition No.5913 of 2017, and challenging order dt.09.08.2017 passed in I.A.No.489 of 2016 in O.S.No.1442 of 2014, the petitioner filed Civil Miscellaneous Appeal No.1201 of 2017.

12. The counsel for petitioner / appellant reiterated the stand taken in the Court below that the husband of petitioner had been convicted in a criminal case filed under Section 138 of the Negotiable Instruments Act, 1882 by certain third parties, and therefore, the petitioner was disabled from contesting the proceedings in the suit.

13. In the affidavit filed in support of I.A.No.123 of 2017, there is no mention of the date of conviction in C.C.No.49 of 2015 of the husband of petitioner, and copy of the order convicting the petitioner's husband in C.C.No.49 of 2015 is also not filed. However, in para no.3 of the affidavit filed in I.A.No.123 of 2017 it is stated that simple imprisonment of (3) months was imposed on the petitioner's husband.

14. If the imprisonment is only for three (03) months, then petitioner has to satisfactorily explain why she waited (264) days to file the application under Order IX Rule 13 of Civil Procedure Code, 1908.

15. A further plea is taken by petitioner that there were two other cases, viz., S.T.C.No.56 of 2016 and S.T.C.No.124 of 2015, pending

before the Judicial Magistrate of First Class, Wanaparthi; that though there was an order granting bail on imposition of certain conditions, since the bail bonds were not furnished to petitioner's husband, he was remanded to judicial custody and lodged in Central Prison, Cherlapally.

16. Assuming these to be true, since petitioner was set *ex parte* on 07.09.2015 that would not be a ground for petitioner to do nothing till 27.07.2016 when I.A.No.489 of 2016 was filed. Admittedly, the petitioner also has a son who is said to be a major and she could have taken the help of her son in moving the application under Order IX Rule 13 of Civil Procedure Code, 1908 immediately after the *ex parte* decree was passed, instead of waiting for (264) days.

17. The Court below has rightly held that petitioner did not explain the delay of (264) days in filing I.A.No.489 of 2016. The reason assigned by petitioner cannot be accepted because the petitioner or her son were not disabled from taking any steps from defending petitioner in the suit merely because her husband was in judicial custody.

18. I therefore do not find any error of jurisdiction in the order dt.09.08.2017 in I.A.No.123 of 2017 in O.S.No.1442 of 2014 passed by the Court below warranting interference by this Court under Article 227 of the Constitution of India.

19. Accordingly, the Civil Revision Petition fails and it is dismissed. No order as to costs.

20. In view of the dismissal of Civil Revision Petition No.5913 of 2017, consequently Civil Miscellaneous Appeal No.1201 of 2017 is also dismissed. No order as to costs.

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

JUSTICE M.S.RAMACHANDRA RAO

Date: 05.03.2019

Ndr/*

