

THE HONOURABLE SRI JUSTICE A.SANTHOSH REDDY

C.R.P.No.2859 OF 2017

ORDER:

This civil revision petition, under Section 115 of the Code of Civil Procedure, 1908 (for short 'CPC), is directed against the order dated 16.06.2016 in I.A.No.211 of 2015 in O.S.No.25 of 2013 on the file of Senior Civil Judge at Bhongir, whereby the said application filed by petitioners herein under Section 5 of the Indian Limitation Act read with Section 151 CPC to condone the delay of 219 days in filing the application to set aside the *ex parte* decree dated 25.09.2014 in O.S.No.25 of 2013, was dismissed.

2. Heard learned counsel for the petitioners. None appeared for the respondents. Perused the record.

3. Respondent Nos.1 and 2 herein/plaintiffs filed the suit in O.S.No.25 of 2013 seeking partition of the suit schedule property and petitioner Nos.1 to 3 herein/defendants engaged a counsel and after filing their vakalat, they intended to instruct their counsel to prepare written statement. However, petitioner No.3 herein, in view of her advanced age and due to her ill health, could not instruct their counsel

to file written statement and the trial Court set the petitioners herein *ex parte* and an *ex parte* preliminary decree was passed on 25.09.2014. While so, the petitioners herein filed an application in I.A.No.211 of 2015 to condone the delay of 219 days in filing the petition to set aside the *ex parte* order dated 25.09.2014. Respondent Nos.1 and 2 herein filed counter and resisted the claim of the petitioners. On consideration of material on record, the trial Court dismissed the said application as the petitioners herein failed to show sufficient cause to condone the delay. Aggrieved by the same, the present civil revision petition is filed.

4. In **BHIVCHANDRA SHANKAR MORE v. BALU GANGARAM MORE**¹ the Hon'ble Supreme Court at para No.15 held as under:

15. It is a fairly well settled law that "sufficient cause" should be given liberal construction so as to advance sustainable justice when there is no inaction, no negligence nor want of *bona fide* could be imputable to the appellant. After referring to various judgments, in *B. Madhuri*, this Court held as under:-

¹ (2019) 6 SCC 387

“6. The expression “sufficient cause” used in [Section 5](#) of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that substantive rights of the parties are not defeated only on the ground of delay.”

5. In the instant case, an *ex parte* decree was passed on 25.09.2014 in the partition suit in O.S.25 of 2013 filed by respondent Nos.1 and 2 herein. The petitioners herein filed application to condone the delay of 219 days in filing the petition seeking to set aside an *ex parte* order it appears that the petitioners have not shown sufficient cause to condone the delay. It is the case of the petitioners that they could not contact their counsel due to ill health of petitioner No.3. In view of her old age and they were busy in attending the health issues and, thus, the delay occurred in approaching their counsel.

6. It is the further case of the petitioners that preliminary decree was passed allotting 6/25th share to respondent Nos.1 and 2 and to petitioner Nos.1 and 2 and 1/25th share was allotted to petitioner No.3 and

preliminary decree was also drawn allotting the said shares. Petitioner No.3 was also the class-I legal heir of the deceased ancestors.

7. The Hon'ble Supreme Court further held in **BHIVCHANDRA SHANKAR MORE**'s case at para 19 as under:

"19. It is pertinent to note that as per Section 97 CPC where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. The object is that the questions decided by the court at the stage of passing preliminary decree cannot be challenged at the time of final decree. If no appeal had been preferred against the preliminary decree, the suit filed by the respondent-plaintiffs being a suit for partition, the appellant would be deprived of the opportunity in challenging the decree on merits. In the interest of justice, the appellant and respondents 14 and 15 are to be given an opportunity to challenge the *ex parte* decree dated 4.7.2008 on merits, notwithstanding the dismissal of their application filed under Order 9 Rule 13 CPC."

8. In the instant case, the petitioners have disputed allotment of 1/25th share to petitioner No.3 by the trial Court and allotment of such

share is not correct and they further claimed that petitioner No.3 is not the class-I legal heir of the deceased ancestor.

9. After considering the fact that no appeal is preferred against the preliminary decree and because of the suit filed by respondent Nos.1 and 2 herein/plaintiffs for partition, the petitioners would be deprived of the opportunity to challenge the decree on merits. Hence, in the interest of justice, I am of the view that the petitioners ought to be given an opportunity to challenge the *ex parte* decree dated 25.09.2014 on merits, and in the facts and circumstances of the instant case the reasons given by the petitioners for condonation of the delay is taken as “sufficient cause” and the delay of 219 days in filing the application to set aside the *ex parte* decree dated 25.09.2014 is hereby condoned.

10. For the foregoing reasons, the impugned order is liable to be set aside.

11. In the result, the civil revision petition is allowed. The impugned order dated 16.06.2016 in I.A.No.211 of 2015 in O.S.No.25 of 2013 passed by the learned Senior Civil Judge at Bhongir is hereby set aside.

Consequently, the I.A. 211 of 2015 is allowed. There shall be no order as to costs.

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

A.SANTHOSH REDDY, J

Date: 20.12.2022
Yvk