

(2002) 12 AP CK 0022

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1405 of 2001

Kurra Lingaiah and Others

APPELLANT

Vs

Oyara Ganu (died) his L.Rs. and Others

RESPONDENT

Date of Decision : 03-12-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Limitation Act, 1963 — Section 5

Citation : (2003) 6 ALT 583

Hon'ble Judges : Dubagunta Subrahmanyam, J

Bench : Single Bench

Advocate : V. Ravikiran Rao, for the Appellant; Vinodkumar Deshpande, for the Respondent

Final Decision : Dismissed

Judgement

Dubagunta Subrahmanyam, J.—The defendants in O.S.No. 1 of 1988 on the file of Senior Civil Judge, Asifabad, filed this revision petition against the order dated 14-12-2000 in I.A.No. 18 of 1994 dismissing the petition filed by them u/s 5 of the Indian Limitation Act, 1963, to condone the delay of 521 days in filing a petition under Order 9 Rule 13 C.P.C., to set aside the ex parte decree dated 31-7-1992.

2. The plaintiff filed a suit for declaration of his title over and for possession of the plaint schedule property. Later he died. His legal representatives, namely, the present respondents in this revision petition came on record as plaintiffs in the suit. The revision petitioners - defendants contested the suit. Plaintiffs adduced evidence on their behalf. After closure of their evidence, the revision petitioners changed their counsel and subsequently, as clear from the impugned order, took number of adjournments for adducing evidence on their behalf. Ultimately they did not adduce any evidence on their behalf. Their counsel reported no instructions for the revision petitioners in the trial court. The trial court set ex parte the defendants and passed an ex parte decree on 31-7-1992.

3. On 28-1-1994 the revision petitioners filed a petition u/s 5 of the Limitation Act along with a separate petition under Order IX Rule 13 C.P.C., to set aside the ex parte decree. In the delay condonation petition, only one cause is mentioned. 4th defendant in his affidavit stated that he went to Maharashtra State on some work and therefore he was not aware of the further proceedings in the suit and about the trial court passing ex parte decree against the petitioners. It is stated across the Bar that the village in Maharashtra State to which the 4th defendant is said to have gone is just about 5 kms from the suit village. It may not be a material fact for disposing of this revision petition. It is also further stated in the affidavit that the first defendant was looking after the litigation and it was also further alleged that he might have colluded with the plaintiffs in the suit. This ground is to be rejected. The reason is very simple. If the other defendants really felt that the first defendant was colluding with the plaintiffs in the suit, they would not have joined the first defendant as one of the petitioners in the delay condonation petition. The fact that all the defendants joined together and filed a common petition to set aside the ex parte decree clearly indicates that all of them are sailing together and therefore the ground regarding alleged collusion between the first defendant and the plaintiffs is a false ground. It is to be stated further that the first defendant is not shown as one of the respondents in the delay condonation petition. It amounts that he also pretends that he is colluding with the plaintiffs. The said reason is absurd and to be rejected at the threshold itself.

4. The other ground pleaded is that the 4th defendant had gone to a village in Maharashtra State and therefore he is not aware of the ex parte decree passed against the defendants. No material except the self serving affidavit of the 4th defendant is produced to indicate even remotely that 4th defendant went to a village in adjoining State and therefore he was not aware of ex parte decree passed against him.

5. In the affidavit it is averred that the petitioners came to know on 20-1-1994 that an ex parte decree was passed against them on 30-7-1992. This averment is a totally false averment. The material on record clearly indicates that even if it is presumed that on 30-7-1992 the defendants are not aware of the ex parte decree passed against them, subsequently they became aware of the ex parte decree against them at least by 19-1-1993. After obtaining ex parte decree, the plaintiffs filed one E.P., and took delivery of possession of the suit property. They filed another E.P., for realization of the mesne profits granted by the trial court. In the second E.P., namely, the E.P., relating to realization of the mesne profits, all the defendants engaged their Advocates in the Executing Court. One Advocate by name Shambu filed vakalat even on behalf of the 4th defendant who filed the affidavit in support of the delay condonation petition. Therefore, by 19-1-1993 at least the petitioners were clearly aware that an ex parte decree was already passed against them on 31-7-1992. Therefore, from that day they must explain the delay in filing the petition to set aside the ex parte decree. In the affidavit filed by the 4th defendant, no such explanation was offered. On the other hand,

the petitioners deliberately suppressed the truth while filing the affidavit in support of the delay condonation petition. They did not at all refer to the two E.Ps. filed previously and one E.P., being pending on the date of his application filed on 28-1-1994. When a party approaches the court suppressing the truth and putting forward a false ground seeking condonation of delay in filing the petition under Order 9 Rule 13 C.P.C., no liberal view need be taken by the courts.

6. The learned counsel for the revision petitioners relied upon some decisions. The first decision is a decision of the Supreme Court reported in Malkiat Singh v. Joginder Singh, AIR 1998 SC 258. In that case the counsel for the parties concerned reported no instructions. He did not inform the said fact to the defendants. The defendants got knowledge of the ex parte decree just four days before filing the petition concerned. Under those circumstances, the Supreme Court held that ex parte decree is liable to be set aside. In the present case, even after the petitioners -defendants engaging their counsel in the second execution proceedings, they kept quiet for a period of more than one year and thereafter they filed the petition u/s 5 of the Limitation Act. In view of these facts, the decision of the Supreme Court is not applicable to the facts of the present case.

7. Another decision relied upon is another decision of the Supreme Court reported in Srinagar Development Authority v. M.H. Leharwal 2001 (1) CCC 19 (SC). There is a delay of about 275 days in filing LPA. The Division Bench refused to condone the delay in filing the appeal. The Supreme Court noticed that the delay occasioned on account of the latches on the part of the appellant, but in the interest of justice, the Supreme Court held that a decision on merits by the Division Bench is necessary and therefore condoned the delay in filing the appeal before the High Court. This decision also does not help the revision petitioners in the present case inasmuch as the cause pleaded by them is proved to be totally false. It is necessary for the petitioners to show a sufficient cause and also establish it before the court concerned. Whether the delay is abnormal or minimal, without establishing the cause pleaded, the parties are not entitled as a matter of right to seek condonation of delay and consequently setting aside the ex parte orders against them.

8. Another decision relied upon is another decision of the Supreme Court reported in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, . The Supreme Court held.that the courts should adopt liberal approach in dealing with petitions filed u/s 5 of the Limitation Act. Liberal approach can be shown if the parties approach the court stating the true facts and without suppressing the truth.

9. The learned counsel for the respondents relied upon a decision of this court reported in Shaik Rahima Begum and Another Vs. Kadiri Narayanamma, . Considering various decisions of the Supreme Court, this court held that delay cannot be condoned as a matter of course even in the absence of sufficient cause as it would disturb the legal rights which have accrued to the other side. He

relied upon another decision of this court reported in Collector and Others Vs. T. Shivalingam, . It is a direct decision applicable to the facts of the present case. In this case also a notice was served at the execution stage. Petition to set aside the ex parte decree was filed one year after the service of notice in execution stage. No explanation was given for such a long delay except stating that they were not aware of the proceedings. The delay was not condoned.

10. As already pointed out, in the present case the petitioners approached the court suppressing the service of notice on them in execution proceedings and suppressing the fact that they have engaged an Advocate and are contesting the execution proceedings. In this regard, the learned counsel for the petitioners contended that this conduct of the petitioners shows that they are diligent in defending the lis pending against them. There is no force in that contention. It can be said that there is diligence on the part of the petitioners if they have approached the trial court to set aside the ex parte decree within a reasonable time immediately after they became aware of the ex parte decree against them. As already pointed out, though the petitioners became aware of the ex parte decree in January, 1993 itself, they suppressed that fact and pretended as though they became aware of the ex parte decree only on 20-01-1994. For all the reason stated above, I find that the revision petitioners failed to establish any sufficient cause for condoning the delay in filing the petition under Order 9 Rule 13 C.P.C. Absolutely I find no merits in the revision petition.

11. In the result, the revision petition is dismissed. No costs.