
(2007) 02 AP CK 0046

In the Andhra Pradesh High Court

Case No : CCCA MP No. 49 of 2007 in CCCA No. 164 of 2005

P. Ram Mohan

APPELLANT

Vs

Dr. Purnachandra, Builder and Partner of Akshita Enterprises

RESPONDENT

Date of Decision : 05-02-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 19, 151

Citation : AIR 2007 AP 206 : (2007) 3 ALD 109 : (2007) 2 APLJ 25

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : T. Ramakrishna Rao, for the Appellant; A.P. Lakshmi, for the Respondent

Final Decision : Dismissed

Judgement

C.Y. Somayajulu, J.—This petition is filed under Order 41 Rule 19 read with Section 151 CPC to set aside the order of dismissal of the appeal for default and for re-admission of the appeal.

2. Before advertng to the contentions raised by the learned Counsel for petitioner/ appellant and the learned Counsel for respondent, it is necessary to state certain facts.

3. As per the record sheet on 19-12-2006, when the appeal was posted, the learned Counsel for the appellant, who filed this petition, informed the learned Judge that in spite of his being a Senior Counsel, the appellant did not behave properly with him and so he does not want to appear for him and so notice may be sent to the appellant. The learned Counsel also informed the learned Judge that the appellant is present in Court. Therefore, the learned Judge called the appellant and he who was present in person, informed the learned Judge that he wants to change his Counsel and made a request for time. So, the case was adjourned to 26-12-2006. Probably due to the appeal not reaching, it was not called on 26-12-2006 and was called on 5-1-2007, and from that day it was

posted to 17-1-2007 and from then to 19-1-2007 and on 19-1-2007, the learned Judge passed the following order:

When this appeal suit came up for hearing, there is no representation on behalf of the appellant.

Hence, this appeal suit is dismissed for default. No costs.

4. In the affidavit of the learned Counsel for the appellant, filed in support of this petition, he stated that when the appeal was listed for hearing on 5-1-2007, he requested the Court to grant time so that he could inform the appellant about the hearing of the appeal and so the Court granted time till after Pongal vacation and thereafter he sent a letter to the appellant by registered post with acknowledgment due, informing him that the appeal would come up for hearing after Pongal vacation in January, 2007, but that registered letter was returned with an endorsement "party left without intimation R/S dated 11-1-2007", and that the appeal was listed on 19-1-2007 showing his name as Counsel for appellant by mistake, but he could not be present in Court to represent the case, as he was engaged in another Court, and requested Sri P.C. Kakar, Advocate to make a request for pass over of the appeal but as he was also engaged in another Court Sri P.C. Kakar could not make the representation and so the appeal was dismissed for default for non-prosecution, and that at 2-15 p.m. on 19-1-2007 when he made a mention to the Court in the presence of Smt. A.P. Lakshmi, Counsel for respondent to restore the appeal and recall the order of dismissal for default, the Court observed that he should file an application to set aside the order of dismissal of the appeal for default.

5. Sri P.C. Kakar, Advocate whose affidavit also is filed in support of this application, stated that on 19-1-2007 the Counsel for appellant made a request to him to ask for a passover if the appeal is called for hearing and that even before he could reach the Court the appeal was dismissed for default.

6. The learned Counsel for petitioner, placing strong reliance on V. Venkata Rao and another Vs. Deputy Transport Commissioner and Secretary, Kakinada and others, , Keram Mangaiah and Another Vs. Agent to Government at Khammam and Another, , Gadiraju Vidyulatha Vs. Indla Venkateswarlu, , N. Dharmiah (died) and others Vs. D. Annapurna and another, , Ram Lakhan Vs. Presiding Officer and Others, , Rafiq and Another Vs. Munshilal and Another, and Shrimad Sudhindra Thirtha Swamy Vs. Sri Kasi Math Samsthan, Tirumala, Chittoor Dist. and another, , contended that since the Counsel being engaged in another Court is a good ground for restoration of the appeal, and since he was engaged in another Court on 19-1-2007 when the appeal was called for hearing and was dismissed for default, the appeal may be restored, as it is the appellant, but not he that would be put to loss due to the appeal being dismissed for his default.

7. The contention of the learned Counsel for respondent is that since the proceeding sheet, and the affidavit of the learned Counsel for appellant also, show that the appellant was not interested in getting the appeal argued by the

Counsel who gave the affidavit in support of this petition and made a request to the Court to grant time to engage another Counsel and since the Court did grant time for that purpose and yet the appellant did not make alternative arrangements for proceeding with the appeal, Counsel for the appellant who gave the affidavit in support of this petition, being absent when the appeal was called for hearing on 19-1-2007 is not of any consequence and as the appellant who sought time to engage another Counsel for proceeding with the appeal on the date on which it was posted for hearing, failed to appear before the Court on that day and also failed to engage another Counsel, the decisions relied on by the Counsel for appellant, who filed this petition, have no application to the facts of this case and since the petition is filed only with a view to drag on the proceedings, petitioner is not entitled to the relief sought.

8. Sri A.V. Seshabai, learned Counsel for third party, also made his submissions. In my considered opinion those contentions are not relevant for disposal of this petition.

9. The ratio in all the decisions relied on by the learned Counsel for petitioner (appellant) is that Counsel for a party being engaged in another Court is a valid ground for setting aside an order of dismissal of a proceeding for default, because the ultimate loser in such a case is the party but not the Counsel who failed to appear when the case is called for hearing. The facts in this case are different from the facts in all the above cases.

10. From the affidavits of the learned Counsel for the appellant and Sri P.C. Kakar, filed in support of this application, it is clear that as the Counsel for the appellant, who filed this application, was engaged in another Court, he could not be present when the appeal is called for hearing. In normal circumstances that fact might have been a good ground for setting aside the order of dismissal of the appeal for default. In this case, on 19-12-2006 itself, the learned Counsel who filed this petition informed the Court that he does not wish to appear on behalf of the appellant. So even if he was present in Court on 19-1-2007 he would not have argued the case, because he had earlier expressed his intention to withdraw from the case due to the conduct of the appellant. The proceedings recorded by the Court on 19-12-2006 show that the appellant who was present in the Court, sought time to engage a Counsel and for that reason the appeal was posted to 26-12-2006 from 19-12-2006 right in the presence of the appellant. Therefore, it is clear that the appellant was aware of the fact that the appeal would be listed for hearing on 26-12-2006 and that he has to engage another Counsel by that date. But, for reasons best known to him, appellant did not choose to appear either in person or through a new Counsel on 26-12-2006 or any other subsequent day.

11. For reasons best known to him appellant (petitioner) did not file his affidavit explaining the reasons for his failure to appear in Court on 19-1-2007 when the appeal was dismissed for default.

12. The Counsel for appellant (petitioner) who filed this petition cannot be blamed or found fault with, because he did his duty by sending a letter by registered post also, though it was not necessary, because the appellant who was present in Court on 19-12-2006, sought time to engage another Counsel to argue the appeal. The affidavit of the learned Counsel also shows that he appeared at 2.15 p.m. on 19-1-2007 in Court and made a request to set aside the order of dismissal of the appeal for default, though his presence, when the case is called for hearing before the learned Judge, in the facts and circumstances of the case, would not have made any difference because, he would not have, in any event, argued the appeal and would have sought time. The appellant who made a request to the Court on 19-12-2006 to grant time to engage another Counsel for arguing the appeal, did not take any steps to engage a new Counsel and failed to explain the reasons for his absence on 19-1-2007 when the appeal was dismissed for default and so I find no grounds to restore the appeal and hence the petition is dismissed. No costs.