
(2014) 01 AP CK 0130
In the Andhra Pradesh High Court
Case No : CRP. No. 4674 of 2013

R. Krishna Alias Kistaiah

APPELLANT

Vs

R. Bala Narasaiah (died) per LRs. and Others

RESPONDENT

Date of Decision : 03-01-2014

Acts Referred:

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

Citation : (2014) 2 ALD 297 : (2014) 2 ALT 634

Hon'ble Judges : M.S. Ramachandra Rao, J

Bench : Single Bench

Advocate : Siddhartha Sarma, for the Appellant; K. Goverdhan Reddy, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Ramachandra Rao, J.—This Revision is filed challenging the order dt. 05.08.2013 in I.A. No. 826 of 2011 in O.S. No. 131 of 2006 of the Senior Civil Judge, Bhongir. The petitioners herein are defendants in the above suit. The suit was filed for specific performance of an agreement of sale dt. 09.10.2005 allegedly executed by defendant Nos. 1 to 3 in favor of the respondent/plaintiff. The defendants filed a written statement but remained ex parte and did not lead evidence. The suit was decreed ex parte on 02.03.2010.

2. I.A. No. 826 of 2011 was filed by the defendants u/s 5 of the Limitation Act, 1963 to condone the delay of 502 days in filing an application under Order IX Rule 13 C.P.C. to set aside the ex parte decree dt. 02.03.2010. They also filed another IA under Order IX Rule 13 C.P.C. to set aside the said decree.

3. In the affidavit filed in support of I.A. No. 826 of 2011, the defendants contended that they had engaged a counsel by name V. Srinivas of Bhongir on their behalf and instructed him to conduct the case on their behalf; that written statement was also filed in 2007; that 2nd defendant was looking after the proceedings in the suit on behalf of other defendants by contacting their counsel;

that their counsel informed the defendants that he would look after the case and inform them as and when their presence was required; suddenly on 29.07.2011, notices were received in E.P. No. 21 of 2011 by them asking them to attend the court on 19.08.2011 along with copy of the EP which indicated that a decree was passed on 02.03.2010 against them; that the counsel avoided to contact them; later they verified through another counsel and came to know that they had been set ex parte on 17.02.2010 as the counsel did not represent the matter and an ex parte decree was passed. They contended that on account of their earlier counsel not informing them about the proceedings in the suit, the ex parte decree came to be passed and the same be set aside after condoning the delay in filing the application to set aside the ex parte decree.

4. Counter-affidavit was filed by the plaintiff/respondent opposing the above application contending that the allegations made by the defendants cannot be believed; that the plaintiff had filed his affidavit in lieu of chief-examination on 15.09.2009 and the suit was decreed only on 02.03.2010; that defendants did not explain why they did not approach their counsel during this period; by blaming their counsel, the defendants cannot get away with the inordinately long delay of 502 days in filing the application to set aside the ex parte decree. The plaintiff therefore prayed that I.A. No. 836 of 2011 filed by the defendants be dismissed.

5. By order dt. 05.08.2013, the court below allowed I.A. No. 826 of 2013. It held that although the defendants had filed a written statement and contested the matter, their counsel did not represent the case on 17.02.2010; therefore, they were set ex parte on that day; that the counsel for defendants also did not cross-examine the plaintiff and ex parte decree was passed on 02.03.2010; that valuable rights of the defendants were involved in the matter and they cannot be condemned unheard, although their counsel did not defend them. It therefore, held that defendants should be given an opportunity to contest the matter and the delay of 502 days can be condoned on payment of costs of Rs. 5,000/- to plaintiff.

6. Challenging the same, this Revision is filed by the plaintiff.

7. Heard Sri P. Venugopal, counsel for Ch. Siddharth Sharma, counsel for the petitioner/plaintiff and Sri K. Goverdhan Reddy, counsel for the respondent Nos. 2 to 10.

8. The counsel for petitioner contended that the defendants were negligent in contesting the suit after having filed the written statement; that they did not explain day-to-day delay; that the court below, without stating that it is satisfied that sufficient cause has been shown by the defendants in explaining the delay in filing the application under Order IX Rule 13 CPC, could not have condoned the delay. He also contended that the defendants failed to avail the opportunity of contesting the suit and therefore no indulgence can be shown to them in the matter.

9. The counsel for the respondent on the other hand contended that the defendants had given valid reasons for condoning the delay in filing the application under Order IX Rule 13 CPC; that the court below rightly condoned the said delay on payment of costs; that the defendants had relied on their counsel to inform them about the proceedings in the suit, but he did not inform them and the negligence/inaction of their counsel cannot be ignored and the defendants cannot be made to suffer for it. He also contended that the suit relates to specific performance of an agreement of sale of valuable land and the defendants be allowed to contest the suit on merits as the plaintiff was adequately compensated by the trial court by imposing costs of Rs. 5000/-. He also cited the decisions Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , N. Balakrishnan Vs. M. Krishnamurthy, , State of Nagaland Vs. Lipok AO and Others, and Bavisetty Jagganna Dora (died), Smt. Bavisetty Sanyasamma, Sri Bavisetty Ramana Babu and Sri Bavisetty China Appala Swamy Dora Vs. Somi Estates and Housing (P) Ltd.,

10. I have noted the submissions of both sides.

11. In the present case, the suit was filed in 2006 for specific performance of an agreement of sale in respect of 3/4th share in valuable land of extent Acs. 9.16 guntas in Medipally Village, Bommalamaram Mandal, Nalgonda District by the petitioner/plaintiff against the respondents/defendants. The defendants had engaged a counsel by name V. Srinivas of Bhongir and through him filed a written statement in 2007. Thereafter, according to the defendants, their counsel, having promised to let them know as and when their participation in the suit is necessary, did not do so; consequently, they were set ex parte on 17.02.2010 and an ex parte decree was passed on 02.03.2010. I.A. No. 826 of 2011 was filed on 16.08.2011 to condone the delay of 502 days in filing the petition under Order IX Rule 13 C.P.C. to set aside the said ex parte decree.

12. The point for consideration is "whether the defendants had shown sufficient cause for condonation of the above delay"?

13. In Collector, Land Acquisition, Anantnag (1 supra), cited by the counsel for respondents/defendants, the Supreme Court held that the power to condone delay by enacting Section 5 of the Limitation Act, 1963 is to enable the courts to do substantial justice to parties by disposing of matters on merits; that the expression "sufficient cause" employed by the Legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which serves the ends of justice which is the life purpose for the existence of the institution of courts; substantial justice deserves to be preferred as against technical considerations; and the courts should prefer to deliver justice on merits in preference to the approach which scuttles a decision on merits.

14. In N. Balakrishnan (2 supra), an application to set aside an ex parte decree dt. 28.10.1991 for declaration of title and ancillary reliefs was dismissed by the trial court on 17.02.1993. It also dismissed for default an application filed on

19.08.1995 to condone delay of 883 days in setting aside the order dt. 17.02.1993. The appellate before the Supreme Court, who had filed the said applications, contended that the advocate engaged by him failed to inform him about the dismissal of the application on 17.02.1993 and that he came to know of the same only on 05.07.1995 when he received summons from the Executing Court; that he went to the same advocate and gave Vakalatnama and signed papers for resisting execution proceedings, but the advocate did not do anything; and that the trial court had erred in dismissing the applications filed by him. The Supreme Court held that the appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant and what he did in defending the suit was not very much far from what a litigant would broadly do; that although he could have been more vigilant, during these days when everybody is fully occupied with his own avocation of life, an omission to adopt such extra vigilance cannot be used as a ground to depict him as an irresponsible litigant and visit him with drastic consequences. It held:

9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is not matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be un-condonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

... ..

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss.

15. In State of Nagaland (3 supra), the Supreme Court followed the above

decision and after referring to other cases on the issue, held that when State is a litigant, it is not impermissible to show some latitude to it and it cannot be put on the same footing as an individual, since the State has to operate through impersonal machinery.

16. In *Bavisetty Jagannadora* (4 supra), this Court held that reasons have to be recorded by the trial court in considering an application for condonation of delay in filing an application to set aside an ex parte decree under Order IX Rule 13 C.P.C. and a cryptic order, without giving reasons, cannot be sustained.

17. Keeping in view the above decisions, I am of the opinion that the facts of the present case are somewhat similar to those in *N. Balakrishnan* (2 supra). Like in that case, here also the defendants had engaged a counsel by paying him fee and through him had filed a written statement in 2007 itself. Proceedings in the suit admittedly dragged on and on 17.02.2010, the defendants were set ex parte due to non-appearance of their counsel. According to the defendants, the counsel had told them that he would call them as and when their presence is required. Unfortunately, he did not appear to have contacted the defendants and informed them about the proceedings in the suit, after filing of the written statement. I see no reason to disbelieve the plea of the defendants that they had waited bonafidely, believing that the counsel would inform them about the proceedings in the suit. Of course, they could have been more vigilant and could have visited the advocate at short intervals to check up the progress of litigation, but as observed by Supreme Court in *N. Balakrishnan* (2 supra), omission to adopt such extra vigilance, cannot be allowed to visit a litigant with drastic consequences and depict him as an irresponsible litigant, when he did take steps to engage a counsel to defend him in the suit. As rightly observed by the Supreme Court, length of delay is no matter but acceptability of the explanation is the only criterion. I am satisfied that the defendants had made out sufficient cause for condonation of the delay in filing the application to set aside the ex parte decree and that they deserve a chance to contest the suit on merits.

18. I am of the view that the court below had correctly exercised its discretion in condoning the delay of 502 days in filing the application to set aside the ex parte decree on payment of costs of Rs. 5,000/- to the respondent/plaintiff.

19. In this view of the matter, I am not inclined to interfere with the impugned order. Therefore, the Civil Revision Petition is dismissed. No costs. However, since the suit is an old suit of the year 2006, both parties shall cooperate with the expeditious disposal of the suit and the trial court shall endeavour to dispose it of within six (6) months from the date of receipt of a copy of this order. Miscellaneous applications pending, if any, in this Civil Revision Petition shall stand closed.