

(2012) 12 AP CK 0046

In the Andhra Pradesh High Court

Case No : C.R.P. No's. 1610 and 1874 of 2012

Smt. D. Manemma and Another

APPELLANT

Vs

V. Anantha Reddy (died) per L.Rs. V. Sudershan Reddy and Others

RESPONDENT

Date of Decision : 04-12-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Limitation Act, 1963 — Section 5

Citation : (2013) 2 ALT 332

Hon'ble Judges : C.V. Nagarjuna Reddy, J

Bench : Single Bench

Advocate : Pasam Srinivas Reddy, for the Appellant; T. Lakshminarayana, for the Respondent

Final Decision : Dismissed

Judgement

C.V. Nagarjuna Reddy

1. The petitioners, who are the defendants in O.S. No. 291/1988 on the file of the learned Principal Junior Civil Judge, Ranga Reddy District, filed these two revision petitions. They have filed C.R.P. No. 1874/2012 against order dated 17-3-2011 in I.A. No. 1251/2009 and C.R.P. No. 1610/2012 against order dated 18-1-2012 in I.A. No. 564/2011 in the above mentioned suit. The brief facts leading to the filing of these Civil Revision Petitions are mentioned hereunder:

One Vanga Anantha Reddy, the father of the respondents herein, filed O.S. No. 291/1988 for specific performance of agreement of sale dated 2-6-1978 against the petitioners. The petitioners filed a written statement and also an additional written statement. During the pendency of the suit, the original plaintiff died and the respondents herein, were brought on record as his legal representatives. The suit underwent innumerable adjournments for nearly two and a half decades. It was dismissed for default on 28-1-2002. The respondents filed I.A. No. 564/2012 on 21-10-2009 for restoration of the suit along with all the Interlocutory

Applications by setting aside the default order dated 28-1-2002. They have also filed I.A. No. 1251/2009 u/s 5 of the Limitation Act, 1963, for condonation of delay of 2792 days in filing the restoration petition. Both these applications were allowed by the lower Court by separate orders whereby the delay was condoned on costs of Rs. 5000/- and the suit was restored to file by setting aside the order dismissing the suit for default. Feeling aggrieved by these orders, the petitioners/defendants filed these two revision petitions.

2. Since both these Civil Revision Petitions are intricately connected with each other, they are heard together and being disposed of by this Common Order.

3. At the hearing, Sri Pasam Srinivas Reddy, learned counsel for the petitioners/defendants, submitted that the lower Court has exceeded its jurisdiction in condoning the enormous delay in filing the application for setting aside the exparte order and that it has committed an equally serious error of jurisdiction in setting aside the default order without there being any reasonable and sufficient cause. He further submitted that even though discretion is vested in the Court to condone the delay, such discretion has to be exercised in a sound and rational manner and that the grounds on which the condonation of delay was sought and exparte order was sought to be set-aside are wholly inadequate to condone such a huge delay and set-aside the exparte order. In support of his submissions, the learned counsel mainly placed reliance on the Judgment of a Division Bench of this Court in State of Andhra Pradesh and Others Vs. A. Murali Madhava Rao and Others, and that of a learned single Judge in Shaik Rahima Begum and Another Vs. Kadiri Narayanamma, He has also placed reliance on the Division Bench Judgment of the Madras High Court in M.R. Venkatarama Aiyar Vs. Nataraja Aiyar,

4. Opposing the above submissions, Sri T. Lakshminarayana, learned counsel for the respondents/plaintiffs, submitted that C.R.P. No. 1874/2012 is not maintainable as the petitioners have waived their right, if any, to question the order in I.A. No. 1251/2009 by receiving the costs of Rs. 5000/- awarded by the lower Court for condonation of the delay and deposited by the respondents. In support of this submission, the learned counsel has relied upon the Judgment of the Madras High Court in Puvvada Satyanarayanamurthy Vs. Gadepalli Sundara Rao, . He has alternatively submitted that as condonation of delay falls exclusively within the jurisdiction of the lower Court, such an order passed by it, even if found erroneous, falls within its discretion and that this Court cannot set-aside such an order by exercising the revisional jurisdiction u/s 115 of the Code of Civil Procedure, 1908. The learned counsel relied upon the Judgment of the Supreme Court in Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others, in support of this submission. The learned counsel also sought to justify the orders of the Court below even on merits by contending that in view of the advice given by the Counsel appearing for the respondents in the lower Court, the respondents have approached the revenue authorities and got the suit agreement validated vide proceedings No. A/1016/89 dated 8-10-1990 by paying the deficit stamp duty and that being under a bonafide impression that

there was no need for the respondents to pursue the suit further, they have not participated in the suit proceedings leading to its *ex parte* dismissal. The learned counsel submitted that on proper analysis of the facts, the lower Court has come to the conclusion that there were justifiable reasons for condoning the long delay and also for setting aside the *ex parte* decree.

5. I have carefully considered the respective submissions of the learned counsel and perused the record.

6. A perusal of the orders of the lower Court would show that it has accepted the plea of the respondents that they were guided by the wrong advice given by one J. Ram Reddy, Advocate, who appeared for them, and abandoned the suit as they have secured an order on 8-10-1990 from the Mandal Revenue Officer, Saroornagar Mandal, Ranga Reddy District, whereunder the agreement of sale was purportedly validated. I have carefully gone through the affidavit of the said J. Ram Reddy, Advocate. He has deposed in the affidavit that the suit was initially filed by Vanga Anantha Reddy; that after his death in the year 1977, the respondents herein came on record as his legal heirs; that when the case was pending, he advised V. Anantha Reddy, to initiate proceedings before the Mandal Revenue Officer, Saroornagar, Ranga Reddy District, for validating the suit document as the entire agreed sale consideration was paid and that accordingly the said V. Anantha Reddy, has made an application on which proceedings were initiated by the Mandal Revenue Officer vide file No. A/1018/89 and an order was passed on 8-10-1990, in pursuance of which 13-C Form and Pattadar Passbooks were issued. He has further stated that in view of the advice given by him, the respondents could not prosecute the suit and as such the same was dismissed in default on 28-1-2002. He has also stated that he was under the bonafide impression that as the document was validated, the same will continue to have validity and accordingly on his advice, the respondents did not prosecute the case.

7. In order to test the veracity of this statement, it is necessary to examine as to how the proceedings before the lower Court went on. Hence, this Court has summoned the docket proceedings of the Court below. A perusal of these proceedings shows that the suit proceedings commenced from 12-7-1988. After the filing of the written statement, Issues were framed on 4-10-1988. On the same day, PW-1 was examined and Exs. A-1 to A-3 were marked and the plaintiff's evidence was closed. Since then, the suit was being posted for evidence on the defendants' side. The suit underwent countless number of adjournments. Significantly, even after the Mandal Revenue Officer, Saroornagar Mandal, Ranga Reddy District, has passed order purportedly validating the agreement of sale, the respondents have not given up the suit.

8. The first adjournment date of hearing of the suit after the purported validation of the agreement of sale was 16-1-1990. Since then, the case underwent more than 100 adjournments. The petitioners were allowed to file additional written statement. Evidently, questioning the said order, the respondents filed C.R.P. No.

3406/1995 in which interim order of stay of further proceedings in the suit was granted by this Court. The said order remained in force till 10-9-1999. When the said Civil Revision Petition was dismissed by this Court, the same was taken note of by the lower Court by its docket order dated 29-10-1999. On 28-1-2000, the lower Court has recorded that the plaintiffs' counsel filed a Memo stating that he has no evidence, reserving his right to lead rebuttal evidence, if any, and accordingly the plaintiffs' side evidence was closed and the suit was posted to 7-2-2000 for the defendants' side evidence. The docket proceedings further show that on 19-1-2001, Mr. J. Ram Reddy, Advocate, filed Vakalath for the plaintiffs with consent. Even after his appearance, the suit underwent several adjournments. On 4-12-2001, the lower Court has adjourned the case finally to 28-12-2001 by endorsing that if the case is not proceeded with by the plaintiffs, the same will be dismissed for default. On 28-12-2001, another adjournment petition was filed by the counsel for the respondents. The said application was allowed. Again on 28-1-2002, another petition for adjournment was filed which was numbered as I.A. No. 182/2002. Mr. P. Vishnuvardhan Reddy, Advocate, who had sworn to the affidavit stated inter alia in his affidavit as under:

I submit that the above suit is posted today for trial, as my Counsel was out of Station, as such he could not come to this Hon'ble Court and unable to represent the case, as such it is just and necessary to adjourn the case to any other convenient date after 15 days otherwise the petitioner will be put to irreparable loss.

9. Obviously, vexed with the spate of adjournments, the lower Court has dismissed the said I.A. on the same day and dismissed the suit for default. The respondents allowed the things to rest at that stage till they filed the above mentioned two I.As. in October 2009, almost seven years after dismissing the suit. In paragraph-8 of the affidavit filed in support of I.A. No. 1251/2009, the respondents inter alia stated that Mr. J. Ram Reddy, to whom the case was entrusted was prosecuting the case and that recently for the reasons best known to him, he did not evince interest properly and that having suspected his bonafides, they have changed their Advocate, whereupon they came to know that the suit was not prosecuted by their Advocate and accordingly it was dismissed for default on 28-1-2002. It is further averred that the fact of dismissal of the suit came to their knowledge only on 20-10-2009 when they went to their present Advocate with no objection Vakalath. They have further stated that they did not file the adjournment petition on 28-1-2002, numbered as I.A. No. 182/2002.

10. The pleas raised by the respondents in their affidavit filed in support of I.A. No. 1251/2009 are self-contradictory. In paragraph-8, they have in fact indicted and insinuated their Advocate that for the reasons best known to Mr. J. Ram Reddy, he did not evince interest in prosecuting the case and that on suspecting his bonafides, they have entrusted the case to another Advocate. However, in paragraph-10, they have stated that taking undue advantage of the wrong advice

given by J. Ram Reddy not to prosecute the suit, the suit was dismissed for default on 28-1-2002.

11. If really Mr. J. Ram Reddy, Advocate, has advised the respondents not to prosecute the case in view of the so-called validation order granted on 8-10-1990, it is impossible to believe that J. Ram Reddy, Advocate or his office colleagues would have appeared in the suit proceedings without either reporting to the Court that the respondents are not interested in prosecuting the case in view of the said validation order or at least kept away from the Court proceedings. Instead, they continued to represent the respondents from 19-1-2001 when Mr. J. Ram Reddy, entered appearance. On 18-7-2001, additional written statement was filed and the case was adjourned for filing of rejoinder, if any. At least, at that stage, the counsel for the respondents has not reported no instructions in the suit. On the contrary, on 11-9-2001, the following Issues were again settled for trial:

1. Whether the agreement of sale dt. 2-6-78 is valid and binding on the defendant?
2. Whether the plaintiff has made the sale consideration?
3. To what relief?

12. The suit was posted to 9-10-2001 for trial and was again being adjourned from time to time. As noted above, the counsel representing Mr. J. Ram Reddy, filed adjournment petitions more than once. In this admitted fact situation, it is quite incredulous that Mr. J. Ram Reddy, would have given advice to the respondents not to prosecute the suit. The respondents have not shown any semblance of diligence in prosecuting the suit. Having been in deep hibernation from 28-1-2002, they have suddenly woke up and filed the present petitions in October 2009 by taking shelter under the affidavit of Mr. J. Ram Reddy, Advocate. From the above uncontroverted facts, I have no manner of doubt that the respondents have come out with a false plea of the so-called wrong advice of their counsel to overcome their default in prosecuting the case and their continuous non-appearance in the suit on several dates of adjournments, including on 28-1-2012. In my opinion, the lower Court ought not to have given credence to the cobbled-up version of the respondents designed only to get the suit restored. The lethargic and laidback approach of the respondents is further evident from the fact that after the dismissal of the suit, they have kept quiet for 7 1/2 years before filing the two applications in question.

13. In the light of the above mentioned finding on facts, I need to examine the legal contentions raised by the counsel for the parties. As noted above, it is the specific contention of the learned counsel for the respondents that the petitioners have accepted the costs deposited by the former as ordered in I.A. No. 1251/2009 as a condition for condonation of delay. In Puvvada Satyanarayana Murthy (4-supra), a similar plea was considered by a learned single Judge of the Madras High Court wherein also while setting aside the default order, the District

Judge of Visakhapatnam (Vizagapatnam as it was then called), awarded costs of Rs. 25/- to the contesting respondent and the same were paid to his Pleader. When the respondent filed a revision petition before the Madras High Court questioning the order of the District Judge setting aside the *exparte* decree, a preliminary objection was raised that having received costs without protest, the contesting respondent before the lower Court was not entitled to question the order passed by the District Judge. While considering this issue, the Madras High Court observed as under:

...The principle underlying this objection has been discussed in a number of cases, both English and Indian, and is based not as stated in some of the cases on equitable estoppel, but falls under the well known rule that a party cannot be allowed both to approbate and reprobate. The question having been fully examined in *Banku Chandra Bose and Another Vs. Marium Begum and Another*, *Gadde Venkatarayudu and Others Vs. Anumolu Chinna Ramakrishnayya and Others*, , it is hardly necessary for me to discuss it again. Suffice it so say that the conclusion arrived at by the learned Judges in these cases was that if a party had adopted an order of the Court and acted under it, he could not, after he had enjoyed a benefit under the order, contend that it was valid for one purpose and invalid for another and that he must in the circumstances be considered to have acquiesced in the order passed by the Court.

14. Indeed, after the Civil Revision Petitions were reserved for Judgment, I have reopened the same in order to verify whether the costs of Rs. 5000/- awarded by the lower Court in I.A. No. 1251/2009 were received by the petitioners. On reopening, the learned counsel for the petitioners has not disputed the fact of receiving the costs. In view of the ratio laid down in the above mentioned case law, I have no option except to hold that having accepted the costs, evidently without any protest, the petitioners/defendants are not entitled to question the order in I.A. No. 1251/2009. Even though this Court is of the strong opinion that the respondents/plaintiffs have miserably failed to offer proper explanation, leave alone convincing explanation for condonation of a substantially long delay, the order of the lower Court passed in I.A. No. 1251/2009 is not liable to be interfered with. In view of this conclusion, it is not necessary for this Court to deal with the Judgment of the Supreme Court in *Manindra Land and Building Corporation Ltd., (5-supra)*, which was considered and explained by this Court in *Shaik Rahima Begum Vs. Kadiri Narayanamma (2-supra)*. C.R.P. No. 1874/2012 is accordingly liable for being dismissed.

15. C.R.P. No. 1610/2012, however, stands on a different footing. In the order passed in I.A. No. 564/2011, which is questioned in the said revision petition, the lower Court did not award costs. Hence, the question of receiving the same by the petitioners did not arise and consequently the petitioners are very much entitled to question the order of the lower Court passed in the said I.A. whereby it has set-aside the order dismissing the suit for default and restored the suit.

16. As discussed hereinbefore, the respondents failed to prove their case that

there was reasonable cause for their absence on 28-1-2002 before the lower Court. Even though the finding of the lower Court falls in the realm of appreciation of facts, it has failed to take into consideration the material aspects while accepting the plea of the respondents. In *Manick Chandra Nandy Vs. Debdas Nandy and Others*, the Supreme Court held :

....For the purpose of ascertaining whether the subordinate court has decided such a collateral question rightly, the High Court, however, cannot function as a court of first appeal so far as the ascertainment of evidence is concerned and substitute its own findings for those arrived at by the Subordinate Court unless any such finding is not in any way borne out by the evidence on record or is manifestly contrary to evidence or so palpably wrong that if allowed to stand, would result in grave injustice to a party.

17. In my opinion, this case falls in the exceptions carved out by the Apex Court for interference by this Court in exercise of its revisional jurisdiction. Not only that the findings are manifestly contrary to the facts and evidence on record, but also on the facts of this case, if the order of the lower Court is allowed to stand, it would result in grave injustice to the petitioners/defendants, for, the alleged agreement of sale is dated 2-6-1978. The respondents/plaintiffs engaged the petitioners/defendants in the civil litigation for more than 14 years before they allowed the suit to be dismissed for default. They have gone into deep slumber for 7 1/2 years before they have filed the application for condonation of the delay in filing application for restoration of the suit. By their default, valuable right came to be vested in the petitioners. Such a right cannot be taken away in a light-hearted manner by accepting the specious plea put forth by the respondents, which is a mere subterfuge. Nearly eight years after the dismissal of the suit for default, the respondents/plaintiffs cannot be allowed to unsettle the settled rights of the parties. Unless the respondents have come out with strong and convincing reasons for their absence on 28-1-2002, it would be a grave travesty of justice if the suit is restored.

18. There is one other factor which weighs with this Court in favour of the petitioners/defendants. The suit is for specific performance of the agreement of sale. The property is situated at Karmanghat, which has become one of the hubs of the city of Hyderabad. There is a radical change of the profile of Hyderabad from 1978. The value of the properties has increased manifold. What the original plaintiff would have paid to the petitioners would have been a pittance in the year 1978 and it will be more than a windfall if their suit for specific performance of the agreement of sale of the year 1978 is decreed, post 2012. The respondents/plaintiffs cannot be allowed to run away with such an unintended benefit on account of their own default in prosecuting the suit. The Court below has completely failed to keep these relevant facts in mind and has reasoned that since the suit filed by the respondents in the year 2005 is pending, no harm will be caused if the present suit is restored. In my opinion, such an approach cannot be sustained. Therefore, I am of the opinion that the lower Court has wrongly

exercised the discretion vested in it in restoring the suit nearly eight years after its dismissal for default. Accordingly, order dated 18-1-2012 of the lower Court passed in I.A. No. 564/2012 is set-aside. For the above mentioned reasons, C.R.P. No. 1610/2012 is allowed. C.R.P. No. 1874/2012 is dismissed.