

(2007) 04 AP CK 0052

In the Andhra Pradesh High Court

Case No : C.R.P. No's. 2744 and 4458 of 2006

Veluru Satish and Others

APPELLANT

Vs

Chittaturu Sailaja and Others

RESPONDENT

Date of Decision : 19-04-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Limitation Act, 1963 — Article 123, 5

Citation : (2007) 5 ALD 257 : (2007) 5 ALT 222 : (2007) 2 APLJ 284

Hon'ble Judges : N.V. Ramana, J

Bench : Single Bench

Advocate : S. Lakshminarayana Reddy, for the Appellant; K.S. Gopala Krishna, for the Respondent

Judgement

N.V. Ramana, J.—These two revisions are directed against the common order dated 20-3-2006, passed by the I Additional Senior Civil Judge, Nellore. By the said common order, the applications in I.A. Nos. 578 and 579 of 2005 in O.S. No.88 of 2004, filed by the respondents-defendants, one seeking to set aside the ex parte decree dated 19-8-2004 and the other seeking to enlarge time for filing written statement by condoning the delay of 429 days, was allowed.

2. Few facts necessary for the disposal of the C.R.Ps. may be noted, and they run thus:

3. The respondents-defendants, in the affidavit filed in support of the I.As., stated that they entrusted the vakalat to one Sri Sanjeeva Kumar, Advocate. During the pendency of the suit, he died. According to them, they requested the counsel to file written statement on their behalf, but for the reasons best known to him, he did not file. There is no negligence on their part. The period of limitation to file the written statement was over by 12-7-2004. Due to non-filing of written statement, ex parte decree was passed in the suit against them on 19-8-2004. It is specifically averred that due to lapses on the part of the previous counsel, who died long prior to the present applications, the ex parte

decree was passed, and they cannot be penalized for the mistakes on the part of their counsel. Thus, they sought to set aside the ex parte decree dated 19-8-2004 and to receive the written statement by enlarging the time till the date of filing the written statement.

4. The petitioners-plaintiffs contested the I.As., denying the averments made by the respondents-defendants in the affidavit filed in support of the I.A. They specifically contended that it was false to aver that the previous counsel engaged by the respondents-defendants was bedridden for months together without attending the Court. They did not choose to file any material to substantiate their claim to set aside the ex parte decree. They filed E.P. No. 23 of 2005 for execution of the ex parte decree. It is also stated that the respondents filed E.A. to grant stay of the execution proceedings, and the same was dismissed. Initially, the respondents-defendants filed I.A. No. 302 of 2005 u/s 5 of the Limitation Act, 1963 to condone the delay in filing the application to set aside the ex parte decree. Subsequently, by withdrawing the said I.A., they filed the present applications, without filing any application to condone the delay in filing application to set aside the ex parte decree. According to them, in the absence of an application to condone the delay in filing application to set aside the ex parte decree, the application to set aside the ex parte decree is not maintainable and is liable to be dismissed. It was further contended by them that the respondents-defendants were negligent in prosecuting the case. They filed unnecessary cases against the petitioners-plaintiffs. They must be diligent enough in prosecuting the matter. There are no bona fides in the I.As., and as such, there is no reason to exercise judicial discretion to set aside the ex parte decree passed in their favour.

5. Heard the learned Counsel for the petitioners-plaintiffs and the learned Counsel for the respondents-defendants.

6. These two C.R.Ps. admittedly, are filed by the petitioners-plaintiffs assailing the legality of the orders passed by the Court below allowing the applications filed by the respondents-defendants - one setting aside the ex parte decree 9-8-2004 and the other enlarging the time to file written statement, subject to payment of costs of Rs. 1,000/- on each of the applications.

7. The main ground urged by the petitioners-plaintiffs in support of the C.R.Ps. is that in the absence of an application u/s 5 of the Limitation Act, 1963 to condone the long delay of 429 days in filing application to set aside the ex parte decree, the application filed by the respondentsdefendants, under Order IX Rule 13 C.P.C., to set aside the ex parte decree, was not maintainable, and the Court below committed an error in allowing the same. According to the petitioners-defendants, since the respondents-defendants were served with notice in the suit, the limitation to file an application started from the date of decree. It is also contended by the petitioners-plaintiffs that since the limitation for filing the ex parte decree, as prescribed under Article 123 of the Limitation Act, 1963 expired, the respondents-defendants were required to file an application u/s 5 of the Limitation Act, 1963 to condone the delay in filing the application to set aside the

ex parte decree. While on the other hand, it is the case of the petitioners-plaintiffs that the respondents-defendants failed to exercise due diligence in prosecuting the suit, and their contention that they requested their counsel to file written statement, and that despite their repeated requests their counsel failed to file written statement, cannot be accepted. The fact that the respondents-defendants instructed their counsel to file written statement, itself shows that the respondents-defendants are well aware of the court procedure, and as such, there was no valid or substantial ground for the Court below to allow the I.As. filed by the respondents-defendants. The petitioners-plaintiffs further contended that the respondents-defendants previously filed an application in I.A. No. 302 of 2005 seeking to condone the delay of 217 days in filing the application to set aside the ex parte decree, and after withdrawing the said application by filing a memo, they filed the present applications - one to set aside the ex parte decree and the other to enlarge time to file written statement, without an application to condone the delay in filing the application to set aside the ex parte decree.

8. The Court below while considering the applications mainly proceeded on the ground whether the applications filed by the respondents-defendants were maintainable without an application to condone the delay in filing application to set aside the ex parte decree being filed. No doubt, the respondents-defendants in support of their pleas relied upon various judicial pronouncements to the effect that the Court is competent to condone the delay even without filing formal application u/s 5 of the Limitation Act, 1963 if the petitioners properly explained the delay in the affidavits filed in support of the I.As., filed under Order IX Rule 13 C.P.C. There is no quarrel with the settled proposition of law. In fact, way back in the year 1957, a Division Bench of this Court in Ramachandra Rao v. Seshiah 1957 (2) An.W.R. 106 (D.B.) held that non-filing of formal application u/s 5 of the Limitation Act, 1963 would not come in the way of the Court exercising power conferred on it under Order IX Rule 13 C.P.C. Once the petitioner satisfies the Court by giving valid or cogent reasons, the Court is competent to condone the delay without a formal application u/s 5 of the Limitation Act, 1963 being filed. The Division Bench further held that non-filing of application u/s 5 of the Limitation Act, 1963 would itself not be a ground to dismiss the application filed under Order IX Rule 13 C.P.C. as held by the Hon'ble Supreme Court.

9. Be that as it may, it is required to be noticed whether the respondents-defendants were diligent enough in prosecuting the suit. It is well known, that in an original suit, the defendant upon receipt of notice, is expected to give instructions to the Advocate for drafting the written statement. The defendant is expected to prosecute the matter diligently. No Advocate can be expected to prosecute or defend the suit, without the presence of the party. No ordinary prudent Advocate appearing for a party in a suit or other matter in trial court would instruct his client not to come to the Court or to his office till the period of limitation expires, that too before filing written statement. I am of the considered view that it is the duty of the client to find out the stage of the litigation from his counsel from time to time, at least till the filing of the written statement. In the

instant case, as the respondents-defendants failed to file written statement, the Court below set them ex parte. It appears, that the respondents-defendants are well conversant with the Court proceedings and they being well-conversant with the Court procedures, ought to have taken adequate steps to file written statement, for their failure to file written statement, would put them to hardship. The facts and circumstances, as appearing in the case, and the material available on record, would show that the respondents-defendants were not diligent enough in prosecuting the matter.

10. The Court below in the impugned order held that the petitioners have not taken steps, what they were expected to take, and as an ordinary prudent litigant, they ought to have filed written statement by engaging some other counsel, if the counsel engaged by them did not file written statement in spite of their request to do so by attending his office regularly. However, in the penultimate paragraph of the impugned order, the Court below held that the applications are allowed on payment of costs of Rs. 1,000/-.

11. Now the question that arises for consideration is whether the Court below having held that the respondents-defendants were not diligent enough in prosecuting the suit, was justified in allowing the present applications.

12. Order IX Rule 13 C.P.C. envisages two possibilities for setting aside the ex parte decree i.e., (1) failure of service, and (2) failure to appear on explaining sufficient reasons. In so far as the first possibility is concerned, if notice is not served, invariably on verification of records, the Court would pass appropriate orders giving reasonable opportunity to the defendants in the interest of justice. While in the case of the second possibility, it is required to be noticed whether the defendants were able to satisfy the Court by giving cogent and valid reasons for not approaching the Court even after receiving the summons. In such a case, it is essential that the period of limitation should be rigorously applied against the party who approaches the Court seeking to set aside the ex parte decree. In the instant case, the respondents-defendants, admittedly, entered their appearance, and the counsel appeared on their behalf on some occasions, and subsequently the very same counsel, filed an application to set aside the ex parte decree, which was accompanied by an application to condone the delay. After demise of the said counsel, the respondents-defendants filed the present applications - one to set aside the ex parte order and the other to enlarge the time to file written statement, by changing the version, by making allegations against the counsel who is no more. A reading of the entire material on record would show, as held by the Court below, the respondents-defendants were not diligent enough in prosecuting the matter.

13. The application under Order IX Rule 13 C.P.C. would ordinarily be entertained in case where it would not cause serious prejudice to the right of the plaintiffs. In the present case, the petitioners-plaintiffs already filed a petition for, execution of the decree. The respondents-defendants simply filed an application for stay of the decree in that E.P. Thereafter, they filed the present applications. The manner

in which the respondents-defendants took steps in the matter, reflects their callous. Be that as it may, since the petitioners-plaintiffs filed the suit against the respondents-defendants claiming damages to a tune of Rs. 3.00 lakhs for alleged defamation, malicious prosecution and false imprisonment, and having regard to the fact that the respondents-defendants despite receiving notice in the suit, were not diligent in prosecuting the suit, I am of the considered opinion that the ends of justice would be met, if the orders of the Court below are upheld by imposing exemplary costs, which are quantified at Rs. 25,000/-.

14. Accordingly, the C.R.Ps. are disposed of. However, the respondents-defendants shall pay to the petitioners-plaintiffs a sum of Rs. 25,000/- (Rupees twenty five thousand only) towards costs, within a period of six weeks from the date of receipt of a copy of this order.