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**(2016) 10 AP CK 0043**  
**In the Andhra Pradesh High Court**  
**Case No : CMA No. 723 of 2012**

Venkatamma

APPELLANT

Vs

Rudresa Chetty

RESPONDENT

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**Date of Decision :** 20-10-2016

**Acts Referred:**

**Citation :** (2017) 2 AndhLD 599

**Hon'ble Judges :** U. Durga Prasad Rao, J.

**Bench :** Single Bench

**Advocate :** Sharad Sanghi, Advocate, for the Appellants; S.V. Muni Reddy, Advocate, for the Respondent Nos. 3 to 5

**Final Decision :** Disposed Off

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## Judgement

U. Durga Prasad Rao, J.—This appeal is preferred by the petitioners / appellants aggrieved by the order dated 27.3.2012 passed in IA No. 468 of 2007 in AS No 98 of 2003 on the file of the District Judge, Chittoor.

2. Under the impugned order, the appellate Court dismissed the petition filed by the petitioners, under Order XLI Rule 19 CPC to restore AS No. 98 of 2003, which was dismissed on 13.12.2007.

3. The brief facts of the case are that the appellants are the plaintiffs in OS No. 949 of 1997 on the file of III Additional Junior Civil Judge, Chittoor. They filed the said suit seeking permanent injunction against the respondents / defendants in respect of the plaint schedule house property. The said suit was tried along with OS No. 836 of 1998, which was filed by the respondents / defendants. A common judgment was passed on 28.4.2003 where under OS No. 949 of 1997 was dismissed and OS No. 836 of 1998 was decreed. Aggrieved by the said decrees and judgments, the appellants filed AS No. 112 of 2003 against the decree and judgment in OS No. 949 of 1997 and as against the decree and judgment in OS No. 836 of 1998, the appellants also filed AS No. 98 of 2003 before the District Judge, Chittoor, and both the matters were coming up for hearing together.

4. While so, both the appeals were posted to 13.12.2007 on payment of costs. The appeals were dismissed for default, since the petitioners / appellants did not get ready. Therefore, the petitioners / appellants filed IA No. 468 of 2007 under Order XLI Rule 19 CPC to set aside the dismissal order, dated 13.12.2007, and restore the appeal to its file. In the affidavit filed in support of the petition, it was mentioned that on the previous day of adjournment, Counsel for the appellants prepared a petition to receive additional written statement and on the date of adjournment, Counsel entrusted the appeal to his junior advocate, by name, Sri Hari Krishna Reddy, as he was suffering with throat infection. However, the junior Counsel, Sri Hari Krishna Reddy, who was present in the Court, did not properly represent the matter and he simply reported "not ready" without mentioning the fact that his Senior Counsel was suffering with throat infection and as such the Court was pleased to dismiss the appeal. At that time, the 2nd appellant was present in the Court and that her mother's name (the 1st appellant) was called. With the aforesaid submissions, the restoration petition in IA No. 468 of 2007 is filed.

5. The respondents / defendants filed counter and opposed the petition. They submit that the petition averments were not true; the petitioners intended only to harass the respondents; that the appeal was posted finally to 13.12.2007 on payment of costs and on that day, as there was no proper representation on behalf of the appellants, the Court below was pleased to dismiss the appeal and there were no merits in the petition.

6. The impugned order dated 27.3.2012 would show that the appellate Court while observing that the Counsel on record, who was allegedly suffering with throat infection, did not choose to file his affidavit to show that he was suffering with throat ailment and could not attend the Court and he gave instructions to his junior and further, the appeals were of the year 2003 and in spite of imposing costs, the appellants did not get ready and it appears that the appellants had no interest in disposal of the appeal, dismissed the appeal. The appellate Court further observed that the 2nd appellant, who claimed to be. physically present in the Court Hall, did not take steps to file set aside petition immediately after disposal and it appears that the appellants had no interest in appeal and thereby dismissed the petition. Hence, the present civil miscellaneous appeal.

7. Heard Sri Sharad Sanghi, learned Counsel for the appellants, and Sri S.V. Muni Reddy, learned Counsel for the respondents.

8. The submission of learned Counsel for the appellants is that the appellants plaintiffs have adequate case and fair chances of succeeding in the appeal and if the appeal is not restored, valuable rights of the petitioners will be jeopardised and the Courts shall not smother the rights of the parties by dismissing the petition filed under Order XLI Rule 19 CPC, when a party shows sufficient cause for the default. He placed reliance on Aravapali Panduranga Rao v. Deputy Commissions of Endowments, Endowment Department Guntur and others, 2012 (3) ALD 770, Learned Counsel further submits that the appellate Court dismissed

the petition on the flimsy ground that the Counsel for the appellants, who was on record, did not file his affidavit stating that he was suffering with throat pain. Learned Counsel vehemently argued that merely because the appellants Counsel did not file his affidavit, the appellate Court ought not to have dismissed the restoration petition. For fault of Counsel, if any, the party should not be made to suffer. On this aspect, he placed reliance on Rafiq and another v. Munshilal and another, AIR 1981 SC 1400 and prayed to allow the civil miscellaneous appeal. He submitted that he would abide by the conditions, if any, imposed by this Court for allowing the appeal.

9. Per contra, opposing the appeal, learned Counsel for the respondents / defendants submits that the appellants did not evince any interest though the appeal was of the year 2003 and therefore the appellate Court rightly dismissed the appeal and, thus there are no merits in the restoration petition. Learned Counsel further submits that the respondents / defendants had good case and if the appeal is allowed and the same is restored to file, the appellants would further prolong the matter and if they failed in the appeal, they would carry the matter in the second appeal and so on and thereby deprive the respondents to enjoy the fruits of the decree obtained in the connected suit. He, thus, prayed to dismiss the appeal.

10. In the light of the above submissions, the point that arise for consideration is:

"Whether there are any merits in the civil miscellaneous appeal to be allowed?"

11. Point : As can be seen from the impugned order, the matter was posted to 13.12.2007 on payment of costs. The submission of the Counsel for the petitioners / appellants is that on that day, their Senior Counsel on record could not appear before the Court below due to throat infection and unfortunately his junior, Sri Hari Krishna Reddy, did not make proper representation and simply reported "not ready" and thereby the Court was pleased to dismiss the appeal and the 2nd appellant, who was physically present in the Court, expected that her name would be called, but the name of the deceased - 1st appellant was called and in those circumstances, she could not make any representation before the Court below.

12. As already stated supra, the appellate Court dismissed the petition on the main observation that the Counsel, who was on record, did not file his affidavit stating that he was suffering with throat infection and thereby he could not attend the Court. It was also observed by the appellate Court that though the 2nd appellant claimed to be physically present in Court on 13.12.2007, the appellants did not file restoration petition immediately after dismissal of the appeal. On the above said grounds, the appellate Court dismissed the restoration petition.

13. On a careful perusal of the record and upon hearing either side, I am of the opinion that there are merits in the civil miscellaneous appeal to allow. So far as non-filing of an affidavit by the Counsel for the appellants is concerned, that

alone could not have been a ground to dismiss the petition. If in the wisdom of learned Counsel for the appellants, the affidavit of the 2nd appellant was sufficient and it was so advised by the Counsel, the party may not be in a position to insist his Counsel to file his affidavit. Hence, the Court shall not punish the party for the laches on the part of the Counsel, if any. In Rafiq's case (supra), the apex Court held that for the fault of an advocate, a party should not to be made to suffer.

14. The next observation of the appellate Court that the 2nd appellant has not filed restoration petition immediately is concerned, the appeal was dismissed on 13.12.2007 and restoration petition was filed on 17.12.2007. Hence, it cannot be said that the petition was filed with inordinate delay. In view of the same, the appellate Court ought not to have smothered the valuable rights by way of dismissing the restoration petition filed under Order XLI Rule 19 CPC. In Aravapalii Panduranga Rao's case (supra), learned Single Judge of this Court observed that in a petition filed under Order XLI Rule 19 CPC, a party, whose appeal is dismissed in default, has a right to seek readmission of the appeal on his putting forth sufficient cause for his non-appearance leading to dismissal of the appeal in default, and such a statutory right cannot be curtailed or scuttled ( by any Court, even if the conduct of the party was not to its satisfaction. Hence, at the outset, there were no compelling grounds to dismiss the petition filed by the / appellants to restore the appeal. Therefore, in my considered view, the appeal can be allowed with suitable terms.

15. In the result, the civil miscellaneous appeal is allowed and the impugned order dated 27.3.2012 in IA No. 468 of 2007 in AS No. 98 of 2003 on the file of the District and Sessions Judge, Chittoor, is set aside and AS No. 98 of 2003 is restored to file on condition of the petitioners/appellants depositing costs of Rs. 1,000/- (Rupees one thousand only) with the District Legal Services Authority, Chittoor, by 10.11.2016 and also getting ready in the appeal. The appellate Court is directed to dispose of the appeal within two months from the date of receipt of a copy of this judgment and both the parties are directed to cooperate with the appellate Court for disposal of the appeal. There shall be no order as to costs.

16. Miscellaneous petitions, if any, pending in this civil miscellaneous appeal shall stand closed. No costs.