

THE HON'BLE SRI JUSTICE B.SESHASAYANA REDDY

Civil Revision Petition No.5302 of 2009

(Dated: 30-11-2009)

Between:

Smt.Udathala Balamai R/o Pyaram Ram village
Bommaramaram Mandal, Nalgonda District
And others

...Petitioners

A n d

Smt.U.Veeramani W/o late Bikshapathy and others

....Respondents

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ORDER:

This revision is directed against the order dated 11.9.2009 passed in C.M.A.No.17 of 2009 on the file of the Principal District Judge, Nalgonda, whereby and whereunder, the learned District Judge dismissed the appeal filed under Order 43 Rule 1 CPC against order dated 27.3.2008 passed by the Senior Civil Judge, Bhongir in I.A.No.891 of 2006 in O.S.No.68 of 2006.

2. Background facts, in a nutshell, leading to filing of this revision by the defendants 1 to 5 in O.S.No.68 of 2006 are:

The respondents 1 to 5 herein filed O.S.No.68 of 2006 for partition and separate possession of their shares in the suit schedule property. According to them, the suit schedule property originally belonged to Bikshapathy and Pentaiah. The petitioners-defendants are the legal representatives of Pentaiah and whereas the respondents-plaintiffs are the legal representatives of Bikshapathy. The defendants entered appearance through a counsel. Consequent on their failure to file written statement, an *ex parte* decree came to be passed against them on 01.12.2006. The defendants filed I.A.No.891 of 2006 under Order 9 Rule 13 CPC along with a written statement to set aside the *ex parte* decree dated 01.12.2006. The 1st

defendant has sworn to the affidavit filed in support of the petition to set aside the *ex parte* decree. It is stated in the affidavit that she fell ill, and therefore, she could not instruct the counsel to prepare written statement. It is further stated in the affidavit that defendants 2 to 4 are residing at various places to eke out their livelihood. Para 2 of the affidavit reads as hereunder:-

“ The above case is filed by respondent/plaintiff for partition and separate possession against us. Actually said case was posted to 21-7-06 for our written statement. But we could not instruct our counsel to prepare the written statement as I became ill-health due to old aged ailments and my sons, defendants 2 to 4 are residing at various places to eke out their livelihood. Consequently, the Hon’ble Court passed an *ex parte* order against us on 21-07-2008 and subsequently, on 1-12-2006, the suit was decreed in *ex parte*. That my absence on the said date or subsequent date of hearings is neither intentional nor wanton, but due to old aged ailments, as I am diabetic patient and as well as B.P.Patient”.

3. The plaintiffs filed counter resisting the application.
4. The trial Court, on considering the material brought on record and on hearing the counsel appearing for the parties, came to the conclusion that the defendants failed to make out any reasonable ground to set aside the *ex parte* decree, and thereby, proceeded to dismiss the application, by order dated 28.3.2008.
5. The defendants filed C.M.A.No.17 of 2009 assailing the order of dismissal of the application filed under Order 9 Rule 13 CPC. The learned Principal District Judge, on reconsidering the material brought on record and on hearing the counsel appearing for the parties, did not find any valid ground

to interfere with the order assailed therein and thereby, proceeded to dismiss the appeal, by order dated 11.9.2009. The said order is assailed in this revision.

6. The respondents filed a caveat and therefore, copy of the petition along with other connected documents came to be served on the counsel appearing on their behalf.

7. When the C.R.P came up for admission, with the consent of the learned counsel appearing for the parties, the revision is taken up for final disposal at the admission stage.

8. Heard learned counsel appearing for the parties.

9. Learned counsel appearing for the petitioners-defendants submits that the petitioners-defendants could not file written statement before 21.7.2006, as the 1st petitioner-1st defendant fell ill and the other defendants left the village to various places to eke out their livelihood. A further submission has been made that the petitioners indeed filed written statement along with the application to set aside the *ex parte* decree and that itself is sufficient to infer a valid reason to set aside the *ex parte* decree. Learned counsel took me to the copy of the written statement filed by the petitioners-defendants, wherein, the petitioners-defendants resisted the claim of the plaintiffs on two folds. *Firstly*; there has been a partition between the two brothers, namely, Pentaiah and Bikshapathy during their lifetime and that Survey No.361 has been acquired in the name of the 1st petitioner-1st defendant and therefore, it is not a joint family property.

10. Learned counsel appearing for the respondents-plaintiffs submits that the petitioners-defendants failed to substantiate the reasons offered by them for not filing the written statement by placing on record any medical certificate as proof of ill health of the 1st petitioner-1st defendant and therefore the order impugned in the revision does not warrant interference.

11. No doubt, the 1st petitioner-1st defendant has not placed any medical record to speak of her ill health. But, it is to be noted that the petitioners filed an application to set aside the *ex parte* decree within 30 days along with the written statement. It was specifically pleaded in the written statement that the properties of the family were partitioned among two brothers and that Survey No.361 exclusively belongs to the 1st petitioner-1st defendant.

12. Order 9 Rule 13 of C.P.C reads as hereunder:

13.Setting aside decree *ex parte* against defendants- In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a decree passed

ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim]

Sufficient cause in Order 9 Rule 13 should be construed literally to advance the cause of substantial justice and not to punish the parties. The guiding principle is that justice should not be sacrificed on the alter of technicalities but at the same time the Court should not loose sight of the satisfactory requirement of existency of sufficient cause and condone the delay on equitable grounds.

13. In the given facts and circumstances of the case, I am of the view that the application filed by the petitioners-defendants can be allowed subject to certain terms and conditions. Accordingly, the order dated 11.9.2009 passed in C.M.A.No.17 of 2009 is set aside and I.A.No.891 of 2006 stands allowed subject to the following conditions: -

- (i) The petitioners shall pay costs of Rs.3,000/- on or before 14-12-2009.
- (ii) Failing compliance of the above said condition; the order impugned in the revision shall stand confirmed.

14. The Civil Revision Petition is accordingly allowed, at the stage of admission. As the suit is of the year 2006, the trial Court is directed to dispose of the suit, as expeditiously as possible.

B.SESHASAYANA REDDY, J

Dt.30-11-2009
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