

**THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO
&
THE HON'BLE Ms JUSTICE J.UMA DEVI**

CIVIL MISCELLANEOUS APPEAL No.340 of 2017

JUDGMENT: (per Hon'ble Ms Justice J.Uma Devi)

Questioning the order, dated 05.01.2017, in I.A.No.264 of 2015 in O.S.No.167 of 2008 on the file of the V Additional District Judge, Nellore, the present civil miscellaneous appeal is filed by the petitioner therein.

2. The facts to the limited extent necessary for disposal of the present appeal are briefly stated as under:

The present appeal was originally filed by one Kambham Narasimham, whom the plaintiff Sri Ponnaluru Venkataramana Reddy authorised to pursue his suit filed for declaration of his title over the suit schedule property; for perpetual injunction and for cancellation of sale deed, dated 12.09.1988, executed by P.Saraswathamma in favour of respondents/defendants. The suit filed by Ponnaluru Venkataramana Reddy through his GPA holder Kambham Narasimham was dismissed for default on 28.06.2013 by the trial Judge, on the ground that the earlier conditional order was not complied with and that the costs imposed were not paid, and it was observed further that the petitioner is not diligent in pursuing the case and that intentionally delayed the proceedings.

3. After the suit was dismissed, restoration of the suit was sought by setting aside the order of dismissal passed in by making a suitable application and such application was preceded by another

application to condone delay caused in filing of such application duly enclosing the affidavit of the counsel of the appellant where he pleaded that due to agitation for Samaikhyandra, application for restoration was not made within the time prescribed.

4. Considering the application made enclosing the affidavit of the counsel of the plaintiff, the delay caused in filing application for restoration of the suit was allowed. But the application made for restoration of the suit was dismissed by the court below, vide order dated 05.01.2017. Aggrieved thereby, the present appeal is filed on his behalf by his General Power of Attorney.

5. After filing of the appeal, the General Power of Attorney who was authorized by the plaintiff died. Upon his death, the plaintiff filed application in I.A.No.1 of 2019 seeking permission of the court to come on record in the place of General Power of Attorney to contest the case, which this court allowed vide separate order.

6. It has been contended by the plaintiff, who has been permitted to contest the appeal, that the court below has committed error in dismissing I.A.No.264 of 2015, which is filed for setting aside the order of dismissal passed in the suit. As per his contention, the court below having allowed I.A.No.212 of 2014, which is filed for condonation of delay in filing of the application to set aside the dismissal order, dated 28.06.2013, ought to have allowed I.A.No.264 of 2015, which is filed for setting aside the order of dismissal passed in the suit, dated 28.06.2013. He further contends that the trial court ought to have taken note of his

valuable right in the suit schedule property while passing the order impugned. He also contends that since his right in the suit is grossly affected due to passing of the order impugned, he seeks the indulgence of the court to set aside the same and pass an appropriate order to safeguard his right to contest the case by ordering for its restoration so that the merit or otherwise his case can be gone into.

7. The order impugned in the present appeal reads as under:

“Perused the material on record. The suit filed in the 2008. Issues framed on 5.2.2011. The suit underwent several adjournments for filing chief affidavit of PW 1. On 22.2.2012 i.e., after passing one year time and after imposing costs and conditional orders, plaintiff filed chief affidavit. The suit underwent several adjournments for marking of documents. Finally on 28.06.2013 i.e., after more than one year, the suit was dismissed for default as PW.1/plaintiff called absent, no representation and costs imposed not paid and as conditional orders not complies. It shows that the petitioner/plaintiff is not diligent in conducting his case and he is not at all interested in continuing the suit and he is intentionally delaying the case proceedings. Further, the present petition was filed on 28.04.2014 i.e., after 10 months of dismissal order. This suit is of the year 2008. No cogent reasons are assigned by the petitioner in the petition. No documentary proof is filed regarding the ill-health of the petitioner. The petitioner has not complied the conditional orders passed in the suit several times. Hence I am not inclined to allow this petition.”

8. It is understood on a reading of the order impugned that the General Power of Attorney whom the plaintiff authorized to pursue the suit filed by him failed to advert proper attention to the suit proceedings and on account of his negligence the suit

underwent several adjournments and it was only after passing of conditional order and on imposition of costs, chief affidavit of General Power of Attorney was filed and later the suit underwent several adjournments for marking of documents and for his cross examination. Due to improper persuasion of the suit filed by General Power of Attorney on behalf of the plaintiff, the court below was inclined to dismiss I.A.No.264 of 2015, which was filed to set aside the order of dismissal passed in the suit, dated 28.06.2013.

9. The appeal is contested by the 1st respondent alone. Respondents Nos.2 and 3 died during pendency of the appeal. I.A.Nos.2 & 3 of 2020 are filed to bring their legal heirs on record and those applications are not opposed.

10. It is pertinent to note that I.A.No.264 of 2015 is preceded by another application i.e., I.A.No.212 of 2014 as there is delay of 274 days in filing the application to set aside the dismissal order passed in the suit dated 28.06.2013. The court below, having been convinced with the reasoning mentioned in the affidavit of the counsel of the appellant where he pleaded that due to agitation for Samaikhyandhra the application for restoration could not be made within time stipulated, had allowed such application. The grievance of the appellant is that the court below having allowed the application made for condonation of delay of 274 days in filing of the application to set aside the default order passed in the suit, ought not to have dismissed the I.A.No.264 of 2015 which is filed to set aside the default order passed in the suit.

11. The suit admittedly was filed on behalf of the plaintiff by his General Power of Attorney. Due to the negligence, if any, attributable to General Power of Attorney, the plaintiff cannot be deterred from fighting for his own cause.

12. It is understood on perusal of the order impugned that while the suit of the appellant was at the stage of cross examination of PW.1, it was dismissed for default and a request made on his behalf by the General Power of Attorney to set aside the order of dismissal had not been acceded to due to his failure to prove the ground urged by him for his absence on the date notified for his cross examination by placing substantial evidence. This is the reason assigned in the order impugned by the trial court to dismiss the application made for setting aside the default order made in the suit. Non-production of substantial proof as regards to the alleged ill-health of General Power of Attorney on the date notified for his cross examination can be construed as lapse on his part, but for the lapses, if any, on the part of General Power of Attorney of the appellant, the appellant's right to fight for his own cause cannot be defeated.

13. There is no dispute that the suit of the appellant is dismissed while it was at the stage of cross examination of his General Power of Attorney due to his unavailability on the date notified for his cross examination. The grievance of the appellant i.e., his claim over the suit schedule property has remained unaddressed without going into the merits or otherwise of the case. Having regard to the above, we are of the considered view that a

chance be given to him to fight for his right in the suit schedule property by setting aside the order impugned by imposing heavy costs.

14. Having reached to the view mentioned above, we are inclined to allow the appeal and accordingly, the Civil Miscellaneous Appeal is allowed by setting aside the order impugned, on condition of the appellant depositing costs of Rs.5,000/- (Rupees five thousand only) with District Legal Services Authority, Nellore, within 15 days from the date of this order, failing which, this order shall stand cancelled.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

U.DURGA PRASAD RAO,J

J.UMA DEVI,J

Date: 30.04.2021
Dsr