

**(2002) 07 AP CK 0018**

**Andhra Pradesh High Court**

**Case No:** C.M.A. No. 1813 of 2002

M. Sidda Reddy and Others

APPELLANT

Vs

Lakshmamma and Another

RESPONDENT

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**Date of Decision:** July 8, 2002

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 151

**Citation:** (2003) 2 ALT 44

**Hon'ble Judges:** Dubagunta Subrahmanyam, J

**Bench:** Single Bench

**Advocate:** J. Srinath Reddy, for the Appellant; M.V.S. Suresh Kumar, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Dubagunta Subrahmanyam, J.

This appeal is filed against the order dated 11.06.2002 in I.A.No.684 of 2001 in O.S.No.114 of 1976 on the file of Principal Senior Civil Judge, Chittoor.

2. Respondents 1 and 2 obtained a preliminary decree for partition and filed a petition in I.A.No.450 of 1998 for final decree. In the said application, after contest by the appellants herein and others, the trial court appointed a Court Commissioner to divide suit properties by metes and bounds as per the terms of the preliminary decree. The Commissioner filed his report before the trial court. Thereafter the trial court posted the petition for filing of the objections by the parties to the petition. Respondents herein filed their own objections. Further time was granted for the appellants herein to file their own objections, if any, to the Commissioner's report. The date was fixed for filing the objections as 8.11.2001. On 8.11.2001 the objections were not filed by them. On that day, their counsel reported no instructions. The trial court set the appellants herein and some other person ex parte. On 9.11.2001 the trial court heard the final decree petition and passed orders. The appellants herein, who are the defendants 2, 3 and 7 filed the petition under

Order IX Rule 13 C.P.C., in I.A.No.684 of 2001 requesting the trial court to set aside the final decree passed in I.A.No.450 of 1998. After hearing both the parties, the trial court dismissed the said application by order dated 11.6.2002. Aggrieved by that order, the appellants filed the present appeal.

3. At the time of admission itself, the respondents appeared before this court through their Advocate. Therefore, this court heard the appeal itself at the time of admission.

4. Two grounds are mentioned by the appellants for their absence on 9.11.2001, on which day the final decree was passed by the trial court. The first ground is that the second defendant was looking after the suit not only on his behalf but also on behalf of his wife - defendant No.3 and his son - defendant No.7, he fell sick and therefore was unable to give instructions to his Advocate and attend the court on 9.11.2001. The second ground mentioned is that their counsel reported no instructions without prior information to the appellants.

5. Appellants 1 and 2 (defendants 2 and 3) are the parents of the third appellant (defendant No.7). According to the appellants it was the first appellant - defendant No.2 who was looking after the entire litigation and due to his sickness, he could not instruct his Advocate and appear before the Court on 8.11.2001 and 9.11.2001. What is the sickness with which the first appellant was suffering with and from how long he was suffering are not disclosed by the appellants. No material was placed by the appellants to prove the alleged sickness of the first appellant. As rightly pointed out by the trial court in the impugned order, the first appellant did not even file his own affidavit regarding his alleged sickness. Therefore, the said cause shown by the appellants for their absence on 9.11.2001 is not proved by the appellants. It is already noticed that according to the appellants it was the first appellant who was looking after the litigation on behalf of appellants. This plea is belied by material available on record. If really the first appellant was alone looking after the litigation on behalf of appellants, he would have filed his own affidavit in support of the petition to set aside the final decree. He did not file his affidavit. On the other hand, it is the third appellant - defendant No.7 who filed the affidavit before the trial court in support of the petition concerned. It shows that it is the third appellant who was looking after the litigation on behalf of appellants. This conclusion is strengthened by another circumstance apparent on the face of the record. In the present appeal a petition in C.M.P.No.1272 of 2002 is filed by the appellants u/s 151 C.P.C., seeking grant of stay of all further proceedings in I.A.No.450 of 1998. The affidavit in support of this petition is filed not by the first appellant but by the third appellant. He stated that he is well acquainted with the facts of the case. It is, therefore, clear that first appellant was not looking after the litigation on behalf of appellants and on the other hand it is the third appellant who is looking after the entire litigation on behalf of appellants. In his affidavit the third appellant did not give any reason or cause either for his absence or for the absence of his mother on the relevant dates

concerned. It is, therefore, clear that final decree cannot be set aside on the ground that the first appellant was sick and therefore the appellants were unable to attend the court either on 8th or 9th November, 2001.

6. I would now consider the second ground pleaded for setting aside the ex parte final decree. According to the appellants their counsel in the trial court did not intimate them earlier about his reporting no instructions in the suit proceedings. The learned counsel for the appellants placed reliance on a decision of this Court in [Basheeroodin Vs. Mohd. Minhorzoddin and Others](#), . As per that decision, as per Rule 12 of Bar Council of India Rule the Advocate shall not ordinarily withdraw from any engagement once accepted without sufficient cause and without reasonable and sufficient notice to his client. In that case a learned single Judge of this court held that in that case counsel appearing for the petitioner reported no instructions and retired from the case without notice to the petitioner, hence it is probable on the part of the petitioner that he was not aware of the dates of hearing and in those circumstances, there was sufficient cause for the petitioner in not attending the Court on 30.8.1994.

7. In my considered opinion, the facts of this decision are not applicable to the facts on hand. No reliable material is placed by the appellants to show that their Advocate without prior intimation to them reported no instructions in the case. It is to be stated that the learned Advocate who appeared for the appellants in the trial court is not a party to the proceedings in I.A.No.684 of 2001. His affidavit is also not filed to show that without prior intimation to his clients, he reported no instructions suddenly for his clients in the court. Without such material, it is not desirable to come to the conclusion that without prior intimation to his clients, the learned Advocate for the appellants in the trial court reported no instructions. I am of the opinion that in any case if an Advocate acts in or deals with his clients in violation of any of the Rules of Conduct framed by the Bar Council of India, the remedy available to the clients concerned is to proceed against the Advocate for his alleged misconduct before the State Bar Council concerned. What transpired between the learned Advocate for the appellants in the trial court and the appellants is not known either to the lower court or this court. I, therefore, hold that in the absence of any positive proof, a court cannot presume that the learned Advocate for the appellants before the trial court reported no instructions for the appellants without prior intimation to them and on that ground set aside the ex parte orders in any court proceedings.

8. In this regard the learned counsel for the respondents placed reliance on a decision of another single Judge of this Court in M.BIXAPATHY Vs. ASEER KHAN 1998 (1) APLJ 22 (SN). In this decision, another learned single Judge (as he was then) held that it is the duty of the defendants to know about the dates of posting and Advocate cannot be blamed that he did not inform the clients. It was further held that as the defendants failed to enquire about the dates of posting, delay cannot be

condoned.

9. The learned counsel for the appellants placed reliance on a decision of the Supreme Court of India in [G.P. Srivastava Vs. Shri R.K. Raizada and Others](#), . The Supreme Court held that where a sufficient cause is made out by defendant for non-appearance on a particular date, he cannot be penalised for any previous negligence which had been overlooked and so condoned earlier. This decision is not relevant for the purpose of this case inasmuch as this Court is not taking into consideration the previous conduct of the appellants either in the suit proceedings or final decree proceedings before the trial court while coming to the conclusion that the appellants failed to show sufficient cause for their absence on the date of the final decree. For all the reasons stated above, I hold that the appellants failed to show any sufficient cause for their absence on the date of the final decree and therefore the impugned order passed by the trial court is not liable to be set aside.

10. In the result, the appeal is dismissed. No costs.