

**THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI**

**CIVIL MISCELLANEOUS APPEAL No.654 of 2015**

**JUDGMENT:**

This is an appeal, under Order XLIII Rule 1 of the Code of Civil Procedure, 1908, ('the Code', for brevity) by the unsuccessful appellant/third defendant, assailing the order dated 25.08.2015 of the learned III Additional Chief Judge, City Civil Court, Hyderabad, passed in I.A.No.1982 of 2015 in O.S.No.135 of 2012, filed under Order IX Rule 13 read with Section 151 of the Code, requesting to set aside the *ex parte* decree dated 23.07.2015 made in the aforementioned suit.

2. I have heard the submissions of the learned counsel for the appellant/third defendant ('the third defendant', for brevity) and the learned counsel for the first respondent/plaintiff ('the plaintiff', for brevity) and the learned counsel for respondents 2 and 3 ('the defendants 1 and 2', for brevity). I have perused the material record.

3. The facts leading to the filing of the present appeal may be stated, in brief, as follows:-

The plaintiff had brought the suit against the defendants 1 and 2/the tenants for eviction. The third defendant got himself impleaded in the said suit *inter alia* claiming that he is the sub-tenant of the defendants 1 and 2. The defendants 1 and 2 had admitted that the 3<sup>rd</sup> defendant is their sub-tenant, but, had contended that the sub-tenancy was created with the consent of the plaintiff/landlord. Be that as it may. During the pendency of the suit, the plaintiff had filed an application under Order XV-A of the Code as applicable to the State of Andhra Pradesh, seeking a direction to the defendants to deposit the admitted rents including the service tax from December 2012 onwards, during the pendency of the suit. The said application was heard along with another two applications. On 19.02.2015, all the three

applications were allowed by the trial Court as prayed for and it was held that all the defendants are jointly and severally liable to pay the admitted rents within 90 days from the date of the said order of the trial Court. Aggrieved of the same, the third defendant had filed C.R.P.Nos.2007, 2008 and 2009 of 2015 before this Court challenging the common order of the trial Court passed in the aforementioned three interlocutory applications. In the aforementioned three C.R.Ps., this Court had granted the following interim order on 19.06.2015:

**“Notice before admission.**

**Even according to the case of the petitioner, admitted rent is Rs.1,00,000/- and there is no evidence to show that the same is received by the original landlord. In that view of the matter, pending further consideration of the matter for admission, there shall be interim stay till 26.06.2015 on condition of petitioner paying Rs.31,00,000/- on or before 26.06.2015.**

**Post on 26.06.2015 as a first case for admission.”**

Subsequently, as the conditional order of stay was not complied with, this Court had passed a further order stating that the conditional order dated 19.06.2015 is not complied with and therefore, it is open for the plaintiff to take further steps in accordance with law, without reference to the pendency of the proceedings before this Court. Subsequently, on 17.06.2015, the trial Court, by orders made in I.A.No.1624 of 2011, had struck off the defence of the defendants 1 to 3 for non-compliance of the order of the Court and posted the suit to 22.06.2015 for plaintiff's evidence. Subsequently, on 22.06.2015, the affidavit in lieu of examination-in-chief of PW1 was filed before the trial Court and as there was no representation for the defendants on that day, the trial Court had adjourned the matter to 03.07.2015, having noticed the order of this Court directing that it is open for the plaintiff to take further steps in accordance with law, without reference to the pendency of the proceedings before this Court. On 03.07.2015, PW1 was examined-in-chief and exhibits A1 to A18 were marked and since none appeared on behalf of the defendants on that day, the defendants were set *ex parte* and the matter was adjourned to 07.07.2015 for further evidence of the plaintiff. Subsequently, on 07.07.2015, the affidavit in lieu of

examination-in-chief of PW2 was filed and exhibit A19 was marked. On that day also, none appeared for the defendants. Then the matter was adjourned to 14.07.2015 for hearing the arguments on the side of the plaintiff and ultimately judgment was pronounced decreeing the suit *ex parte* on 23.07.2015.

4. Feeling aggrieved of the said *ex parte* decree, the third defendant had filed the interlocutory application in IA.No.1982 of 2015 to set aside the *ex parte* decree. And in the affidavit filed in support of that application seeking to set aside the *ex parte* decree, the third defendant, while narrating the events which lead to his impleadment in the suit, had *inter alia* pleaded as follows:-

**“I submit that on 03.07.2015, the respondent No.1 examined and also marked Exs.A.1 to A.18, which are inadmissible in evidence. The copy of which were not served on the petitioner, however, this Hon’ble Court was pleased to set the petitioner *ex parte*, and the unchallenged statement of P.W.1 was taken as truth and an *ex parte* decree was passed on 23.07.2015 holding the petitioner also liable to pay the rents, mesne profits along with respondents 2 and 3 jointly and severally. I humbly submit that though the petitioners defence was struck off, the petitioner always had a right to cross examine P.W.1. and the petitioner was denied the opportunity of fair hearing and the matter was decided *ex parte* which caused great prejudice to my rights.**

**I submit that since the petitioner counsel’s maternal uncle died on 02.07.2015, he went to his native place and therefore, could not represent the mater, which is neither willful nor wanton.**

**It is therefore just and necessary that the *ex parte* decree dated 23.07.2015 be set aside and I may be given opportunity to contest unjust claim of the respondent No.1 against the petitioner.**

**Hence, it is therefore, prayed that this Hon’ble Court may be pleased to set aside the *ex parte* decree dated 23.07.2015 in the interest of justice, as otherwise, the petitioner will be put to irreparable loss and damage which cannot be compensated by any other means.”**

[Reproduced verbatim]

The plaintiff had filed a detailed counter resisting the application and narrating the history of the case, which is already adverted to *supra*, in brief. It is *inter alia* contended by the plaintiff in the counter affidavit as follows:-

“I submit that the application under reply filed under Order IX Rule 13 is not applicable to the present case, as the defence of the defendants was strike off and the defendants has also not complied the orders passed by this Hon’ble Court and the orders passed by the Hon’ble High Court in C.R.P.Nos.2007 of 2015, 2008 of 2015 and 2009 of 2015. I further submit that, on 24.04.2015, my counsel has informed before the Hon’ble High Court in the above said C.R.Ps about the passing of decree in the above suit.

I submit that, as stated above from 03.07.2015 to 23.07.2015, there was no representation on behalf of the defendants and they were not prevented from the proceedings with the matter by paying the rents as directed by the Courts. Further, the suit proceedings were will within the knowledge of the defendants, as such the Order IX Rule 13 of C.P.C is not applicable to the present case and the petitioners cannot maintain the application. The petitioner only to drag the eviction proceedings has filed the application under reply, with ulterior motive to gain time, as much as possible and to prevent the respondent/decreed holder from realizing the fruits of the decree as such the same is liable to be dismissed.”

[Reproduced verbatim]

The defendants 1 and 2, who are admittedly the tenants of the plaintiff, filed their counter affidavit only to bring to the notice of the Court that the third defendant was not paying any rents to them and that an Arbitration proceeding was initiated and that the same is pending.

5. The learned counsel for both the sides advanced their arguments in line with the respective pleadings, which are already stated *supra*. In addition to it, the learned counsel for the plaintiff had submitted that as on today, as per the calculation memo filed before this Court, the rents in a sum of Rs.83,00,000/- and odd are due and payable by August, 2015, for 33 months including the service tax.

6. Now the points for determination are:

1. **Whether the third defendant had made out valid and sufficient grounds to set aside the *ex parte* decree dated 23.07.2015 made in O.S.No.135 of 2012 on the file of the III Additional Chief Judge, City Civil Court, Hyderabad?**
2. **Whether the order impugned is unsustainable**

**under facts and in law, as contended by the third defendant?**

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**7. POINTS:-**

The facts that lead to filing of this appeal, the pleadings of both the parties and the contentions of the learned counsel are already stated *supra*. I have noted the submissions of the learned counsel for both the sides.

**7.1** The admitted and undisputed facts are as under:

The plaintiff had brought the suit for eviction of the defendants 1 and 2. The third defendant got himself impleaded in the said suit *inter alia* claiming that he is the sub-tenant of the defendants 1 and 2. The defendants 1 and 2 admitted that the third defendant is their sub-tenant, but, further urged that the sub-tenancy was created with the consent of the plaintiff/landlord. During the pendency of the suit, the plaintiff had filed an application under Order XV-A of the Code, as applicable to the state of Andhra Pradesh, and orders were passed directing the defendants to pay the admitted rents. Having filed C.R.Ps before this Court and having obtained stay orders, the third defendant had failed to comply with the conditional orders of this Court. Therefore, for non-payment of the admitted rents as per the orders of the Court and non-compliance of the order of stay, this Court directed that it is open for the plaintiff to take further steps in accordance with law, without reference to the pendency of the proceedings before this Court. As a sequel, the defence of the defendants was struck off and the suit was adjourned for the evidence on the side of the plaintiffs. Afterwards, the affidavit in lieu of examination-in-chief of PW1 was filed. On the day when PW1 was examined and exhibits (A1 to A18) were marked, there was no representation for the defendants and the defendants were, accordingly, set *ex parte*. Subsequently, PW2 was examined and one more exhibit (A19) was marked. Later the suit was decreed *ex parte*.

**7.2** Now the first contention of the learned counsel for the third defendant is that though the defence of the defendants was struck off, the third defendant is entitled to participate in the trial and cross-examine the witnesses of the plaintiff, including the plaintiff, and that the trial Court did not afford the said opportunity to the third defendant and that therefore, in the absence of cross-examination of the witnesses of the plaintiff, there is no valid evidence which is admissible and worthy of credit on record and that the trial Court, by taking the evidence of PW1 and also the documents marked by him as truthful, had erroneously decreed the suit without granting an opportunity to the third defendant to cross-examine the witnesses of the plaintiff.

**7.3** In support of the said contention, the learned counsel had placed reliance on the decision of the Supreme Court in ***Modula India Vs. Kamakshya Singh Deo***<sup>[1]</sup>. In the cited decision, it was held that even in a case where the defence against delivery of possession of a tenant is struck off under Section 17(4) of the West Bengal Premises Tenancy Act, 1956, the defendant, subject to the exercise of an appropriate discretion by the Court on the facts of a particular case, would generally be entitled to cross-examine the plaintiff's witnesses. There is no dispute with the legal position that the defendants though were set *ex parte*, are entitled to cross-examine the witnesses of the plaintiff and participate in the trial. Nonetheless, when once the trial starts, it is for the parties to appear before the Court on the date of every adjournment and participate in the trial. But, in the instant case, the 3<sup>rd</sup> defendant did not appear before the trial Court though he is aware of the proceedings in the suit pending before it. Admittedly, in the C.R.Ps preferred by the third defendant before this court, while noting that the conditional order was not complied with, this Court gave opportunity to the plaintiff to proceed with the suit without reference to the pendency of the C.R.Ps., before this Court. In spite of the said order, the third

defendant did not approach the trial Court and was not present before the trial Court on the various dates of adjournments to which the suit was adjourned from time to time. Since the defence of the defendants was already struck off and ultimately they were set *ex parte* for their absence and for the absence of representation on their behalf, neither the defendants 1 and 2 nor the 3<sup>rd</sup> defendant are entitled to any further notice from the trial Court about the day-to-day proceedings. It was obligatory on the part of the third defendant to be present before the trial Court on the various dates to which the suit was adjourned from time to time. The 3<sup>rd</sup> defendant and his counsel had not appeared before the trial Court; and, the 3<sup>rd</sup> defendant having not appeared before the trial Court had willfully failed to avail the opportunity to cross examine the PW1. Therefore, the contention that the trial Court had denied the opportunity to the defendants to cross-examine the witnesses of the plaintiff cannot be countenanced.

**7.4** The next contention of the 3<sup>rd</sup> defendant is that the maternal uncle of the counsel for the third defendant died on 02.07.2015 and therefore, he had been to his native place and therefore, he could not represent the mater and that, therefore, the absence of the third defendant before the Court below along with his counsel is not wanton and willful and hence, the *ex parte* decree is liable to be set aside. Dealing with this contention, what is to be noted is that this explanation in the affidavit only explains the absence of the counsel of the third defendant but not the absence of the third defendant on that day before the trial Court. Therefore, a reading of the affidavit filed in support of the petition would go to show that no valid explanation was offered and no sufficient cause was shown for the absence of the third defendant on various dates to which the suit was adjourned from time to time, before the suit was decreed *ex parte*. The learned counsel for the plaintiff had placed reliance on the decision of the Supreme Court

in *Parimal Vs. Veena @ Bharti*<sup>[2]</sup>, wherein, the expression 'sufficient cause' is explained as follows:

**"Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide: Ramlal and Ors. v. Rewa Coalfields Ltd. AIR 1962 SC 361; Sarpanch, Lonand Gram panchayat v. Ramgiri Gosavi and Anr. AIR 1968 SC 222; Surinder Singh Sibia v. Vijay Kumar Sood AIR 1992 SC 1540; and Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation and Anr. (2010) 5 SCC 459."**

In the instant case, the third defendant could not give valid explanation or show sufficient cause for his absence on the various dates to which the suit was adjourned from time to time and till an *ex parte* decree was passed in favour of the plaintiff. Further, in view of the facts peculiar to this case, the third defendant, by not paying the huge amount of arrears of rent, cannot contend that his conduct is *bona fide*.

**8.** Having regard to the reasons, this Court finds that no valid and sufficient grounds are made out and no sufficient cause was shown by the 3<sup>rd</sup> defendant for setting aside the *ex parte* decree and that therefore, the order impugned is sustainable under facts and in law and calls for no interference.

**9.** Viewed thus, this court finds that the appeal is devoid of merit and is liable to be dismissed.

**10.** In the result, the Civil Miscellaneous Appeal is dismissed. There

shall be no order as to costs.

Miscellaneous petitions pending, if any, in this appeal shall stand dismissed.

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**M.Seetharama Murti, J**

15<sup>th</sup> September, 2015  
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[\[1\]](#) (1988) 4 SCC 619

[\[2\]](#) AIR 2011 SC 1150