

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

C.R.Ps.No.93 of 2011 and 2357 of 2015

Between:

Smt.Zareena Sultana

... Petitioner(s)

and

Dr.Mrs.Sangeetha Jha and four others.

... Respondent (s)

DATE OF JUDGMENT PRONOUNCED: ***06th August, 2015.***

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

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| 1 | Whether Reporters of Local newspapers
may be allowed to see the Judgments? | Yes/No |
| 2 | Whether the copies of judgment may be
marked to Law Reports/Journals | Yes/No |
| 3 | Whether Their Ladyship/Lordship wish to
see the fair copy of the Judgment? | Yes/No |

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**THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA
RAO**

C.R.Ps.No.93 OF 2011 and 2357 of 2015

COMMON ORDER:

Since these two Revisions arise between the same parties and out of the same suit, they are being disposed of by

this common order.

2. The petitioner in both the Revisions is plaintiff in suit O.S.No.733 of 2001 on the file of IV Senior Civil Judge, City Civil Court, Hyderabad. The said suit was filed to direct the 3rd respondent/1st defendant to deliver vacant and peaceful possession of Flat bearing Nos.001 and 101 in premises bearing No.10-2-289/19, Shanthinagar, Hyderabad, to evict the 1st petitioner there from and for delivery of peaceful possession of the said apartments and for other reliefs.

3. Summons in the said suit were served on respondents 1 to 3. Respondents 1 and 2 engaged an advocate by name Syed Jaleel Ahmed to defend them. But they did not file any written statement. They were set ex parte on 09.06.2005.

4. Thereafter the plaint was got amended and the schedule to the plaint was corrected by substituting plot No.201 in place of plot Nos.001 and 101 which were originally mentioned therein. The 3rd respondent contested the suit and ultimately on 29.06.2009 the suit was decreed against the respondents 1 to 3.

5. The 3rd respondent filed CCCA.No.139 of 2009 before this Court which is pending.

6. On 12.08.2009, the respondents 1 and 2 filed I.A.No.608 of 2009 under Section 5 of the Limitation Act, 1963

to condone the delay of 13 days in filing the petition under Order IX Rule 13 CPC for setting aside the ex parte decree and I.A.(SR).No.4512 of 2009 under Order IX Rule 13 CPC for setting aside the said ex parte decree.

7. In the affidavits filed in support of these application, respondents 1 and 2 contended that they received suit summons and engaged advocate by name Syed Jaleel Ahmed to defend them; they were informed by the 3rd respondent that he would take care of the litigation and he would protect them from frivolous litigation initiated by the petitioner; they being medical practitioners, they believed the words of the 3rd respondent and got engaged in their professions; and they were also under the impression that having entrusted the matter to the advocate Syed Jaleel Ahmed, he would take care of the entire litigation. They allege that on 06.08.2009 they came to know from the 4th respondent that the suit was decreed on 29.06.2009; they then contacted their counsel Syed Jaleel Ahmed, who told them that since they have not given instructions to draft a written statement, he did not prepare the same and file it into the Court and they have been set ex parte on 09.06.2005. He also informed that in May, 2005 he suffered heart attack and that he stopped active law practice in Courts and therefore he did not inform them about the filing of the written statement. Respondents 1 and 2 therefore contended that they are

ignorant of the legal procedure to be followed and they were under the impression that they once entrusted the matter to the Advocate, he would pursue and defend them; they were also not aware of the procedure with regard to the filing of the written statement or other procedures of trial and that the non filing of the written statement was neither willful nor intentional. They contended that they had purchased Flat No.201 from 3rd respondent by paying substantial amount, that they had invested large amounts of money for interior works and other works, that they are *bonafide* purchasers for valuable consideration and they had fair chances to succeed in the suit. They therefore prayed that the delay of 13 days in filing the application under Order IX Rule 13 CPC be condoned and ex parte decree dt.29.06.2009 be set aside.

8. Counter affidavit was filed by the petitioner in both these applications. She contended that these applications are filed only to harass her and to delay the execution of the decree passed by the Court below; that having received summons and engaged an advocate, it was the duty of the respondents 1 and 2 to know about the proceedings in the Court and contest the matter and appear personally before the Court whenever the matter is posted. She pointed out that as per the allegations of respondents 1 and 2, after engaging advocate, they did not care to contact the advocate or to instruct him to file any written statement; and four years after they were set ex parte and after the suit is decreed, they came

forward to file these applications. She contended that in view of the negligence on the part of the respondents 1 & 2 and their deliberate inaction, both applications ought to be dismissed. She denied the other allegations made by respondents 1 and 2. She further contended that the decree was not an ex parte decree but was passed on merits and the only remedy open to the respondents 1 and 2 was to file an appeal challenging the decree and they cannot maintain an application under Order IX Rule 13 CPC.

9. Before the trial Court no evidence was adduced by either party.

10. By order dt.29.09.2010, the Court below allowed both the applications. It held that the contention of the respondents 1 and 2 that they could not appear before the Court since their counsel did not inform them, cannot be a ground to set aside the ex parte decree. It held that having engaged an advocate and having entrusted the matter to him, they are bound to contact their advocate to know about the further proceedings of the suit. The Court pointed out that they were set ex parte on 09.06.2005 and even thereafter the trial went on for four years and judgment was pronounced only on 29.06.2009, but respondents 1 and 2 had not chosen to contact their advocate. It held that since respondents 1 and 2 were highly educated and literate, even if they are ignorant of legal procedure, they cannot be ignorant of the idea that they

should contact their advocate to know about the proceedings in the suit and they had no excuse to leave the matter to the mercy of their advocate. It therefore held that the reason given by respondents 1 and 2 that they could not appear before the court since their advocate did not inform them about the order dt.09.06.2005 passed by the Court below setting them ex parte cannot be a genuine and reasonable ground for not appearing before the Court. It also held that the contention raised by respondents 1 and 2 regarding ill-health of the counsel engaged by them and further allegation that counsel told that he would inform them about the further steps to be taken are also not genuine grounds and they would be of no avail to respondents 1 and 2.

11. Having held so, on the ground that notice of the amendment of the plaint, substituting "Flat No.201" in the place of "flat Nos.001 and 101" mentioned originally in the plaint, was not given to respondents 1 and 2, and observing that they were entitled to notice even if they were set ex parte by the date of filing of the amendment petition, it held that there is a ground to condone the delay in filling the petition to set aside the ex parte decree and also to set it aside, because the petitioner was seeking to change the identity of the suit schedule property itself. It observed that failure of the petitioner to give notice of amendment of the plaint to respondents 1 and 2 made them to be under the impression that the suit was in respect of the flats No.001 and 101 with

which they were not concerned and they might have been advised by the 3rd respondent that the litigation is not in respect of Flat No.201 with which they were concerned and the respondents 1 and 2 felt that they had nothing to worry. It therefore, held that inaction, negligence or non prosecution of the matter by respondents 1 and 2 can be held to be a sufficient and bonafide cause which prevented them from appearing before the Court when the case was called or on subsequent dates till the disposal of the suit. It therefore allowed both I.A.No.608 of 2009 by condoning the delay in filing IASR.No.4512 of 2009 and also allowed IASR.No.4512 of 2009 setting aside the ex parte decree dt.29.06.2009.

12. Challenging the same, these two Revisions are filed.

13. Counsel for the petitioner Sri J.A.Qureshi, contended that the notice of amendment of the plaint was served on the counsel for respondents 1 & 2 and produced the photocopy of the endorsement made on behalf of the counsel for respondents 1 and 2 that he had received notice of amended plaint on 26.04.2005. He contended that when the Court had rejected the contention of the respondents 1 and 2 that the reasons mentioned in the affidavits filed along with I.A.No.608 of 2009 and I.A.SR.No.4512 of 2009 cannot be accepted as a ground for condonation of delay or for setting aside the ex parte decree, the Court below could not have presumed non-service of notice on respondents 1 and 2 about the

amendment of the plaint substituting “Flat No.201” in the place of “Flat Nos.001 and 101”, when such a contention was not even raised in the affidavit filed by respondents 1 and 2 and when no material is placed by them before the Court to establish that notice of amendment of plaint has not been served on them. He contended that the question whether notice of amendment of plaint was given to the respondents 1 and 2 or not, is a question of fact, which if it had been pleaded by respondents 1 and 2, petitioner would have had an opportunity to refute, and the Court below therefore erred in presuming that said notice was not served on respondents 1 and 2 without any material placed before it by respondents 1 and 2 in that regard. He therefore contended that this finding of the Court below is based on no evidence and cannot be sustained.

14. Counsel for the respondents 1 and 2 in both the cases, Sri S.Niranjan Reddy, contended that the reasons given by the Court below to allow both the applications are valid; that the respondents 1 and 2 had established sufficient cause for condonation of delay of 13 days in filing the application under Order IX Rule 13 CPC and also for setting aside the ex parte decree; the respondents 1 and 2 had relied upon the assurance given by the 3rd respondent that he would take care of the litigation and therefore did not follow the course of the litigation and that they were also under the impression that the counsel Sri Syed Jaleel Ahmed, engaged by them, would

take care of the matter without any further intervention on their part.

15. I have noted the submissions of both sides.

16. Order IX Rule 13 CPC states:-

“O.IX R.13 CPC - 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.”

17. In ***G.P. Srivastava v. R.K. Raizada & Ors.***^[1] the

Hon’ble Supreme Court had held:

“Under Order 9 Rule 13 C.P.C. an ex-parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any 'sufficient cause' from appearing when the suit was called on for hearing. Unless 'sufficient cause' is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex-parte decree.”

18. Therefore, if sufficient cause is made out for non-appearance of the defendant on the date fixed for hearing when ex-parte proceedings were initiated against him, he cannot be penalized for his previous negligence which has been overlooked and thereby condoned earlier. If the defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour provided the absence was not malafide or intentional.

19. From the facts narrated above, it is clear that respondents 1 and 2 received summons in the suit and also engaged a counsel Syed Jaleel Ahmed to represent them in the matter. So it was their bounden duty to give instructions to the counsel and get a written statement filed within the time permitted by law. It is also their bounden duty to follow the proceedings in the Court and take appropriate steps with the assistance of the counsel engaged by them to defend their interests in the subject property.

20. Admittedly respondents 1 and 2 are medical practitioners and highly educated persons. Their contention that they were under the impression that without any instructions from them, their counsel would take care of the entire litigation is too incredible to be accepted. So is their contention that they were assured by the 3rd respondent that it would take care of the litigation initiated by the petitioner.

These pleadings of the respondents 1 and 2 indicate that it is a case of deliberate negligence, intentional and malafide conduct on their part in not defending the suit.

21. The respondents 1 and 2 had been set ex parte on 09.06.2005 and the suit was decreed on 29.06.2009 but till 06.08.2009, they did nothing in the matter. Therefore, the trial Court was correct in giving a finding that the reasons given by them in the affidavit filed in support of both the applications cannot be said to be a valid reason for condonation of delay in filing the application to set aside the ex parte decree and to set aside the ex parte decree.

22. There is no dispute that the plea of the respondents 1 and 2 that they had not been served a notice of amendment of the plaint substituting Flat NO.201 in the plaint schedule in the place of Flat Nos.001 and 101 was not raised by respondents 1 and 2 in the affidavit filed in support of I.A.No.608 of 2009 or in I.A.SR.No.4512 of 2009. They had also not produced any material before the trial Court to enable it to come to the conclusion that notice of amendment of plaint was not served on respondents 1 and 2. In the absence of a plea in this regard raised by respondents 1 and 2, the Court below could not have allowed them to raise such a plea and given a finding in their favour without any material having been placed by them before the Court.

23. The counsel for the petitioner has placed before me the

photocopy of the docket of the amended plaint on which there is an endorsement on behalf of the counsel engaged by respondents 1 and 2 that he had received the copy of the amended plaint on 26.04.2005. Also it is a normal practice that all applications filed by any party in the suit would normally be served on the counsel appearing for all other parties. There is nothing to presume that this was not done in the present case. In the absence of any material placed by respondents 1 and 2 to substantiate their plea that notice of amendment of plaint, by amending the schedule, was not given to their counsel, the Court below erred in accepting the said contention raised by respondents 1 and 2. Therefore, I am of the opinion that orders passed by the Court below cannot be sustained.

24. Accordingly, both the Civil Revision Petitions are allowed. The common order dt.29.09.2010 in I.A.No.608 of 2009 and IASR.No.4512 of 2009 in O.S.No.733 of 2001 of the IV Senior Civil Judge, City Civil Court, Hyderabad is set aside and the said applications are dismissed. There shall be no order as to costs.

25. Consequently, Miscellaneous Petitions pending if any, shall stand closed.

M.S. RAMACHANDRA RAO, J

06th August, 2015.
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^[1] 200(3) SCC 54