

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CIVIL MISCELLANEOUS APPEAL No.788 OF 2007

JUDGMENT:

This civil miscellaneous appeal is filed under Order XLIII Rule 1 of CPC challenging the order dated 01.10.2007 in I.A. No.108 of 2007 in O.S. No.399 of 2002 on the file of VI Additional Senior Civil Judge Court, City Civil Court, Hyderabad.

2. For the sake of convenience, the parties to this miscellaneous appeal will be referred to as they are arrayed before the trial court.

3. The facts leading to filing of the present appeal are briefly as follows: The petitioners are defendants in O.S. No.399 of 2002. They filed the I.A. No.108 of 2007 under Order IX Rule 13 of CPC seeking to set aside the *ex parte* decree dated 02.8.2007 passed in the suit. The defendant No.5 filed affidavit in support the petition. He pleaded that on 30.7.2007 he entered into witness box and marked certain documents. The matter was adjourned to 01.8.2007 for his cross-examination. On 31.7.2007, he developed giddiness and unable even to attend normal duties. Due to chronic ill-health, he could not attend the court on 01.8.2007 and the matter was adjourned to 02.8.2007. On 02.8.2007 also he could not attend the court and their counsel filed petition to adjourn the matter. The trial court dismissed the adjournment petition and decreed the suit *ex parte* on 02.8.2007. Hence, the petitioners filed I.A. No.108 of 2007.

4. The respondents filed counter denying all the averments made in the petition, *inter alia*, contending that the petitioners produced false medical certificate.

5. Basing on the material available on record, the trial court dismissed the petition. Feeling aggrieved by the order of the trial court, the petitioners preferred the present miscellaneous appeal.

6. The learned counsel for the petitioner submitted that the finding of the trial court that the petitioners intentionally and wilfully dragging on the matter is not supported by the material available on record. He further submitted that due to ill-health the petitioner could not attend the court on 02.8.2007. ***Per contra***, learned counsel for the respondents submitted that the petitioners intentionally

and wilfully dragging on the matter on one ground or the other; therefore, there are no grounds to interfere with the order passed by the trial court.

7. Basing on the rival contentions, the point that arises for consideration in this appeal is:

Whether there are justifiable grounds to set aside the order passed by the trial court in I.A. No.108 of 2007?

Point:

8. The first respondent filed O.S.No.399 of 2002 against the first petitioner on the file of VI Additional Senior Civil Judge Court, City Civil Court, Hyderabad, for recovery of possession of an extent of 500 Sq.yards or equivalent to 418.05 Sq.Metres, Survey No.318/1, old Ward-16-6, New Ward-16-2 of Moosarambagh, Gaddiannaram, Dilsukhnagar, Hyderabad. Pending suit, the first petitioner and first respondent died and their legal representatives were brought on record.

9. A perusal of the record reveals that after completion of plaintiffs' side evidence, the matter was posted for defendants' side evidence. On 30.7.2002, the petitioner entered into witness box and marked certain documents and the matter was adjourned to 01.8.2007 for cross-examination of the petitioner. For one reason or the other, the petitioner could not attend the court on 01.8.2007 and the matter was adjourned to 02.8.2007. On 02.8.2007, learned counsel for the petitioner filed petition seeking adjournment of the matter on the ground that the petitioner was not feeling well. The trial court dismissed the petition and passed *ex parte* decree on 02.8.2007. The petitioner, thereafter, filed I.A. No.108 of 2007 to set aside the *ex parte* decree and the same was dismissed on 01.10.2007.

10. A perusal of the record further reveals that the petitioner could not attend the trial court on 01.8.2007 and 02.8.2007 as he was suffering from heart ailment. The learned counsel for the petitioner filed medical certificate along with I.A. No.108 of 2007 in proof of his ailment. The trial court dismissed I.A. on the ground that the reason assigned for non-appearance of petitioner No.5 does not inspire confidence. While deciding the petitions of this nature, the approach of the court should be pragmatic but not pedantic. The trial court ought to have

allowed the I.A., by considering the medical certificate. The petitioner has assigned reasons much less cogent and valid reasons for non-appearance before the trial court on 02.8.2007. The trial court has not taken into consideration the hardship likely to be caused to the petitioner by dismissal of I.A. No.108 of 2007. Therefore, the order passed by the trial court is not sustainable.

11. Having regard to the facts and circumstances of the case, I am of the considered view that it is a fit case to allow I.A. No.108 of 2007. However, in order to safeguard the interest of the respondents, this court is inclined to direct the petitioners to deposit the costs of the suit on or before 30.10.2015.

12. In the result, the civil miscellaneous appeal is allowed, setting aside the order 02.8.2007 in I.A.No.108 of 2007 in O.S. No.399 of 2002 on the file of VI Additional Senior Civil Judge Court, City Civil Court, Hyderabad, on condition of the petitioners depositing the suit costs to the credit of O.S.No.399 of 2007 on or before 30.10.2015. Consequently, I.A. No.108 of 2007 is allowed and the *ex parte* decree dated 02.8.2007 is set aside. If the petitioners fail to deposit the suit costs on or before 30.10.2015, the civil miscellaneous appeal stands dismissed automatically. There shall be no order as to costs. Miscellaneous petitions, if any pending in this miscellaneous appeal, shall stand closed.

T.SUNIL CHOWDARY, J.

Date: 08.10.2015

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