

HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

C.R.P.Nos.1370 of 2013 & 1077 of 2015

COMMON ORDER:

Petitioners herein are defendant Nos.1 and 2 in O.S.No.29 of 2009 on the file of I Additional District Judge, Kadapa, YSR Kadapa District. The said suit was filed by the respondent/plaintiff against the petitioners for recovery of a sum of Rs.24,66,666/- being the principal and interest due on the memorandum of agreement dt.27-03-2008 executed for Rs.20.00 lakhs pursuant to the oral agreement entered on 25-03-2008 with future interest at 24% per annum from the date of filing of the suit till the date of realization and for costs.

2. Written statement was filed by the petitioners opposing the suit claim.

3. Issues were framed. Trial commenced. P.W.1 was examined in chief and the suit was posted for cross examination of P.W.1 on 16-03-2012. Petitioners did not attend on that day for cross examination of P.W.1. Therefore, *ex parte* decree was passed in the suit on 16-03-2012 with costs of Rs.66,304/-.

4. I.A.No.468 of 2012 was filed on 13-04-2012 under Order 9 Rule 13 CPC to set aside the said *ex parte* decree dt.16-03-2012. Thus, this application was filed within 30 days of the passing of the

ex parte decree. In the said application, it was stated that 1st petitioner was busy with hospital work and 2nd petitioner was busy in preparing their daughter for the Intermediate Board examination and so they could not attend on 16-03-2012.

5. Counter affidavit was filed opposing the said application by the respondent.

6. By Order dt.18-03-2013, the Court below allowed I.A.No.468 of 2012 and set aside the *ex parte* decree on condition of the petitioners' depositing suit costs of Rs.66,304/- within one week from the date of said order and granted liberty to the respondent to withdraw the same while directing the petitioners to proceed with the cross examination of P.W.1 on 25-03-2013.

7. Questioning the same, C.R.P.No.1370 of 2013 is filed.

8. Within the one week's time given by the Court, the petitioners could not comply with the said order.

9. They filed I.A.No.480 of 2013 under Section 148 CPC on 25-03-2013 to enlarge the time fixed by the Court. In the affidavit filed in support of the said application, the 1st petitioner contended that he was not doing well and laid up with 'colitis' (large intestinal obstruction) and unable to move about; that he was taking

treatment in a Nursing Home at Kadapa city; the doctors advised him to take strict bed rest because of the complications involved; and he was also being administered I.V. fluids. He therefore stated that for these reasons, he could not comply with the Order dt.18-03-2013 in I.A.No.468 of 2012 in O.S.No.29 of 2009.

10. On the same day, counter affidavit was filed by the respondents opposing the extension of time contending that 1st petitioner had never mentioned about this ailment earlier in I.A.No.468 of 2012, that he has only stated that he is a practicing doctor at Hyderabad and could not attend the Court on account of his pre occupation as Dental Surgeon. It was contended that 1st petitioner had no intention to comply with the order and the application is not *bona fide*. It was further contended that P.W.1 had come all the way from Hyderabad for cross examination and that medical records of 1st petitioner are fabricated.

11. On the same day i.e. 25-03-2013, I.A.No.480 of 2013 was dismissed by the Court below. It held that the medical record filed pertains to the period up to 24-02-2013 only and it was not referred to in the prior petitions filed by 1st petitioner; that there is no acceptable reason why 2nd petitioner could not make arrangement for payment of costs and could not give instructions to

counsel for cross examination of P.W.1; that the petitioners were probably playing fraud to get the extension of time to comply with the directions of the order; and there are no *bona fides* on the part of the petitioners.

12. Questioning the same, C.R.P.No.1077 of 2015 is filed by the petitioners.

13. Heard Sri Md. Saleem, learned counsel for the petitioners and Sri B.Yuvraj, learned counsel for the respondent.

14. The learned counsel for the petitioners contended that the Court below erred in directing the petitioners to pay suit costs of Rs.66,304/- as a condition precedent for setting aside the *ex parte* decree dt.16-03-2012 in O.S.No.29 of 2009 vide its Order dt.18-03-2013 in I.A.No.468 of 2012 on the ground that the petitioners were not present on 16-03-2012, a single day; that the Court below erred in saying that the reasons given by the petitioners for their non-appearance are lame excuses; that 1st petitioner could not attend the Court on that day because of his pre occupation with the hospital work and 2nd petitioner could not attend because she was attending on their daughter who was studying senior Intermediate and facing a Board exam; these reasons were genuine reasons; and the Court below at any rate

ought not to have asked the petitioners to pay huge costs of Rs.66,304/- as condition precedent for setting aside the *ex parte* decree that too within one week from 18-03-2013. He further contended that the petitioners had filed application I.A.No.480 of 2013 in I.A.No.468 of 2012 for enlargement of time pointing out that in the meantime, 1st petitioner had fallen ill as he was suffering from 'colitis' and was taking treatment; that he was advised strict bed rest because of the complications involved and was being administered I.V. fluids and therefore, the condition order also could not be complied with. He contended that the Court below ought not to have refused to extend the time and erroneously dismissed it on the ground that he had played fraud to get extension of time.

15. The learned counsel for the respondent on the other hand contended that the Court below had rightly directed the petitioners to pay the suit costs as a condition precedent to set aside the *ex parte* decree dt.16-03-2012 in the suit; petitioners had adopted a very casual approach to the proceedings in the suit and neither of the petitioners appeared on 16-03-2012 to cross examine P.W.1; therefore, the Court below rightly passed *ex parte* decree on that day; although indulgence was shown to the petitioners by the Order dt.18-03-2013 in I.A.No.468 of 2012, the petitioners did not avail of it and did not comply with the conditional order

passed on 18-03-2013; the alleged illness pleaded by 1st petitioner cannot be accepted because there was no mention of it in the earlier application I.A.No.468 of 2012 and therefore, the petitioners were not entitled to seek any extension of time for complying with the Order dt.18-03-2013 in I.A.No.468 of 2012 as well. He therefore, prayed that both the Revision Petitions be dismissed.

16. I have noted the submissions of both sides.

17. Order 9 Rule 13 CPC states:

“Order IX Rule 13 - 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:

¹ *[Provided further that no Court shall set aside a decree passed ex partemereely 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.]*

² *[Explanation.--Where there has been an appeal against a decree passed ex parte under this rule, and*

the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree.]”

18. In **G.P.Srivatsava Vs. Sri R.K.Raizada and others**^[1], the Supreme Court held that 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. It held the words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to erring party. It held that sufficient cause for non-appearance refers to the date on which the absence was made a ground for proceeding *ex-parte* and cannot be stretched to rely upon circumstances anterior in time. It held that 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 penalised for his previous negligence which had been overlooked and thereby condoned earlier. It held that in a case where defendant approaches the Court immediately and within the statutory time specified, the

discretion is normally exercised in his favour, provided the absence was not *mala fide* or intentional. It also observed that for the absence of a party in the case, the other side can be compensated by adequate costs and the lis decided on merits.

19. Keeping in mind the above decision, I will first note the facts of the case.

20. The Court below had set the petitioners who are defendants in O.S.No.29 of 2009, *ex parte* on 16-03-2012 on the ground that they were not present for cross examination of P.W.1 on that day, and also passed *ex parte* decree on the same day. This is some what unusual since normally the Court would adjourn the matter for the other evidence of the plaintiff to another day and then decide the matter *ex parte*. In any event, application I.A.No.468 of 2012 to set aside the *ex parte* decree was filed on 13-04-2012 within the period of 30 days from the date of passing of the *ex parte* decree. Thus there is no inordinate delay in approaching the Court seeking to set aside the *ex parte* decree on the part of the petitioners.

21. The petitioners had pleaded that 1st petitioner is busy with hospital work while 2nd petitioner was busy preparing her child for the intermediate Board examination. It cannot be said that the reasons assigned by the petitioners for their non-appearance indicate a

deliberate inaction or negligence on their part. It also cannot be said to be *mala fide*. While correctly exercising the discretion to set aside the *ex parte* decree, however, the Court below ought to have imposed only a reasonable amount as costs and then decided the suit on merits. Unfortunately, the Court below directed the petitioners to deposit the suit costs within one week from that day which amount to Rs.66,304/-.

22. In my considered opinion, to direct the petitioners to pay such a huge amount as costs for being absent on a single day is punitive and cannot be said to be correct exercise of discretion under Order IX Rule 13 CPC.

23. Therefore, C.R.P.No.1370 is allowed and the Order dt.18-03-2013 in I.A.No.468 of 2012 in O.S.No.29 of 2009 is set aside. I.A.No.468 of 2012 in O.S.No.29 of 2009 shall stand allowed on condition of the petitioners depositing sum of Rs.1000/- (Rupees One Thousand only) within two weeks from today before the Court below; on such deposit the respondent is entitled to withdraw the same without furnishing security; the petitioner shall also cross examine P.W.1 on 07-04-2015 without fail. In default of the petitioners complying with any of these directions, C.R.P.No.1370 of 2013 shall stand dismissed.

24. Having regard to the Order in C.R.P.No.1370 of 2013, the Order dt.25-03-2013 in I.A.No.480 of 2013 in

I.A.No.468 of 2012 in O.S.No.29 of 2009 is also set aside since the Order dt.25-03-2013 in I.A.No.480 of 2013 is a dependent order and its fate is dependent on C.R.P.No.1370 of 2013 wherein the Order dt.18-03-2013 in I.A.No.468 of 2012 in O.S.No.29 of 2009 was challenged and modified. Therefore, no orders are required in C.R.P.No.1077 of 2015.

25. With the above directions, C.R.P.No.1370 of 2013 is allowed and consequently, C.R.P.No.1077 of 2015 is closed. No costs.

26. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 23-03-2015

Note:

Issue C.C. in three days.

B/o.

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[\[1\]](#) (2000) 3 S.C.C. 54