

*** THE HON'BLE SRI JUSTICE S. RAVI KUMAR**

+ CIVIL REVISION PETITION No.463 of 2013

%05.06.2015

S. Davender Reddy

...Petitioner.

Vs.

\$ S. Ravinder Reddy

...Respondent.

! Counsel for the Petitioner: Sri B. Nalin Kumar

Counsel for Respondents: Sri K. Ashok Reddy

<Gist :

>Head Note:

? Cases referred:

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

CRP No.463 of 2013

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Date:05.06.2015

Between:

S. Davender Reddy

... Petitioner.

AND

S. Ravinder Reddy

...Respondent.

The Court made the following :

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

CRP No.463 of 2013

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ORDER:

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This revision is preferred against order dated 12-12-2012 in I.A.No.309/2012 in O.S.No.1271/2007 on the file of XXII Junior Civil Judge, City Civil Court, Hyderabad.

2. Revision petitioner herein is plaintiff and respondent herein is defendant in O.S.No.1271/2007. Respondent herein filed I.A.No.309/2012 under Section 5 of Limitation Act to condone delay of 850 days in filing petition to set aside *ex-parte* judgment and decree dated 25-02-2010 and the said petition was opposed by the plaintiff i.e., revision petitioner herein and the trial Court considering the material, overruled the objection of the plaintiff and allowed the application and condoned delay. Aggrieved by which, plaintiff preferred present revision.

3. Heard both sides.

4. Advocate for revision petitioner submitted that respondent herein preferred A.S.No.370/2010 challenging *ex-parte* decree and judgment dated 25-02-2010, but subsequently, he has not pressed the said appeal, therefore, he cannot invoke the provisions of Order IX, Rule 13 CPC as it is a bar under explanation given to the said provision. He submitted that the trial Court, without considering the said objection, allowed the petition filed under Section 5 of the Limitation Act and the order of the trial Court is liable to be set aside. On the other hand, Advocate for respondent/defendant submitted that the trial Court rightly negatived the objection of the plaintiff, because the appeal was not decided on merits and it was dismissed as not pressed, which will amount to withdrawal, therefore, trial Court has not committed any error.

5. Now the point that would arise for my consideration in this revision is whether orders of the Courts below are legal, proper and correct?

6 . **Point:-** Revision Petitioner herein filed O.S.No.1271/2007 for eviction and that the respondent herein filed written statement disputing the relationship of landlord and tenant contending that there was an agreement between them for sale of suit schedule property for a consideration of Rs.11,00,000/- and that the defendant paid Rs.5,00,000/- as advance and as the revision petitioner herein refused to register the property by receiving remaining sale consideration, he filed O.S.No.683/2008 for specific performance of agreement of sale. It is the contention of the respondent herein that his counsel underwent open heart surgery and due to his ailment, the witnesses of plaintiff was not cross-examined and that an examined *ex-parte* decree was passed and on the instructions of his previous

counsel, he filed A.S.No.370/2010 challenging the said *ex-parte* judgment, but on the advise of present counsel, he has not pressed that appeal and filed a petition under Order IX Rule 13 CPC to set aside *ex-parte* decree with delay condonation petition.

7. Now the main objection of the plaintiff i.e, revision petitioner herein is that in view of the explanation under Order IX Rule 13 CPC, there is a bar to entertain application under Order IX Rule 13. For better appreciation, it is necessary to read the said provision which is extracted below:-

“Setting aside decree ex parte against defendant.

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 sent aside as against all or any of the other defendant 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 plaintiff's claim.

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 of setting aside the ex parte decree. ”

8. A plain reading of the above provision makes it clear that if the appeal preferred challenging the *ex-parte* judgment is disposed on any ground other than the ground that it was withdrawn an application under Order IX Rule 13 is not maintainable. According to

Advocate for revision petitioner as the appeal is disposed of as not pressed, but not due to reason of withdrawal, it has to be treated that the appeal has been disposed of on the ground other than withdrawn, therefore, the application under Order IX Rule 13 is not maintainable. The very same objection was raised before the trial Judge and some rulings were also cited before the trial Judge. Advocate for revision petitioner mainly focused on the decision of Hon'ble Supreme Court in **Rani Choudhury vs. Lt.-Col.Suraj Jit Choudhury**, in support of his argument, as to the maintainability of application under Order IX Rule 13 CPC. In that decision, the appeal was filed with a delay condonation petition challenging the *ex-parte* decree and that delay condonation petition was dismissed on merits, thereafter, an application under Order IX Rule 13 CPC was filed by the very same party and the High Court took a view that as the appeal was not decided on merits held that application under Order IX Rule 13 CPC is maintainable, which was not accepted by the Hon'ble Supreme Court. But here in this case, the appeal was not decided on merits, and it was dismissed as not pressed. Withdrawing the appeal or not pressing the appeal, in my view is one and the same, because in both the cases, there will be no order on merits. It is not known for what reason the appeal was not pressed. If it was not pressed on any ground, which prohibits the party from availing any other remedy available under law, then the plaintiff may be correct in objecting, but when the explanation provides that withdrawal of appeal enables party to invoke the provision of Order IX Rule 13 CPC, not pressing appeal would also come under the purview of withdrawal and the trial Court has rightly considered this aspect and I do not find any illegality or wrong exercise of jurisdiction to be interfered by this Court under the revisional powers.

9. For these reasons, I am of the considered view that the revision is devoid of merits, therefore, liable to be dismissed.

10. Accordingly, revision is dismissed. No costs.

11. As a sequel, miscellaneous petitions, if any, pending in this Civil Revision Petition, shall stand dismissed.

JUSTICE S. RAVI KUMAR

Date:05.06.2015

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