

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

**RAO**

**C.R.P.No.1176 OF 2015**

**ORDER :**

This Civil Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.07.02.2015 in I.A.No.46 of 2014 in O.S.No.71 of 2008 of the XII Additional Chief Judge(FTC), City Civil Court, Hyderabad.

2. Petitioners herein are the defendants in the above suit. The said suit was filed by the respondent herein for partition and separate possession and for future measne profits.

3. Counter affidavit was filed by the petitioners denying the claim respondent.

4. Issues were framed and trial commenced. The evidence on the side of the respondent/plaintiff was closed and the matter was posted to 28.03.2014 for the evidence of the petitioners/respondents. On that day, the petitioners were not present and no evidence was adduced on their behalf. So, their evidence was closed and the matter was posted to 25.04.2014 for arguments.

5. Petitioners therefore filed I.A.No.46 of 2014 on 23.04.2014 alleging that their counsel, who is 76 years old, mistakenly noted the date of adjournment as 28.04.2014 instead of 28.03.2014. It is further contended that there is

no presiding officer in the Court of XII Additional Chief Judge, City Civil Court, Hyderabad and the Counsel believed that the suit was posted to 28.04.2014 instead of March, 2014; therefore, no representation was made when the case was called before the in-charge Court, resulting in the evidence of the petitioners being closed. It was contended that the absence of the petitioners and their counsel on 28.03.2014 was neither willful nor intentional but due to bona fide mistake and that the 1<sup>st</sup> petitioner is filing her affidavit in lieu of her chief examination and therefore the order dt.28.03.2105 be set aside and the case be reopened permitting the petitioners to lead evidence.

6. This application was opposed by the respondent alleging that sufficient time had been granted to the petitioners by the Court below to lead evidence but they did not adduce any evidence and therefore the Court had rightly closed their evidence and posted the matter for arguments.

7. By order dt.07.02.2015, the Court below dismissed the said I.A. holding that the docket order of the proceedings indicates that the matter had been posted for the petitioners' evidence number of times; the respondent had opposed granting of further time; and that the cause for absence is mentioned only for one adjournment and not for all other adjournments.

8. Challenging the same this Revision is filed.

9. Counsel for the petitioners contended that the Court below erred in dismissing the I.A.No.46 of 2014 and setting the petitioners ex parte, thereby denying them an opportunity to lead evidence and contest the suit; that the counsel for the petitioner had been absent on 28.03.2014 when the matter was listed for leading the petitioners' evidence because he had wrongly noted the date as 28.04.2014; that the Court below should have set aside the order of closing the petitioners evidence and allowed the IA; and that the Court below is not entitled to look into the reasons for non appearance to a period anterior to 28.03.2014.

10. Even though the respondent had been served there is no representation on his behalf.

11. Although the application had been moved under Section 151 CPC, it is actually Order IX Rule 7 CPC, which is attracted. The said provision states that where the Court had adjourned the hearing of the suit ex parte and the defendant at or before such hearing, appears and assigns good cause of his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

12. Order XVII Rule 3 CPC also states that whether a party to a suit to whom time has been granted, fails to produce his

evidence or to cause attendance of his witnesses or to perform any other act necessary to the further progress of the suit, for which time had been allowed, the Court may, notwithstanding such default (a) if the parties are present, proceed to decide the suit forthwith or b) if the parties are, or any of them is, absent, proceed under rule 2 of Order XVII CPC. The latter provision states that the Court may proceed to dispose of the suit in one of the modes attracted under Order IX CPC.

13. In the present case, the Court had decided to proceed with the suit after closing the evidence of the petitioners on the ground that the petitioners had not commenced their evidence on 28.03.2014 on which date the matter has been posted for their evidence.

14. In my considered opinion, while deciding whether the order dt.28.03.2014 passed by the Court below is required to be recalled, the Court should focus on the cause for non appearance on that date alone and cannot look into the previous absence of counsel or parties. While considering the word “sufficient cause” occurring in Order IX Rule 13 CPC, the Supreme Court in ***G.P. Srivastava v. R.K. Raizada & Ors***<sup>[1]</sup> had observed 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 penalized for his previous negligence which

had been over looked and thereby condoned earlier.

15. In this view of the matter, I am of the opinion that the Court below was not entitled to look at the inability of the petitioners to lead evidence prior to 28.03.2014. I am also satisfied that the cause given by the petitioner for not commencing her evidence on 28.30.2013 is only on account of mistake of her counsel which was realized on 23.04.2014 itself, within a short time and, the I.A.No.46 of 2014 was filed along with the affidavit in lieu of chief examination of DW1. Therefore, in these circumstances I am of the opinion that order dt.07.02.2015 in I.A.No.46 of 2014 cannot be sustained.

16. So, the Civil Revision Petition is allowed. Order dt.0702.2015 in order dt.07.02.2015 in I.A.NO.46 of 2014 in O.S.NO.71 of 2008 of the XII Additional Chief Judge(FTC), City Civil Court, Hyderabad is set aside and the said I.A. is allowed. It is made clear that the petitioners shall commence their evidence within one week from date of receipt of copy of this order without fail and conclude their evidence within a period of two (02) months from the date of receipt of a copy of this order. In default, this Revision stands dismissed. There shall be no order as to costs.

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

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M.S.RAMACHANDRA RAO, J

31<sup>st</sup> August, 2015.  
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[\[1\]](#) 2000(3) SCC 54