

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SMT. JUSTICE ANIS**

CIVIL MISCELLANEOUS APPEAL NO. 77 OF 2016

JUDGMENT: (Per the Hon'ble Smt. Justice Anis)

1. This Civil Miscellaneous Appeal, under Order XLIII Rule 1 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), is directed against the order, dated 17.11.2015 passed in I.A.No.1465 of 2014 in O.S.No.6 of 2014 on the file of the District Judge, Adilabad.
2. Appellants were arrayed as the petitioners, while the respondent as the respondent in I.A. before the trial Court.
3. For the sake of convenience, the parties are referred to as arrayed in the I.A. before the trial Court.
4. The petitioners/defendants filed the petition under Order IX Rule 13 read with Section 151 C.P.C. for setting aside the *ex parte* decree dated 02.09.2014 to enable them to contest the suit on merits.
5. The brief averments made in the petition filed before the trial Court are as follows:

The first petitioner is the first defendant in the suit and he received suit summons by registered post, but no case

papers were sent through post and at the relevant time his parents were not keeping good health as they were suffering with various ailments, and on enquiry he came to know that they were set *ex parte* on 19.03.2014. Thereafter, he filed an application in I.A.No.848 of 2014 to set aside the *ex parte* order and the same was dismissed on 01.08.2014. As against the said order, C.R.P.No.2609 of 2014 was filed and initially the said C.R.P. was dismissed, but on a review application, the same was allowed. In the meanwhile, the trial Court decreed the suit on 02.09.2014. Therefore, he prayed for the Court to set aside the *ex parte* decree.

6. The respondent/plaintiff filed counter stating that the appellants, who are the defendants, received summons by registered post wherein the date of adjournment was mentioned as 19.03.2014, but they did not attend the Court and the reason mentioned in the affidavit is that the parents of 1st defendant were not keeping good health. The first defendant is a party to O.S.No.118 of 2009 on the file of the I Additional Senior Civil Judge, Nizamabad, O.S.No.117 of 2009 which was settled before Lok Adalat and E.P.No.18 of 2011 on the file of I Additional Senior Civil Judge, Bodhan of Nizamabad district. The defendants were pursuing the matters in the above cases, but intentionally avoided to

attend the Court in O.S.No.6 of 2014 on the file of the District Judge, Adilabad. In fact, the father of the first petitioner by name Bhoomaiah was hale and healthy and was regularly assisting the first petitioner in his business activities. Therefore, the fact of his suffering with ailments cannot be believed and the appellant is speaking falsehood and the present petition is filed only to drag on the matter on frivolous grounds. The non-appearance of the petitioners for more than 90 days was willful and intentional to avoid the disposal of the suit, as such the trial Court rightly set them *ex parte* for non-filing of written statement. This Court also dismissed C.R.P.No.2609 of 2014 initially and thereafter review petition was filed. The present petition filed by the petitioners is not maintainable and prayed the Court to dismiss the petition.

7. After hearing both sides and on perusing the pleadings, the District Judge, Adilabad dismissed the petition with costs.

8. Aggrieved by the order of the trial Court, the defendants preferred the present appeal.

9. The learned counsel for the appellants argued that when the petitioners were set *ex parte*, they filed petition to set aside the *ex parte* order and the same was dismissed, and

against the said orders, C.R.P.No.2609 of 2014 was filed before this Court and initially it was dismissed and again it was reviewed by this Court vide orders dated 15.09.2014, wherein this Court observed that liberty was given to the petitioners to take out appropriate proceedings in accordance with law for setting aside the decree and on such exercise, the trial Court shall take into consideration the facts before passing of the decree. It is also argued that the first appellant never borrowed any money from the respondent and the documents relied on by the respondent/plaintiff are fabricated ones and if the decree is not set aside, the appellants will suffer irreparable loss and prayed the Court to allow the appeal.

10. On the other hand, the learned counsel for the respondent/plaintiff vehemently opposed for allowing the appeal on the ground that the petitioners have not showed sufficient cause for not appearing before the trial Court though they received summons. It is further argued that the appellants have not filed any documentary evidence to show that the parents of the appellant No.1 were ailing and due to the said reason they were not in a position to attend the Court on the date of first hearing. It is further argued that the appellant No.1 has borrowed a sum of Rs.20 lakhs for

business purpose by depositing title deeds of schedule property and agreed to pay the loan amount with interest, but failed to do so, as such the respondent/plaintiff constrained to file the suit. It is also argued that the petitioners intentionally not appeared before the Court when the matter was posted for appearance and thereafter they were set *ex parte* and that the *ex parte* decree was passed by the trial Court after considering the oral and documentary evidence, and therefore, the findings of the trial Court in dismissing I.A.No.1465 of 2014 in O.S.No.6 of 2014 needs no interference, and finally prayed the Court to dismiss the Civil Miscellaneous Appeal.

11. After hearing both sides, the point that arises for consideration is:

Whether the appellants/petitioners have made out any case to set aside the impugned order, dated 17.11.2015 passed by the trial Court as prayed for?

12. **POINT:**

After hearing both sides and on perusal of the record, there is no dispute that the respondent filed the suit for recovery of Rs.44,84,466/- against the petitioners. The summons was served on the petitioners and the petitioners

failed to attend the Court, as such an *ex parte* order has been passed on 19.03.2014. It is also an admitted fact that I.A.No.848 of 2014 was filed under Order IX Rule 7 C.P.C. to set aside the *ex parte* order and the same was dismissed on 01.08.2014. Aggrieved by the said order, the petitioners filed C.R.P.No.2609 of 2014 before this Court. Initially, the said C.R.P. was dismissed and later on, on a review application, it was disposed of on 15.09.2014 again with liberty to the petitioner to take out appropriate proceedings in accordance with law for setting aside the decree. Prior thereto, on 02.09.2014, the trial Court passed the decree against the petitioners. Aggrieved by the same, the petitioners, who are the appellants, filed I.A.No.1465 of 2014 under Order IX Rule 13 C.P.C. to set aside the *ex parte* decree. The Principal District Judge passed the order on 17.11.2014, dismissing the said petition with costs. Aggrieved by the said orders, the petitioners/appellants filed the present Civil Miscellaneous Appeal.

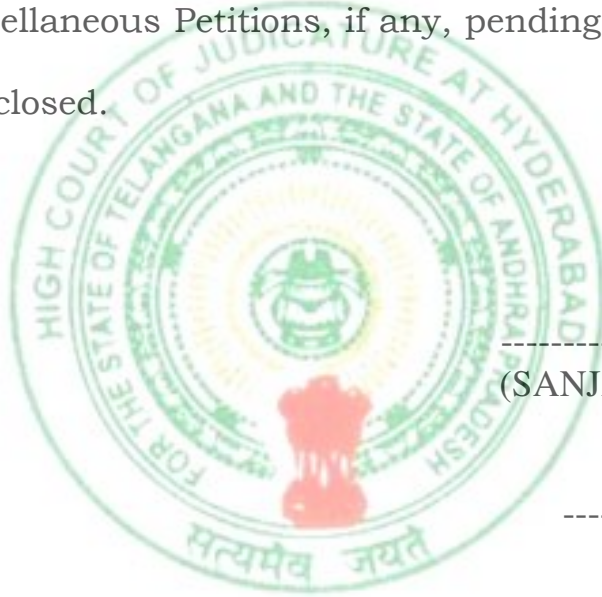
13. The main contention of the appellants is that during the period when they received summons from the Court, the parents of the appellant No.1 were not well, as such they could not appear before the Court and they were set *ex parte*, and therefore, non-appearance before the trial Court

during that period is not intentional. On the other hand, the contention of the respondent is that the petitioners have not proved that they were prevented by sufficient cause from appearing on the date of hearing.

14. Admittedly, the first petitioner now filed Written Statement and the second petitioner filed memo adopting the Written Statement filed by the first petitioner. Since the suit is filed for preliminary decree based on mortgage for recovery of an amount of Rs.44,84,466/-, in the Written Statement, the petitioners denied the suit transaction and asserted that the documents alleged to have been executed are fabricated ones. The learned counsel for the appellants also contended that there are good chances of winning the case by the appellants/petitioners. Admittedly, the suit is filed in the year 2014 and the petitioners are dodging the matter by taking the legal course. Since the suit transaction is with respect to heavy amount, if one opportunity is extended to the petitioners to contest the suit on certain terms, certainly no prejudice will be caused to the respondent/plaintiff.

15. In the result, the Civil Miscellaneous Appeal is allowed setting aside the order dated 17.11.2015 passed by the District Judge, Adilabad in I.A.No.1465 of 2014 in O.S.No.6 of 2014 and consequently the *ex parte* preliminary decree and

judgment dated 02.09.2014 passed in the aforesaid suit is also hereby set aside and the suit is restored to file, subject to payment of costs of Rs.5,000/- (Rupees Five thousand only) payable by the appellants/defendants to the respondent/plaintiff within one month from the date of this order, failing which the appeal stands dismissed. The learned District Judge, Adilabad shall deal with the suit on merits in accordance with law and is directed to dispose of the suit as early as possible subject to identified, old and part-heard cases. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.



(SANJAY KUMAR, J)

(ANIS, J)

14.11.2016
Anr

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