

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO
CIVIL REVISION PETITION Nos.1214, 1231 of 2016 &
820 of 2014

COMMON ORDER:

C.R.P.No.820 of 2014 has been filed by the revision petitioners who are plaintiff Nos.1 to 8 in O.S.No.2980 of 2007 on the file of I Additional Senior Civil Judge, Ranga Reddy District, L.B.Nagar. There are 27 defendants to the suit. The suit claim is for declaration of registered sale deed document No.613 of 1980 dated 27.05.1980 as null and void and not binding on the plaintiffs and for consequential permanent prohibitory injunction and other reliefs. Among the plaintiffs 1 to 8, plaintiff Nos.1, 3 to 8 are the sons and daughters of the 2nd plaintiff and her late husband Mohd. Ismail who died on 10.01.1997, claimed as the owners for the land of Ac.92-21 guntas out of survey Nos.148 to 155 of Hafizpet village and Taluk, Hyderabad west, along with defendant Nos.1 to 5, in claiming the source from the original pattadars by name Abdul Rahaman and Sk. Ibrahim under registered sale deed document No.600 of 1964 dated 10.11.1964 and the same was also subject matter of partition suit of the plaintiffs in O.S.No.21 of 2004 on the file of III Additional District and Sessions Judge, Ranga Reddy District, covered by partition preliminary and final decrees respectively dated 14.11.2005 and 17.04.2007. It is the averment that the defendants remained exparte therein by non participation with knowledge. It is further averred that 6th defendant (no other than 13th defendant, which is entity by name Gopal Nagar Cooperative House Building Society Limited in O.S.No.21 of 2004 supra) claiming as vendee under the impugned registered sale deed document No.613 of 1980 dated 27.05.1980 supra and the other

defendants are his henchmen and under the behest alleged obtaining of sale deed of 1980 trying to interfere in saying father of the plaintiff Nos.1, 3 to 8 also was co-vendor of the sale deed with no truth and for the reason of the signature of their father Md. Ismail is not there in the sale and the same was forged and fabricated document, the plaintiffs are constrained to file the suit saying the suit is within limitation period i.e., within 3 years from the date of knowledge to them on 01.11.2007 about the sale deed by stating cause of action to the suit lis. The suit while under contest as coming for trial pursuant to the conditional order dated 22.10.2013 for filing chief examination of 1st plaintiff and with costs (who was looking after the matter) posted to 25.10.2013, for his suffering lumbar spondilitis with pain undergoing treatment through Dr. (Ayurvedic) for past more than 2 weeks continuously was being un-recovered, could not attend to cause prepare chief examination affidavit and pay costs and thereby telephoned to their advocate Sri A.Suryanarayana of Chikadpally, Hyderabad, by cause sending the medical certificate in proof of that and in seeking for time a petition was filed under Section 148 r/w. 151 CPC to that effect with the supporting affidavit of said advocate with medical certificate in seeking 2 weeks time by extending the conditional order for 2 weeks from 20.10.2013, the affidavit petition was of even adjournment dated 25.10.2013. The medical certificate dated 24.10.2013 issued by Dr. P.Ravi Kumar of the R.K. Ayurvedic & Psoriasis Research Centre Private Limited, situated at KPHB Colony, Hyderabad speaks that Md. Aslam (1st plaintiff) is suffering lumbar spondilitis and under his treatment including with panchakarma, kati basti and matra vasti since

20.10.2013 and advised complete bed rest and treatment for a further period of 2 weeks with effect from 20.10.2013. It also includes the prescription dated 20.10.2013 by giving internal ayurvedic medicine and external application of oil for pain relief and muscle relaxation. The said petition was ended in dismissal by order dated 25.10.2013 by the learned I Additional Senior Civil Judge which is in I.A.No.1208 of 2013 which shows from presence of the counsel for petitioners/plaintiffs and of the respondents/defendants and from perusal of the material papers on record and from hearing respective arguments by the docket order "dismissed as there are no bonafide grounds." It is consequent to it by another docket order of even date in the suit, which reads "costs not paid. Petition filed for adjournment and is dismissed as there are no bonafide grounds. Hence the suit is dismissed for non prosecution."

2. CRP.No.820 of 2014 is filed against the impugned docket order dated 25.10.2013 in I.A.No.1208 of 2013 referred supra. No doubt there is no separate revision maintained for the consequential docket order of the suit in dismissing the suit of even date from stating outcome of dismissal of the petition. In the application in I.A.No.1208/2013 vis-à-vis in the suit only respondent Nos.6, 7, 8 and 11 were contesting and not by others and thereby in the revision maintained, it is endorsed respondents/defendants Nos.1 to 5, 9, 10, 12 to 27 are not necessary parties to the petition. Sri K.Laxman is the advocate for said contesting respondent Nos.6, 7, 8 and 11. The matter is since then coming for hearing and from the request and taken up to decide with the 2 connected revision petitions supra viz.,

CRP.Nos.1214 and 1231 of 2016 relating to connected suit in claim in O.S.No.21 of 2004 referred supra.

3. From this background coming to CRP.Nos.1214 & 1231 of 2016, these 2 revisions were maintained impugning the orders in I.A.Nos.232 and 233 of 2007 in O.S.No.21 of 2004 respectively dated 29.10.2015 and 02.11.2015 passed by the learned III Additional District Judge, Ranga Reddy District at L.B.Nagar.

3(a). So far as I.A.No.232 of 2007 concerned, it is an application filed by defendant 13th among defendant Nos.1 to 13 to set aside the exparte decree and judgment in O.S.No.21 of 2004, which is the exparte decree (preliminary) dated 14.11.2005, by showing the plaintiff as 1st respondent and defendant Nos.1 to 12 as respondent Nos.2 to 13.

3(b). So far as I.A.No.233 of 2007 concerned, this is another application filed by selfsame 13th defendant entity by name Gopal Nagar Cooperative House Building Society Limited represented by its president SBSN Raju to set aside the exparte final decree dated 17.04.2007 in O.S.No.21 of 2004. These applications filed are thus to set aside the exparte preliminary and final decrees respectively passed against the defendant Nos.1 to 13, sought only by the 13th defendant.

4. The background of the facts necessary to mention for these 2 applications are that, sole plaintiff Md. Aslam (no other than the 1st plaintiff in O.S.No.2980 of 2007) filed the suit against the thirteen defendants supra of whom, but for the 13th defendant entity, other defendants are individuals (of whom defendant Nos.1

to 7 are no other than co-plaintiffs 2 to 8 of O.S.No.2980 of 2007 and defendant Nos.8 to 13 are no other than defendant Nos.1 to 6 of O.S.No.2980 of 2007). The claim in O.S.No.21 of 2004 is with averments that in favour of the 13th defendant entity supra and also in favour of some third parties, the defendant Nos.1 to 12 are trying to alienate the schedule property. It is in further saying the plaintiff, defendant Nos.2 to 7 are the issues of 1st defendant and late Md. Ismail who are all joint owners, for defendant Nos.8 to 12 also joint owners with late father of plaintiff Nos.2 to 7 from their joint purchase of Ac.92-21 guntas of the land in Hafizpet from the original pattadars by name Abdul Rahaman and Sk. Ibrahim under registered sale deed document No.600 of 1964 dated 10.11.1964 and while they are all continuing in joint possession, the plaintiff for not willing to continue joint, seeks for partition and separate possession of his 14/96th share therein from all other defendants. Further that even he was demanding, the defendant Nos.1 to 12 are postponing on one ground or the other and the 13th defendant is also trying to occupy without any right and thereby he is entitled to the relief of partition preliminary decree for his 14/96th share and for separate possession of the same and for such other reliefs.

5. The plaint in O.S.No.21 of 2004 was filed on 13.08.2003. As can be seen from the partition preliminary decree, the defendant Nos.1 to 13 remained exparte and the suit was consequently thereby decreed by passing the preliminary decree dated 14.11.2015 for 14/96th share of plaintiff in clearly saying besides said share of plaintiff, defendant Nos.2 to 4 and 7, his brothers are entitled to equal shares so also their sisters defendant Nos.5 and 6, but for their mother 1st defendant entitled to 1/12th

share only and remaining by all other defendant Nos.8 to 12 and with no costs. It is pursuant to the said preliminary decree, plaintiff by showing all the 13 defendants applied for final decree for separation of his share defined in the preliminary decree and the partition final decree after notices to the defendants, for defendant Nos.8, 11 and 13 since remained *exparte* and suit against defendant Nos.9, 10 and 12 dismissed as not pressed, only defendant Nos.1 to 7 appeared through their advocate did not oppose, a Commissioner was appointed and submitted his report by division of properties into plots shown as schedules A to H of the report and by accepting the said report by allotting plot No.1 admeasuring Ac.1-48 guntas in S.No.150, which is A schedule of the Commissioner report, leave about allotment to the respective defendants, (defendant Nos.1 to 7 are allotted separately as they sought by showing in the schedules as B to H), leave about the remaining that of defendant Nos.8 to 12 not defined, said partition final decree was dated 17.04.2007.

6. The applications in I.A.Nos.232 and 233 of 2007 filed respectively (under Order 9 Rule 13 CPC) were on 26.06.2007. The averments are common in both affidavits of 13th defendant entity represented by its President who is resident of Kukatpally, save several of those facts are already covered, but for any repetition to the extent necessary, in nutshell are that the 13th defendant entity by the date of the suit in O.S.No.21 of 2004 was filed on 13.08.2003 shown as if represented by its president Pentaiah Yadav S/o. Chennaiah Yadav, but elections to the society were held prior to that on 16.08.2002 for a period of 5 years till 05.08.2007 and by then one P.Ramagoud was the President and

the deponent SBSN Raju was General Secretary and said Pentaiah Yadav by the date of suit and serving of summons was no way concerned with the 13th defendant entity, where the name of the president of the society wrongly mentioned in order to knock away the property of the society. It is also averred that, said President of the society by name Pentaiah engaged one Srimannarayana, advocate, however did not file written statement when posted for payment on costs by non payment of costs also and from which the 13th defendant was set exparte on 27.04.2005, leave about defendant Nos.1 to 8 and 11 already remained exparte and suit claim against defendant Nos.9, 10 and 13 not pressed and the exparate decree passed later on 14.11.2005. It is further averred that the 13th defendant society purchased the entire land of Ac.93-24 guntas in Survey Nos.148 to 155 of Hydernagar Village, Rajendranagar Taluk under registered sale deed bearing No.6130 of 1980 dated 20.05.1980 from K.Sitaram Reddy and others, who are defendant No.8 and others including the father of plaintiffs and defendant Nos.2 to 7 to the suit O.S.No.21 of 2004 and thereby plaintiff, his brothers and sisters and mother and other defendants among defendant Nos.1 to 12 also have no right over the property and the exparte preliminary decree dated 14.11.2005 is liable to be set aside. It is also averred that the 13th defendant entity developed the land and also allotted plots out of it to its members by delivery of possession respectively and most of the members made constructions in their respective plots with continuous possession. It is averred that the 13th defendant society came to know about the exparte decree only on 22.05.2007 through its members and thereby filed the petitions immediately after Court

reopening and in the meantime by collecting the papers from the information and on also came to know about the final decree passed meantime, in seeking to set aside the exparte preliminary decree and final decree respectively.

7. The counter filed by the plaintiff in O.S.No.21 of 2004 as 1st respondent to the 2 petitions with common contest, particularly from Para Nos.5 to 9 is that, the 13th defendant/petitioner to the applications including in the affidavit of the present president/Ex-secretary did not even mention as to when the alleged elected president of the election dated 06.08.2002 for 5 years by name P.Rama Goud and by the deponent as Secretary taken charge of the society for reasons better known and in the absence of showing no bonafides and lack of credentials to the Ex-President, it is not left open from once duly served and appeared on behalf of the society by engaging advocate for not disputing the status of him to the society and once having given opportunity when not availed in filing written statement despite posted on costs, since the entity was set exparte and before passing of the decree no application is filed consequence to which after 13th defendant was set exparte on 27.04.2005, the partition preliminary decree was passed on merits on 14.11.2005 and even later to it from the application of the plaintiff for partition final decree and from service of notices, the partition final decree was passed from they remained exparte and thereby there are no merits to set aside the exparte decree. It is also the contest that the 13th defendant from the beginning of the suit proceedings got knowledge and withheld from contest for reasons better known and might be for nothing to oppose the suit claim if any and with the affidavit petition averments, it cannot

gain any sympathy of the Court to overcome from the latches. It is also the contest that the plaintiff having come to know about the obtaining of the sale deed in the year 1980 by forging the signature of the plaintiff's father from other defendants showing as if plaintiff's father also executant, plaintiff filed along with his brothers, sisters and mother the suit in O.S.No.2980 of 2007 for cancellation of the sale deed and thereby sought for dismissal of the applications in saying no grounds to set aside the preliminary decree and final decree respectively. It is also the contest that in filing the applications, there is no application filed to condone the delay and there is no basis to setup lack of knowledge earlier to the filing of applications within 30 days from the date of alleged knowledge and thereby the petitions are liable to be dismissed in limini.

8. The learned III Additional District Judge by the impugned respective 2 orders in I.A.No.232 of 2007 dated 29.10.2015 and in I.A.No.233 of 2007 dated 02.11.2015 held that so far as the main contention of the plaintiff has wrongly mentioned the 13th defendant entity as representing by B.Pentaiah Yadav with H.No.1-2-485, G.M.Road, Domalguda, Hyderabad, and the office of the society claimed never situated at Domalguda including as on date of suit, but for residence of Pentaiah Yadava who was not by then the President, but for the society registration certificate disclosing address at Hydernagar Taluk, Ranga Reddy District. Whereas plaintiff did not choose to file any document to disprove the same to show Pentaiah Yadav was president by then as on date of suit or the office of the society was situated at Domalguda. However, the fact remains in the suit besides defendant Nos.1 to 7, defendant

Nos.8 and 11 also remained *exparte* and plaintiff no doubt not pressed the suit claim against defendant Nos.9, 10 and 12 for reasons better known in passing the preliminary decree dated 14.11.2005. It is from scrutiny of material shows the contention of the 13th defendant society by its present president of having no knowledge about the suit and passing of *exparte* preliminary decree by setting the society *exparte*. However for setup the knowledge in filing the petition when got no mention of date even and the source of knowledge even to take date of that knowledge into consideration to count the period of limitation therefrom. No doubt it is to set up date of knowledge on 22.05.2007 which is in summer vacation from immediately on summer vacation since the petition is filed and the law lays down that 30 days from date of knowledge to file the application is within limitation and thereby there is no necessity to file any application to condone the delay from what is explained to consider in allowing the same to set aside the *exparte* decree and cited the decision of the Apex Court in **S.P. Chengalvaraya Naidu (Dead) by L.Rs. Vs. Jagannath (Dead) By L.Rs.**¹, speaks filing of suit for partition by the plaintiff without disclosing the execution of release deed relinquishing his rights over property is nothing but obtained a preliminary decree by fraud to set aside the same. The decision apply to the present facts of similar in nature and as per the claim of the society, father of the plaintiff was also a co-executant of the sale deed in favour of the society and plaintiff did not disclose the same, nor stated his father executed the sale deed. So far as *exparte* final decree concerned, observed that in view of the orders passed in I.A.No.233

¹ AIR 1994 SC 853

of 2007 setting aside the preliminary decree on merits, final decree passed pursuant to the preliminary decree is liable to be set aside.

9. It is the same impugned in the grounds of 2 revisions stating the said conclusions arrived by the lower Court are unsustainable and not by proper appreciation of facts and law and once there is a final decree passed in a partition suit in which the preliminary decree merges, the same shall be impugned by first appeal at best and not to seek for setting aside the exparte preliminary decree and even to seek for setting aside the exparte final decree, setting aside the preliminary decree is not only erroneous but also of the final decree therefrom by reopening the matter without justification or sufficient cause, and thereby sought for allowing the revisions by setting aside the impugned orders of the lower Court allowing the 2 applications and consequently by dismissing the 2 applications.

10. Heard Sri V.V. Ramana, learned senior counsel for the revision petitioners and Sri VLNGK Murthy, learned counsel for revision 1st respondent/13th defendant entity (petitioner society of the 2 applications covered by the impugned orders supra) for other defendants/respondents endorsed as not necessary parties, and perused the material on record. At request, all the revision petitions in respect of the impugned orders in the applications concerning the two suits, taken up together by common hearing and for common disposal.

11. In answering the lis covered by the revisions it is necessary to refer Order 9 Rule 13 CPC which reads as follows:

“13. 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.”

12. So far as I.A.No.232 of 2007 from the above if the summons were shown not duly served, the Court if satisfied to that effect, set aside the decree passed exparte on such terms as to costs, payment into Court or otherwise as it thinks fit. However, the 2nd proviso speaks that mere irregularity in the service of summons is not a ground to set aside the exparte decree, if the Court is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim. As per the Article 123 of the limitation Act, 1963 to set aside the decree passed exparte, the limitation is 30 days to commence from the date of decree or where summons or notices were not duly served when the applicant had knowledge of the decree. Thus knowledge of the decree in the event of non-service of summons is main criteria. Here the 2 documents filed before the lower Court by the 13th defendant show the election conducted on 05.08.2002 to the 13th defendant society, whereas the suit filed in

O.S.No.21 of 2004 referred supra was dated 13.08.2003. There is nothing even shown of the 13th defendant society elected representatives for the tenure from the date of 5 years from that election, did not take charge as on the date of filing of the suit and serving of summons and as per bye laws till assuming charge, the old governing body shall be the competent and authorized to represent the entity legally and validly. Without which once there was election conducted as contended in the applications to set aside the exparte preliminary and final decrees of the summons were served showing the name of the entity with a wrong address and not even to the address of the entity at its registered office to say any irregularity, but to the residential address of the Ex-president and even he received summons did not file any memo stating he has no locus standi, but for present elected governing body and by showing the address of the registered office of the society somewhere and as wrongly sent and received by him, he participated by filing vakalath and later failed to file written statement. Thereby that will not cure the defect much less to say that is a mere irregularity in service of summons.

13. In fact it is the duty of the plaintiff as per Order 6 Rule 14A CPC to furnish the registered address, as per clause (4) and (5) of the address of the party where resides and where discovered incomplete, order for fresh summons, and else till furnishing of correct registered address to stay the suit proceedings, till furnishing of correct address; leave about Court got discretionary power even to order to some other address than what is mentioned also. Once such is the legal position with reference to the facts supra, *prima facie* the address shown of 13th defendant is not the

registered address of the 13th defendant for not the registered office address, nor even to the entity represented by the (present) President or Secretary of it as on date of suit to serve even at the residential address of that President or Secretary, in showing of such service to consider as mere irregularity. However the fact remains even summons not served duly and decree passed exparte, to set aside the same that to be sought it must be within 30 days from date of knowledge. Here is it believable that the 13th defendant has no knowledge including of the final decree proceedings pursuant to the preliminary decree dated 14.11.2005, filed the final decree application that was allowed after setting exparte including the 13th defendant from duly served, on 17.04.2007, and the exparte final decree was even dated 17.04.2007, the application filed to set aside the exparte preliminary decree and final decree respectively were on 26.06.2007. What is averred in the affidavit of the deponent who is the present President and even Ex-Secretary as on the date of suit apart from Ex-Secretary earlier, if any, he came to know of the exparte decree on 22.05.2007 only. He did not speak how the society came to know and what source on that date but for saying through its member, without even named as to who is said member that informed. In the suit O.S.No.21 of 2004 among the 13 defendants, it is not the 13th defendant alone but defendant Nos.8 to 12, third party defendants, leave about defendant Nos.1 to 7 who are mother, sisters and brother of the plaintiff and among them even defendant Nos.8 and 11 served and remained exparte.

14. Before answering further, it is important to consider the affidavit averments in seven Paras of the application to set aside

the final decree sought in I.A.No.233 of 2007. There is no whisper saying not served with summons in the final decree application what all stated in Paras 3 to 6 is only about taking summons to the name of Ex-President of the society despite there was already election and new body elected and the Ex-President engaged through advocate did not file written statement and remained exparte and defendant Nos.1 to 8 and 11 also remained exparte and suit against defendant Nos.9, 10 and 12 dismissed as not pressed in passing the exparte decree and in seeking to set aside the same. There is nothing in the affidavit as to what about the service of summons in the final decree petition. The lower Court also did not even refer the record as to which address the final decree petition summons were taken, to say to the address given in the plaint and preliminary decree of the entity and its representative as Pentaiah Yadav or to any other address leave about wrong mention if any of the representative once entity name is there if taken summons to the registered office of the entity. That is the crux to say once the summons in the final decree application were served there could be knowledge of the earlier exparte preliminary decree to file the application under Article 123 of the Limitation Act from that date of knowledge within 30 days that has to be explained failing which invariably an application to condone the delay in filing the application under Section 5 of the Limitation Act is mandatory in seeking to set aside the exparte preliminary and final decrees and what the lower Court in not deciding both the applications together having allowed the preliminary decree set aside application, consequently allowed the final decree set aside application, though it is not a mere

consequential to the other, for what is discussed supra, from setting aside the preliminary decree, final decree can also go. Once if it is within the knowledge, it can be deemed service of notice in final decree application that equally exists to have knowledge to count for 30 days time to seek to set aside the preliminary decree. That was not even pleaded in the affidavit petitions and not even properly considered by the lower Court.

15. No doubt the very plaint in O.S.No.21 of 2004, it is averred that plaintiff in claiming through his father who was joint owner along with defendant Nos.8 to 12 since his father's death succeeded that interest to continue in joint possession as owner along with defendant Nos.8 to 12 by plaintiff and defendant Nos.1 to 7, defendant Nos.1 to 12 are trying to alienate in favour of the 13th defendant who tries to interfere and they are not cooperating for partition, thereby his share is liable to be defined and divided. He did not speak about his father was shown as a co-executant of the sale deed of 1980 along with defendant Nos.8 to 12 in favour of 13th defendant. There is nothing on record even to attribute any knowledge to him, in the absence of which it is difficult for even to the trial Court to place on the expression of the Apex Court in S.P. Chengalvaraya Naidu Supra; for the reason there the plaintiff himself executed relinquishment deed relinquishing his undivided interest over the property and by suppressing the same maintained the suit. Here it is not the case much less not even shown from 1980 sale deed of the plaintiff is party to it along with his brothers, sisters and mother if any. It is unknown how the trial Court come to conclusion therefrom saying the facts are similar and applicable

to the case on hand despite the above. Thereby, the order of the lower Court on its face is unsustainable.

16. Further among the expressions placed reliance in the hearing of the revision petitions are, one is of the Division Bench of Allahabad High Court in **Lala Ajodhya Prasad Vs. Musammat Katori**². It was held therein that defendant Nos.1 to 5 were duly served with notice but did not appear and defendant Nos.6 and 7 also remained absent and the ordinary decree in accordance with Order XXXIV Rule 4 (mortgage preliminary decree) was drawn up and later 2 of the defendants applied to set aside the exparte decree alleging that they were not duly served with notice and decree holder applied to the Court in stating said Pitam and Musammat Katori, defendant Nos.6 and 7 shown as proforma parties for no relief sought against them by formally examined them from decree which had been passed in the case and trial Judge however without giving any reasons set aside the exparte decree and ordered whole case to be reopened and has not considered what the allegations are which he refers nor why the case deserves to be reopened nor the learned pleader who appears to the opposite party been able to enlighten on this point thereby held unfair under the circumstances to reopen the whole case at the instance of the persons who no longer in any way interest in the decision having been expressly exempted from decree and thereby set aside the order allowing to set aside the exparte decree. The other decision placed reliance is the single Judge expression of the Delhi High Court in **Smt. Santosh Chopra Vs. Teja Singh and**

² MANU/UP/0415/1921

Another³, which is on the ground that only a defendant in action can move application under Order 9 Rule 13 CPC and not by a person who is not a party, though he may be interested in the suit, is not entitled to apply. Even a person who is formally a party but against whom nothing is said in the operative portion of the decree, who has been expressly exempted from a decree cannot apply under this Rule to set aside the exparte decree.

17. Here from reading of the plaint, so far as 13th defendant concerned what is alleged is defendant Nos.1 to 12 are trying to alienate in favour of the 13th defendant and he is trying to interfere and defendant Nos.1 to 13 are not cooperating the plaintiff's demand for partition and thereby sought for partition with defendant Nos.1 to 12. There is no relief asked against 13th defendant practically. Even a preliminary decree passed or final decree passed by non participation of the defendant Nos.8 to 12 who remained exparte leave about defendant Nos.1 to 7 and even there is sale deed in favour of the 13th defendant in claiming as executed by father of plaintiff and defendant Nos.2 to 7 and husband of 1st defendant along with defendant Nos.8 to 12, that right is no way taken away by virtue of suit preliminary or final decree proceedings and it is left open to the 13th defendant and the members of it in claiming through to resist. It is to say by virtue of the 2 expressions supra once the 13th defendant is a proforma party it makes no difference of even not duly served or remained exparte, that no way takes away its independent right pursuant to 1980 sale deed to workout its rights therein, no doubt subject to

³ AIR 1977 Delhi 110

result of the lis covered by O.S.No.2980 of 2007, where the plaintiff with defendant Nos.1 to 7 herein sought for cancellation of sale deed and the suit was no doubt dismissed for default and restoration application ended in dismissal and the same is subject matter of revision.

18. Having regard to the above, the lower Court did not properly advert to these aspects of whether 13th defendant being a proforma party to the suit is even entitled to invoke Order 9 Rule 13 CPC to seek to set aside the exparte decree much less against all other defendants even. Apart from once knowledge of the final decree proceedings from not service deemed knowledge of the exparte preliminary decree if at all to seek for set aside within 30 days therefrom and if not within 30 days by the time the application filed it is barred by time and on its face for no application to condone the delay, it won't survive and it is only to be reflected from perusal of the record of the preliminary decree and final decree proceedings of the trial Court of the original summons etc., to decide and having regard to above the matter requires remand by setting aside the impugned orders allowing the applications setting aside the preliminary and final decrees and by retaining preliminary and final decrees in the meantime.

19. So far as the contention in support of the revision petitioners on the very maintainability of the revision petitions impugning the allowing of the exparte preliminary and final decrees and 13th defendant entity as revision respondent submits that the other defendants were not made parties to the revision petition by service of summons having endorsed among the 13

defendants of respondent Nos.2 to 13 who are defendant Nos.1 to 12 as not necessary parties and thereby the revision itself does not survive. In fact as observed supra, the order of the lower Court on its merits when no way sustain and having regard to above, there is nothing to give importance to that technicality in the factual scenario though otherwise even the defendant Nos.1 to 12 some of them remained exparte and against few of them not pressed by the plaintiff the suit in the trial Court in getting the preliminary and final decrees and once the entire preliminary and final decrees were set aside by the impugned orders notices must go to all of them. Here procedural law is handmaid and not mistress of justice and once the very order of the lower court is outcome of non application of mind and per se not sustainable, it is liable to set aside and be remanded by allowing the parties to correct the defects in the applications filed before the lower Court if at all required for ordering fresh notice by the lower Court on remand and restoration pursuant to the order supra.

20. The decision placed in this regard of this Court in **Kojjarapu Venkata Rao Vs. Rajapudi Nageswara Rao and Others⁴**, that in a suit where defendants were set exparte and application to set aside the exparte order passed under Rule 7 of Order 9 was dismissed and subsequently the exparte decree was passed and revision filed only against Order 9 Rule 7 application and not the subsequent passing of the Order 9 Rule 13 CPC exparte decree, without filing another revision also from the subsequent event, it no way survives. This decision has not

⁴ 1999 (5) ALD 478

application so far as the present facts on hand concerned from what is discussed supra.

21. From this now coming to the revision in C.R.P.No.820 of 2014, a perusal of the affidavit of the counsel for the 1st plaintiff among the 8 plaintiffs of the suit maintained against 27 defendants of whom the 6th defendant society represented by its President with address at Kukatpally as on the date of filing of suit of 2007 with registered office address at Kukatpally is contestant along with any other among defendant Nos.7,8 and 11 for 1 to 5, 9, 10, 12 to 27 remained exparte even before the lower Court and in the application to restore the suit, the lower Court permitted the application and no such objection is even raised on maintainability before the lower Court, the only thing to be considered is whether the principle laid down in Kojjarapu Venkata Rao Supra applicable to the facts on hand or not. In the said expression, at Para 18; a Single Judge of this Court laid down 4 guidelines which read as follows:

“18. Thus, the following principles would emerge from the decisions referred to above:

- (1) If an order or decree of the lower Court is carried in appeal or revision before the higher Court and any proceedings that takes place in the Subordinate Court pending appeal or revision, the proceedings of the lower Court shall be subject to the orders that may be passed by the High Courts.
- (2) That as on the date of filing the appeal or revision, if no proceeding are pending in the lower Court, the proceedings already passed by the lower Court shall continue to be effective until they are set aside by the competent Court.
- (3) The principle of law that certain orders and decrees which are subordinate and dependant upon earlier orders and decrees could only remain inforce so long as the orders or decrees on which they were dependant are not reversed or superseded will only apply if the impact on such subordinate and dependant orders are immediate and inevitable giving no scope for the Court except to pass these orders.

(4) Whether it is a subordinate and independent or consequential order depends on the nature of the order and the provisions under which the orders are passed. There cannot be general principle on this issue. Each case has to be decided on its own merits.”

22. In fact the guidelines Nos.2 and 3 as part of the principles emerge in deciding the lis as per the Single Judge of this Court are that, certain orders and decrees which are subordinate and dependant upon earlier orders and decrees could only remain inforce so long as the orders or decrees on which they were dependant are not reversed or superseded will only apply if the impact on such subordinate and dependant orders are immediate and inevitable giving no scope for the Court except to pass these orders. The very clause (3) as one of the 4 principles laid down itself if applied to the case on hand, the learned trial Judge having dismissed the application to restore the suit dismissed for default in I.A.No.1208 of 2013 on 25.10.2013 as not on bonafide grounds consequently and as a result of which dismissed the suit itself, it is because the conditional order to file chief affidavit of the 1st plaintiff and to pay costs not complied with, it is the time sought for extension of the conditional order was dismissed. Even as per Section 148 CPC amended by Amended Act 2002 one month can be granted therein and beyond it by Section 151 CPC Court can grant time even in conditional order passed that is not a be all and end of as also laid down by the Apex Court in reference to these provision in Salem Bar Association expressions 1 and 2 of the years 2002 & 2005.

23. In fact an order setting aside the exparte decree must be a reasoned order for the same being a judicial order if not supported by reasons is unsustainable as held by the Apex Court

in **Mahesh Yadav and Another Vs. Rajeshwar Singh and Others**⁵

and the impugned orders of the lower Court which are not by judicial application of mind and not with sustainable reasons it is as good as no tenable reasons and is liable to be set aside to remand therefrom also. Thus, once such is the case and the order dismissing the suit is only consequential one to the dismissal of the application for extension of time and extension of time to comply the conditional order and pay costs and file chief affidavit. In fact the medical certificate is clear of 1st petitioner/PW.1 is bed ridden and undergoing treatment in the clinic for lumbar spondilitis and it is the treatment in the hospital by panchakarma, kati basti and mati vasti from 20.10.2013 onwards and could not attend or the advocate to cause prepare the chief affidavit and appear and submit before the Court to state the facts thereon on oath to take the same as chief examination and once such is the cogent reason for the inability to attend, so also to pay the costs in compliance with the conditional order and sought for time, the lower Court should have been considered the granting of time and not by dismissal of the same without adverting to the material facts supra and by the laconic order without reasons even and without application of mind in passing said single line order as if there are no bonafide grounds; despite there are bonafide grounds mentioned in the medical certificate and in the supporting affidavit for saying why those are not reliable and despite it how to say still no bonafide grounds. Thereby that order of the lower Court is liable to be set aside and it requires remand to the lower Court for redetermination.

⁵ AIR 2009 SC 1064

24. Accordingly and in the result, all the three revision petitions are allowed by setting aside the impugned orders and the consequential order dismissing suit from dismissal of the application for extension of time since the application is restored and all the matters are remanded back to the lower Court for fresh disposal after ordering notice to all parties and after service and opportunity of hearing.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

Date: 29.09.2016
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JUSTICE Dr. B.SIVA SANKARA RAO

