

CIVIL REVISION PETITION No.2383 of 2016

ORDER:

This Civil Revision Petition under Article 227 of the Constitution of India is filed by the Revision Petitioner/Respondent No.2 challenging the Order in I.A.No.376 of 2012 in O.S.No.2207 of 2013 on the file of XX Junior Civil Judge, City Civil Court, Hyderabad, whereby the appellate Court reversed the Order and Decretal Order dt. 21.11.2012 passed by the trial Court in granting interim injunction in favour of revision Petitioner restraining the respondents herein from interfering with his possession and enjoyment over the suit schedule property by allowing Civil Miscellaneous Appeal No.49 of 2013.

2. Learned counsel for revision petitioner/plaintiff filed a suit O.S.No.2207 of 2012 on the file of XX Junior Civil Judge, City Civil Court, Hyderabad and filed an Interlocutory Application under Order 39 Rule 1 and 2 of CPC along with the suit, for grant of interim injunction restraining the respondents and their men from interfering with the suit schedule property during pendency of the suit.

3. The trial Court by its Order dt. 21.11.2011 granted temporary injunction in favour of revision petitioner restraining the respondents and their men from interfering with his possession and enjoyment over the schedule property.

4. Aggrieved by the Order and Decretal Order passed by the trial Court, the respondent No.1 in I.A. No.376 of 2012 preferred C.M.A.No.49 of 2013 on the file of X Additional Chief Judge, City Civil Court, Hyderabad and by its Order dt. 20.01.2016, X Additional Chief Judge's Court, City Civil Court, Hyderabad, allowed the appeal setting aside the Order and Decretal Order passed by the trial Court in I.A.No.376 of 2012 in O.S.No.2207 of 2012 on the file of XX Junior Civil Judge, City Civil Court, Hyderabad.

5. Aggrieved by the Order and Decretal Order, Respondent No.2 in

I.A.No.376 of 2012 preferred this Revision raising several contentions.

6. During hearing, Sri Mounis Abidi, learned counsel for Revision Petitioner would contend that the Appellate Court specifically recorded in para No.7 of the Order that:

“ when the matter is taken up for hearing, there is no representation from both the counsel and this CMA is pertaining to 2013 and the suit is 2012. On account of pending of this CMA and connected records, the trial Court is deprived of proceeding further in the suit. In the said circumstances, this Court has chosen to dispose of the case on merits basing on the available pleadings and documents on record”.

and Allowed the Civil Miscellaneous Petition, which is against the purport of the Order 41 Rule 17 (1) and explanation thereto of CPC. It is further contended that in the absence of the counsel for appellant or non-prosecution on his behalf, the only course left open for the Court is to dismiss the appeal for default and the same cannot be decided on merits.

7. It is further contended that the revision petitioner filed two I.A Nos. 107 and 108 of 2013 to cause production of passport and for personal appearance of respondent No.1 herein under Order 10 of CPC, but those applications were not considered by the appellate Court and decided the main Civil Miscellaneous Appeal on merits, which is contrary to under Order 41 Rule 17 (1) and Explanation thereto of CPC.

8. Learned counsel for revision petitioner placed reliance on ***Ghanshyam Dass Gupta v. Makhan Lal***^[1] in support of his contention.

9. Notices of respondent Nos. 1 and 2 were served in this Civil Revision Petition, but none appeared on their behalf.

10. As seen from the material on record and more particularly, the observations in para No.7 of Appellate Order in CMA No. 49 of 2013 that none appeared for the appellant and respondent despite listing the matter for hearing finally and the appellate Court while observing that CMA pertains to the year 2013 and the suit pertains to 2012 and on account of pendency of the CMA, the trial Court is unable to proceed with the trial of the suit and therefore it disposes of the appeal on merits. The disposal of the appeal on merits is totally contrary to Order under 41 Rule 17(1) and Explanation thereto of CPC. The Judgment of the Apex Court relied

on by the revision petitioner is directly on the issue in question, wherein it was held that for non appearance of appellant or non representation on his behalf on the date of hearing of appeal, the Courts can dismiss the appeal of appellants and cannot be decide and dismiss the appeal on merits. Therefore, the Order passed by the appellate Court is contrary to the procedure contemplated under Order 41 Rule 17 (1) of CPC.

11. Yet, learned counsel for the revision petitioner drawn the attention of this Court about filing of two petitions by him; (1) issue direction to the plaintiff/respondent No.1 herein to cause production of Passport and the other for his personal appearance. However, those two petitions were not disposed of by the appellate Court, but they were closed. When two petitions are filed before the appellate Court to cause production of Passport and for the appearance of the party are necessary to decide the real controversy between the parties, closer of two petitions without deciding the same on merits while deciding the appeal on merits is illegal on the face of the record.

12. The Appellate Court is supposed to know the procedure to be followed when the appellant was absent and could have followed the procedure prescribed under Order 41 Rule 17 (1) and proviso thereto of CPC while deciding the appeal, but the Court erroneously decided the main Appeal in over haste so as to enable the trial Court to proceed with the trial of the matter, which is a blatant infirmity in the order passed by the appellate Court.

13. Since two applications are closed without deciding on merits and decided the main appeal on merits, I find that it is a fit case to decide those two petitions and also decide the appeal afresh.

14. In the result, this Civil Revision Petition is allowed setting aside the Order and Decretal Order dt.20.01.2016 in C.M.A.No.49 of 2013 on the file of X Additional Chief Judge, City Civil Court, Hyderabad. C.M.A.No.49 of 2013 on the file of X Additional Chief Judge, City Civil Court, Hyderabad, is restored to its file. The Appellate court is directed to decide I.A.Nos.107 of 2013 and 108 of 2013 afresh and thereafter decide the appeal in accordance with law either on merits or by following the procedure under Order 41 Rule 17(1) and Explanation thereto of

CPC, in case the respondents therein did not appear and represent the matter either in person or through their counsel. On receipt of the Order of this Court, the Appellate Court is directed to issue notices to both parties fixing date for hearing of the appeal along with I.A. Nos.107 of 2013 and 108 of 2013 and dispose of the same in accordance with law.

As a sequel, miscellaneous petitions, if any, pending in this case, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 16-08-2016

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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Dt. 16-08-2016

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[\[1\]](#) (2012) 8 SCC 745