

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.2253 of 2016

ORDER:

This Civil Revision Petition under Article 227 of the Constitution of India by the unsuccessful 1st defendant in O.S.no.114 of 2011 is directed against the orders, dated 31.03.2016, of the learned Principal Senior Civil Judge, Mahabubnagar, passed in I.A.no.221 of 2016 filed under Order IX Rule 7 of the Code of Civil Procedure, 1908, ('the Code', for brevity) for setting aside the *ex parte* order (*sic* decree) dated 11.07.2012 passed against him in the said suit.

2. I have heard the submissions of the learned counsel for the revision petitioner/ 1st defendant and the learned counsel for the 1st respondent/plaintiff. I have perused the material record. The parties shall hereinafter be referred to as 'the plaintiff' and 'the defendants' for convenience and clarity.

3. The facts, which are required to be stated as a prelude to this order, in brief, are as follows:

The plaintiff brought the suit against the defendants 1 and 2 for recovery of money on the foot of a promissory note. The defendants having entered appearance filed a common written statement *inter alia* pleading that the entire amount due to the plaintiff was repaid and that therefore no further amount is due and payable to the plaintiff. Taking into consideration the pleadings of the parties, the trial Court framed issues. On behalf of the plaintiff Corporation its representative filed his affidavit in lieu of his examination-in-chief and exhibited documents in support of its case. Later, as the defendants failed to appear before the trial Court, the suit was decreed *ex parte* on 11.07.2012. Thereafter, the 2nd defendnat/ 2nd respondent herein alone filed I.A.no.964 of 2012 for setting aside the *ex parte* decree. The Court

below, by orders dated 18.09.2013, allowed the said petition filed by the 2nd defendant and set aside the *ex parte* decree in entirety, that is, against both the defendants 1 and 2. Later, when the suit is coming for cross-examination of PW1, the trial Court refused to consider the request of the 1st defendant/revision petitioner to cross-examine PW1 as he did not file any application to set aside the *ex parte* decree or the *ex parte* order passed in the suit. Therefore, the 1st defendant was compelled to file the instant application in I.A.no.221 of 2016 for setting aside the *ex parte* decree passed against him in the suit. That application was resisted by the plaintiff. The trial Court by the orders impugned in this revision dismissed the said petition *inter alia* observing that the petition is filed to drag on the proceedings and that the 1st defendant's contentions in the affidavit filed in support of the petition cannot be countenanced as the defendants filed a common written statement and the 2nd defendant is contesting the suit. Aggrieved of the said orders, the 1st defendant had filed this revision.

4. It is an admitted fact that after both the defendants filed a common written statement, they were set *ex parte* on 11.07.2012 for their non-appearance before the trial Court. It is also undisputed that the 2nd defendant earlier filed I.A.No.964 of 2012 under Order IX rule 13 of the Code requesting to set aside the *ex parte* decree passed in the suit. It is trite to note that while allowing the said petition, by order dated 18.09.2013, the Court below set aside the *ex parte* decree in entirety, that is, against both the defendants though the application is filed by the 2nd defendant alone. The operative portion of the said order reads as under:

“In the result, the petition is allowed and the *ex parte* decree passed against the petitioner/defendant No.2 so also against the respondent/defendant No.1 dated 11-7-2012 is hereby set aside subject to condition that the petitioner/defendant No.2 shall furnish security for 1/4th of suit amount by 11-10-2013 and also shall cross-examine PW1 on the date of his presence and shall also complete his side of evidence without much

delay. Failure to comply any of the conditions the petition shall stand dismissed.”

[Reproduced verbatim]

5. Thus, the *ex parte* decree was set aside in its entirety. Therefore, there was no need under facts and in law for the 1st defendant to again file an application seeking to set aside the *ex parte* decree. In this context, it is necessary to note that the 1st proviso to Order IX Rule 13 of the Code provides that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also. Therefore, the trial Court in its discretion had set aside the *ex parte* decree in its entirety against the defendants 1 and 2 though the application seeking to set aside the *ex parte* decree was filed by the 2nd defendant alone. In that view of the matter, when the *ex parte* decree was set aside in its entirety, the 1st defendant is also entitled to participate in the trial proceedings as the *ex parte* decree passed was set aside against him also. Therefore, the trial Court was in error in not permitting the 1st defendant to cross-examine PW1 and in not allowing the 1st defendant to participate in the trial proceedings and in insisting upon the 1st defendant to file a petition to set aside the *ex parte* decree passed in the suit. Therefore, the trial Court in the first place ought not to have insisted upon the 1st defendant to file a petition to set aside the *ex parte* decree passed in the suit and ought not to have dismissed the application, when filed as per its directions. Viewed thus, this Court finds that the order impugned in this revision is liable to be set aside.

6. In the result, the Civil Revision Petition is allowed. In view of the fact that the *ex parte* decree was set aside in its entirety against both the defendants on the application filed by the 2nd defendant and as the law entitles the 1st defendant to participate in the trial proceedings, there is no need to allow the application in I.A.No.221 of 2016 as the 1st defendant even without filing any further application has a right to participate in the trial proceedings,

once the *ex parte* decree was set aside in its entirety. In that view of the matter it is needless to state that the trial Court shall permit the 1st defendant to participate in the trial proceedings and also give liberty to the 1st defendant to recall the witnesses already examined on behalf of the plaintiff and cross-examine them, if he so desires, and also to adduce evidence on his side in the suit. No costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

02nd September, 2016
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