

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Revision Petition No.2165 of 2015
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ORDER:

This revision under Article 227 of the Constitution of India by the 1st respondent/plaintiff is directed against the orders dated 16.04.2015 of the learned II Additional Chief Judge, City Civil Court, Hyderabad passed in IA.no.508 of 2015 in OP.no.127 of 2013 filed by the 5th defendant under Order IX Rule 7 read with Section 151 of the Code of Civil Procedure, 1908 requesting to set aside the ex parte order dated 28.10.2014 passed in the suit in the interests of justice.

2. I have heard the submissions of the learned counsel for the revision petitioner/plaintiff ('the plaintiff', for brevity) and the learned counsel for the 1st respondent/5th defendant ('the 5th defendant', for brevity). Respondents 2 to 8 are stated to be not necessary parties. I have perused the material record.

3. The case of the 5th defendant in support of its request aforementioned, in brief, is this:

The 5th defendant is a Society. The deponent of the affidavit filed in support of the petition of the 5th defendant is its Secretary and authorized signatory. The suit is filed by the plaintiff against the defendants for a declaration to declare the auction conducted by the learned XI Additional Chief Judge in EP.no.3 of 2004 is null and void and for other reliefs. The 5th defendant instructed its counsel to enter appearance. However, the Secretary, due to ill health and old age and as he was confined to bed for many months, was not in a position to give instructions to the counsel for drafting the written statement. Thus, for

not filing written statement, the 5th defendant was set *ex parte*. Further, the 5th defendant had to collect information regarding the transaction as it had purchased the property from the defendants 1 to 4. In view of the said facts, that is, ill health, advanced age and the necessity of collating the required information, the 5th defendant was unable to instruct the counsel for drafting the written statement. Because of non filing of the written statement, the Court below was pleased to set the 5th defendant *ex parte* on 28.10.2014; and, as the other defendants are not contesting the suit, the Court below had posted the matter to 04.12.2014 for judgment, after recording the evidence of PW1. On 10.12.2014, upon being informed by the counsel about the fact that the matter is reserved for judgment, the Secretary of the 5th defendant, despite his ill-health, had immediately rushed to the counsel and got filed the necessary application to set aside the *ex parte* order. The non filing of the written statement on 28.10.2014 is only for the above said *bona fide* reasons and not on account of either wilful or wanton reasons. The 5th defendant is a *bona fide* purchaser for value. The vendors of the 5th defendant in their turn had purchased the property in a Court auction. The 5th defendant has got a good case to defend the suit.

4. The case of the plaintiff as stated in detail, in the counter, in brief, is as follows:

The defendants 1 to 4 entered appearance on 08.07.2013 through their counsel Sri M. Jeevan Reddy. In spite of extension of time for filing the written statements, they did not file their written statements. Sri

A. Venkatesh, advocate filed vakalat for the 5th defendant. The 5th defendant had also not filed its written statement within the time allowed under law. Finally, time was granted till 08.10.2014 for filing written statements. Again time was granted till 20.10.2014 and thereafter till 28.10.2014 on payment of costs of Rs.200/- by each defendant. The

defendants 1 to 4 have paid costs but they did not file their written statements. The 5th defendant did not pay the costs and had also failed to file the written statement. Therefore, all the defendants were set *ex parte* on 28.10.2014. The suit was posted for *ex parte* evidence on 10.11.2014. However, the evidence of plaintiff was recorded on 04.12.2014 and documents were exhibited; and, the suit was posted to 10.12.2014 for judgment. On that day written arguments on behalf of the plaintiff were filed and the suit was posted to 24.12.2014. Thereafter the suit was adjourned to 05.02.2015. In the affidavit, it is vaguely stated by the Secretary that because of his old age he was confined to bed for many months. The said contention is not supported by medical reports. The period of sickness is also not specifically mentioned. Earlier the plaintiff filed a writ petition for declaration of auction sale as null and void and to that WP(SR).no.112582 of 2009, the 5th defendant is a party. Therefore, the ground that the written statement was not filed as he was collating material facts regarding the suit property is invented. The 5th defendant was not diligent and careful in prosecuting the defence. By playing fraud, the defendants 1 to 4 brought the subject house property to sale in EP.no.3 of 2004 in OS.no.268 of 2001 though the suit house belongs to G. V. Subba Rao, the grandfather of the plaintiff and the judgment debtors in the said suit/EP have no ownership or marketable title to the suit house. No bidders had appeared inspite of publication of the sale proclamation twice in newspapers. The defendants 1 to 4 purchased the property on 08.12.2005 in a court auction sale for Rs.70.00 lakhs and had obtained the sale certificates. They had immediately sold the suit house to the 5th defendant on 10.08.2006 for Rs.36.00 lakhs. The 5th defendant is not a *bona fide* purchaser. Since the 5th defendant is careless and negligent the *ex parte* order cannot be set aside. The suit is liable to be decreed at once.

5. At the time of enquiry before the trial Court, no oral and documentary evidence was adduced. On merits and by the order impugned in this revision, the trial court had allowed the petition on costs of Rs.500/- payable to the other side on or before 28.04.2015. Aggrieved of the said orders, the plaintiff is before this Court.

6. The case pleaded in the grounds of revision, in brief, is as follows:

The order of the court below is contrary to facts and law. The court below did not properly appreciate the contentions in the counter and erred in allowing the application of the 5th defendant and in setting aside the *ex parte* order. The affidavit filed on behalf of the 5th defendant is vague and does not contain any material particulars. The 5th defendant having entered appearance through its counsel had failed to file its written statement. The court below ought to have seen that for filing the written statement of the 5th defendant, the matter was adjourned on day costs of Rs.200/- and the said fact is evident from the order dated 28.10.2014 recorded in the proceeding sheet. Even the said costs were not paid. The 5th defendant does not deserve any sympathy. The impugned order suffers from material irregularities and the order is not a well reasoned order. The plea of sickness taken by the 5th defendant is not supported by medical record. The court below ought to have seen that the 5th defendant is negligent and careless in not prosecuting the defence and in not filing the written statement within the time allowed under law or within the extended time.

7. While reiterating the case pleaded in the counter of the plaintiff and the grounds of revision, the learned counsel for the plaintiff would further submit as follows: "Since the day costs of Rs.200/- which are imposed while extending time for filing written statement were not paid,

the Court below refused to entertain the petition filed by the 5th defendant for setting aside the *ex parte* order and returned the petition. Then, the 5th defendant without paying the costs to the plaintiff or his counsel, had re-presented the said petition filed by stating that the costs are paid; in fact the costs were paid to the District Legal Services Authority and not to the plaintiff and thus, a misrepresentation was made to the court at the time of numbering of the said application. Though the application was allowed on costs of Rs.500/- the said costs were not paid. Though a memo was filed on 28.04.2015 before the trial Court that costs as per the directions in the orders impugned in this revision are paid to the counsel for the plaintiff, no such costs are paid; the endorsement on the memo said to have been made by Sri V. Srikanth Rao, advocate for Sri C. Ramesh Sagar, advocate for the plaintiff is indeed not made by the said advocate and it is a false endorsement made by somebody and not by V. Srikanth, advocate, who is the colleague of Sri C. Ramesh Sagar, advocate for the plaintiff. Thus, the signature of the said Sri V. Srikanth Rao, advocate on the memo filed by the 5th defendant before the trial court on 28.04.2015 reporting that costs as imposed in the orders, which are impugned in this revision, are paid is a forged signature and the endorsement is a false endorsement. Since the 5th defendant had played fraud on the court at two stages, it does not deserve any sympathy and the order is liable to be set aside.”

8. On the other hand, the learned counsel for the 5th defendant while supporting the orders of the court below would submit as follows:

The suit is still pending before the trial court. The property which was sold in a Court auction was purchased by the vendors of the 5th defendant, that is, the defendants 1 to 4; they in their turn had sold the property to the 5th defendant. The 5th defendant is a *bona fide* purchaser. In the instant suit, the cancellation of the Court auction sale

is being sought by the plaintiff. Therefore, valuable rights in regard to immovable property are involved. The trial Court by setting aside the *ex parte* order gave an opportunity to file written statement and contest the suit. The said well reasoned order does not warrant interference. In the counter filed by the plaintiff before the trial court the issue in regard to the payment of day costs of Rs.200/-, which are imposed while extending the time for filing written statement, is not raised. Further, the issue in regard to non-payment of costs of Rs.500/-, which are imposed while setting aside the *ex parte* order, is not raised even in the grounds of revision. The first contention in regard to day costs of Rs.200/- is not raised in the counter, but is raised in the grounds of revision; and, the second contention in regard to non payment of Rs.500/-, which are imposed in the orders impugned, is not raised in the grounds, but, is only raised at the time of hearing. Therefore, the said contentions are untenable. The costs of Rs.500/- are paid to the advocate of the plaintiff, who signed on the Vakalat for the plaintiff. When costs are paid, the counsel for the 5th defendant did not ensure about the identity of the advocate who had received the costs and the costs are paid as per practice. This court need not now enquire into the correctness of the endorsement on the memo dated 28.4.2015 filed before the trial court on behalf of the 5th defendant whereby it is reported to the trial Court that costs are paid to the counsel for the plaintiff. This Court can confirm the order of the Court below and leave that aspect to be decided by the Court below, if necessary. The revision is devoid of merit and is liable for dismissal.

9. I have given earnest consideration to the facts and the submissions. The trial Court, when the suit is at the stage of rendering *ex parte* judgment, had allowed the application filed by the 5th defendant to set aside the *ex parte* order and permitted it to file written statement and contest the suit on merits. Having regard to the facts and the

reasons assigned by the Court below in its order, this Court normally would have straight away confirmed the order of the Court below without much ado. However, in the instant case, there are two peculiar aspects which need to be addressed to. In the first place, the trial Court while finally extending time for filing of the written statement of the 5th defendant had imposed day costs of Rs.200/- payable by the 5th defendant to the plaintiff. On non payment of such costs and failure to file the written statement, the 5th defendant was set *ex parte*. When the application for setting aside the *ex parte* order is filed, the trial Court returned that application stating that the said costs are not paid. Instead of paying the costs to the plaintiff or his counsel, the petition was re-presented stating that the costs are paid. In fact, costs are paid to the local Legal Services Authority and not to the plaintiff. Thus, an incorrect representation was made on behalf of the 5th defendant and the petition filed for setting aside the *ex parte* order was got numbered. Though this contention in regard to non payment of costs was not taken in the counter of the plaintiff, this contention was taken in the grounds of revision. Since this is a serious matter related to wrong representation made before the trial Court, the said contention has its own force and deserves consideration. Secondly the application filed for setting aside the *ex parte* order was allowed and the *ex parte* order was set aside subject to payment of costs of Rs.500/-. There is a dispute in regard to payment of the said costs. The 5th defendant filed a memo before the trial Court reporting that the said costs as imposed in the impugned order were paid. That memo contains an endorsement said to have been signed by an advocate by name V. Srikanth Rao, who is a colleague of the counsel for the plaintiff. It is submitted before this Court that the signature on the endorsement on the said memo is not that of the said advocate and that the costs of Rs.500/- are not paid either to the plaintiff or his counsel and that on behalf of the 5th defendant a false

representation was made that costs are paid to the plaintiff. In reply, the learned counsel for the 5th defendant submitted that the costs are paid to the plaintiff's counsel and that at the time of payment of costs, no attempt to ensure the identity of the advocate was made and that costs are paid as per practice. In fact, while raising this contention before this Court for the first time, the affidavit of Sri V. Srikanth Rao, advocate is also filed asserting the fact that the signature appearing on the said memo does not belong to him and that the endorsement is not written by him. Even then, an affidavit of the counsel who paid the costs or of the Secretary of the 5th defendant society is not filed to assert the defence of the 5th defendant in this regard. Even though this contention is also raised for the first time before this Court, it relates to an incorrect representation made to the trial Court. Therefore, this contention also requires consideration. Thus, neither the day costs of Rs.200/- nor the costs of Rs.500/- imposed in the orders impugned are paid to the plaintiff. However, the fact remains that the day costs were paid to the Legal Services Authority and the costs of Rs.500/- are paid to some advocate without ensuring whether he is the proper advocate or not. Therefore, the mistake appears to be that of the counsel. Hence, for either the negligence of the counsel or his mistake, the 5th defendant society cannot be penalised and an opportunity to contest the suit involving a valuable immovable property cannot be denied to the 5th defendant, in the well considered view of this Court. However, to compensate the hardship and offset the loss that is caused to the plaintiff, it is just and fair to impose costs while confirming the orders of the Court below impugned in this revision.

10. Viewed thus, this Court finds that the order impugned can be confirmed subject to the condition that the 5th defendant shall pay Rs.20,000/- as penal costs to the plaintiff through the learned counsel Sri C. Ramesh Sagar by way of Banker's cheque or demand draft drawn in

favour of the said learned advocate on or before 15.07.2016. It is needless to state that on failure of the 5th defendant to so pay the said costs, the order of the Court below impugned in this revision shall stand set aside and as a sequel, IA.no.508 of 2015 in OS.no.127 of 2013 on the file of the trial Court shall stand dismissed.

11. The Civil Revision Petition is disposed of accordingly.

There shall be no order as to costs.

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

M. SEETHARAMA MURTI, J

27th June 2016

Note: Issue CC by 01.07.2016

(B/o)

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