

**THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**CIVIL REVISION PETITION NO.2820 OF 2016**

**ORDER:**

This civil revision petition is filed challenging the order passed by the XI Junior Civil Judge (FAC I Junior Civil Judge), City Civil Court at Secunderabad dated 22.02.2016 in I.A.No.92 of 2016 in O.S.No.231 of 2013 whereby, the petition filed under Order IX Rule 13 read with Section 151 C.P.C. was allowed setting aside the *ex parte* decree dated 14.12.2013 while permitting the petitioner to file his written statement to defend the suit.

The petitioner herein is the first respondent before the Trial Court and the other respondents herein are the respondents.2 to 4 before the Trial Court.

For the sake of convenience, the ranks given to the parties in I.A.No.92 of 2016 in O.S.No.232 of 2013 will be adopted throughout the judgment.

The petitioner before the Trial Court (first respondent herein) filed petition under Order IX Rule 13 read with Section 151 C.P.C. to set-aside the *ex parte* decree dated 04.12.2013 permitting the petitioner to file written statement to defend the suit. It is alleged that the first respondent filed suit for eviction, recovery of arrears of rents and mesne profits and the suit was posted to 06.11.2013 for filing written statement by the petitioner. As the petitioner was suffering from Lumbago and Left Sciatica, since 01.11.2013, he could not file his written statement, since he was advised to take

complete bed rest and thereby, he could not instruct his counsel to prepare written statement and file it. As the petitioner failed to file his written statement on 06.11.2013, he was set *ex parte* and posted the suit for plaintiffs evidence and later, on 04.12.2013, recording the plaintiffs evidence, the suit was decreed.

The petitioner after recovery from his illness, contacted his counsel on 25.04.2014 and enquired about the fate of the case and in-turn he was informed that an *ex parte* decree was passed on 04.12.2013 and on 25.04.2014 the petitioner received notices of execution proceeding filed by the first respondent for petitioner's eviction. Immediately, the petitioner filed petition before the Court under Section 5 of the Limitation Act to condone delay of 115 days and to set-aside the *ex parte* decree dated 04.12.2013 thereby permit the petitioner to file his written statement.

The respondent filed counter affidavit denying material allegations and contended that the petitioner was afforded sufficient opportunity to file his written statement and to contest the matter. It was also contended that even the junior counsel representing the petitioner sought time on many occasions and on no occasion the reason of petitioner's ill health was ever cited. Further, the junior counsel refused to cross-examine the witnesses and examine D.W.1 during Trial and that the medical certificate produced by the petitioner does not disclose the factum of advise to take bed rest and that the delay was not explained, thereby

there is no cause, much less, sufficient cause to set aside the *ex parte* decree.

Upon hearing argument of both the counsel, the Trial Court allowed I.A.No.340 of 2014 by order dated 27.01.2016 filed under Section 5 of the Limitation Act, accepting the reason for his failure to appear before the Court. Further, the Trial Court set aside the *ex parte* order passed while permitting the petitioner to file written statement on payment of costs of Rs.1,000/- to the first respondent.

Aggrieved by the order passed by the Trial Court, the present civil revision petition under Article 227 of the Constitution of India is filed challenging the order on various grounds, mainly contending that, in the petition filed under Order IX Rule 13, permission to file written statement cannot be granted and that the Trial Court passed an order exceeding its limits and beyond the scope of Order IX Rule 13 and in such a case, this Court can set-aside the impugned order passed by the Trial Court.

During hearing, learned counsel for the revision petitioner Sri Zeeshan Adnan Mahmood would contend that the outer limit time prescribed under Order VIII Rule 1 of C.P.C is 90 days and the Trial Court has not accepted to grant time beyond 90 days, therefore in a petition filed under Order IX Rule 13, leave of this Court to file a written statement cannot be granted, in support of his contention he places reliance on the judgment of the Apex

Court in **New India Assurance Co. Ltd v. Hilli Multipurpose Cold Storage Pvt Ltd<sup>1</sup>**.

Learned counsel further contended that the Court may set-aside the *ex parte* decree by exercising discretionary power under Order IX Rule 13 and only in certain circumstances and not in a routine manner, more particularly, when no notice was served on the petitioner/defendant or where he had no sufficient time to appear before the Court after receiving notice or summons from the Court. But, in the present case, he appeared before the Court and contested the matter for some time, thereby, he is disentitled to file petition, in view of the principle laid down in **Nilkanta Sidramappa Ningashetti v. Kashinath Somanna Ningashetti and others<sup>2</sup>** and **Sunil Poddar and others v. Union Bank of India<sup>3</sup>** and finally requested this Court to set-aside the impugned order passed by the Trial Court confirming the *ex parte* decree passed against petitioner (respondent herein)

Per contra, learned counsel for the respondent Sri Venkatesh Deshpande contended that, when delay condonation petition was allowed believing the reason explained for his non-appearance before the Trial Court which attained finality and when same cause is shown in the present petition, the petition cannot be dismissed, in view of the principle laid down in **V. Haritha and another v. Kapil Chit Funds<sup>4</sup>**. He also contended that the decree even if

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<sup>1</sup> 2013 AIR (SC) 86

<sup>2</sup> AIR 1962 SUPREME COURT 666(1)

<sup>3</sup> (2008) 2 SUPREME COURT CASES 326

<sup>4</sup> 2004 (2) ALD 817

passed under Order VIII Rule 10 of C.P.C for non filing of written statement, it is only an *ex parte* decree within the meaning of limits of Order IX Rule 13 and therefore, the petition is maintainable in view of the law declared by Kerala High Court in **M/s M. Manick Peter and others v. K. Surendranathan**<sup>5</sup>.

Learned counsel for the respondent further drawn attention of this Court that two reliefs cannot be claimed in view of the bar under Rule 55 of the Civil Rules of Practice, the Court has to follow necessary procedure, but when such petition is filed and entertained by the Court, the Court cannot dismiss the petition, in view of the law declared by this Court in **Kavali Narayana and others v. Kavali Chennamma**<sup>6</sup> and supported the order passed by the Trial Court in all respects.

Considering the rival contentions and perusing the material available on record, the point that arose for consideration is:

***Whether the Court can grant permission to file written statement in a petition filed under Order IX Rule 13 to set aside the ex parte decree, if any, whether the order passed by the Trial Court under challenge is sustainable.***

**In Re Point:**

Admittedly, the first respondent before the Trial Court/revision petitioner herein filed suit for eviction, recovery of arrears of rents and *mesne* profits. Settling the petitioner/first

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<sup>5</sup> AIR 1988 KERALA 161 (1)

<sup>6</sup> 2005 (1) ALD 672

respondent herein as *ex parte*, during the pendency of the matter, several adjournments were granted and finally the matter was posted on 06.11.2013, for filing written statement by the petitioner. But, due to ill-health, the petitioner/the first respondent herein, he could not contact his advocate and file written statement before the Court. Therefore, he was set *ex parte*, forfeiting his right to file written statement and posted the matter for plaintiff's evidence and an *ex parte* decree was passed on 04.12.2013.

No doubt, the reason for passing an *ex parte* decree was failure of the petitioner to file written statement within the time frame, under Order VIII Rule 1 read with Rule 10 of C.P.C, and the period fixed for filing written statement is 30 days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than 90 days from the date of service of summons. Thus, the outer limit of filing written statement is 90 days even by granting adjournments, after service of notice or summons, the Court has to record reasons for such extension of time in writing. But, the petitioner/first respondent herein did not file his written statement within time frame fixed by the Court and maintained silence for nearly four months and allowed the Trial Court to pass a decree and thereafter, he leisurely approached the Court with a petition to condone the delay of 115 days under Section 5 of the Limitation Act to set-aside the *ex parte* decree passed by the Trial

Court under Order IX Rule 13 with a reason of ill-health, seeking leave of the Court to file written statement. Thus, the petitioner claimed two reliefs in I.A.No.92 of 2016 i.e one is to set-aside the *ex parte* decree and the other is to grant leave to file written statement.

Order IX Rule 13 is totally on different footing, which enables the Court to set aside decree passed *ex parte*, passed filed against the defendant. Order IX deals with appearance of parties and consequence of non-appearance, but Order VIII deals with filing of written statement, set-off and counter claim and consequence thereto. Therefore, there is some direct link between Order VIII and Order IX, since, failure to file written statement under Order VIII Rule 1 leads to consequence contemplated under Rule 10 where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up. Therefore, the ensuing consequence for failure to file written statement is passing an *ex parte* decree which can be set aside by an application under Order IX Rule 13. However, two applications are required to be filed by the petitioner, in view of the bar contained under Rule 55 of the A.P. Civil Rules of Practice, but a similar question came up before this Court in **Kavali Narayana's** case (referred supra), where this Court

expressed a view that Rule 55 of the Civil Rules of Practice mandates that separate application for each distinct prayer shall have to be filed. If several reliefs are claimed in the same application, the Court may direct the applicant to restrict it to one such relief. An exception to this mandate is where one relief claimed in that application is consequential to the other. From a reading of Rule 55 of Civil Rules of Practice, it is evident that filing of individual application for separate reliefs is not a universal principle. Much would depend on the nature of reliefs. In the matter of filing of applications, either Rule 9 or 13 of Order IX C.P.C, condonation of delay, whenever such applications are filed beyond the stipulated period of limitation, is interconnected to the main relief, namely to set aside the order dismissing the suit for default or to set aside the *ex parte* decree. In many cases, the grounds, which are found to be sufficient for condonation of delay, are treated as holding good for the other or consequential relief to set aside the orders dismissing the suit for default or an *ex parte* decree. These two reliefs are so interconnected with each other that one cannot exist in the absence of the other. Thus, the Court can permit filing of one application, if one of the reliefs is consequential to the main relief. If the principle laid down in the above judgment is applied to the present facts of the case, the two reliefs prayed if consequential, in the petition cannot be found fault, but granting leave to the petitioner/the first respondent herein is not consequential to setting-aside the *ex parte* decree, because the

defendant even without filing written statement can participate in Trial.

If, the petitioner intends to file written statement, he can file a petition under Order VIII Rule 1 read with Rule 10 of C.P.C, while seeking relief to set-aside the order forfeiting the right of the petitioner to file a written statement. But, instead of filing such application, the petitioner filed a single application to set aside the *ex parte* decree and to grant leave to file written statement. Since, filing written statement is not a consequence, the same cannot be accepted in a petition seeking two reliefs and the same is not maintainable, in view of the bar contained under Rule 55 of the A.P. Civil Rules of Practice.

In a judgment reported in **S.V.Krishna Reddy v S.Mariam Bee and others**<sup>7</sup>, this Court held in similar situation that the petition for two reliefs is not maintainable.

In the facts of the above decision, the petition under Order 1, Rule 10(4), Order 6, Rule 17 of CPC and Rule 28 of A.P. Civil Rules of Practice was filed, dealing with respondents whom petitioner seeks to implead as necessary parties for adjudication of all questions relating to sale of property by 1<sup>st</sup> respondent and sought amendment of the plaint impleading defendants 2 to 4. So as to join them as parties to the execution along with 1<sup>st</sup> defendant, introducing new cause of action which amendment can be sought only on separate application under Order 6, Rule 17 of CPC.

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<sup>7</sup> 1993(3) ALT page 44

A similar question came up before this Court on **Massarath Yasmeen v. Mohammed Azeemuddin and another**<sup>8</sup> wherein this Court discussed the scope of separate application for each distinct prayer and the Court held that if relief is separate and distinct, two separate applications be filed under Rule 55. When one relief is ancillary to main relief or interconnected to main relief, two prayers can be asked for, in one petition. Even if two separate applications are necessary Court may direct party to file two applications and the Court cannot dismiss the petition on such technical ground.

In **S. Sekhar Babu v. Y. Ramakrishna Reddy and another**<sup>9</sup> this Court held that separate applications for distinct prayers are mandatory unless the reliefs are consequential and an application to set aside *ex parte* decree is not maintainable with two prayers i.e one for condonation of delay in filing the said application and the other to set aside the *ex parte* decree, as they are two distinct prayers, two applications be filed under Rule 55 of the Rules. The Court further held that, when only one application made with prayers to condone delay and set aside *ex parte* decree without filing separate application for condonation delay, unless delay is condoned, petition for setting aside of *ex parte* decree cannot be entertained. Both are distinct reliefs. Filing of one application is contrary to Rule 55 of the Rules and allowing of one application made by defendants by Court below is erroneous and such an

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<sup>8</sup> 2011 (6) ALT 202

<sup>9</sup> 2008 (1) ALT 475

order passed by Trial Court by misapplying the law laid down by High Court in a decision and without keeping in view Rule 55 of the Rules.

However, it is for the Court to take such objection at the initial stage and give an option to restrict anyone of the reliefs. But, the Trial Court did not apply its mind properly and did not raise such objection.

Even assuming for a moment that the petitioner is entitled to claim two reliefs in one petition, by applying the principle laid down in **Kavali Narayana's** case (referred supra), there are certain restrictions in exercise of power to the grant of leave to file written statement, though, the decree passed under Order VIII Rule 10 is an *ex parte* decree within the meaning of Order IX Rule 13, as held by the Kerala High Court in **M/s M. Manick Peter's** case (referred supra).

Learned counsel for the revision petitioner mainly relied on the full bench judgment of the Apex Court reported in **New India Assurance Co. Ltd** case (referred supra), wherein the Apex Court in paragraph 16 of the judgment held that under Order VIII Rule 1 of C.P.C, there is a legislative mandate that written statement of defence is to be filed within 30 days. However, if there is a failure to file such written statement within the stipulated time, the Court can at the most extend further period of 60 days and no more. Under the Consumer Protection Act, the legislative intent is not to give 90 days of time but only maximum 45 days for filing the

version of the opposite party. Therefore the aforesaid mandate is required to be strictly adhered to.

In view of the principles laid down in the judgment of the Apex Court referred supra, the Court has to record reasons for granting such leave. But, in the present case, the Trial Court did not even advert to Order VIII Rule 1 and 10 while granting leave and consequences flow from such forfeiture to file a written statement under Order VIII Rule 10, but granted leave in a most routine manner and the approach of the Trial Court is contrary to the principles laid down by the Apex Court which are referred supra. Therefore, the leave granted by the Trial Court to file written statement to the petitioner is erroneous on the face of record and by applying the principles laid down by the Apex Court, this Court can safely conclude that the petitioner is not entitled to file written statement without seeking leave by this Court, explaining the reasons for his failure for filing of written statement after 90 days, which is the outer limit prescribed by amended provision of C.P.C.

One of the major contentions of the learned counsel for the petitioner/first respondent is that, an *ex parte* decree can be set-aside only in certain circumstances when no notices or summons were served or when the defendant had no time to appear before the Court after receiving summons or notices. But when summons were served in advance and appeared through an advocate and sought time to file written statement in the Trial Court, the question of non-service of summons prior to the date of hearing

etcetera, would not arise and the Court cannot set-aside the *ex parte* decree. To support his contention, he places reliance on the judgment of the Apex Court in **Nilkanta Sidramappa Ningashetti's** case (referred supra), wherein, the Apex Court while deciding a matter pertaining to Arbitration Act, discussed about service of notice required in the arbitration application, but that is not much relevant in the present case.

But, in **Sunil Poddar's** case (referred supra), the Apex Court held that, when an *ex parte* decree is to be set-aside, the petitioner has to prove non-service of summons and non-availability of time and held in paragraphs 23 & 27 of the judgment as follows:

*"23. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code. Since the said provision applies to Debt Recovery Tribunals and Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before the DRT, they had no sufficient time to appear and answer the claim of the plaintiff-bank and on that ground, ex parte order deserves to be set aside.*

*27. Finally, we are exercising discretionary and equitable jurisdiction under Article 136 of the Constitution. From the facts and circumstances of the case in their entirety, we do not feel that there is miscarriage of justice. On the contrary, we are convinced that the appellants had not come forward with clean hands. They wanted to delay the proceedings. Though they were aware of the proceedings pending against them, had appeared before the Civil Court, but then did not care to inquire into the matter. Even after ex-parte order was passed, in an application for setting aside the order, they had not candidly disclosed all the facts that they were aware of such proceedings and were represented by a counsel. In the light of all these facts and keeping in view the provisions of Section 22 (2)(g) of the Act read with Rule 13 of Order IX of the Code, if the Debt Recovery Tribunal dismissed the application and the said order was confirmed by the Debt Recovery Appellate Tribunal and by the High Court, it cannot be held that those orders were wrong and ex parte order should be quashed. The prayer of the appellants, therefore, has no substance and cannot be accepted.”*

In view of the principles laid down by the Apex Court in the above judgments, the Court cannot set-aside *ex parte* unless the two requirements mentioned in the above judgments are established by the petitioner. In the present case, the petitioner appeared before the Court after receiving summons in the suit and contested the matter for some time, but failed to file written statement within the time frame fixed under C.P.C, but explained the reason for his failure to appear before the Court and to prosecute the proceedings, is illegal and the Trial Court accepted the reason for his failure to appear before the Court and allowed the petition filed under Section 5 of the Limitation Act, which attained finality. Therefore, in such a case, the reason assigned by the petitioner cannot be disbelieved while deciding the petition

under Order IX Rule 13 to set-aside *ex parte* decree, in view of the judgment reported in **V. Haritha's** case (referred supra), wherein, this Court held that, when the Court comes to a conclusion that there is sufficient cause to condone delay and the application filed in regard thereto shall be allowed, the consequential rejection order passed in the other application filed under Order IX Rule 13 of C.P.C will not survive and will stand automatically cancelled notwithstanding the fact that no appeal has been filed as against that order.

Thus, in view of the principle laid down in the judgments referred supra, an order passed by the Court to set-aside the *ex parte* decree can be sustained, since the order passed in the petition under Section 5 of the Limitation Act in I.A.No.92 of 2016 in O.S.No.232 of 2013 attained finality, believing the reason assigned by the petitioner. Therefore, the order of the Trial Court setting aside the *ex parte* decree does not call for interference by this Court. However, the permission granted to the petitioner to file written statement is erroneous, since it is not consequential to setting aside an *ex parte* decree and therefore, the order to the extent of granting leave to file written statement is hereby set aside. Accordingly, the point is answered.

In the result, the civil revision petition is allowed in part, setting aside the leave granted by the Trial Court to file written statement while confirming the order setting aside the *ex parte*

decree dated 22.02.2016 in I.A.No.92 of 2016 in O.S.No.232 of 2013.

Consequently, miscellaneous applications pending if any, shall also stand closed. No costs.

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**JUSTICE M. SATYANARAYANA MURTHY**

Date:19.09.2016

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