

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITION No.4006 of 2015

ORDER:

This Civil Revision Petition under Section 115 of the Code of Civil Procedure, 1908, by the petitioner/defendant is directed against the order, dated 02.09.2015, passed in I.A.No.147 of 2015 in O.S.No.1591 of 2011 on the file of the Court of the learned V Additional Senior Civil Judge, City Civil Court, Hyderabad. The order was passed by the learned XVIII Additional Senior Civil Judge who is holding full additional charge of the said Court.

2. I have heard the submissions of *Sri P. Shashi Kiran*, learned counsel for the petitioner/defendant, and of *Sri G. Gopala Krishna*, learned counsel for the respondent/plaintiff.

3. I have perused the material record.

4. The plaintiff's suit for eviction and recovery of possession was decreed *ex parte* on 05.10.2013. Hence, the defendant filed a petition to set aside the *ex parte* decree; however, since a delay of 489 days had occasioned in filing the said petition, the subject application was filed for condonation of the said delay.

5. The case of the petitioner/defendant in support of the said request, in brief, is as follows:

The plaintiff filed vexatious and false suit even though he has no *locus standi* to institute the suit. The defendant entered appearance through a learned counsel. The defendant did not file his written statement as the plaintiff approached him with a proposal for compromise and assured him that he would withdraw the suit. The said

counsel engaged by the defendant did not inform him about the case proceedings in spite of his regular visits to the office of the said counsel. Further, the counsel was bed ridden and left legal profession due to his health problems. Hence, the written statement could not be filed. Therefore, he was set *ex parte* on 19.06.2012 and subsequently the suit was dismissed for default. Recently, the defendant learnt that the order of dismissal for default passed in the suit was set aside and the suit was restored to file as per orders dated 01.10.2013 in I.A.No.837 of 2013. The said application was filed without giving prior notice to this defendant/petitioner. In the said interlocutory application, no notice was served on the defendant. Even after restoration of the suit, no fresh suit summonses were ordered and no fresh suit summonses were served on this defendant. However, the trial Court proceeded to pass an *ex parte* decree and judgment on 05.10.2013. Only on filing of the E.P.No.28 of 2015, this defendant came to know in the first week of March, 2015, that the suit was decreed *ex parte*. In the said circumstances, the delay in seeking to set aside the *ex parte* decree had occasioned. This defendant is having a strong defence and fair chances of success in the suit. If the delay is not condoned and *ex parte* decree is not set aside, the petitioner/defendant would suffer serious loss.

6. The case of the respondent/plaintiff, in brief, is this.

The defendant having entered appearance failed to file his written statement. Therefore, it is clear that he is having knowledge of the suit and the suit proceedings. The application for condonation of delay, which is filed belatedly, is intended to protract the litigation without any legal right. The allegations that the defendant's counsel did not inform him about the proceedings in the suit despite his repeated visits to the office of the counsel and that the counsel fell ill and gave up legal

profession are all false. The counsel, Sri N. Lakshmi Narayana, was hale and healthy and was an active practitioner in the City Civil Courts at the relevant time and during the years 2012, 2013, 2014 and 2015. It is true that the suit was dismissed for default. The suit was dismissed for default as, at that time, the plaintiff underwent heart surgery and could not attend before the trial Court. Later, the said order dismissing the suit for default was set aside and the suit was restored to file. On the application filed for restoration of the suit, the plaintiff personally offered to serve notice on the defendant, but he objected to take the copy of the affidavit and the petition and the said facts were informed to the Court by the counsel for the plaintiff; and on accepting the said submission, the petition was ordered and the suit was restored to file. The allegations that the defendant came to know about the *ex parte* decree in the first week of March, 2015, on issuance of a warrant in E.P.No.28 of 2015 and that the delay had occasioned in the circumstances stated by him are false. The petition is intended to delay the execution of the decree. The defendant is squatting on the properties for almost ten years without paying the agreed rentals. No valid grounds are urged for condonation of delay.

7. At the hearing before the trial Court, no oral or documentary evidence was adduced.

8. By the order impugned in this revision, the trial Court dismissed the petition *inter alia* observing that though the petitioner was set *ex parte* on 19.06.2012 and the suit was dismissed for default on 12.06.2013, the petitioner did not choose to take steps to set aside the *ex parte* order during the period between 19.06.2012 and 12.06.2013 and that even after availing one year time, the defendant was not diligent in prosecuting his defence and that the suit is one filed for recovery of the

property from the defendant, who is in illegal possession, and that as he is continuing as a tenant in a mulgi for ten years even after expiry of lease, the delay cannot be condoned and that after the decree holder has taken steps for recovery of possession by instituting execution petition, entertaining and allowing the petition would amount to permitting the defendant to abuse the process of law.

9. Aggrieved thereof, the defendant is before this Court.

10. Learned counsel for the defendant, while reiterating the pleaded case of the defendant, would submit that the defendant had sufficiently explained the reasons that had led to the passing of the *ex parte* decree and also the delay which had occasioned in seeking to set aside the *ex parte* decree and that in any view of the matter, after the defendant was set *ex parte*, the suit was dismissed for default and that on the application filed by the plaintiff for setting aside the order of dismissal for default and for restoration of suit, **no** notice was issued to the defendant and that the said application was allowed by the trial Court without notice to the defendant and that even after the restoration of the suit, no fresh suit summons were ordered and served on the defendant and that therefore the *ex parte* decree granted in violation of the principles of natural justice and the provisions of the Code is unsustainable and is liable to be set aside and hence on the said ground alone, the defendant is entitled to the relief claimed.

11. Learned counsel for the respondent/plaintiff, while supporting the order of the Court below, stated that the defendant is squatting on the property without paying any amount towards rent or damages for use and occupation and that the defendant had intentionally remained *ex parte* and came back leisurely and sought the relief to set aside the *ex*

parte decree only with a view to drag on the matter and squat on the property without paying any amount and that the explanation offered for condonation of delay is absolutely false and that no grounds much less valid grounds were made out for condonation of the delay.

12. Keeping aside for a moment the aspect of the sufficiency or otherwise of the explanation offered for condonation of delay, what is to be first noted is that after the defendant had remained *ex parte*, the suit was dismissed for default and that subsequently the plaintiff filed I.A.No.837 of 2013 for setting aside the order of dismissal of for default passed in the suit and for restoration of the suit and that admittedly the trial Court did not order notice to the defendant on the said application and the said application was allowed on 01.10.2013 even without notice to the defendant and thus, the suit was restored to file. Even though the plaintiff contends that personal notice was offered on the said application to the defendant and that the defendant rejected to receive the notice when personally offered and that the said fact was intimated to the Court, the Court record does not support the said contention of the plaintiff. The defendant mainly contends that in a matter of this nature, the Court is obliged to order notice to the defendant on the application filed for restoration of the suit, but the Court failed to do so. His further contention is that even after the suit was restored to file, no fresh suit summons were ordered and served on the defendant and that the suit was decreed *ex parte* even without service of fresh summons on the defendant after the suit was restored by setting aside the order of dismissal of the suit for default. Therefore, the defendant pleads that on the above said ground alone the *ex parte* decree is liable to be set aside.

13. In this backdrop, it is necessary to refer to the provisions of order IX Rules 8 and 9 CPC, which read as under:

Rule 8. Procedure where defendant only appears:- Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Rule 9. Decree against plaintiff by default bars fresh suit:- (1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceedings with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.”

The sub Rule (2) of Rule ordains that no order setting aside the dismissal order shall be made unless notice of the application has been served on the opposite party. But for the application of this sub Rule the order dismissing the suit should have been made under Rule 8, that is, in the presence of the defendant. In the case on hand the suit was dismissed for default after the defendant had remained *ex parte*. Further, under Section 2 (2) of the Code any order of dismissal for default is not a decree. Yet, when a suit is dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. Head note of the said Rule 9 reads that ‘decree against plaintiff by default bars fresh suit’. Order XLIII 1 (c) says that an appeal shall lie from an order under Rule 9 of Order IX rejecting an application (in case open to appeal) for an order to set aside the dismissal of the suit. Therefore, when a suit is dismissed under Rule 8 a right accrues to the defendant and hence, any order under Rule 9 shall not be made unless notice of the application has been served on the defendant.

In the present context it is necessary to refer to Rules 2, 3 and 4 also, which read as under:

Rule 2. Dismissal of suit where summons not served in consequence of plaintiffs failure to pay costs:- Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee of postal charges, if any, chargeable for such service or to present copies of the plaint or concise statements, as required by rule 9 of order VII, the Court may make an order that the suit be dismissed:

Provided that no such order shall be made, if notwithstanding such failure, the defendant attends in person or by agent when he is allowed to appear by agent on the day fixed for him to appear and answer.

Rule 3. Where neither party appears, suit to be dismissed: Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

Rule 4. Plaintiffs may bring fresh suit or Court may restore suit to file:- Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

In case of dismissal under Rule 2, the question of presence of the defendant at the time of passing of the order of dismissal for default does not arise for consideration. An order dismissing the suit made under Rule 3 contemplates a situation in which both the parties who are required to appear fail to appear when the suit is called on for hearing. XLIII does not provide for an appeal from an order under Rule 4 of Order IX rejecting an application filed for an order to set aside the dismissal of the suit. Further, Rule 4 states that where the suit is dismissed under Rule 2 or Rule 3, the plaintiff may (subject to law of limitation) bring a fresh suit or he may apply for an order to set the dismissal side.

Before proceeding further it is profitable to refer to the precedents cited by both the sides.

Decisions cited on behalf of the plaintiff/Respondent:

(i) In **Avutu Vijayalkshmi and another v. M/s Sri Pujitha Chit Fund, Vijyawada**¹ this Court refused to set aside the ex parte decree as it was found on facts that the defendants came to Court with unclean hands and that their conduct deserved no indulgence.

(ii) In **Pirag Chand v. Firm Ramlal Channanmal**² it was held that once the suit proceeds ex parte against a particular defendant because he elects not to contest the suit, it hardly matters whether the suit is tried by the Court of D. J. or it is tried by the Court of ADJ No. 1 or for that matter, by the Court of ADJ No. 2, and once he elects not to proceed with the suit he is not entitled to any notice of such a transfer. It was also held that even if such a suit is dismissed in default and is restored back, the defendant who is ex parte in the suit is neither entitled to any notice for restoration nor to any notice after restoration.

(iii) In **DVH Industries v. Hartley Knits & others**³ arguments have been addressed before a Division Bench of the Delhi High Court to the effect that notice of the application for restoration ought to have been served on the Appellant before it could have been allowed. Rejecting the said argument it was held that since the Appellant/Defendant No. 1 was not present at the hearing when the suit was originally dismissed, that is 20.9.2005, that Order IX Rule 4 is the provision of the Code of Civil Procedure, 1908, which stands attracted and not Order IX Rule 9 thereof as contended by learned Counsel for the Appellant; and it was further held that the absence of a provision akin to Sub-rule (2) of Order IX Rule

¹ 2005 (1) ALT 91

² AIR 1988 Rajasthan 201

³ (2009) 160 DLT 118 DB

9 requiring notice to be issued to the opposite party as a prerequisite, in Order IX Rule 4 is indeed conspicuous by absence, and cannot but lead to the conclusion that notice is required to be issued only to the party which is actually present at the hearing on which the dismissal of the suit occurred.

Decision cited on behalf of the Defendant/petitioner:

(i) **Shishupal v. Mnaka Chand**⁴ a Division Bench (Jaipur Bench) of Rajasthan High Court held as follows: 'Besides this, we agree with the view taken by Modi J. in Labharam v. Kuberdan (1957 Raj LW 598) (supra). It is implicit in the provisions of Order IX, Rule 4, C.P.C. that when the suit is restored and a date is fixed for hearing of the suit, then a notice of hearing of the suit should be given to the defendant else it would be a great injustice to the defendant and it would be most inequitable that the suit having been dismissed in default, after its restoration, it may be taken up ex parte. If the suit is dismissed in default after its restoration, the defendant has a right to join at any stage in the proceedings of the suit and that the defendant would be deprived of his right in case notice of the hearing is not given to the defendant after restoration of the suit. The view taken in the aforesaid decision of this Court by Modi J. appears to be correct for the reasons stated above. The said view is in conformity with Allahabad (Mool Chand v. Ganga Sahai) ATR 1933 All 522 and Nagpur view (Ramchandra Khatik v Sahadeo Khosti): AIR1945 Nag 185 and we have taken the above view having to the law laid down by their Lordships of the Supreme Court in Sangram Singh v. Election Tribunal, Kotah: AIR 1955 SC 425) (supra). We are therefore, of the opinion that when the suit has been dismissed in default of both the parties and it has been restored back on the application of the plaintiff, without notice of the

⁴ AIR 1992 Rajasthan 57

application to the defendant, a notice is necessary to the defendant after restoration for proceeding with the hearing of the suit, although, there may be an *ex parte* order passed against the defendant before dismissal of the suit in default of the parties. The question does not make any reference to the situation that there was an *ex parte* order against the defendant. Even if there is no *ex parte* order against the defendant, the answer to the question would be that for proceeding in the suit after restoration, notice to the defendant is necessary.

Be that as it may. As long as the suit is pending (and not dismissed for default) notice of interlocutory application need not be given to a party/defendant who has not entered appearance after having been served with notice in the main proceeding. (See: Rule 58 (4) of Civil Rules of Practice). However, once the suit is dismissed for default, the said Rule position is inapplicable, as the main proceeding is itself not pending for adjudication. If a suit is adjourned for hearing *ex parte*, the defendant may appear and assign a good cause for his previous non appearance and seek to set aside the order setting him *ex parte*. The defendant can make such a request at any time during the pendency of the suit and before the suit is decreed *ex parte*. After the defendant remained *ex parte*, if an order of dismissal for default is passed in the suit, the defendant seeking to set aside the order setting him *ex parte* does not arise. Therefore, when the plaintiff applies for an order to set the dismissal of the suit aside, no order shall be made on such application unless notice of the application has been served on the defendant. When the plaintiff applies for an order to set the dismissal of the suit aside and the suit is restored to file, the defendant who had remained *ex parte* would be entitled to file an application and appear and assign good cause for his previous non appearance and seek to contest

the suit on restoration of the suit. Therefore, unless a notice is directed to be issued to the defendant on the application filed by the plaintiff for an order to set the dismissal of the suit aside, the defendant may not be in a position to know about the restoration of the suit which was earlier dismissed for default. To emphasize the view of this Court it is trite to envision and consider the following situation: 'A defendant who remained *ex parte* and who intends to file an application assigning good cause for his previous non appearance appears before the Court, but, comes to know that the suit was dismissed for default for non appearance of the plaintiff when the suit was called for hearing; he therefore would be required to wait to seek the remedy till the suit is restored to file. In such a situation, if the Court restores the suit on the application filed by the plaintiff and grants an *ex parte* decree to the plaintiff either without ordering notice to the defendant on the application of the plaintiff filed for setting aside the order of dismissal of the suit or without service of fresh summons on the defendant after restoration of the suit, the said course would result in injustice to the defendant and the defendant would suffer an *ex parte* decree for no fault of him.' Therefore, in my considered opinion, when the plaintiff files an application for an order to set the dismissal aside and seeks restoration of the suit to file, the question whether the order of dismissal for default was passed under which rule of Order IX may not be of much significance as in any of the cases no order shall be made unless notice of such application has been served on the defendant. In the considered view of this Court, the plaintiff cannot be heard to say that a suit dismissed for default either under Rule 2 or 3 can be restored under Order IX Rule 4 without notice to the defendant as such a contention would be opposed to the principles of natural justice. The Order dismissing the suit was an order in favour of the defendant. The

principle that before an adverse order is passed against a person, he has to be heard in the matter is well established and is unquestionable. It is applicable so far as judicial and quasi judicial proceedings. Under certain circumstances that principle has been extended even to administrative orders. At this stage, it is important to refer to the guiding principle on interpretation, viz., 'the purposive rule of interpretation', which is otherwise known as the Heydon's Rule of interpretation, which lays down that it is the duty of the Court to interpret provisions of law in a manner consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. In the case on hand, a view that a notice need not be served on the defendant before an order for restoration of the suit is passed under Rule 4 of Order IX and the further view that when the suit has been dismissed in default of both the parties and it has been restored back on the application of the plaintiff, without notice of the application to the defendant, a notice is not necessary to the defendant after restoration of the suit and before proceeding with the hearing of the suit, are to be accepted, then, the defendant who remained *ex parte* prior to the restoration of the suit would be unaware of restoration of the suit and would be denied an opportunity to file an application seeking to set aside the *ex parte* order made against him in the suit prior to its dismissal for non prosecution. Therefore, taking such a view would facilitate encouraging mischief and makes the provision of Order IX Rule 7 of the Code otiose or sterile. The law is well settled that interpretations which make provisions otiose or redundant are impermissible. Further, a construction of a provision which would defeat the purpose of another provision should be avoided and if more than one construction is possible that which preserves the workability and efficacy of all the provisions shall be preferred to the one which would encourage mischief

and renders another provision sterile (see: State of Tamilnadu v. M.K.Kandaswamy: 1975 (4) SCC 745)

In **Sangram Singhv. Election Tribunal, Kotha**⁵ a Bench of three Hon'ble Judges of the Supreme Court held as follows:

Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.

Hence, this Court finds itself in agreement with the view that a notice is to be served on the defendant before an order for restoration of the suit comes to be passed under Rule 4 of Order IX; and that when the suit has been dismissed in default of both the parties and it has been restored back on the application of the plaintiff, without notice of the application to the defendant, a notice is necessary to the defendant after restoration of the suit before proceeding with the hearing of the suit, although, there may be an ex parte order passed against the defendant before dismissal of the suit in default of the parties. On the above

⁵ AIR 1955 SC 425

analysis this Court finds that the *ex parte* decree passed in the instant suit is not valid and sustainable under facts and in law and is therefore liable to be set aside. Since the *ex parte* decree is not valid and is not sustainable, in the well considered view of this Court, the request of the defendant for condonation of delay in seeking to set aside the *ex parte* decree merits consideration. Viewed thus, this Court finds that the order impugned is liable to be set aside.

14. In the result, the Civil Revision Petition is allowed and the order impugned in this revision is set aside and as a sequel I.A.No.147 of 2015 in O.S.No.1591 of 2011 on the file of the Court of the learned V Additional Senior Civil Judge, City Civil Court, Hyderabad, is allowed. As a consequence, the trial Court is directed to take up the application to set aside the *ex parte* decree and pass consequential orders allowing the same in view of the position of law and fix a date for appearance of the parties and for filing the written statement of the defendant and receive it on file, if filed, and then dispose of the suit on merits as per the procedure established in law.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this Civil Revision Petition shall stand closed.

M. SEETHARAMA MURTI, J

Date: 06.01.2017

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