

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

+ CIVIL REVISION PETITION No. 2981 OF 2011

% 30-06-2017

Ekkaladevi Devaiah.

....Petitioner

Vs.

\$ Bojja Laxmi and others.

.... Respondents

!Counsel for the petitioner : Sri P.V.Narayana Rao

Counsel for the Respondent: Sri M.Raja Malla Reddy

<Gist :

>Head Note:

? Cases referred:

1. 1996(4) ALT 129
2. 1997(4) ALT 77
3. 2012(1) ALD 114
4. 2013(6) ALT 169
5. AIR 2007 Uttaranchal 10
6. 1977 M.P.H.C. 1 F.B.
7. 2013(4) CCC 122 (Ori.)
8. AIR 1987 SC 42
9. 1997 (4) ALT 77
10. 2013(4) ALD 72
11. 2000(2) ALD 565
12. AIR 2003 SC 3527
13. AIR 2002 SC 2436
14. 2013(6) ALD 499
15. 2008(5) ALD 333



THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No. 2981 OF 2011

ORDER:

The first respondent in CMA No.5 of 2010 on the file of Senior Civil Judge, Siricilla, who is the plaintiff in O.S. No.44 of 2008, filed this revision petition under Article 227 of the Constitution of India challenging the Order dated 08.04.2011 in CMA No.5 of 2010, whereby the learned Senior Civil Judge allowed the CMA while setting aside the order dated 04.10.2010 in I.A. No.107 of 2010 in O.S. No.44 of 2008 passed by the Junior Civil Judge, Vemulawada.

The revision petitioner was the plaintiff in O.S. No.44 of 2008 and 1st respondent in I.A. No.107 of 2010, whereas the first respondent herein was the 6th defendant in O.S. No.44 of 2008 and the petitioner in I.A. No.107 of 2010 and respondents 2 to 6 were the defendants 1 to 5 in O.S. No.44 of 2008. But to avoid confusion in referring the parties, they will hereinafter be referred to as the revision petitioner and respondents as arrayed in the civil revision petition, for convenience sake.

The revision petitioner filed suit in O.S. No.44 of 2008 for partition and other consequential reliefs before the Junior Civil Judge, Vemulawada, Karimnagar District. Respondents 1 and 6 contested the suit appearing through their counsel and filed written statement, whereas the other respondents were set exparte. During trial, P.Ws.1 and 2 were examined on behalf of the plaintiffs, but they were not cross-examined by the counsel for respondents 1 and 6 herein. Later the matter went on several

adjournments, but neither the first respondent nor his counsel turned up, to cross-examine P.Ws.1 and 2 and to adduce evidence on behalf of respondents 1 and 6. Thereupon the court passed the decree on 17.03.2016.

Later on, the first respondent filed I.A. No.107 of 2010 under Rule 13 of Order IX of the Code of Civil Procedure, 1908 (for short 'CPC') to set aside *ex parte* preliminary decree, explaining the delay contending that during first week of October 2009 she suffered from severe back ache and spondylosis. As per the advise of the Doctor, she has taken bed rest for about six months, thereby she could not contact her counsel to know the stage of suit and the counsel also could not cross-examine P.Ws.1 and 2 and other witnesses produced by the plaintiff, who is the revision petitioner herein, due to lack of instructions as she was completely on bed she could not file affidavit in lieu of examination-in-chief and tender herself to cross-examine her by the adversary, examining any witness before the court. Therefore, she was prevented by a cause which is beyond her reasonable control i.e. back ache and spondylosis and thereby preliminary decree passed by the trial court is an *ex parte* decree and prayed to set aside the *ex parte* decree.

The revision petitioner filed counter denying the material allegations *inter alia* contending that his affidavit in lieu of examination-in-chief was filed on 09.11.2009 and thereafter documents were marked as Exs.A.1 to A.15 and the suit was adjourned for his cross-examination by the counsel for respondents 1 and 5, but they failed to cross-examine the petitioner. Later, he filed affidavit in lieu of examination-in-chief of

P.W.2 under Rule 4 of Order XVIII of CPC. He was also not cross-examined inspite of granting several adjournments. Ultimately the cross-examination of P.W.2 was also closed and the suit was adjourned for defendants' evidence. But respondents 1 and 6 did not examine any witness and the matter was heard on 15.03.2010, pronounced the judgment on 17.03.2010 passing the preliminary decree, on merits. Therefore, the decree passed on merits cannot be set aside and the petition under Rule 13 of Order IX of CPC is not maintainable. It is also contended that the allegations that she suffered from backache and spondylosis during the first week of October 2009 and took bed rest on the advise of doctor for a period of six months and thereby she could not contact her counsel are all false and that the docket proceedings of the suit would disclose the tactics adopted by the petitioner in protracting the trial of suit thereby the court cannot exercise its discretion, set aside the *ex parte* decree exercising power under Rule 13 of Order IX of CPC. The allegations made in the affidavit filed along with petition are concocted and invented for the purpose of the petition and they are all false, finally prayed to dismiss the petition.

The trial court upon hearing argument of both the counsel dismissed the petition holding that the suit was disposed of on merits. On account of failure of respondents 1 and 6, P.Ws.1 and 2 were not cross-examined and did not adduce any evidence.

Aggrieved by the order dated 04.10.2010 in I.A. No.107 of 2010, the first respondent herein preferred the appeal, in CMA No.5 of 2010 on the file of Senior Civil Judge at Siricilla, under Rule 1 of Order XLIII of CPC. The appellate court, upon hearing argument of both the counsel, based on the principle laid down by

this Court in **Galla Laxmamma v. Reparthi Anjaiah**¹ and **Raju Kumar and another v. G.Anasuya**² concluded that the preliminary decree passed under Rule 13 under VIII of CPC is maintainable while setting aside the order dated 04.10.2010 in I.A. No.107 of 2010 in O.S. No.44 of 2008 passed by the Junior Civil Judge at Vemulawada and restored the I.A. to its original number directing the learned Junior Civil Judge to dispose of the petition within two months from the date of receipt of this order.

Aggrieved by the order dated 08.04.2011 in CMA No.5 of 2010, the present civil revision petition under Article 227 of Constitution of Indian is filed raising several contentions mainly on the ground that on account of conduct of respondents 1 and 6 herein to cross-examine the witnesses and did not adduce evidence on their behalf; the trial court was forced to pass the preliminary decree on merits, but it would fall within the Rule 3 of Order XVII of CPC, not under Rule 2 of Order XVII of CPC and the appellate court without considering the explanation annexed to Rule 3 of Order XVII of CPC, erroneously allowed the CMA, thereby committed illegality in allowing the petition reversing the order passed by the trial court. It is further contended that the preliminary decree passed by the trial court is not an *ex parte* decree, but on merits, thereby the petition under Rule 13 of Order IX of CPC is not maintainable, the said fact was not considered by the appellate court in proper perspective. The appellate court also failed to take into consideration, the conduct of the first respondent in prosecuting the proceedings, more particularly, non-payment of costs imposed by the trial court on 08.02.2010 for

¹ 1996(4) ALT 129

² 1997(4) ALT 77

obtaining adjournments one after the other, to protract the matter at considerable length of time. When the first respondent failed to comply the conditional order for payment of costs, the court has no alternative except to accept the contention of the revision petitioner, but the appellate court on erroneous appreciation of facts allowed the petition setting aside the order dated 04.10.2010 in I.A. No.107 of 2010 in O.S. No.44 of 2008 passed by the Junior Civil Judge and prayed to set aside the same.

During hearing, Sri P.V.Narayana Rao, learned counsel for the revision petitioner, contended that when the matter was argued by the counsel for the first respondent, the decree cannot be described as an *ex parte* decree. Apart from that the trial court considered the entire material both documentary and oral evidence and arrived at the conclusion that the petitioner is entitled to a share in the property claimed in the plaint. He also produced a copy of docket proceedings to establish that the first respondent was guilty of negligence in prosecuting the proceedings, which disentitled him to claim any relief in the petition filed under Rule 13 of Order IX of CPC. It is also contended that when the court found substantial evidence to decide the real controversy between the parties as per the explanation to Rule 3 of Order XVII of CPC, decided the matter on merits, cannot be faulted, consequently only appeal lies on preliminary decree, but the appellate court on erroneous appreciation committed grave error in allowing the CMA setting aside the order passed by the trial court.

In support of his contention placed reliance on several judgments of this court and other High courts. He has drawn the attention of this court to the judgments in **M.Ramanjulu v.**

Sapparaju Venkata Sessaiah³, Velpuri Krishna Rao v. Randhi Suryanarayana and others⁴, State of U.P. v. Jaman Singh and Anr.⁵, Budhulal Kasturchand v. Chhotelal and Others⁶ and finally **Jitendra Kumar Choudhury v. Banku Sahoo⁷**. On the strength of the principles laid down in the judgments, he contended that the decree under challenge cannot be said to be *ex parte* decree to invoke jurisdiction under Rule 13 of Order IX of CPC to set aside the preliminary decree passed by the trial court. Therefore the appellate court did not follow the principles laid down by this court and other high courts in the judgments referred to above and prayed to set aside the order passed by the appellate court restoring the order passed by the trial court in I.A. No.107 of 2010 in O.S. No.44 of 2008.

The learned counsel for the first respondent while supporting the order under challenge, contended that when the first respondent failed to cross-examine P.Ws.1 and 2 and failed to adduce evidence, the course open to the court is to follow the procedure under Rule 2 of Order XVII of CPC and A.P. amendment to Rule 3 of Order XVII of CPC also directs the court to decide any such suit when the party did not produce evidence and contest the matter to decide such suit under Rule 2 of Order XVII of CPC. Therefore, the appellate court rightly held that it is only an *ex parte* decree and the petition under Rule 13 of Order IX of CPC is maintainable. In support of his contention he placed reliance on the judgment of the Apex Court in **Prakash Chander Manchanda**

³ 2012(1) ALD 114

⁴ 2013(6) ALT 169

⁵ AIR 2007 Uttaranchal 10

⁶ 1977 M.P. H.C. 1 F.B.

⁷ 2013(4) CCC 122 (Ori.)

and another v. Smt.Janaki Manchanda⁸, and the judgment of this Court in **Raj Kumar and another v. G.Anasuya⁹**, **Mandadi Srinivasa Rao v. Shaik Mehrunnisa¹⁰** and **Daka Venkatrami Reddy v. Central Bank of India, Ongole¹¹**. Based on the principles propounded in the judgments referred to above, the decree can be treated as an *ex-parte* decree for all practical purposes. He also further contended that the first respondent never participated in the proceedings, though there is a reference about hearing of argument of counsel for the 1st respondent in the preamble of the judgment, it is a patent error in view of the observation of the trial court at last paragraph in page 5 of the judgment, since preamble is prepared by the stenographer.

On the other hand the docket proceedings produced before this court by the counsel for the revision petitioner herein also disclosed that P.Ws.1 and 2 were not cross-examined despite imposing costs of Rs.50/- on 01.12.2009, Rs.100/- on 18.01.2010 and again on 08.02.2010. On any of the dates of the adjournments, the first respondent or his counsel appeared and prosecuted the proceedings, except one or two occasions, advancement of argument by the counsel for the first respondent is unbelievable and thereby hearing of arguments mentioned in the preamble cannot be accepted and as such the principle laid down in **M.Ramanjulu v. Sapparaju Venkata Seshiah** (3rd supra) has no application to the present facts of the case and prayed to dismiss the revision petition affirming the order passed by the appellate court in CMA No.5 of 2010.

⁸ AIR 1987 SC 42

⁹ 1997(4) ALT 77

¹⁰ 2013(4) ALD 72

¹¹ 2000(2) ALD 565

Considering rival contentions, the point that arose for consideration is;

Whether the Decree and Judgment dated 17.03.2010 passed by the Junior Civil Judge, Vemulawada, is an ex parte Decree and Judgment? If not, whether the petition under Rule 13 of Order IX of CPC is maintainable?

POINT:

The revision petitioner filed suit for partition against several defendants including the first respondent herein who was arrayed as 6th defendant in the suit. Respondents 2 to 5 remained *ex parte*. Respondents 1 and 6 alone contested the suit by filing written statement. But for one reason or the other, the counsel for the first respondent before this court did not cross-examine the witnesses, who were examined on behalf of the revision petitioner (P.Ws.1 and 2). Respondents 1 and 6 filed their written statement and the suit was posted for framing of issues on 19.04.2007, thereafter the matter was adjourned for more than 20 times for framing issues, finally on 02.02.2009 the trial court framed the issues, thereafter the suit was adjourned for about 8 times from 20.04.2009 to 03.11.2009; i.e., almost for a period of 7 months. On 09.11.2009 the affidavit of the plaintiff was filed under Rule 4 of Order XVIII of CPC in lieu of examination-in-chief, without serving any notice. On 13.11.2009 a copy of affidavit filed under Rule 4 of Order XVIII of CPC was served. On 23.11.2009 P.W.1 entered into witness box, Exs.A.1 to A.5 were marked and the matter was posted for the revision petitioner/plaintiff's further evidence. On 26.11.2009 affidavit of P.W.2 under Rule 4 of Order XVIII of CPC in lieu of examination-in-chief was filed and posted

for cross-examination on 01.12.2009. However, he was absent on that day and adjourned the suit on payment of costs of Rs.50/- to 07.12.2009. Even on that day costs not paid and no representation for the revision petitioner/plaintiff and again adjourned to 14.12.2009. Even on that day he was absent, but filed a Memo informing that P.W.2 was suffering from paralysis, again filed another affidavit of P.W.2 by name Chinna Rajaiah under Rule 4 of Order XVIII of CPC on 02.01.2010, due to intervention of vacation, the matter was posted to 18.01.2010. Even on that day, P.W.2 was called absent and again adjourned on payment of costs of Rs.100/- to 29.01.2010. On 29.01.2010 P.W.2 was present, costs paid, and counsel for the revision petitioner/plaintiff reported no further evidence, thereby, the revision petitioner/ plaintiff's evidence was closed. For defendants evidence the matter was posted to 08.02.2010. Curiously on 08.02.2010 there was no representation on behalf of the defendants, but adjourned the suit on payment of costs of Rs.100/- to 15.02.2010, again 16.02.2010 and 22.02.2010. But there was no representation for one reason or the other on behalf of the defendants 5 and 6. The trial court on 02.03.2010 heard argument in the suit in part, again on 12.03.2010 heard in part, finally on 15.03.2010 hearing of argument in suit was concluded and pronounced judgment on 17.03.2010.

It is evident from the docket proceedings on various dates referred to above, it is clear that P.Ws.1 and 2 were not cross-examined by the counsel for respondents 1 and 6/ defendants 5 and 6 before the trial court and docket does not disclose whether P.Ws.1 and 2 were cross-examined by the counsel for the

defendants or not? The court afforded more than four opportunities to the defendants to adduce evidence on their behalf. On one occasion due to abstaining courts by the Advocates, there was no representation, but on the other three occasions, none appeared and represented the matter on behalf of respondents 1 and 6/ defendants 5 and 6.

Based on the factual back ground referred to above, the first respondent contended that the decree passed by the trial court is only an *ex parte* decree under Rule 2 of Order XVII of CPC, but not the decree on merits. The trial court did not accept the contention. However, the appellate court accepted the contention and set aside the decree and judgment holding that the decree is only an *ex parte* decree, while holding the petition under Rule 13 of Order IX of CPC is maintainable. The counsel for the revision petitioner contended that though sufficient opportunity was afforded, the first respondent failed to adduce evidence. In such case, when sufficient evidence is available on record, the court can pass decree and judgment on merits in terms of the explanation to Rule 2 of Order XVII of CPC. Therefore, the decree and judgment passed by the trial court are only on merits not *ex parte*. In view of specific contention of the counsel for the revision petitioner, it is apposite to advert Rules 2 and 3 of Order XVII of CPC.

According to Rule 2 of Order XVII of CPC where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by order IX or make such other order as it thinks fit. But the explanation annexed to it clarified that where the evidence or a substantial portion of the

evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the court may, in its discretion, proceed with the case as if such party were present. Thus, it is clear from explanation when a substantial portion of the evidence of any party has already been recorded, the court can decide the matter on merits instead of proceeding under any one of the modes under order IX of CPC.

It is clear that in case where a party is absent only course is as mentioned in Order XVII Rule 3(b) to proceed under Rule 2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under Rule 2. Similarly the language used of Rule 2 as now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the modes directed under Order IX of CPC. The explanation to Rule 2 conferred discretion on the court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party who is absent, has led some evidence or has adduced substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been adduced up to that date the court has to option to proceed to dispose of the matter in accordance with Order XVII Rule 2 in any one of the modes prescribed under Order IX of CPC.

Here, the trial court proceeded to decide the matter on merits under Rule 3 of Order XVII of CPC as if there is substantial evidence on record adduced by the party who was absent i.e. defendants in the suit, but ignored A.P. amendment to Rule 3 of Order XVII of CPC. It is extracted hereunder:

“Provided that in a case where there is default under this rule as well as default of appearance under Rule 2 the court will proceed under Rule 2. (27-04-1961).”

Thus, from the Proviso annexed to Rule 3 of Order XVII of CPC by A.P. amendment, any default is committed by any of the parties either under Rules 2 or 3 of Order XVII of CPC, the court has to proceed under Rule 2 alone, but not under Rule 3.

For application of Rule 3 the following requisites are to be satisfied, namely:

(1) The hearing is adjourned on the application of a party to the suit, as distinguished from an adjournment by the court of its own motion;

(2) The hearing is adjourned on the application of the party who subsequently makes the default;

(3) The adjournment is granted to enable the party to produce his evidence or to cause the attendance of his witness, or to perform any other act necessary to the further progress of the suit; and the party fails to perform any of the acts for which the adjournment was granted within the time allowed by the court. In the end of Rule 3, in view of the addition of the wording “the court may, notwithstanding under Rule 2” the distinction between Rules 2 and 3 is clear and the power to act as laid down therein is discretionary.

Rules 2 and 3 are not mutually exclusive. Amendment to Rule 3 now makes it clear that even in case of default within the meaning of Rule 3 there can be no decision on merits unless both the parties are present. In the absence of both or either, the court is to fall back upon Rule 2. Rule 2, no doubt still authorizes the court to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as thinks fit. But an explanation had been added to explain and guide what would be

such other order. The guidelines incorporated is that the party absent shall not be treated as absent, but shall be deemed to be present if his evidence or the substantial portion of his evidence had already been recorded. The words “to make such other order” can no longer be interpreted to mean that the court would still be entitled to proceed under Rule 3 for the purpose of disposing of the suit on merits, in such a way as to deny the remedy under Order IX Rule 13 to the defendant, where he was absent and had not adduced any evidence earlier.

Therefore, to proceed under Rule 3 of Order XVII of CPC, the absent party must adduce evidence or substantial portion of the evidence. Otherwise the court cannot proceed under Rule 3 of Order XVII of CPC to decide the suit on merits. But A.P. amendment by way of Proviso to Rule 3 takes away the right of the court to decide on merits even under Rule 3 and the court is bound to proceed under Rule 2.

An identical question came up before the Apex Court in **Prakash Chander Manchanda and another v. Smt.Janki Manchanda** (8th supra). Wherein the Apex Court held as follows:

"It is clear in cases where a party is absent only course is as mentioned in O.17(3)(b) to proceed under R.2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under R.2. Similarly the language of R.2 as now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the modes directed under O.9. The explanation to R.2 gives a discretion to the Court to proceed under r.3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined

substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined up to that date the court has no option but to proceed to dispose of the matter in accordance with O.17 R.2 in any one of the modes prescribed under O.9 Civil P.C. It is therefore clear that after this amendment in O.17 R.2 and 3 Civil P.C. there remains no doubt and therefore there is no possibility of any controversy.”

In **B.Janakiramaiah Chetty v. A.K. Parthasarathi and Ors.**¹² the Apex court explained the scope of Rules 2 and 3 of Order XVII of CPC and the purpose for which the explanation to Rules 2 and 3 of Order XVII of CPC was added. The crucial expression in the explanation is, where the evidence or a substantial portion of the evidence of a party, there is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The court, while acting under the explanation, may proceed with the case, if that prima facie is the position. The court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision.

¹² AIR 2003 SC 3527

The discretion conferred under Rules 2 and 3 of Order XVII of CPC is that the power to proceed to decide on merits is permissive and not mandatory. The explanation to Rule 2 is in the nature of deeming provision, when under given circumstances, the absentee party is deemed to be present. Thus, the Apex court also laid down certain essential requirements to decide the matter on merits, exercising power under explanation to Rule 2 of Order XVII of CPC and observed that the explanation to Rule 2 of Order XVII of CPC permits the court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned. As the provision itself shows, discretionary power given to the court to be exercised in a given circumstances. For application of the provision, the court has to satisfy itself that (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day; and (c) the day is one to which the hearing of the suit is adjourned.

Rule 2 permits the court to adopt any of the modes provided in Order IX or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The explanation is in the nature of exception to the general power given under the Rule, conferring discretion on the court to act, under the specified circumstances. Therefore, there must be a substantial part of evidence on record of the defaulting party. In the present case, respondents 1 and 6/ defendants 5 and 6 absentee parties did not even cross-examine P.Ws.1 and 2 did not adduce any evidence on their behalf. In such

case the trial court cannot exercise its discretion under explanation to Rule 2 of Order XVII of CPC in ignorance of A.P. amendment to Rule 3 of Order XVII of CPC, proceeded to decide the suit on merits. Therefore, the order under challenge is erroneous on the face of record and at best it can be treated as *ex parte* decree for all purposes as if the court proceeded under Rule 2 of Order XVII of CPC. In a similar situation, the Apex Court in **Mohandas and Ors., v. Ghisia Bai and Ors.**¹³ held that neither the plaintiff nor his witnesses were present on the date fixed by the court, suit has to be dismissed under Rule 2 of Order XVII of CPC. It is further observed that even Rule 3 of Order XVII of CPC itself provides that if the parties or any of them absent, the court shall proceed to decide the suit under XVII, Rule 2. The same analogy can be applied when the defendants failed to adduce evidence and proceed with the matter in the suit.

In **Mailwar Narsappa and Pendyala Prabhakar v. B.Sangamma**¹⁴ this Court held that though the defendant was absent and failed to adduce any evidence, such suit shall be disposed of in any of the modes under Order IX of CPC and such decree shall be deemed to have been an *ex parte* decree.

In **Mekala Ramasubbaiah v. Potula Yesepu and ors.**,¹⁵ this Court relying on the judgment of the Apex Court in **Prakash Chander Manchanda and another v. Smt.Janaki Manchanda** (8th supra), **Galla Laxmamma v. Reparthi Anjaiah** (1st supra) and **Daka Venkatrami Reddy v. Central Bank of India, Ongole** (11 supra) held that a decree passed in the absence of any of the

¹³ AIR 2002 SC 2436

¹⁴ 2013(6) ALD 499

¹⁵ 2008(5) ALD 333

parties who failed to adduce evidence or substantial portion of the evidence must be treated as an *ex parte* decree.

Learned counsel for the first respondent also placed reliance on the judgments of this court in **Daka Venkatrami Reddy v. Central Bank of India, Ongole** (11 supra), **Raj Kumar and another v. G.Anasuya** (9 supra) and **Mandadi Srinivasa Rao v. Shaik Mehrunnisa** (10 supra) and the judgment of the Apex Court in **Prakash Chander Manchanda and another v. Smt.Janaki Manchanda** (8 supra). In these Judgments, the Apex Court and this court consistently took a view when default party failed to adduce any evidence or any substantial part of evidence, the court if passed the decree shall be deemed to be a *ex parte* decree and the petition under Rule 13 of Order IX of CPC is maintainable in such case.

In the instant case the trial court passed the judgment and decree discussing all the four issues at one stretch, while observing, at last paragraph of page 5, that inspite of taking several adjournments, respondents 1 and 6 failed to cross-examine P.Ws.1 and 2 and the court observed that though the counsel for respondents 1 and 6 received affidavits of P.Ws.1 and 2 filed under Rule 4 of Order XVIII of CPC, did not chose to cross-examine the witnesses. Therefore, cross-examination of P.Ws.1 and 2 treated as 'NIL' and later the matter was adjourned for defendants evidence, but they did not adduce any evidence. Therefore, the defaulting parties are respondents 1 and 6 and when they did not adduce any evidence much less substantial portion of evidence, the court shall not proceed to decide the matter under Rule 3 of Order XVII of CPC invoking the explanation to Rule 2 of Order XVII

of CPC, ignoring the AP amendment to Rule 3 of Order XVII of CPC to conclude that the decision is on merits. The trial court must advert to the various contentions raised in the written statement and the evidence if any and arrive at a conclusion recording specific finding on each issue. But here just extracted the evidence of P.Ws.1 and 2, making certain observation about the conduct of defendants 5 and 6, passed the Decree and Judgment in favour of the revision petitioner/plaintiff. Therefore, such decree and judgment are virtually *ex parte* decree and judgment and they cannot be treated as decree and judgment under Rule 3 of Order XVII of CPC in view of proviso added to the Rule 3 by A.P. amendment.

Sri P.V. Narayana Rao, learned counsel for the revision petitioner vehemently contended that the decree is only on merits, since the trial court heard arguments of the counsel for the defendants 5 and 6 and drawn the attention of this court to the preamble of the judgment.

The preamble of the Judgment was prepared by the Stenographer. The court itself recorded about the advancement of arguments of Sri G.Bhaskar Reddy, counsel for respondents 1 and 6/ defendants 5 and 6, in fact the preamble of the Judgment is not dictation of the Judge and in the entire judgment, the argument allegedly advanced by Sri G.Bhaskar Reddy was not referred and considered. Therefore, mere recording in the preamble that the argument of Sri G.Bhaskar Reddy, counsel for respondents 1 and 6/ defendants 5 and 6 was heard is not a ground. It would not change the nature of disposal i.e. *ex parte* decree and judgment. In **M.Ramanjulu v. Sapparaju Venkata Seshiah** (3supra) this

court, is of confirmed view that when he counsel advanced argument and participated in the trial and the same was recorded in the preamble of the judgment, the judgment shall be treated as judgment on merits, but not an *ex parte* judgment.

Here the very advancement of argument by Sri G.Bhaskar Reddy, counsel for respondents 1 and 6/ defendants 5 and 6 is false in view of docket proceedings produced by the counsel for the revision petitioner on various dates. From 26.11.2009 there was no representation on behalf of the parties and the docket is not clear whether Sri G.Bhaskar Reddy is the counsel for respondents 1 and 6/ defendants 5 and 6. Therefore, mere recording about hearing of counsel for defendants 5 and 6 in the preamble prepared by the stenographer is not sufficient to conclude that the counsel advanced argument. The counsel also relied on the Full Bench Judgment of Madhya Pradesh High Court in **Budhulal Kasturchand v. Chhotelal and Others** (6supra), **Jitendra Kumar Choudhury v. Banku Sahoo** (7supra) and **State of U.P. v. Jaman Singh and Anr.** (5supra). In these judgments, the High courts held that when judgment was pronounced due to availability of substantial part of evidence, it can be treated as judgment on merits under Rule 3 of Order XVII of CPC, not an *ex parte* decree or judgment. But those judgments are not binding on this court, except persuasive value. In the States of Madhya Pradesh, Uttaranchal and Orissa, there was no amendment identical to the A.P. amendment referred to supra to Rule 3 of Order XVII of CPC. But the law declared by in these Judgments is contrary to the law declared by the Apex Court referred supra. Therefore, the

contention of the counsel for the revision petitioner that the judgment is on merits is without substance.

The trial court recorded that the defendants failed to pay costs, but non payment of costs by itself is not a ground to decide the suit on merits in view of sub-section (2) of Section 35-B of CPC which says that the costs, ordered to be paid under sub-section (1), shall not, if paid, be included in the costs awarded in the decree passed in the suit; but, if such costs are not paid, a separate order shall be drawn up indicating the amount of such costs and the names and addresses of the persons by whom such costs are payable and the order so drawn up shall be executable against such persons.

Thus, in view of sub-section (2) of Section 35-B of CPC, if the court imposed costs and the party failed to pay costs, it is the duty of the court to prepare a separate order, which is executable. Instead of following sub-section (2) of Section 35-B of CPC, the court decided the matter on merits without adverting to the contentions raised by respondents 1 and 6/ defendants 5 and 6. Therefore, the decree in O.S. No.44 of 2008 is only under Rule 2 of Order XVII of CPC, but not the decree under Rule 3 of Order XVII of CPC. In such case the respondents 1 and 6/ defendants 5 and 6 are entitled to move an application under Rule 13 of Order IX of CPC and if the court finds sufficient cause which prevented the respondents 1 and 6/ defendants 5 and 6 to appear and to adduce the evidence, the court can set aside the *ex parte* decree. Here the respondents 1 and 6/ defendants 5 and 6 explained the reason for his failure to adduce evidence, which is required to be considered by trial court, on its remand by the appellate court. Therefore the

appellate court exercised its discretion in accordance with law. But the trial court on wrong appreciation of facts and law, in ignorance of the State amendment to Rule 3 of Order XVII of CPC by way of proviso, passed the order dated 04.10.2010 in I.A. No.107 of 2010 in O.S. No.44 of 2008 which was set aside by the appellate court rightly.

In view of foregoing discussion, I hold that the decree and judgment passed by the trial court are only *ex parte* decree and judgment in terms of Rule 2 of Order XVII of CPC read with proviso to Rule 3 of Order XVII of CPC (AP amendment) and thereby the petition under Rule 13 of Order IX of CPC is maintainable. As such the appellate court rightly set aside the order passed by the trial court exercising its discretion and consequently I find no merits in the civil revision petition to exercise jurisdiction under Article 227 of Constitution of India which is supervisory in nature.

Article 227 of Constitution of India deals with power of superintendence by the High Court over all Subordinate Court and Tribunals. The power of superintendence conferred upon the High Court by Article 227 is not confined to administrative superintendence only, but includes the power of judicial revision also even where no appeal or revision lies to the High Court under the ordinary law, rather power under this Article is wider than that of Article 226, in the sense that it is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction and such power can also be exercised suo motu. It is a well settled principle that the High Court can exercise supervisory power under Article 227 of Constitution of India and interfere with the order in several

circumstances, as held by the Apex Court in **State (N.C.T. Of Delhi) v. Navjot Sandhu@ Afsan Guru**¹⁶.

In view of the law laid down by the Apex Court, this Court cannot exercise its power under Article 227 of the Constitution of India though the order is wrong, since the power can be exercised only to keep the subordinate Courts and Tribunals within its bounds. Therefore, I am unable to exercise power under Article 227 of the Constitution of India to interfere with the findings recorded by the appellate court, since the appellate court acted within its bounds and passed the order, which is under challenge. Hence the civil revision petition deserves to be dismissed.

In the result, the civil revision petition is dismissed, confirming the order dated 08.04.2011 in CMA No.5 of 2010 passed by the Senior Civil Judge, Siricilla. No costs.

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

M.SATYANARAYANA MURTHY, J

Date:30.06.2017
BV

Note: LR COPY MARKED.

¹⁶ (34)2005 (3) ALT (Cri.) 125 (SC)