

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

C.R.P.Nos.5733 & 5741 of 2011 AND 5743 of 2017

COMMON ORDER :

C.R.P.Nos.5733 and 5741 of 2011 are filed impugning the orders in I.A.No.649 and 650 of 2011 in O.S.No.198 of 2002 viz., dismissal order, dated 22.09.2011, to set aside the ex parte order, dated 09.06.2010, passed against defendant No.3 by her applications under Order IX Rule 7 and read with Section 151 C.P.C. (I.A.No.649 of 2011 in the main suit and I.A.No.650 of 2011 in temporary injunction application in I.A.No.1055 of 2002 pending suit). Whereas, C.R.P.No.5743 of 2017 is filed by different parties in a different suit. C.R.P.No.5743 of 2017 is filed against dismissal order, dated 18.08.2017, in I.A.No.905 of 2017, to set aside the dismissal order, dated 13.04.2017, in I.A.No.227 of 2017 by the defendant No.1 in O.S.No.673 of 2016. I.A.No.227 of 2017 is also defendant No.1's application filed under Order IX Rule 7 and Section 151 C.P.C. and that was originally allowed subject to condition of filing of written statement and for non-compliance by filing of the written statement as one of the commissions, dismissed the petition ultimately on 13.04.2017 and to set aside the same I.A.No.905 of 2017 is filed.

2. This matter in C.R.P.No.5743 of 2017 is taken up along with two matters in C.R.P.No.5733 and 5741 of 2011 as the counsel for the petitioners in C.R.P.Nos.5733 and 5741 of 2011 and counsel for respondent No.1 in C.R.P.No.5743 of 2017 is one and the same and from different contentions raised in both the matters, this Court felt it

from hearing, to give common disposal of the similar issues involved on the scope of Order IX Rule 7 and Section 151 C.P.C.

3. Heard in all three civil revision petitions at length and perused the material on record and taken up for common disposal as referred supra.

4. Coming to the facts, common in C.R.P.Nos.5733 and 5741 of 2011, the plaintiff was one K.V.N. Kannababu. O.S.No.198 of 2002 was filed against three defendants, among whom Sri A.Laxmi Narasamma-Respondent No.2 to the revision petitions since stated died though she was alive by the impugned order without impleading the legal representatives, as per docket order, dated 31.10.2017, with this observation for no steps taken and from submission of not necessary party otherwise dismissed on merits against her. The prayer in the suit is that O.S.No.198 of 2002 was for permanent prohibitory injunction against the defendants and their men from any way interfering with the plaintiff's right, possession and enjoyment of the plaint schedule property viz., vacant site with compound wall bearing No.4864/6 of 816 sq. yards in Ward No.7 situated in Kondapallivari Veedhi, Anakapalle, Visakhapatnam District, within the boundaries described therein. Pending suit, the plaintiff filed application for temporary injunction in I.A.No.1055 of 2002. In both matters, the petitioner-defendant No.3 as respondent No.3 respectively remained ex parte and the ex parte order was dated 09.06.2010. It is to set aside that ex parte order in the suit and in the temporary injunction

application I.A.No.649 and 650 of 2011 respectively, filed with the averments that she suffered from jaundice and extreme weakness for more than two months and from the illness, she could not met her counsel to give instructions to file counter and written statement consequently she was ex parte in both the matters on 09.06.2010 and she got a strong case to defend. Therefore, to afford opportunity sought for allowing the applications setting aside the ex parte order in the suit and in the injunction petition. The plaintiff as respondent No.1, leave about the other respondent Nos.2 and 3-defendant Nos.2 and 3 of whom respondent No.2 died and the revision is abated against her, opposed saying the petitioner/defendant No.3 never resided at Vizianagaram as alleged and never suffered with alleged weakness or ill-health of Jaundice and there is no medical certificate in proof of her case, therefore, she was set ex parte for non filing of written statement and counter respectively and she did not even chose to file written statement and counter respectively in the petitions, thereby those petitions are not maintainable.

5. It is further contest of the counter of the plaintiff-respondent No.1 to the applications vis-à-vis the revisions that earlier the petitioner/defendant No.3 filed I.A.Nos.657 and 658 of 2005 to set aside the ex parte order in the suit and to set aside the ex parte order in the injunction application and therein also she did not chose to contest and those were dismissed for dragging on the matter without filing written statement and counter respectively thereby she got knowledge

right from 2002 as defendant No.3/petitioner came on record way back in the year 2003 and later remained ex parte and even earlier as per orders in I.A.Nos.657 and 658 of 2005 that were allowed on 06.05.2010 setting aside the ex parte orders with a direction to file written statement and counter for not filing despite opportunities those petitions were ended in dismissal thereby as per the impugned order of the lower Court, there are no grounds to entertain the applications, much less to set aside the ex parte order for non-compliance with the earlier order.

6. Similar almost are the facts in C.R.P.No.5743 of 2017, where plaintiff-one Smt.Padmaja filed the suit against two defendants, among whom defendant No.1 is the petitioner herein and defendant No.2 is M/s.Rasna Private Limited, for recovery of possession of the plaint schedule property of first floor of building measuring 2265 sq. feet with premises No.1-1-256/8/1, 2 & 3 and Door No.1-1-287/17, Street No.3, Bapu Nagar, Chikkadpally, Hyderabad, within the boundaries and the other direction for damages to be ascertained from the date of suit till delivery of possession. In the suit O.S.No.673 of 2016, the petitioner-defendant No.1 remained ex parte and an application under Order IX rule 7 C.P.C. in I.A.No.227 of 2017 is filed saying he was admitted for chest complaint in KIMS Hospital on 04.02.2017 underwent bypass surgery on 09.02.2017 and discharged later and on 11.11.2016 in the suit with urgent notice issued direction to appear before the trial court and on that day, he appeared and

sought for time to engage advocate and defend the case and that petition was posted along with main suit to 01.12.2016 and at that day defendant No.1, advocate by profession, allegedly represented through another counsel, sought for adjournment saying he was in High Court and he engage another counsel. However, the Court set him ex parte and defendant No.2 was also set ex parte and matter posted for ex parte evidence of plaintiff to 07.02.2017 and the absence is not willful as on that day he was appeared before the High Court in M.A.C.M.A.No.562 of 2010 and W.P.No.40489 of 2016, etc., As referred supra, I.A.No.227 of 2017 was though originally allowed with conditional order for compliance by filing written statement/counter, the same was not complied with ultimately on 13.04.2017 for non-compliance of the condition of filing the pleadings by way of written statement, etc., the petition was dismissed. It is subsequently, I.A.No.905 of 2017 is filed to set aside the dismissal order in I.A.No.227 of 2017 with averments that before date fixed for ex parte evidence, dated 07.02.2017, having set exparte on 01.12.2016, the petitioner/defendant No.1 filed petition and the ex parte set aside order was passed in I.A.No.227 of 2017 to file counter and written statement and on 23.02.2017 the Court imposed condition to file written statement on or before 23.03.2017 for allowing the petition though he was admitted in KIMS hospital on 09.02.2017 and on 23.03.2017 time extended by posted to 13.04.2017 and on that that day, the junior counsel filed memo of understanding for appearance

and the Court returned the memo and dismissed I.A.No.227 of 2017 on 13.04.2017 and the said absence is not willful but for the ill-health having underwent bypass surgery, thereby, to set aside the same by allowing I.A.No.905 of 2017. The plaintiff/respondent No.1 opposed the same saying the petition is not maintainable and there is nothing to non-comply the conditional order and even from the bypass surgery long prior to the date of the application and the trial Court rightly dismissed I.A.No.227 of 2017 for non-compliance of the conditional order and the subsequent petition to set aside the same, thereby would not lie. The Court therefrom observed that the Apex Court in **Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi and others**¹, observed that the Court has got discretion even to receive the written statement or counter beyond the date fixed and after expiry of the period, invoking the decision on facts even the order passed to comply with the conditions for non-compliance once dismissed the same cannot be revived to interfere with the dismissal order in I.A.No.227 of 2017 by allowing I.A.No.905 of 2017.

7. As referred supra, in both the suits and the injunction applications covered by three revisions impugning the three orders of the lower Courts supra, even along with petitions to set aside the earlier conditional order non-compliance dismissal of the Order IX Rule 7 C.P.C. applications originally allowed subject to conditions for

¹ AIR 2010 SC 475

non-compliance dismissed for no written statement and counter respectively filed.

8. As per the expression of the Apex Court in **Balraj Taneja and another v. Sunil Madan and another**² and as per Order VIII Rule 10 C.P.C. even though written statement or counter not filed, it is not a bar for the respective defendant to part take in the proceedings and very passing an ex parte order even not set aside not a bar to proceed by participation in the subsequent proceedings. Here, no doubt, this Court even can clear the cloud by saying the respective defendants can participate in the proceedings without even written statement though they cannot set up a positive defence, but for test veracity of the respective plaintiff claims including by cross-examination.

9. However, coming to the facts on hand with reference to the principles of law laid down in Bharat and Balraj (1 & 2 supra) in both the suits for trial is not commenced and to defend the case, the pleadings by written statement is also essential to set up positive defence, interest of justice can be sub-served by allowing the applications permitting filing of written statement and counter respectively within one week from the date of receipt of this common order in these three revision cases, subject to costs of Rs.5,000/- in C.R.P.No.5733 of 2011, Rs.2,000/- in C.R.P.No.5741 of 2011 payable to the plaintiff/respondent No.1 and costs of Rs.5,000/- in C.R.P.No.5743 of 2017 payable to the plaintiff/respondent No.1.

² AIR 1999 SC 3380

10. With the above direction, all the three civil revision cases are allowed. Any non-compliance of the above directions, this common order to the extent of the respective three matters ceases its force and consequently revives the respective dismissal order of the respective trial Court.

Miscellaneous petitions pending in both the revisions, if any, shall stand closed.

1st November 2017.

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Dr. B. SIVA SANKARA RAO, J

