

THE HON' BLE DR. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION No.6253 OF 2017

ORDER:

This revision is filed by the petitioner/ defendant, aggrieved by the order dated 05.10.2017 in I.A.No.344 of 2017 in O.S.No.218 of 2017 passed by the XXII Junior Civil Judge, City Civil Court, Hyderabad.

2. Heard both sides and perused the grounds urged in the revision and the impugned order.

3. The petitioner and respondents herein are defendant and plaintiffs respectively in O.S.No.218 of 2017. The defendant having taken time after first appearance on 06.03.2017 to file written statement including to engage an advocate and even after engaging advocate ultimately subject to costs of Rs.100/- in posting the matter to 20.06.2017 from 02.06.2017 and for the costs not paid written statement not filed again adjourned to 30.06.2017 and it is for that reason the defendant as set ex parte. The docket order reads from counter of the plaintiff in I.A.No.344 of 2017 that "Defendant is present, written statement not filed. Costs not paid 90 days over, set ex-parte plaintiff's evidence by 25-07-2017". That order is in challenge by maintaining the application in I.A.No.344 of 2017 by the sole

defendant in the suit of the two plaintiffs in O.S.No.218 of 2017 for eviction and mesne profits.

4. The lower Court dismissed the application by the impugned order dated 05.10.2017 with observations referring to the above and in saying the petitioner/ defendant came up with the application to set aside the said order supra under which her right to file written statement forfeited and her case of suffering from viral fever and could not give instructions to file written statement. However, a perusal of the proceedings show on 30.06.2017 her right to file written statement is forfeited and she was in fact very much present before the Court. However, did not file written statement and not paid costs. Therefore, her contention of suffering from viral fever is appearing to be a lie and otherwise not chosen to file written statement along with the petition even to consider.

5. The petition is only to set aside the ex parte order under Order IX Rule 7 C.P.C. The very prayer in the petition shows to set aside the ex parte order referred supra in the interest of justice and to pass such other order or orders as the case may be. From reading of Order IX Rule 6 C.P.C. once party appeared, the question of setting ex parte does not arise and filing of application to set aside the ex parte order under Order IX Rule 7 equally does not arise. Even the very order of the lower Court clearly speaks the defendant present before the

Court what she stated is she could not cause prepared the written statement due to viral fever by instructing the defendant properly before the time granted thereby could not file and sought for time. It is not that on 30.06.2017 she was suffering from viral fever as admittedly she was before the Court. It is understand rather than raising her submitting the points from any contentions of the whole reading of her affidavit of could not cause prepared the written statement in cause filing the same within the time fixed. In fact it is not the application to receive the written statement condoning the delay in filing for not filed within 90 days or such other time granted. It is only to set aside the ex parte order, that ex parte order passed by the Court is in fact wrongly, even party present. As referred supra, once party present, the question of setting ex parte does not arise. Leave it as it is. Even no written statement filed, as contemplated by Order VIII Rule 10 C.P.C., when Court not chosen to pronounce a judgment at once; the Court has to proceed with trial as held in Balraj Taneja and another v. Sunil Madan and another¹, the Court has to consider the plaint averments where the plaint averments required some proof even defendant failed to file written statement, the Court cannot pass a decree, but for, on merits even defendant remained ex parte or not chosen to contest.

¹ AIR 1999 SC 3381

6. No doubt, the contention of the learned counsel for the respondents/ plaintiffs at this stage is that inadvertently in para-3 of the counter before the lower Court, it is mentioned as if set ex parte, there is no ex parte order, in fact. The Court order itself speaks the same, leave it as it is. If there is no ex parte order when the very prayer in the application is to set aside the ex parte order and Court not even treated when inherent power as an application to receive written statement, the question of dismissing the application does not arise instead of closing with that docket order.

7. Having regard to the above, the very passing of ex parte order under Order IX Rule 7 C.P.C by the lower Court for not filing written statement even party physically present is *per se* unsustainable, thereby, set aside by allowing the revision and the trial Court shall follow the expression of the Apex Court in Balraj Taneja (supra).

8. Miscellaneous petitions pending consideration, if any, in this case shall stand closed in consequence. There shall be no order as to costs.

DR. B. SIVA SANKARA RAO, J

Date: 24.11.2017
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