

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CMA.No.53 OF 2018

ORDER

This Civil Miscellaneous Appeal is directed against the order dated 08.12.2017 passed in I.A.No.896 of 2017 in O.S.No.475 of 2015 on the file of the XXIV Additional Chief Judge, City Civil Court, Hyderabad.

Plaintiffs 1 and 2 filed I.A.No.896 of 2017 and Plaintiffs 3 and 4 filed I.A.No.944 of 2017 in O.S.No.475 of 2015 under Order IX, Rule 9 CPC to restore the suit which was dismissed for default by order dated 10.11.2017.

The plaintiffs filed suit for various reliefs and along with the suit filed another application, which was subject matter of C.M.A.No.978 of 2016 under Order 26 Rule 9 of CPC and certain directions were issued by this Court in the said CMA in para No.13 of the order directing the Court below to dispose of the suit within six months as per Clause (ii), para 13 of the order. While the matter stood thus, the petitioners filed an application under Order 17 Rule (1), which was dismissed declining to grant adjournment. Further, as the counsel was absent at the time of call work, the trial Court dismissed the suit. Thereafter, the Counsel reached the Court at 4.00 p.m. late as he was busy in other Court. Therefore, dismissal of

the suit for default on the ground that there was no representation is illegal, and requested to set aside the dismissal order by allowing the application filed under Order IX, Rule 9 CPC.

The respondents opposed the petition on various grounds mainly on the ground that the petition is not maintainable in accordance with law and that in order to introduce new pleadings in the suit, the plaintiffs filed the impugned applications, in violation of the direction issued by this Court in the CMA referred to above, and prayed for dismissal.

Upon hearing the learned counsel on either side, Court below dismissed I.A.No.944 of 2017 & I.A.No.896 of 2017 in O.S.No.475 of 2015 with costs holding that the petitioners along with other two plaintiffs filed an application under Order 17 Rule (1) of CPC on 10.11.2017, but the petition was dismissed declining to adjourn the suit and that while disbelieving the contention that his counsel was not present and his absence was not at all due to the work in other Courts.

Aggrieved by the order, the present appeal is preferred raising several contentions mainly on the ground that the order of the Court below is irrational, illogical and without consideration of material. But based on mere presumptions,

assumptions and un-connected facts, the Court below dismissed the petition and that the petitioners made out sufficient cause which prevented them from appearing before the Court below and that the Court below dismissed the petitions to set aside the dismissal order and to restore the suit, illegally and therefore, it is prayed to set aside the same by allowing this appeal.

Sri B.Venkateswara Rao, learned counsel appearing for the respondents has drawn attention of this Court as to the conduct of the petitioners/appellants in prosecuting the proceedings and filing petitions one after the other under Order IX, Rule 9, and their negligence in prosecuting the proceedings in spite of the direction issued by this Court in CMA No.978 of 2017 to dispose of the suit within six months. He submits that the petitioners failed to co-operate with the Court below to complete the trial and dispose of the suit within the time frame fixed, instead of co-operating for completion of trial, they filed petitions one after another in order to protract the proceedings and it is prayed to dismiss the appeal.

There is no dispute regarding the direction issued by this Court in CMA No.978 of 2016 to dispose of the suit within six months. But the petitioners sought adjournment along

with other plaintiffs and filed IA No.889 of 2017 under Order 17 Rule 1, which was dismissed by the Court below on the same day. The reason assigned for seeking adjournment for a period of seven days was that due to some unavoidable circumstances, the senior counsel for the petitioners/plaintiffs is unable to attend before the Court, and the absence of the petitioners/plaintiffs and the senior counsel is neither wilful nor wanton. But the petition was dismissed by the Court below on the same day. At about 4.00 p.m, the counsel, lately, appeared before the Court by which time, the suit was dismissed for default.

In para 3 of the affidavit filed in I.A.No.896 of 2017, it is contended that the above suit was coming up for trial, the suit was posted for plaintiffs' evidence and the learned counsel was busy in other Courts and could not appear before the Court during the call work and immediately attended the Court at 4.00 p.m, by which time, the Court passed an order dismissing the suit.

Thus, it is obvious from para 3 of the affidavit that due to work in other Court, the counsel for the petitioners could not appear before the Court. Whether such cause is sufficient cause or not is a question to be decided. If this averment in para 3 of the affidavit is read along with para 2, the averments

made in the present petition in I.A.No.896 of 2017 or in IA.No.889 of 2017 under Order 17 Rule 1 are false as they are inconsistent with another. Even otherwise, the allegations made in para 3 of the affidavit filed in the petition against which the appeal is filed are true, that is not a ground to set aside the order. The Apex Court in *Shiv Cotex v. Tirgun Auto Plast Private Limited and Ors*¹, while dealing with similar situation of granting adjournment held as under:

“Is the Court obliged to give adjournment after adjournment merely because the stakes are high in the dispute? Should the Court be silent spectator and leave control of the case to a party to the case who has decided not to take the case forward.

Thereafter, the Court proceeded to answer thus:

It is sad, but true, that the litigants seek-and the courts grant-adjournments at the drop of the hat. In the cases where the Judges are little proactive and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realise that adjournments do dent the efficacy of the judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The Courts, particularly trial Courts, must ensure that on every date of hearing, effective progress

¹ (2011) 9 SCC 678

takes place in the suit. No litigant has a right to abuse the procedure provided in Code of Civil Procedure. Adjournments have grown like cancer corroding the entire body of justice delivery system.

After so stating, the Bench observed as follows: A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit-whether the plaintiff or the defendant-must co-operate with the Court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril.

In para 16 as extracted above, the Apex Court cited certain illustrations where the Court has power to grant adjournments and where the Court should consider serious ill health of the party or their counsel. But, here, the reason assigned by the petitioners is that their counsel was engaged in other Court. Therefore, in view of the law declared by the Apex Court, the ground urged in the petition is not sufficient to adjourn the matter.

In *Ramon Services Private Limited v. Subhash Kapoor and ors*², the Apex Court cautioned thus:

“Nonetheless we put the profession to notice that in future the advocate would also be answerable for the consequence suffered by the party if the non-appearance was solely on the ground of a strike call. It is unjust and inequitable to cause the party alone to suffer for the self imposed dereliction of his advocate.

² AIR 2001 SC 207

We may further add that the litigant who suffers entirely on account of his advocate's non-appearance in Court, he has also the remedy to sue the advocate for damages but that remedy would remain unaffected by the course adopted in this case. Even so, in situations like this, when the Court mulcts the party with costs for the failure of his advocate to appear, we make it clear that the same Court has power to permit the party to realize the costs from the advocate concerned. However, such direction can be passed only after affording an opportunity to the advocate. If he has any justifiable cause the Court can certainly absolve him from such a liability."

In this context, I may refer to the pronouncement in *Pandurang Dattatraya Khandekar v. Bar Council of Maharashtra, Bombay and ors*³, wherein the Court observed that an advocate stands in a loco parentis towards the litigants and it, therefore, follows that the client is entitled to receive disinterested, sincere and honest treatment especially where the client approaches the advocates for succour in times of need."

Similarly, in *Lt. Col.S.J.Chaudhary v. State (Delhi Administration)*, a three-Judge Bench, while dealing with the role of an advocate in a criminal trial, has observed as follows:

"We are unable to appreciate the difficulty said to be experienced by the petitioner. It is stated that his Advocate is finding it difficult to attend the Court from day-today. It is the duty of every Advocate, who accepts

³ (1984) 2 SCC 556

the brief in a criminal case to attend the trial from day-to-day. We cannot over-stress the duty of the Advocate to attend to the trial from day-today. Having accepted the brief, he will be committing a breach of his professional duty, if he so fails to attend.

In Mahabir Prasad Singh (supra), the Bench, laying emphasis on the obligation of lawyer in his duty towards the Court and the duty of the Court to the Bar, has ruled as under:

A Lawyer is under obligation to do nothing that shall detract from the dignity of the Court of which he is himself a sworn officer and assistant. He should at all times pay deferential respect to the Judge, and scrupulously observe the decorum of the Court room.

Of course, it is not a unilateral affair. There is a reciprocal duty for the Court also to be courteous to the members of the Bar and to make every endeavour for maintaining and protecting the respect which members of the Bar are entitled to have from their clients as well as from the litigant public. Both the Bench and the Bar are the two inextricable wings of the judicial forum and therefore the aforesaid mutual respect is sine qua non for the efficient functioning of the solemn work carried on in Courts of law. But that does not mean that any advocate or group of them can boycott the courts or any particular Court and ask the Court to desist from discharging judicial function. At any rate, no advocate can ask the Court to avoid a case on the ground that he does not want to appear in that Court.

Learned counsel also relied on the decision of the Apex

Court in *R.K.Garg, Advocate v. State of Himachal Pradesh*⁴.

⁴ (1981) 3 SCC 166

In *Hussainara Khatoon v. Home Secretary, State of Bihar*⁵, the Apex Court held that in criminal jurisprudence, speedy trial has become an indivisible component of Article 21 of the Constitution and it has been held by this Court that it is the constitutional obligation on the part of the State to provide the infrastructure for speedy trial.

In *Diwan Naubat Rai and ors v. State through Delhi Administration*⁶, it is held that

“In a democratic set up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith in the system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect-potentiality to bring in a state of cataclysm where justice may become a causality. A litigant expects a reasoned verdict from a temperate Judge but does not intend to and rightly so, to guillotine much of time at the altar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right. This right can be fully ripened by the requisite commitment of all concerned with the system. It cannot be regarded as a facet of Utopianism because such a thought is likely to make the right a mirage losing the centrality of purpose. Therefore, whoever has

⁵ AIR 1979 SC 1360

⁶ AIR 1989 SC 542

a role to play in the justice dispensation system cannot be allowed to remotely conceive of a casual approach.

But, instead of following the said principles, the petitioners-appellants approached the Court below by filing petitions under Order 9 Rule 9 CPC to restore the suit by setting aside the dismissal order in a most casual manner, but cautiously the Court below dismissed both the applications on the grounds enumerated in the order. Therefore, the reasoning assigned by the Court below dismissing the petitions supported by long line of the judgments referred to above.

Learned counsel for the petitioners-appellants has placed reliance of the judgment of Gujarat High Court in Special Civil Application No.15764 of 2014 (*Homibhai Jahangirji Vesuna through POA Surendra Kumar Ishwarlal and ors vs. Minubhai Darbasha @ Dali Patel and ors.*), the said Judgment is not a binding precedent.

However, in the above judgments referred to supra, taking into consideration the conduct of the parties disowning their responsibility towards the Court filing the petitions one or the other and such practice cannot be encouraged adopting a sympathetic approach towards the parties.

In another Judgment in *Parminder Singh v. Virender Pal Singh Jolly*⁷, the trial Court while deciding the similar issue filed under Order 9 Rule 13 CPC held that it is not open to a Civil Judge to show mercy to a litigant who is palpably delaying proceedings for several years. There can be no controversy that the defendant had actual knowledge of the filing of the suit for possession and mesne profits since he had already filed his written statement. Process had repeatedly been issued from time to time and ought to have been held to have been served on the defendant through a female member of his family, even after he was set ex parte.

So, the principles laid down in the said judgment is that no mercy can be shown to a litigant who is palpably delaying the proceedings.

In *Dhanraj Lilaram Motwani and another vs. Rajendra Kumar Dayachand Jain and others*⁸, it is held that practice of granting adjournment as a matter of course is deprecated, when a party was given many adjournments, despite that, Court once again adjourned case with clear mention that it would be last adjournment-Party again seeking adjournment on such date-Such application ought to be rejected.

⁷ LAWS (DLH) 2004 547

⁸ AIR 1996 Bombay 3

In the present case, the trial Court dismissed the petition under Order 17 Rule 1 CPC and dismissed the suit for default.

Without appearing before the Court and without following said principles, the appellants approached the Court by filing two petitions under Order 9 Rule 9 CPC with inconsistent pleas as available seeking to set aside the dismissal order in a most cavalry manner. But cautiously the Court below dismissed both the applications on the grounds enumerated in the order. Therefore, the reasons assigned by the Court below in dismissing the petitions are supported by long line of the judgments referred above.

In the above circumstances, this Court is of the view that the order passed by the Court below is in consonance with law declared by various Courts and therefore, the order impugned does not call for any interference. This appeal is liable to be dismissed as devoid of merits.

Accordingly, the CMA is dismissed. No costs.

Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

JUSTICE M.SATYANARAYANA MURTHY

7th February, 2018
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