

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.R.P.No.25 OF 2011

ORDER:

This revision petition is filed under Section 115 C.P.C. challenging the order dated 24.08.2010 passed in C.M.A.No.209 of 2008 by the II Additional Chief Judge, City Civil Court, Hyderabad confirming the order dated 31.07.2008 passed in I.A.No.1402 of 2007 in O.S.No.16386 of 2003 by the V Junior Civil Judge, City Civil Court, Hyderabad, where by the petition filed under Order IX Rule 13 C.P.C. was dismissed on the sole ground that the decree was not an exparte decree and it was only a decree on merits.

2. Aggrieved by the order passed by the trial Court and confirmed by the appellate Court, the present revision petition is filed.

3. During hearing, learned counsel for the petitioner contended that the decree is only an exparte decree and not on merits and thereby, the petitioner is entitled to invoke jurisdiction of the appellate Court under Order IX Rule 13 C.P.C. and dismissal of the appeal on that ground is an apparent error on the face of record. When the Court exercised its jurisdiction irregularly or illegally, this Court can interfere with the impugned order exercising power under Section 115 C.P.C.

4. It appears from the record that the petitioner filed written statement raising specific contention that he paid Rs.10,000/- by the date of filing written statement and after filing written statement, he paid Rs.21,910/- vide receipt No.848 on 20.08.2004 and requested

this Court to permit the petitioner to cross examine the witness to the extent of payments.

5. The only reason recorded by the Courts below is that the decree is not an *ex parte* decree. However, the contention of learned counsel for the petitioner is that is only an *ex parte* decree.

6. Order 17 Rule 2 C.P.C. prescribes the procedure if parties fail to appear on day fixed and explanation made it clear 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 was present. The State amendment w.e.f. 27.04.1961 says that mere presence in Court of a party or his counsel not duly instructed shall not be considered to be an appearance of the party within the meaning of this rule. Rule 3 of Order XVII C.P.C. where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, if the parties are present proceed to decide the suit forthwith, or if the parties are, or any of them is, absent, proceed under Rule 2. The state amendment further provides that in a case where there is a default under this rule as well as default of appearance under Rule 2, the Court shall proceed under Rule 2.

7. Thus, in view of Rule 3, the Court shall proceed under Sub-rule 2 even for the failure to perform any other act necessary for the

progress of the suit. Failure to cross examined by the counsel for the defendant, the petitioner herein is to perform any other act necessary for further progress of the suit. But he failed to perform such act to complete cross examination of the witness. If that is the case, the Court has to dispose of such suit following the procedure under Order XVII Rule 2 C.P.C. According to it, 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 with the suit in any one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

8. The explanation is clear 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 the day of hearing of the suit is adjourned, the Court may proceed with the case as if such party was present.

9. In both the situations, whether the party failed to appear under Order XVII Rule 2 C.P.C. or any one of the parties failed to perform any act for further progress of the suit, in view of A.P. State Amendment to C.P.C., the procedure to be followed by the Court is under Order IX Rule 9 C.P.C. Therefore, the finding recorded by the Court below that it is a decree on merits is an error apparent on the face of record and this view is supported by the judgment of this Court in **Satyamma and another v G.Lalitha Bai**¹.

10. The trial Court, instead of following the procedure under Order XVII Rule 2 C.P.C., passed an order and decree on merits,

¹ 2006(3) ALT 420

which is erroneous on the face of record. Therefore, the finding recorded by the Court below is illegal and hereby set-aside, while affording opportunity to the petitioner to adduce evidence in support of his contentions raised in the written statement.

11. In the result, the civil revision petition is allowed setting aside the order dated 31.07.2008 passed in I.A.No.1402 of 2007 in O.S.No.16386 of 2003 by the V Junior Civil Judge, City Civil Court, Hyderabad, which was confirmed by order dated 24.08.2010 passed in C.M.A.No.209 of 2008 by the II Additional Chief Judge, City Civil Court, Hyderabad and I.A.No.1402 of 2007 in O.S.No.16386 of 2003 is allowed. Since, it is a suit of 2007, the trial Court is directed to dispose of the suit in accordance with law, as expeditiously as possible, in any event, not later than three months from the date of receipt of copy of this order.

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

JUSTICE M. SATYANARAYANA MURTHY

27.02.2018
kvrn