

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL MISCELLANEOUS APPEAL No.1015 of 2018

ORDER:

This civil miscellaneous appeal is filed under Order XLIII Rules 1 and 2 of Civil Procedure Code (for short "C.P.C.") to set aside the order dated 03.05.2018 passed in I.A.No.371 of 2016 in O.S.No.64 of 2012 by the V Additional District Judge, Tirupati, whereby the petition filed under Order IX Rule 13 of C.P.C. was dismissed.

The appellant herein filed a petition under Order IX Rule 13 of C.P.C. to set aside the exparte orders dated 31.03.2016 passed against the appellant. In the said petition, the appellant alleged that on 12.11.2015 her husband met with an accident and admitted in SVRRGG Hospital, Tirupati for treatment, thereafter, he was shifted to private hospitals in and around Tirupati and Bangalore and treated till 02.04.2016. Therefore, she could not contract her counsel and later came to know that the suit was decreed exparte. She also asserted that she is having good case on merits to succeed in the main case and requested to set aside the exparte decree dated 31.03.2016.

The respondent filed counter before the Court below denying the material allegations interalia contending that the appellant/defendant filed her written statement and contested the suit and the respondent/plaintiff was cross examined by the appellant/defendant and after contest the suit was decreed on merits. According to the decree and judgment, the

respondent/plaintiff deposited balance of sale consideration of Rs.12,50,000/- in State Bank of India, Tiruipati vide challan No.4230 dated 21.04.2016 and also filed E.P.No.26 of 2016 and the appellant causing troubles at every stage of the proceedings and requested to dismiss the petition filed by the appellant/defendant.

In the present appeal, the appellant raised same grounds as narrated in the petition filed before the Court below.

During hearing, learned counsel for the appellant also reiterated the same grounds as narrated in the memorandum of appeal.

Considering rival contentions and perusing the material on record, the points that arise for consideration are:

- (1) ***Whether the appellant was prevented by the sufficient cause from appearing before the Court on the date of hearing? If not, whether the order passed by the trial Court in I.A.No.371 of 2016 in O.S.No.64 of 2012 liable to be set aside?***

P O I N T:

The petition was filed under Order IX Rule 13 of C.P.C. on the sole ground that the appellant/defendant was prevented from the cause which is allegedly beyond her control despite exercise of due diligence i.e. her husband met with an accident and admitted in SVRRGG Hospital, Tirupati on 12.11.2015 and shifted from one hospital to other hospital and he was in hospital till 02.04.2016. If

really, husband of the appellant herein was admitted in the hospital for treatment due to injuries sustained by him in the road accident, there must be some proof to establish that her husband underwent treatment in hospital and the appellant was attending on him throughout hospitalization of her husband. But for one reason or the other, no scrap of paper produced to establish that her husband was hospitalized for treatment. In the absence of any material to substantiate the allegation made in the affidavit, the Court cannot believe the same as a gospel truth on the basis of such bald statement without any further details as to the name of the hospital at Tirupati and Bangalore. Therefore, the trial Court rightly dismissed the petition.

However, learned counsel for the appellant contended that the trial Court did not refer the order passed in a petition E.A.No.63 of 2016, wherein a direction was given to the appellant for deposit of suit costs to the credit of the suit. The said direction issued by the trial Court is not an illegality warranting interference of this Court under Order XLIII Rules 1 and 2 of C.P.C. Though it is an appeal against the order, unless there is an illegality either in appreciation of facts or law, this Court cannot interfere with the order passed by the Court below. On the other hand, the order impugned in this appeal disclosed that the appellant/defendant filed written statement and contested the suit and cross-examined the witnesses examined on behalf of the respondent/plaintiff. Therefore, the impugned order can be treated as order passed under Order XVII Rule 2 of C.P.C. Explanation to Order XVII Rule 2 of C.P.C. was inserted by Act 104 of 1976 with effect from

01.02.1977. Rule (2) deals with procedure if parties fail to appear on day fixed. Order XVII Rule (2) of C.P.C. reads thus:

“Order XVII Rule 2: 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 added by Act 104 of 1976 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 were present.

Therefore, the disposal of the case by the trial Court would fall under explanation to Order XVII Rule 2 of C.P.C. The trial Court by relying on the judgment of this Court in “**Daka Venkatrami Reddy v. The Central Bank of India, Ongole**”¹ held that it is a decree passed under explanation to Order XVII Rule 2 of C.P.C. The conclusion arrived by the trial Court is erroneous for the reason that the petitioner/defendant did not adduce any evidence or substantiated her contention. Therefore, the finding to the extent stated above is set aside.

Even if a decree passed by the trial Court do not attract Order XVII Rule 2 of C.P.C. and the suit is expected to be disposed of under Order IX of C.P.C. When the petitioner filed a petition to set aside the exparte decree and judgment invoking Order IX Rule 13 of C.P.C., it is for her to satisfy the Court that the summons

¹ 2000 (1) A.P.L.J. 199 (H.C.)

were not duly served or that she was prevented by any sufficient cause from appearing when the suit called for hearing. The cause shown by the petitioner do not attract the first limb of said requirement i.e. summons were not duly served, but the cause would fall within the second limb that the petitioner was prevented from sufficient cause from appearing when the suit called for hearing. The reason assigned by the petitioner is that her husband was hospitalized due to injuries sustained by him in a road accident. But the same was not substantiated by any material, more particularly when he underwent treatment approximately for six months. Even if, the decree and judgment is treated as *exparte* order, it can not be set aside on mere asking setting up a ground which is not substantiated. Therefore, I find no ground to interfere with the order passed by the Court by exercising power under Order XLIII Rules 1 and 2 of C.P.C. Consequently, the appeal fails and the same is liable to be dismissed.

In the result, the civil miscellaneous appeal is dismissed. No costs.

The miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

01.11.2018
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