

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL MISCELLEANEIOUS APPEAL No.364 2017

JUDGMENT:

This Civil Miscellaneous Appeal under Order XLIII Rule 1 (r) of CPC is filed questioning the Order in I.A.No.88 of 2017 in O.S.No.88 of 2017 passed by IV Additional District Judge, Ranga Reddy District at L.B.Nagar, dismissing the application filed under Order XXXIX Rules 1 and 2 CPC.

The petitioners filed suit for permanent injunction restraining the respondents and their men from interfering with their peaceful possession and enjoyment of the suit schedule property and along with the suit, the petitioners filed an application in I.A.No.88 of 2017 under Order XXXIX Rules 1 and 2 CPC, for grant of interim injunction during pendency of the suit, alleging that the respondents are trying to interfere with their peaceful possession and enjoyment and in case the respondents are allowed to interfere with their possession, it will led to serious consequences and that the respondents have no right in the property and sought for temporary injunction during pendency of the suit.

The respondent Nos. 2 to 5 appeared and filed an elaborate counter raising several contentions while denying the right of the petitioners to claim a temporary injunction during pendency of the suit while asserting title to the property etc.,

The trial Court dismissed the petition on merits, as the counsel for the petitioners did not appear before the Court despite granting time, declined to grant temporary injunction during pendency of the suit.

Aggrieved by the Order passed by the trial Court, the present Civil Miscellaneous Appeal is filed challenging the dismissal Order in a petition filed under Order XXXIX Rules 1 and 2 r/w 151 CPC.

The present appeal is filed on the ground that when the Advocate did not appear, the Court ought not to have passed an Order on merits and the course open to the Court is to pass an Order under Order IX CPC and passing such an Order on merits is an illegality and contrary to Order XVII Rules 1, 2 and 3 CPC. It is also contended that for the fault of the Advocate, the party should not suffer and on this ground also, the petitioners sought to set aside the Order passed by the trial Court.

Per contrary, the learned counsel for the respondents/defendants contended that as on the first date of appearance, the respondents filed Counter and reported ready, but the counsel for petitioners herein/plaintiff obtained adjournment on the pretext of settling the matter outside the Court without the knowledge of the respondents, that there are no grounds to set aside the Order passed by the Court, prayed to confirm the order in I.A.No.88 of 2017 in O.S.No.88 of 2017.

As seen from the observations made in para No.3 of the Order of the trial Court, it is evident that the petitioners failed to submit arguments and there was no representation on their behalf. The respondent Nos. 2 to 5 submitted arguments and filed documents, but they are not marked, it is clear that there was no representation for the petitioners and the petitioners were not heard by the trial Court. When the petitioners failed to appear and advance arguments, the course left open to the trial Court is to follow the procedure contemplated under Order XVII Rules 1 and 3 CPC.

Order XVII Rule 1 CPC deals with grant of time and adjourn hearing; Rule (2) CPC deals with the procedure the party failed to appear on the date fixed; and Rule (3) CPC deals with the procedure to be followed when either party failed to produce evidence. According to Rule No.3, 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 any of them is absent proceed under Rule 2. The A.P. Amendment to Rule 3 CPC, which says as follows: " provided that in a case where there is a default under this rule as well as default of appearance under Rule 2, the Court will proceed under Rule 2 incorporated in the CPC with effect from 27.04.1961. Thus, in case where any party to a suit failed to produce his evidence or to cause attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, the Court is required to fall back the procedure prescribed under Sub Rule 2 in view of the AP Amendment dt. 27.04.1961. Rule 2 mandates that where on any date 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 any one of the modes directed in that behalf by Order IX CPC or make such other order as it thinks fit. The explanation thereto further says 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 direction, proceed with the case as if such party were present.

In the present case, the question of recording any part of the evidence is irrelevant because the petition filed under Order XXXIV Rules 1 and 2 CPC was dismissed by exercising power under Order XVII Rule 3 CPC instead of proceeding under Order XVII Rule 2 CPC by following any of the modes contemplated under Order IX CPC, for disposal of the case.

No doubt, the counsel for the petitioners conveniently avoided to appear before the Court obviously for the reasons best known to him and such practice is unhealthy, which would clog the proceedings. If such

practice is allowed and permit the parties to absent themselves without representation by any counsel though appearing, it will lead to serious consequences. But, the trial Court ought to have dismissed the petition by following any of the modes for disposal of the petition under Order IX CPC for disposal of the petition, instead that the trial Court dismissed the petition on merits.

No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 CPC should be maintained. When we say 'justifiable cause' what we mean to say is, a cause which is not only 'sufficient cause' as contemplated in sub-rule (1) of Order XVII CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause. The list is only illustrative and not exhaustive. However, the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an

important circumstance which the courts must keep in view whenever a request for adjournment is made. 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 plaintiff or defendant - must cooperate 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. (See *Shiv Cotex v Tirgun Auto Plast Private Limited and others*)¹.

In view of the serious observations recorded by the Apex Court, the Court shall not grant beyond three adjournments in view of the cap contained under proviso to Order XVII Rule 1 CPC except in extraordinary circumstances, which are illustrated in the judgment.

In the present case, the counsel for the petitioners conveniently did not appear for one reason or the other, disowning his professional responsibility as a counsel appearing on the party and drove the Court to pass the impugned Order in challenge in this appeal. Therefore, such unhealthy practice of avoidance of appearance before the Court by the counsel though his conscious about pendency of the matter before the Court and his obligation to represent the party in the suit would amount to abuse of process of the Court and such practice has to be discouraged and deprecated.

As discussed above, when there was no representation on behalf of the petitioners, the Presiding Officer of the Court is supposed to pass an Order under Order IX CPC, but not on merits, in view of the law declared by the Apex Court in *Harbans Pershad Jaiswal v. Urmila Devi Jaiswal*².

¹ 2011 9 SCC 678

² 2014 5 SCC 723

Thus, the Order passed by the trial Court, is illegal to the extent of passing an Order on merits. Therefore, the order passed by the trial Court deciding the rights of the parties on merits, is hereby set aside while treating the Order as one under Order IX CPC. Therefore, the Order is confirmed treating the same as dismissal for default as one of the modes under Order IX of CPC as contemplated under Order XVII Rule 2, Rule 3 and AP Amendment thereto.

With the above observation, this Civil Miscellaneous Appeal is disposed of.

Miscellaneous Petition, if any pending, in this case, shall stand dismissed.

Date: 31-01-2018
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M. SATYANARAYANA MURTHY, J



HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



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