

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITION No.5719 of 2018

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, by the unsuccessful defendant/revision petitioner, is directed against the order, dated 02.05.2018, of the learned IX Additional District Judge, Chittoor, passed in IA.No.71 of 2017 in OS.No.31 of 2015.

2. I have heard the submissions of Sri *N.Ranga Reddy*, learned counsel appearing for the revision petitioner/defendant ('defendant' for brevity); and of Sri *O.Udaya Kumar*, learned counsel appearing for the respondent/plaintiff ('plaintiff' for brevity). I have perused the material record.

3. The facts, which are necessary to be stated as a preface to the order, in brief, are as follows: In a suit for specific performance filed by the plaintiff, the defendant, having filed her written statement, is resisting the suit. While so, when the matter is posted for cross-examination of PW1 on payment of costs, the learned counsel engaged by the defendant failed to appear before the trial Court and cross-examine PW1 and the costs, which are imposed, are also not paid. Therefore, the trial Court set the defendant *ex parte*. Thereafter, the defendant filed the subject application to set aside the *ex parte* order passed, on 16.04.2018, and to permit the defendant's learned counsel to cross-examine PW1. By the impugned order, the

said application was dismissed. Therefore, the defendant is before this Court.'

4. The case of the defendant, in support of her request, in brief, is this: 'The suit is posted to 16.04.2018 for cross-examination of PW1. Her learned counsel was engaged in I Additional District Court and was conducting a proceeding in that Court. In the meanwhile, the trial Court called the defendant, as the matter is posted for cross-examination of PW1. By that time, the defendant was waiting near the I Additional District Court in which her counsel is engaged in conducting a matter. Due to non-representation, the trial Court was pleased to set the defendant *ex parte* and posted the matter to 20.04.2018. She has got good defence to succeed in the suit. The failure of her learned counsel to cross-examine PW1 on 16.04.2018 is neither due to wilful nor wanton reasons, but for the reasons stated supra. Therefore, the petition is filed.'

5. The case of the plaintiff is in the nature of denial. In the detailed counter, the plaintiff stated *inter alia* as follows: 'The suit is once decreed *ex parte*. The plaintiff deposited to the credit of the suit, the balance sale consideration, which is a substantial amount. Later, at the request of the defendant, the *ex parte* decree was set aside. Thereafter, the matter is posted for cross-examination of PW1. Despite several opportunities, the defendant failed to cross-examine PW1. Hence, the matter

was adjourned finally on payment of costs. Despite granting such reasonable opportunities and an opportunity on imposition of costs, the defendant failed to avail the opportunities. The matter underwent several adjournments. In view of the laches on the part of the defendant and delaying tactics being adopted by the defendant in order to harass the plaintiff, who has come from Bangalore to give evidence, the trial Court is justified in setting the defendant *ex parte*. Giving an opportunity to the defendant in a matter of this nature where she is not diligent will be amounting to sending wrong signals to the litigants. Hence, the petition may be dismissed.'

6. Learned counsel for the defendant and the learned counsel for the plaintiff advanced arguments in line with the cases of the respective parties, which are stated supra.

7. I have given earnest consideration to the facts and submissions.

8. A perusal of the order impugned reflects that the trial Court dismissed the application of the defendant noting that sufficient opportunities are granted to the defendant to cross-examine PW1 and that an *ex parte* decree was once set aside and that an Advocate Commissioner who was appointed for recording cross-examination of PW1 had returned the warrant for non-cooperation of the learned counsel for the defendant and that, therefore, the defendant did not deserve any further opportunity. Insofar as the previous events viz., the fact that

the *ex parte* decree was once set aside at the instance of the defendant and that the matter was adjourned number of times, suffice if it is observed that the trial Court had unnecessarily taken into consideration the previous events and had stretched the matter to cover circumstances which had occurred prior to the date on which the defendant was set *ex parte* and that the trial Court had unnecessarily penalised the defendant for previous negligence which had already been over looked and condoned earlier. In fact while considering the merits of the application filed for setting aside the *ex parte* order passed in the suit, the Court has to only consider the valid reason, if any, for non appearance of the defendant and her counsel on the day the defendant was set *ex parte*; but, the Court cannot take into consideration the aspects of their non appearance on previous dates of adjournments and cannot stretch the matter to cover circumstances, which had occurred prior to the date on which the defendant was set *ex parte*, as the said conduct prior to the said date stands over looked and condoned.

9. Moreover, as rightly contended, when the matter is coming for cross-examination of PW1 and when there is default on the part of the defendant in cross-examining PW1, the trial Court, if it were not inclined to grant further time, ought to have closed the evidence of PW1 by forfeiting the right to cross-examine the witness as per practice and procedure, instead of setting the defendant *ex parte*. In that view of the matter, this

Court finds that the procedure adopted by the trial Court is not justified and appreciable. Be it noted that the suit is filed for specific performance; and the rights of the defendant with regard to valuable immovable property are involved in the *lis*. Further, as rightly urged by the learned counsel for the defendant, the defendant cannot be penalised for her learned counsel's absence before the trial Court and his failure to cross examine PW1. Additionally, a plausible explanation was offered by stating that when the matter was called, the learned counsel was unable to present before the trial Court and cross-examine PW1, as he was engaged in another Court conducting another proceeding. In the considered view of this Court, having regard to the fact that the defendant was not at fault and as the matter is still before the trial Court, it is just and fair to grant one more opportunity to the defendant to substantiate the defence by setting aside the *ex parte* order.

10. Viewed thus, this Court holds that sufficient grounds are made out and that the revision deserves to be allowed.

11. In the result, the Civil Revision Petition is allowed and the impugned order is set aside and as a sequel, IA.No.71 of 2017 in OS.No.31 of 2015 is allowed and the *ex parte* order passed against the defendant, on 16.04.2018, in the original suit is set aside. Having regard to the fact that the suit is once decreed *ex parte* and the *ex parte* decree is set aside and that the suit is of the year 2015, the trial Court is directed to dispose of the suit,

as expeditiously as possible and preferably within two (02) months from the date of receipt of a copy of this order.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

M.SEETHARAMA MURTI, J

Date: 15th December, 2018

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