

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.No.3555 of 2018

ORDER:

This Revision is filed challenging the order dt.16.02.2018 in I.A.No.818 of 2017 in O.S.No.103 of 2016 of the Senior Civil Judge, Ranga Reddy District at Medchal.

2. Petitioners herein are plaintiffs in the above suit.

3 The said suit was filed by the petitioners seeking cancellation of the registered sale deeds executed by them in favour of the 1st respondent and its predecessor in title.

4. On 16.04.2016, the 1st respondent was set *ex-parte* as its counsel was not present when the matter was taken up by the Court on that day.

5. Through the counsel for the 1st respondent an affidavit was filed along with an application I.A.No.105 of 2016 under Order IX Rule 7 CPC.

6. By a cryptic order dt.10.03.2017 the Court below allowed the said application on payment of costs of Rs.500/-.

7. This was challenged by the petitioners in CRP.No.3090 of 2017 before this Court.

8. The said CRP was allowed on 04.08.2017 and the matter was remitted back to the Court below for fresh consideration

afresh on merits on the ground that reasons were not recorded in the order of the trial Court.

9. After remand, I.A.No.105 of 2016 was dismissed on 10.10.2017. While the trial Court agreed that now-a-days getting stranded in traffic may be a cause for setting aside an order setting a party *ex-parte*, but in view of a decision of this Court that affidavits cannot be filed by advocates in suits, the application was liable to be dismissed and accordingly it dismissed the I.A.No.105 of 2016

10. Since the ground on which the trial Court dismissed the application was that the party did not file the affidavit in support of I.A.No.105 of 2016, the 1st respondent filed I.A.No.818 of 2017 which was supported by an affidavit of the Regional Manager of the 1st respondent reiterating that the counsel could not be present when the matter was called because he got stuck up in traffic.

11. This application was opposed by the petitioners on the ground that once I.A.No.105 of 2016 was dismissed, a second application under Order IX Rule 7 CPC i.e., I.A.No.818 of 2017 is not maintainable.

12. According to them, the 1st respondent ought to have challenged the order dt.10.10.2017 in I.A.No.105 of 2016 in the High Court by way of Revision and should have got it set aside

and since they did not do so, the principle of *resjudicata* would apply.

13. By order dt.16.12.2018, the Court below rejected the objection of the petitioners and allowed the I.A.No.818 of 2017. It noted that the order dt.10.10.2017 in I.A.No.105 of 2016 was not on merits and was only on a technical ground, that it was filed without supporting affidavit of the party, and that counsel's affidavit cannot be accepted. It relied on the decision of the Supreme Court in **Arjun Singh v. Mohindra Kumar and others¹**.

14. In that decision, the Supreme Court observed that the purpose of an application under Order IX Rule 7 CPC is to ensure orderly conduct of proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation. An order under Order IX Rule 7 CPC does not put an end to the litigation nor does it involve the determination of any issue in controversy in the suit and the decision in an application under Order IX rule 7 CPC would not operate as *resjudicata* either on fact or in law.

15. The Court below observed that since the instant application was filed with an affidavit signed by party instead of by counsel unlike in I.A.No.105 of 2016, it is maintainable and the Court below accepted the reason given in the said affidavit for the absence of the counsel on 16.11.2016 i.e., the counsel absent as

¹ AIR 1964 SCC 993

he stuck up in traffic, as a valid ground for setting aside the order passed by it on 16.11.2016 setting the 1st respondent *ex-parte*. It however imposed costs of Rs.1,000/- on the 1st respondent.

16. Assailing the same, this Revision is filed.

17. It is the contention of the counsel for the petitioners that the order passed by the Court below cannot be sustained and that the Court below could not have entertained I.A.No.818 of 2017 once I.A.No.105 of 2016 earlier filed under Order IX Rule 7 CPC was rejected on 10.10.2017 after hearing both sides and when the said order was not challenged in Revision and it attained finality. He also placed reliance on judgment in ***R.Unnikrishnan and another v. V.K.Mahanudevan and others***², ***Kalinga Mining Corporation v. Union of India and others***³, ***P.Kiran Kumar v. A.S.Khadar and others***⁴, ***Prabhunath Dixit v. IIIrd Additional District Judge, Deoria and other***⁵ and ***Prahlad Singh and another v. Niyaz Ahmad and other***⁶.

18. Counsel for the 1st respondent on the other hand supported the order of the Court below and contended that the Court below had rightly relied on decision in ***Arjun Singh***'s case(1 supra) in granting relief to the 1st respondent; and that when I.A.No.818 of 2017 is filed with the supporting affidavit of the party and not by its counsel as in the case of I.A.No.105 of 2016, the Court below

² 2014(4) SCC 434

³ 2013(5) SCC 252

⁴ 2002(3) ALD 109(SC)

⁵ AIR 2001 Allahabad 355

⁶ AIR 2001 Allahabad 78

did not commit any error of jurisdiction in entertaining it and allowing it.

19. From the facts narrated above, it is clear that the only reason why I.A.No.105 of 2016 was dismissed on 10.10.2017 was that the affidavit supporting it was filed by the counsel for the 1st respondent and not by the 1st respondent's employee. It is also not in dispute that the Court while dismissing the I.A.No.105 of 2016 agreed that advocate getting stuck up in traffic is a valid reason normally to allow an application under Order IX Rule 7 CPC.

20. Therefore, when the second application under order IX rule 7 CPC i.e., I.A.No.818 of 2017 is filed by the party i.e., the 1st respondent and not by its counsel, the Court below was justified in entertaining it and allowing it.

21. In **Arjun Singh's** case(1 supra) the Supreme Court held that:

“interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after

the same has once been disposed of the court would be justified in rejecting the same as an abuse of the process, of court. There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation. The case of an application under O. IX. r. 7 would be an illustration of this type. If an application made under the provisions of that rule is dismissed and an appeal were filed against the decree in the suit in which such application were made, there can be no doubt that the propriety of the order rejecting the reopening of the proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate court. In that sense, the refusal of the court to permit the defendant to "set the clock back" does not attain finality. But what we are concerned with is slightly different and that is whether the same Court is finally bound by that order at later stages, so as to preclude its being reconsidered. Even if the rule of resjudicata does not apply it would not follow that on every subsequent day on which the suit stands adjourned for further hearing the petition could be repeated and fresh orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the court does not however necessarily rest on the principle of res judicata. Thus if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same facts, is not barred on the application 'of any rule of res judicata, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of resjudicata is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issue, whereas in the other case, on proof of fresh facts, the court would be competent, nay,, would be bound to take those

into account and make an order conformably to the facts freshly brought before the court.”

22. Thus, the Supreme Court categorically held that applications under Order IX Rule 7 CPC are only designed to ensure just, smooth, orderly and expeditious disposal of the suit and the principle of *resjudicata* would not apply and fresh petitions can be maintained, though they may not be allowed by the Court below in certain circumstances.

23. Since the only reason for dismissal of I.A.No.105 of 2016 was that affidavit supporting it was filed through the counsel and not by the 1st respondent itself, and since I.A.No.818 of 2017 also filed under Order IX Rule 7 CPC supported by affidavit of the 1st respondent's employee and not by its counsel, the above judgment would clearly apply and the Court below did not commit any error of jurisdiction in allowing I.A.No.818 of 2017.

24. The judgments in **R.Unnikrishnan's** case(2 supra), **Kalinga Mining Corporation's** case(3 supra) and **P.Kiran Kumar's** case(4 supra) cited by the counsel for the petitioners, firstly, did not deal with Order IX Rule 7 CPC and, secondly, they are all rendered by benches of two Judges whereas judgment in **Arjun Singh's** case(1 supra) relied on by the counsel for the 1st respondent is rendered by a Bench consisting of three Judges of the Supreme Court. Also the judgment in **Arjun Singh's** case(1 supra) has not been referred to the judgments in **R.Unnikrishnan's** case(2 supra),

Kalinga Mining Corporation's case(3 supra) and **P.Kiran Kumar's** case(4 supra) cited by the counsel for the petitioners.

25. Therefore, I am of the opinion that the judgments in **R.Unnikrishnan's** case(2 supra), **Kalinga Mining Corporation's** case(3 supra) and **P.Kiran Kumar's** case(4 supra) cannot be of any assistance of the petitioners.

26. The judgments of the Allahabad High Court cited in **Prabhunath Dixit's** case(5 supra) and **Prahlad Singh's** case(6 supra) are only of a persuasive value and do not bind this Court and I am not inclined to follow them.

27. Accordingly, this Civil Revision Petition is dismissed with costs of Rs.2,000/- to be paid by the petitioners to the 1st respondent within two (02) weeks from the date of receipt of a copy of this order.

28. Consequently, miscellaneous petitions pending if any, shall stand closed.

M.S. RAMACHANDRA RAO, J

06th June, 2019.

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