HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

C.M.A.Nos.126 and 139 of 2017

COMMON JUDGMENT :

Since these two Civil Miscellaneous Appeals arise between the same parties, they are heard together and being disposed of by this common judgment.

The appellant in both these appeals is defendant in O.S.No.1529 of 2013 and plaintiff in O.S.No.1827 of 2014.

O.S.No.1529 of 2013 was filed by the respondent in these appeals against the appellant for recovery of possession of the suit schedule property, damages/mesne profits of Rs.3,60,000/- for the period from September, 2010 to August, 2013, future damages @ Rs.10,000/- per month from the date of filing of the suit till handing over original Sale Deed dated 19.09.2006 to the respondent in respect of Flat bearing Municipal No.1-21-328/1/F2 (old No.21-332 & 21-67/4/2) on Plot Nos.15 and 16 in Sy.Nos.444, 445, 446 and 447, admeasuring 425 square feet in Chitharaiah Colony, Venkatapuram, under Alwal Municipality, Malkajgiri Mandal, Ranga Reddy District.

The appellant also filed suit O.S.No.1827 of 2014 (old O.S.No.174 of 2013) for perpetual injunction restraining the respondent from interfering with his alleged possession and

enjoyment of the same property, which is subject matter of O.S.No.1529 of 2013.

Both the suits were heard together and evidence was being recorded in O.S.No.1529 of 2013.

The respondent was examined as PW.1 therein in the presence of the appellant and the appellant filed a Memo that he had no objection to conduct a joint trial.

The joint trial commenced on 18.08.2015, but inspite of giving several opportunities to the appellant to cross-examine the respondent/PW.1, he did not avail the same and so evidence of PW.1 was closed.

Thereafter, the matter was posted for evidence of appellant and inspite of several adjournments granted, he did not lead evidence.

Thereafter, arguments of the respondent were heard, but the appellant did not come forward to address arguments in the suits.

Ultimately, O.S.No.1529 of 2013 was decreed *exparte* and O.S.No.1827 of 2014 was dismissed for default, both on 26.02.2016.

On 24.03.2016, the appellant filed I.A.No.360 of 2016 in O.S.No.1529 of 2013 invoking Order 9 Rule 13 of C.P.C. to set aside the *exparte* decree dt.26.02.2016 in O.S.No.1529 of 2013;

and I.A.No.361 of 2016 in O.S.No.1827 of 2014 invoking Order 9 Rule 9 of C.P.C. to restore the suit O.S.No.1827 of 2014 by setting aside the dismissal for default order dt.26.02.2016.

In both these applications, the appellant contended that the respondent and her husband came to the suit schedule property on 20.03.2016 and asked to vacate and handover the physical possession of the suit schedule property as the judgment was passed in their favour; that the appellant had contacted his earlier counsel, but he stated that the suit is pending and that he need not worry about the same; that the appellant got it verified through the present counsel, and came to know that an *exparte* decree was passed against him in O.S.No.1529 of 2013 and O.S.No.1827 of 2014 was dismissed for default. The appellant stated that on account of ill-health, since he was suffering from viral fever and jaundice, he could not contact his previous counsel and give instructions to proceed with the matter and as his earlier counsel did not inform him about the proceedings in the suit, he could not attend the Court; and, therefore, O.S.No.1529 of 2013 came to be decreed *exparte* and O.S.No.1827 of 2014 was dismissed for default, and hence, both these orders were required to be set aside.

Separate counter affidavits were filed by the respondent in both the I.As., contending that the appellant was personally present several times before the Court below when the suits were listed, but he did not cross-examine PW.1 and did not lead

evidence and with a malafide intention only these applications are filed to harass her. It is also contended that the appellant should strictly prove his ill-health on account of the alleged viral fever and jaundice and he had not even filed a single document in respect of his ill-health.

The Court below, vide order dt.28.10.2016 dismissed I.A.No.360 of 2016 in O.S.No.1529 of 2013; and vide order dt.10.11.2016 dismissed I.A.No.361 of 2016 in O.S.No.1827 of 2014.

Challenging the same, these two appeals are filed by the appellant.

Learned counsel for the appellant reiterated that the appellant was unwell and that the appellant had also filed Medical Certificate in support of his alleged illness before the Court below, but the same was not taken into consideration and the Court below only relied upon events prior to 26.02.2016 and the appellant cannot be punished for the failure of his counsel to cross-examine the witness PW.1.

On the other hand, learned counsel for the respondent refuted the said contentions and supported the orders passed by the Court below.

It is settled law that, while considering the application under Order 9 Rule 13 of C.P.C., the Court has to focus on the reason,

which prevented the defendant from attending the Court on the fixed date and the actions of the defendant on other dates cannot be taken into account (see CH. PRABHAKAR vs. CH. SADANANDAM[1], GARUDA SAKUNTALA vs. A.V.M. JAGGA RAO[2] and THOTA NAGESWARA RAO vs. GOLLA VENKATA NARASIMHA RAO[3]).

Thus, it is clear that, while deciding an application under Order 9 Rule 13 of C.P.C., for setting aside an *exparte* order, the past conduct of the defendant cannot be looked into and the Court is only required to see whether the cause shown is sufficient or not.

This legal position is not disputed by the learned counsel for the respondent.

A reading of the orders passed by the Court below indicate that the Court had given more importance to the absence of the appellant on the earlier dates when the matter was listed and seems to have got prejudiced by the same and thus it committed an error in dismissing the applications filed by the appellant.

Though evidence on record does not indicate that any Medical Certificate was filed before the Court below, because there is no reference with regard to the same in the impugned orders, and the Court below had also specifically recorded that no

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[1] 1997 (1) ALT 689 (D.B.)
[2] 2000 (6) ALT 396 (D.B.)
[3] 2003 (2) An.W.R. 164 (A.P.)

document was filed by the appellant to show that he was suffering from viral fever and jaundice, since substantial stakes are involved in the matter, and the counsel for the appellant also promises that the appellant would cooperate to the Court below for early disposal of the suits, the order dt.28.10.2016 in I.A.No.360 of 2016 in O.S.No.1529 of 2013 and the order dt.10.11.2016 in I.A.No.361 of 2016 in O.S.No.1827 of 2014, passed by the Court below, are set aside; and the said applications are allowed, subject to the appellant giving an undertaking that he would cooperate with the Court below for early disposal of the suits and also paying a sum of Rs.20,000/- (Rupees twenty thousand only) towards costs to the respondent within a period of four (4) weeks from the date of this judgment. In default of payment of costs within the above stipulated period, these appeals shall stand dismissed.

As a sequel, miscellaneous petitions pending, if any, in these appeals shall stand closed.

M.S. RAMACHANDRA RAO, J

19.03.2019
Msr

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C.M.A.Nos.126 and 139 of 2017

19.03.2019
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