

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
THE HON'BLE SRI JUSTICE T.VINOD KUMAR**

C.M.A.No.807 of 2016

ORDER: *(Per the Hon'ble Sri Justice M.S.Ramachandra Rao)*

Heard Sri S.Ramachandra Prasad, counsel for appellant, Sri S.Satyanarayana Rao, counsel for respondents 3 & 4, and Mrs. Manjari S.Ganu, counsel for 5th respondent. Since notices sent to respondents 1 & 2 have been returned with endorsement 'unclaimed', they are deemed to be served.

2. This Civil Miscellaneous Appeal is filed under Order XLIII Rule 1 CPC challenging the order dt.09.09.2016 in I.A.No.1378 of 2013 in O.S.No.47 of 2007 of the IX Additional Chief Judge, City Civil Court, Hyderabad.

3. Appellants herein are the plaintiffs in the above suit.

4. The said suit was filed by the appellants against the respondents seeking partition of the plaint schedule property into five shares and allotment of 1/5th share to each of them with possession. They also sought a decree of Perpetual Injunction against the respondents restraining them from alienating the property to third parties or changing the character of the suit property.

5. Written statement was filed by the respondents opposing the suit claim.

6. Matter was posted on 22.10.2013 for trial on payment of costs of Rs.200/-.

7. On that day, petitioners, who were represented by GPA Holder, did not attend. Therefore the suit was dismissed for default.

8. On 20.11.2013, within 30 days from the date of dismissal of the suit on 22.10.2013, petitioners filed through their GPA Holder I.A.No.1378 of 2013 invoking Order IX Rule 9 CPC. The GPA Holder of the petitioners contended that he was aged about 60 years and suffering from Cardiac problem because of which he could not appear on 22.10.2013 when the matter was listed for trial. He stated that his absence before the Court on the said date was neither deliberate nor intentional and the order dt.22.10.2013 dismissing the suit for default, be set aside.

9. Counter affidavit was filed by 5th respondent opposing the said application. He contended that the petitioners, in spite of giving several opportunities to commence trial, did not lead evidence, that the matter had been adjourned on payment of costs to 22.10.2013 for leading evidence, and because of their non-cooperation the suit was dismissed for default. It is also contended that no medical certificate was filed by the petitioners to show that the GPA Holder of the petitioners was suffering from Cardiac problem on that date i.e. 22.10.2013.

10. By order dt.09.09.2016, the Court below dismissed the said application. The Court below also held that because no medical certificate was produced to establish that the GPA holder of the petitioners was suffering with Cardiac problem, the application deserved to be dismissed.

11. Assailing the same, this Appeal is filed.

12. Counsel for the appellants contended that the Court below could not have dismissed the application on the ground that medical certificate to prove the illness of the GPA Holder of the petitioners was not filed, particularly, when the application for restoration of the suit was filed within 30 days from the date of dismissal of the suit.

13. Counsel for the respondents however supported the order passed by the Court below and reiterated that in the absence of evidence of ill-health of the GPA Holder of the appellants on 22.10.2013, the Court below did not commit any error of law in dismissing the application.

14. Under order IX Rule 9 CPC where a suit is dismissed for default, plaintiff may apply to have the said dismissal set aside, if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called for hearing.

15. In the instant case, all three appellants/plaintiffs are ladies and they are represented by GPA Holder, who is the husband of the 1st appellant.

16. The suit itself is for a decree of partition of a valuable property located in Hyderabad city.

17. It is no doubt true that when the matter was listed prior to 22.10.2013 as trial had not commenced, the Court has posted it to 22.10.2013 on payment of costs of Rs.200/-.

18. It is the contention of the GPA Holder of the appellants that he is a senior citizen and he suffered a Cardiac problem and so he could not appear on 22.10.2013.

19. In our opinion, the Court below ought to have taken a liberal view of the matter instead of a hyper-technical view taking into account the facts that the appellants are ladies, the GPA Holder is a Senior Citizen, valuable rights to property are involved, and the application for restoration of the suit was filed within the period of 30 days on 20.11.2013 itself.

20. Considering a comparable provision contained in Order IX Rule 13 CPC, which contains a similar language as Order IX Rule 9 CPC, the Supreme Court in **G.P.Srivastava v. R.K.Raizada and others**¹ has held that the word 'sufficient cause' appearing in Order IX Rule 13 CPC must be liberally construed to enable the

¹ AIR 2000 SCC 1221

Court to do complete justice between the parties particularly when no negligence or inaction is imputable to erring party. It also stated that the words 'sufficient cause' for non-appearance refers to the date on which the absence was made a ground for proceeding *ex-parte* and cannot be stretched to rely upon other circumstances anterior in time. It also observed that where defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not *malafide* or intentional, while compensating the other side with adequate costs to ensure that the *lis* is decided on merits.

21. Applying similar analogy to the instant case, we are of the opinion that the application for restoration of the suit having been filed within 30 days from the date of dismissal of the suit, the Court below should have exercised discretion for restoration of the suit and ought not to have penalized the appellants, who had filed the suit for partition of a valuable property in the city of Hyderabad. However, we are also of the view that the appellants ought to compensate the respondents with costs of Rs.1,000/- payable to each of the respondents.

22. Accordingly, this Civil Miscellaneous Appeal is allowed; the order dt.09.09.2016 in I.A.No.1378 of 2013 in O.S.No.47 of 2007 of the IX Additional Chief Judge, City Civil Court, Hyderabad is set aside and the said I.A. is allowed, subject to the condition of the appellants depositing a sum of Rs.5,000/- to the credit of the

suit in the Court below within a period of three (03) weeks from the date of receipt of a copy of this order and on such deposit, each of the respondents is permitted to withdraw Rs.1,000/-. In default of depositing the amount as directed above, this Appeal shall stand dismissed. Counsel for the appellants undertakes to extend full cooperation to the Court below for expeditious disposal of the suit and the Court below shall endeavour to decide it as early as possible, preferably within a period of six (06) months from the date of receipt of a copy of this order.

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

M.S. RAMACHANDRA RAO, J

T.VINOD KUMAR, J

27th August, 2019.

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