

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

**CIVIL REVISION PETITION NO.6935 OF 2018**

**ORDER:**

This Revision is filed under Article 227 of the Constitution of India challenging the order dt. 04.10.2018 in I.A. No.91 of 2017 in O.S. No.225 of 2014 of the XII Additional Chief Judge, City Civil Court, Secunderabad.

The petitioner is the third defendant in the suit.

The first respondent herein filed the said suit against the petitioner for cancellation of a sale deed dt. 19.11.2010 and for a direction to respondent No.2 and the petitioner to pay to the first respondent a sum of Rs.77,04,927/- with future interest.

On the ground that written statement was not filed, the respondent No.2, the petitioner and the 5<sup>th</sup> respondents were set *ex parte* and an *ex parte* decree was passed on 30.01.2016.

The petitioner herein filed I.A. No.91 of 2016 under Section 5 of the Limitation Act to condone the delay of 14 days in filing the petition under Order IX Rule 13 CPC and I.A. No.90 of 2016 to set aside the *ex parte* decree dt. 30.01.2016 passed in O.S. No.225 of 2014.

In the affidavit filed in support of the said application, the petitioner contended that he had given instructions to his counsel to prepare written statement, that he had also signed it and copies were given to the junior counsel of the counsel engaged by the petitioner, but the said junior counsel did not file the written statement. He contended that he is a Senior Citizen who had superannuated from service and is suffering from many health ailments; that he later came

to know about the *ex parte* decree when he went to his counsel's office on 12.03.2016. He stated that under the said unavoidable circumstances, which are beyond his control, he could not appear in the court or file written statement and that he is filing written statement along with these applications.

Counter-affidavit was filed by the respondent opposing the said application. She contended that it did not disclose any valid grounds for granting the relief and the petitioner did not come to the court with clean hands. It is stated that criminal proceedings were also initiated against the petitioner and the petitioner has a criminal intention to harass the first respondent. Certain decisions of the Delhi High Court and the Supreme Court were also cited in the counter-affidavit.

By order dated 04.10.2018, the court below dismissed the I.A. No.91 of 2017. It held that the petitioner had been set *ex parte* on 13.07.2015 itself when the matter was pending before a different court and was later transferred to the court of the XII Additional Chief Judge, City Civil Court, Secunderabad; that the petitioner did not whisper the name of the junior counsel and the date shown in the written statement is 16.03.2016 which indicates that it was prepared after he was set *ex parte*. It observed that even after giving sufficient time, the petitioner did not file written statement and so the plea of the petitioner that written statement was handed over to the junior counsel to file before the court is not correct. It observed that the petitioner did not state that there was a delay of 14 days to set aside the *ex parte* decree and that he did not give any reason for not filing the written statement before he was set *ex parte*. It held that the petitioner was not diligent in filing the written statement even though

the court gave opportunity, that day to day delay was not explained by him, and the application was filed to drag on the proceedings.

Assailing the same, the Revision is filed.

Heard the learned counsel for petitioner and Sri G. Dhananjai, the learned counsel for the first respondent. It is the contention of the counsel for the petitioner that the court below erred in refusing to condone the short period delay of fourteen days in filing the application under Order IX Rule 13 CPC, and the petitioner being a Senior Citizen, cannot be made to suffer *ex parte* decree for the fault of the junior counsel of the counsel whom he had engaged in the court below. It is also contended that the court below unnecessarily took into account the conduct of the petitioner prior to passing of the *ex parte* decree.

Sri G. Dhananjai, learned counsel appearing for the first respondent refuted the said contentions and supported the order passed by the court below. He also pointed out the date on which the written statement was filed along with I.A. No.91 of 2017 is 16.03.2016 and contended that the petitioner did not state the truth as to when the written statement was prepared and handed over to the junior counsel for filing in the court below.

I have noted the contentions on both sides. An *ex parte* decree can be set aside under Order IX Rule 13 CPC at the request of the defendant, if he satisfies the Court that the summons were not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, and the Court in such situations shall make an order setting aside the decree as against him upon such terms as to costs.

In **G.P. Srivastava v. R.K. Raizada**<sup>1</sup>, the Supreme Court observed that the words 'sufficient cause' in Order IX Rule 13 CPC should be liberally interpreted, and the 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 observed that previous negligence cannot be taken into account.

Unfortunately the court below seems to have not noticed this legal principle and considered the conduct of the petitioner prior to the passing of the *ex parte* decree on 30.01.2016 which is impermissible in law.

When the stakes in the suit are high and when the petitioner, being a Senior Citizen, states that he did sign the written statement and handed over it to the junior of the counsel engaged by him in the court below for filing it in the said court, but the said counsel did not file it and within fourteen days from that the date the *ex parte* decree was passed, when he approaches the court to set aside the *ex parte* decree, the court below ought to have sympathetically considered the same.

The date on which the written statement filed by the petitioner along with the I.A. No.91 of 2017 cannot be taken into account because it is quite possible that the written statement given to the junior counsel was probably misplaced and it had to be prepared afresh. In any event mere delay of fourteen days in filing application under Order IX Rule 13 CPC cannot be refused to be condoned, when substantial stakes are involved in the suit, particularly when the

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<sup>1</sup> 2000(3) SCC 54

petitioner, having engaged a counsel, would rely on the counsel to take appropriate steps to defend his interest.

Therefore, the impugned order is set aside and the consequential order in I.A. No.90 of 2017 is also set aside; and the suit is restored to file in the court below. The CRP is allowed with costs of Rs.1,000/- to be paid by the petitioner to the 1<sup>st</sup> respondent or to be deposited in the court below, in case the first respondent refuses to receive them, within one week from the date of receipt of a copy of this order and the petitioner shall be permitted to file written statement and to cross-examine P.W-1 apart from leading evidence to support his defence.

Miscellaneous petitions, pending, if any shall stand closed. No costs.

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**M.S. RAMACHANDRA RAO, J**

Date: 03.07.2019

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