

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

Civil Revision Petition No.7121 of 2018

ORDER:-

This revision is filed challenging the order dated 18.09.2018 in E.A.No.227 of 2015 in E.A.No.246 of 2009 in E.P.No.39 of 2002 on the file of the IV-Senior Civil Judge, City Civil Court, Hyderabad.

2. The said E.A. was filed seeking restoration of E.A.No.246 of 2009 in E.P.No.39 of 2002 which had been dismissed for default on 15.04.2015.

3. The said E.A.No.227 of 2015 had been filed within 30 days from the dismissal of E.A.No.246 of 2009.

4. By the impugned order dt.18.09.2018, the E.A.No.227 of 2015 was dismissed.

5. It is the contention of the petitioner that the 1st petitioner had filed E.A.No.227 of 2015 because it had been dismissed for default on account of his inability to attend the Court on account of his illness, and the Court below therefore ought to not to have dismissed E.A.No.227 of 2015 when it was filed within 30 days from the date of dismissal of E.A.No.246 of 2009 for default.

6. The reason assigned by the Court below for dismissing E.A.No.227 of 2015 is that the 1st petitioner did not proceed with the enquiry and place any evidence, either oral or documentary, in support of his claim since 2009 in spite of being given several directions and opportunities and so it was dismissed. It also observed that no material was placed before the Court to the effect

that the 1st petitioner was bedridden. Therefore, it held that the 1st petitioner was negligent and there was deliberate inaction on his part.

7. Order XXI Rule 106 C.P.C. has been invoked by the petitioner in E.A.No.227 of 2015.

8. Order XXI Rules 105 and 106 C.P.C. are extracted hereafter since they are both relevant for consideration:-

“105. Hearing of application - (1) The Court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.

(2) Whereon on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application *ex parte* and pass such order as it thinks fit.

Explanation:- An application referred to in sub-rule (1) includes a claim or objection made under Rule 58.

106. Setting aside orders passed *ex parte*, etc.-

(1) The applicant, against whom an order is made under sub-rule (2) of rule 105 or the opposite party against whom an order is passed *ex parte* under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the Court to set aside the order, and if he satisfied the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order or such terms as to costs, or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

(2) No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an *ex parte* order, the notice was not duly served, within thirty days from the date when applicant had knowledge of the order.

9. A reading of the above provisions indicates that when an application in execution is not proceeded with on a date fixed for hearing by a party, the Court has power under Order XXI Rule 105(2) CPC to dismiss the application; and when the party absent applies within 30 days to set aside the said order, the Court can set it aside if the Court is satisfied that there was sufficient cause for non-appearance of the party when the application was called on for hearing.

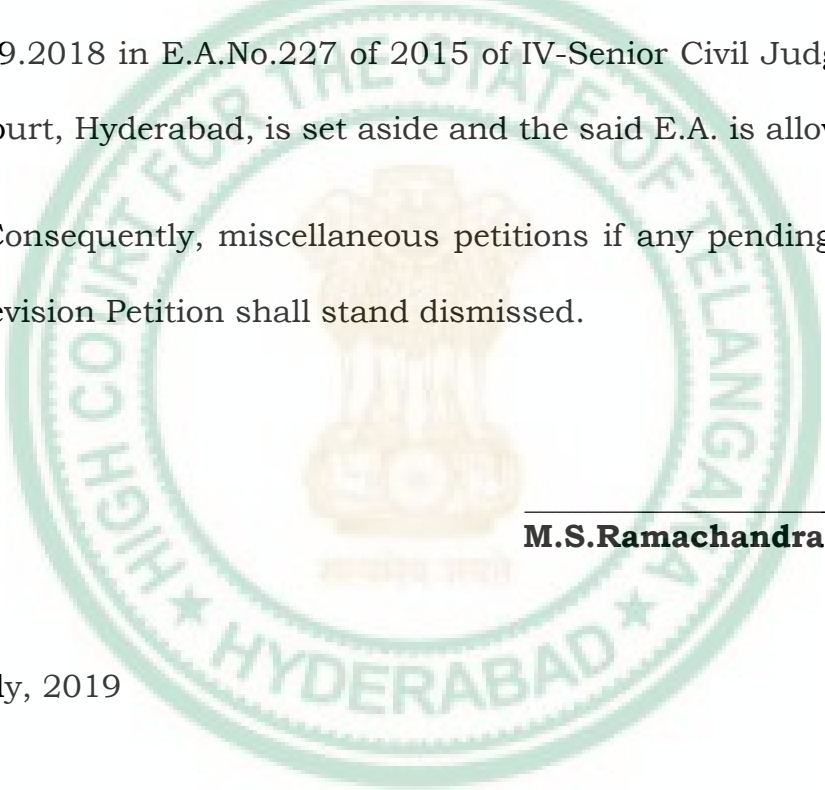
10. In the instant case, it is not in dispute that the 1st petitioner had filed a summary suit O.S.No.2958 of 1988 on the file of the High Court of Mumbai and had obtained a decree in the said suit from the said High Court. The decree was transferred to Hyderabad and the execution petition filed by the 1st petitioner was initially allotted to the Court of the II-Senior Civil Judge, City Civil Court, Hyderabad and numbered as E.P.No.63 of 1997. Later, it was transferred to the Court of the IV-Senior Civil Judge, City Civil Court, Hyderabad and re-numbered as E.P.No.39 of 2009. The attempts made by the 1st petitioner to execute the decree have been explained in detail in paragraphs 2 and 3 in E.A.No.246 of 2009. It has also been explained how the judgment-debtor evaded to satisfy the decree inspite of repeated directions given by the said Court to the garnishees to deposit the amounts which were attached.

12. Merely because the 1st petitioner could not attend the Court on 15.04.2015 on account of his illness, the Court below could not have refused to set aside its order dated 15.04.2015 in E.A.No.246 of 2009, when E.A.No.227 of 2015 was filed under Order XXI Rule

106 CPC within 30 days from 15.04.2015. The whole approach of the trial Court appears to be perverse. A party who obtained a decree from a High Court in Mumbai and whose attempts to realize the amounts payable to him under the said decree have been frustrated repeatedly by the respondents, cannot be punished in this manner on the ground that he was absent on a single day on 15.04.2015 when E.A.No.246 of 2009 was listed before the Court below.

13. Accordingly, the Civil Revision Petition is allowed; the Order dt.18.09.2018 in E.A.No.227 of 2015 of IV-Senior Civil Judge, City Civil Court, Hyderabad, is set aside and the said E.A. is allowed.

Consequently, miscellaneous petitions if any pending in the Civil Revision Petition shall stand dismissed.



M.S.Ramachandra Rao, J

31st July, 2019

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