

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION No.7485 of 2018

ORDER:

This Revision is filed challenging the order dt.08-08-2018 in I.A.No.1514 of 2017 in CMASR.No.11212 of 2017 of the Principal District Judge, Ranga Reddy District at L.B. Nagar.

2. Petitioner Bank herein is defendant in O.S.No.1624 of 2012 on the file of the II Additional Senior Civil Judge, Ranga Reddy District.

3. The said suit was filed by respondent against petitioner for recovery of a sum of Rs.7,77,413/- with future interest @ 18% p.a. from the date of suit till date of actual payment or realization.

4. The petitioner remained *ex parte*. On 17-10-2014, an *ex parte* decree was passed for a sum of Rs.2,72,880/- with proportionate costs and interest @ 6% p.a. from the date of suit till date of realization.

5. Within 30 days from passing of the *ex parte* decree, petitioner filed I.A.No.1115 of 2014 invoking Order IX Rule 13 C.P.C. to set aside the *ex parte* decree dt.17-10-2014 in O.S.No.1624 of 2012 and to permit the petitioner to contest the suit.

6. The counsel for petitioner/defendant in the suit filed an affidavit in the said I.A. stating that some documents were not traceable in the petitioner Bank, that he could not note down the dates correctly and therefore could not appear on 02-04-2014 when the petitioner was set

ex parte, that a detailed written statement has been filed and the claim of respondent is not tenable.

7. Respondent filed a counter opposing the said I.A. stating that petitioner is a Nationalized Bank and only its officials should have filed the affidavit in support of I.A.No.1115 of 2014 and not the counsel; written statement was not filed in spite of giving sufficient time and the petitioner had adopted a casual approach. The contention of the counsel for petitioner that he could not note down the suit dates correctly was also stated to be not sufficient cause to set aside the *ex parte* decree.

8. By order dt.28-12-2015, the II Additional Senior Civil Judge, Ranga Reddy District dismissed the said I.A. He held that petitioner Bank did not file affidavit in I.A. explaining the failure on its part to file written statement in the suit for more than 15 months; that the affidavit of the counsel did not show any cogent reason for not filing of written statement by petitioner; that petitioner did not show sufficient cause and its plea was vague. It held that there was negligence on the part of petitioner and it did not act *bona fide*ly.

9. Assailing the same, petitioner filed C.M.A.SR. No.11212 of 2017 before the Principal District Judge, Ranga Reddy District at L.B. Nagar with a delay of 455 days. It also filed I.A.No.1514 of 2017 to condone the said delay in preferring the said appeal against the order dt.28-12-2015 in I.A.No.1115 of 2014 in O.S.No.1624 of 2012 of the II Additional Senior Civil Judge, Ranga Reddy District.

10. In the affidavit filed in support of this application, petitioner had taken a plea that it had received show cause notice from the trial Court on 22-03-2017 in E.P.No.189 of 2016; and on enquiry with the counsel appearing for petitioner, it came to know that I.A.No.1152 of 2014 was dismissed; that counsel was requested for copy of judgment and decree dt.22-03-2017 and asked to file appeal; the petitioner was under the impression that the appeal has to be filed within 90 days; that the delay in filing the appeal occurred only due to lack of communication between the petitioner and its counsel. It is also contended that the Court below erroneously dismissed I.A.No.1115 of 2014 and it is in the interest of justice to set aside the *ex parte* order.

11. Counter-affidavit was filed by respondent opposing the said application contending that the deponent of I.A.No.1514 of 2017 in C.M.A.SR.No.11212 of 2017 had no capacity to file the said affidavit. It is contended that the official of the petitioner acted callously in applying and obtaining certified copy of the order passed in I.A.No.1115 of 2014 in O.S.No.1624 of 2012; that no cogent reasons have been assigned for condoning the delay of 455 days in preferring the appeal; and so the said delay cannot be condoned.

12. By order dt.08-08-2018, the Principal District Judge, Ranga Reddy District at L.B. Nagar dismissed the said I.A. She held that petitioner failed to prosecute its case properly by filing written statement in time, that it was set *ex parte* in the suit and later the suit was decreed *ex parte*; that there was no proper explanation for not filing written statement in time and the application to set aside the *ex*

parte decree was dismissed for not stating cogent reasons on 28-12-2015. She observed that there was callous approach in prosecuting the suit on the part of the petitioner and petitioner should have been proactive in preferring the appeal in time, but it continued with the same approach of negligence and filed I.A.No.1514 of 2017 with a delay of 455 days. It observed that non-communication between the counsel and Bank is not possible, and that repeated lapses at every stage are an abuse of Court process.

13. Assailing the same, this Revision is filed.

14. Leaned counsel for petitioner contended that the orders passed by the Courts below cannot be sustained and they ought to be set aside and petitioner be given an opportunity to contest the suit on merits. He contended that while deciding whether or not to set aside the *ex parte* decree, the opportunities granted earlier to the defendant to file written statement cannot be taken into consideration and only the cause for absence on the date when the *ex parte* decree was passed should be taken into account. He also contended that when petitioner had engaged a counsel in the trial Court as well as in lower appellate Court, and when the application to set aside the *ex parte* decree was filed in the trial Court within the period of 30 days, and the Advocate did not inform about the dismissal of I.A.No.1115 of 2014 on 28-12-2015 to the petitioner, the petitioner being a public sector Bank, cannot be made to suffer for the same.

15. Learned counsel for respondent refuted the above contentions and supported the order passed by the Court below. According to him, the petitioner had been negligent in not availing several opportunities given by the trial Court for filing written statement and therefore the trial Court rightly dismissed I.A.No.1115 of 2014. He further contended that no sufficient cause was shown for the absence of petitioner in the trial Court when it was set *ex parte* on 02-04-2014 and also for the delay in filing C.M.A. of 445 days. He contended that the communication gap between the petitioner and its counsel cannot be a sufficient cause to set aside the *ex parte* decree.

16. I have noted the contentions of both sides.

17. Petitioner is a public sector Bank and because of absence of petitioner's counsel on 02-04-2014, it was set *ex parte* in the suit and an *ex parte* decree was passed on 17-10-2014. No doubt as recorded in the order of the trial Court, opportunities were given to the petitioner to file written statement on 10-12-2012 and 10-03-2014, but there was no regular Presiding Officer posted in the trial Court in between these two dates. On 10-03-2014, matter was again adjourned to 19-03-2014 to 02-04-2014 on payment of costs and on 02-04-2014, petitioner was set *ex parte* and *ex parte* decree was passed on 17-10-2014. The reason given in I.A.No.1115 of 2014 by petitioner to set aside the *ex parte* decree was that documents were not traceable in the petitioner Bank and also that the counsel for petitioner did not note down the dates of posting of the suit correctly.

18. But it is not in dispute that the application under Order IX Rule 13 C.P.C. i.e., I.A.No.1115 of 2014 was filed within 30 days from the date of passing of the *ex parte* decree.

19. The Supreme Court in **G.P.Srivastava Vs. R.K.Raizada and others**¹ held that the words ‘sufficient cause’ occurring in Order IX Rule 13 C.P.C. must be liberally construed enabling the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party; and the term ‘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 held that if sufficient cause is made out for non-appearance of defendant on the date fixed for hearing when *ex parte* proceedings were initiated against him, he cannot be penalized for his previous negligence which had been overlooked and thereby condoned earlier. It laid down that *in cases where defendant approaches the Court immediately and within statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional; and for the absence of a party in the case the other side can be compensated at adequate costs and the lis be decided on merits.*

20. A reading of Order dt.28-12-2015 in I.A.No.1115 of 2014 in O.S.No.1624 of 2012 shows that the II Additional Senior Civil Judge, Ranga Reddy District relied on earlier opportunities given to petitioner for not filing written statement as one of the reasons for

¹ (2000) 3 SCC 54

dismissing it. He also relied on the absence of affidavit on behalf of the bank explaining the failure on its part to file written statement in the suit for more than 15 months.

21. Both these above two reasons cannot be valid reasons for dismissing I.A.No.1115 of 2014 because as held in **G.P.Srivastava** (1 supra), petitioner cannot be penalized for its previous negligence which had been overlooked and condoned earlier. Also, when the petitioner approached the Court immediately and within the statutory time specified, the II Additional Senior Civil Judge, Ranga Reddy District ought to have exercised its discretion in its favour because there is nothing to show that the absence was *mala fide* or intentional and seems to have happened because wrong noting down of dates by its counsel.

22. In **Lal Devi and another Vs. Vaneeta Jain and others**², the Supreme Court held that counsel for a party can move application under Order IX Rule 13 C.P.C. when they did not appear before the Court on the date fixed for hearing nor represented to the Court about their absence. It observed that the defendant cannot be made to suffer an *ex parte* order when he was not at fault having duly instructed his counsel to appear before the Court of the District Judge; and allowing the *ex parte* decree to remain would be too harsh a consequence. It observed that the Court should have set aside the *ex parte* decree.

² AIR 2007 SC 1889

23. In the instant case also, petitioner cannot be made to suffer for the mistake of its counsel in wrongly noting down the dates of posting of the suit and the II Additional Senior Civil Judge, Ranga Reddy District therefore ought to have allowed I.A.No.1115 of 2014 and set aside the *ex parte* decree not only because it was filed within the period of limitation, but also because the reason assigned by petitioner is acceptable to set it aside. Also, the fact that the petitioner is a public sector Bank dealing with public funds could not have been ignored by him.

24. In my opinion, when it was the error of the Counsel in wrongly noting the posting dates which resulted in the petitioner being set *ex parte*, there is nothing wrong in the counsel for the petitioner in the suit filing affidavit on it's behalf in I.A.1115 of 2014.

25. Coming to the delay in filing C.M.A., there too the delay in filing C.M.A. occurred according to the petitioner because of lack of communication between the petitioner and it's counsel and petitioner came to know about the dismissal of I.A.No.1152 of 2014 by the II Additional Senior Civil Judge, Ranga Reddy District only on 22-03-2017 when it received notice from the said Court in E.P.No.189 of 2016.

26. The Principal District Judge, Ranga Reddy District, while dismissing the said I.A., again relied on the fact that petitioner did not file written statement for more than 15 months on the pretext that documents could not be traced and that it shows negligence.

27. As already pointed out by me, this factor cannot be taken into account at all and only cause for non-appearance on the date on which such absence occurred and was made a ground for proceeding *ex parte* can be taken into account. Previous negligence which has been over looked and condoned cannot be considered.

28. No doubt, as rightly observed by the Principal District Judge, Ranga Reddy District petitioner should have been proactive in preferring the appeal in time against the order dt.28-12-2015 in I.A.No.1115 of 2014.

29. But its view about non-communication between petitioner and its counsel being impossible, cannot accepted because petitioner cannot be made to suffer when it engaged a counsel and there was no communication from the counsel about dismissal of I.A.No.1115 of 2014.

30. When public sector Banks such as petitioner had to suffer an *ex parte* decree, like in the instant case, and when the said Bank has taken steps to set aside the *ex parte* decree within the time prescribed by law of limitation, I am of the opinion that it should be given an opportunity to contest the suit on merits subject to compensating the respondent with heavy costs.

31. Accordingly, the Civil Revision Petition is allowed on payment of costs of Rs.20,000/- (Rupees Twenty Thousand only) by petitioner to the respondent on or before 15-06-2019; the order dt.08-08-2015 in I.A.No.1514 of 2017 in C.M.A. (SR) No.11212 of 2017 is set aside

and the said I.A. is allowed; and the order dt.28-12-2015 in I.A.No.1115 of 2014 in O.S.No.1624 of 2012 of the II Additional Senior Civil Judge, Ranga Reddy District is also set aside and the said I.A. is allowed. However, in default of deposit of said costs before the II Additional Senior Civil Judge, Ranga Reddy District to the credit of O.S.No.1624 of 2012 on or before 15-06-2019, this Civil Revision Petition shall stand dismissed. In the event costs are paid, the II Additional Senior Civil Judge, Ranga Reddy District shall endeavour to dispose of the said suit as expeditiously as possible, preferably within one year from the date of receipt of copy of this order.

32. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 03-06-2019

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