

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD
CIVIL MISCELLANEOUS APPEAL No.490 OF 2019**

JUDGMENT: (per Hon'ble Sri Justice M.S.Ramachandra Rao)

Heard Sri Ganta Ramakrishna, learned counsel for the appellant and Sri V.Satyam Reddy, learned counsel for the respondent.

2. This appeal is preferred against the order dated 27.02.2019 in I.A.No.692 of 2017 in H.M.O.P.No.20 of 2016 of the Senior Civil Judge at Miryalaguda.

3. The appellant had filed the said OP before the Senior Civil Judge, Peddapalli as O.P.No.21 of 2013 seeking decree of divorce against the respondent by seeking dissolution of their marriage which took place on 27.08.2010 on the grounds of mental cruelty and desertion.

4. Counter affidavit was filed by the respondent opposing grant of the said relief to the appellant.

5. Subsequently, O.P.No.11 of 2014 was filed by the respondent against the appellant before the Senior Civil Judge, Miryalaguda apart from M.C.No.4 of 2014 under Section 125 of the Cr.P.C., before the Principal Judicial Magistrate of First Class at Miryalaguda.

6. Transfer C.M.P.Nos.88 and 120 of 2014 were filed by both the parties to club both the matters and they were ultimately allowed on 12.12.2014 and O.P.No.21 of 2013 was withdrawn from the

Court of Senior Civil Judge, Peddapalli and transferred to the Court of Senior Civil Judge, Miryalaguda to be tried along with O.P.No.11 of 2014.

7. After transfer, the matter O.P.No.21 of 2013 was re-numbered as H.M.O.P.No.20 of 2016 and was coming up for evidence of the appellant.

8. On 25.06.2017, affidavit in lieu of chief examination was filed by the appellant through his counsel, but the appellant could not appear before the Court below as his mother was unwell. The matter was then adjourned to 26.07.2017.

9. But, on that day, the appellant could not reach the Court within time and the OP was dismissed for default on 26.07.2017.

10. Within one month thereof, on 02.08.2017, the appellant filed I.A.No.692 of 2017 invoking Order IX Rule 9 CPC to restore the OP stating that his failure to appear before the Court on 26.07.2017 was not deliberate and willful and that he was ready to proceed with the trial if the OP is restored.

11. Counter affidavit was filed by the respondent opposing the said application and denying the contentions of the appellant i.e., mother was unwell on 26.07.2017 and so he could not appear before the Court. It was also stated that several opportunities had been given to the appellant previously, but he had not availed the same.

12. By order dated 27.02.2019, the Court below dismissed the I.A.No.692 of 2017. The Court below recorded that the matter was posted for enquiry, but the appellant failed to attend before the Court to lead evidence in spite of imposing costs as a condition to adduce evidence and that both the appellant and his counsel failed to appear before the Court. It is stated that the Court waited for the appellant upto 4.20 pm., and then only passed the order. It also held that the reason given by the appellant is a lame excuse and that the appellant was not serious in pursuing the matter. Assailing the same, this appeal is filed.

13. The counsel for the appellant contended that the Court below ought not to have dismissed the application under Order IX Rule 9 CPC filed by the appellant, and when the application itself was filed within 30 days from the date of the dismissal of the OP, it should have taken a liberal view and restored the OP and decided it on merits.

14. The counsel for the respondent supported the order passed by the Court below.

15. Heard both sides.

16. According to the counsel for the appellant, affidavit in lieu of chief examination was filed by the appellant on 25.07.2017. This fact is not disputed by the respondent or the respondent's counsel. Even the Court below did not say that the appellant did not file his affidavit in lieu of chief examination on 25.07.2017. When the

matter was posted on the next day, the appellant could not appear before the Court as his mother fell sick. The Court below should not have relied upon the events which transpired before 25.07.2017 when the matter had undergone some adjournments in order to give opportunity to the appellant to lead evidence, because what is the relevant is only the cause for dismissing the OP for default on 26.07.2017 and not prior dates.

17. The valuable rights of the parties are involved in the OP, and when the application for restoration was filed within 30 days from the date of dismissal of the OP for default, the Court below ought to have considered the same and allowed it and proceeded to decide the OP on merits.

18. We do not agree with the reasoning of the Court below that adequate opportunity was given to the appellant and he did not cooperate with the Court and took a false plea/lame excuse for not appearing before the Court on 26.07.2017.

19. Accordingly, the appeal is allowed; order dated 27.02.2019 in I.A.No.692 of 2017 in H.M.O.P.No.20 of 2016 on the file of the Senior Civil Judge at Miryalaguda is set aside and the said IA is allowed. The appellant shall appear before the Court below on a date fixed by the said Court and submit himself for cross examination and is also directed to lead other evidence, if any, in support of his case. Thereafter, the Court below shall give opportunity to the respondent to lead evidence and then decide the

OP on its own merits. H.M.O.P.No.20 of 2016 shall be heard along with O.P.No.11 of 2014 on the file of the Court below and be decided along with O.P.No.11 of 2014. No costs.

20. Miscellaneous petitions, if any, pending shall stand dismissed.

M.S.RAMACHANDRA RAO, J

T.AMARNATH GOUD, J

Date: 23.01.2020
TJMR

