

**THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER
AND
THE HON'BLE SRI JUSTICE NAGESH BHEEMAPAKA**

CIVIL MISCELLANEOUS APPEAL No.66 OF 2012

JUDGMENT: (Per Hon'ble Dr.SA,J)

This Civil Miscellaneous Appeal, under Order XLIII Rule 1 of the Civil Procedure Code, 1908, is filed by the appellants/defendant Nos.1, 2, 3 and 8, aggrieved by the docket order, dated 02.02.2011, passed in I.A.No.794 of 2010 in O.S.No.175 of 2005 by the learned XI Additional Chief Judge (FTC), City Civil Court, Hyderabad, wherein, the subject I.A.No.794 of 2010 held by the appellants/defendants Nos.1,2,3 and 8 under Order IX Rule 13 read with Section 151 of C.P.C., filed by the petitioners/defendants seeking to set aside the *ex parte* decree, dated 08.10.2010 passed in the subject suit, was dismissed. The impugned docket order dated 02.02.2011 reads as follows:

"Costs paid. PW2 to PW4 present. Petitioner is not willing to cross-examine the witnesses who are requesting to complete their cross atleast today. So petition is dismissed."

2. We have heard the submissions of learned counsel for both sides and perused the record.

3. The learned counsel for the appellants/defendant Nos.1,2,3 and 8 would submit that the counsel on record for the appellants/defendant Nos.1,2,3 and 8 before the Court below met with an accident and as such, he could not proceed with the cross-examination and on the very same day, the Court below was pleased to allow the I.A.No.442 of 2010, ordering issuance of summons to the proposed witnesses by 07.10.2010. However, on 07.10.2010 also, the counsel on record could not appear before the Court below, since he was not recovered. It is further submitted that the then counsel has not informed about the adjournment date and the appellants/defendant Nos.1,2,3 and 8 were under impression that their counsel would pursue the matter. On 07.10.2010, the Court below was pleased to adjourn the matter to next day, i.e., 08.10.2010. On that day, the Court below passed an order setting the appellants/defendant Nos.1,2,3 and 8 *ex parte*. Consequently the subject suit was decreed *ex parte*. The suit is for declaration of title in respect of Item Nos.1 to 7 shown in the suit schedule property and partition in relation to Item No.8 of the suit schedule property. The appellants/defendant Nos.1,2,3 and 8 have denied the title to the property in respect of Item Nos.1 to 7 and also filed several documents to substantiate the same. The subject suit needs determination on merits. The plaintiffs in the subject suit, who

are respondent Nos.1 and 2 herein, without their being adjudication, assailed their title over the subject land. When the counsel on record for appellants/defendant Nos.1,2,3 and 8 before the Court below met with an accident, the court below ought to have afforded an opportunity to the appellants/defendant Nos.1,2,3 and 8 to cross-examine PWs. 2 to 4, inasmuch as costs were paid as ordered and ultimately prayed to set aside the impugned docket order dated 02.02.2011 and allow the appeal as prayed for.

4. Learned counsel for the respondent Nos.1 and 2/plaintiffs would contend that since the appellants/defendants 1,2,3 and 8 were not willing to cross-examine the witnesses who were requesting to complete their cross, the Court rightly dismissed the subject I.A.No.794 of 2010 *vide* impugned docket order dated 02.02.2011. The contentions raised on behalf of the appellants/defendants 1,2,3 and 8 are untenable. There is no illegality in the impugned order and ultimately prayed to dismiss the appeal.

5. It is the contention of the respondent Nos.1 and 2/plaintiffs that the respondent Nos.1 and 2/plaintiffs have alienated 50% of the share in Item No.1 of the suit schedule property, so also the appellants/defendants 1,2,3 and 8 sold 80% of their share. But the counsel for the appellants/defendants 1,2,3 and 8 herein did not plead

ignorance of the alienation said to have been made by the appellants/defendants 1,2,3 and 8. Anyhow this aspect requires to be determined in the suit. When there are averments in the affidavit that the counsel on record for the appellants/defendants 1,2,3 and 8 before the Court below, had met with an accident and was not in a position to conduct the cross-examination of PWs.2 to 4 and when PWs 2 to 4 have paid costs imposed by the trial court and when there are rival contentions in relation to the Item Nos. 1 to 7 of the property shown in the suit schedule, the Court below ought to have disposed of the suit on merits after affording an opportunity to both the parties. It ought not have dismissed the subject application and the Subject I.A.No.794 of 2010, depriving the petitioner of his valuable right to cross-examine the witnesses. The court below ought to have provided an opportunity, by imposing further costs to the appellants/defendants 1,2,3 and 8. The substantial question in relation to acquisition of the property by the respondents Nos.1 and 2/plaintiffs and whether the property is open for partition or not, ought to have been decided on merits.

6. In view of the circumstances the impugned order dated 02.02.2011, passed in I.A.No.794 of 2010 in O.S.No.175 of 2005 by the learned XI Additional Chief Judge (FTC), City Civil Court, Hyderabad, is unsustainable and is liable to be set aside, subject to payment of costs

of Rs.10,000/- payable by the appellants/defendants 1,2,3 and 8 to the respondent Nos.1 and 2/plaintiffs, within in a week from the date of receipt of a copy of this judgment. On such payment, the subject I.A.No.794 of 2010 in O.S.No.175 of 2005, stands restored to the file of the Court below. The parties shall assist the court in expeditious disposal of the suit.

7. The Civil Miscellaneous Appeal is disposed of accordingly.

Miscellaneous Petitions, if any, pending in this appeal shall stand closed. There shall be no order as to costs.

Dr. SHAMEEM AKTHER, J

NAGESH BHEEMAPAKA, J

Date: 27.12.2022
Pns/SSP