

(1981) 03 AP CK 0016
In the Andhra Pradesh High Court
Case No : C.R.P. No. 878 of 1980

Gangina Veera Venkamma

APPELLANT

Vs

M. Venkataramayya

RESPONDENT

Date of Decision : 17-03-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 13, Order 9 Rule 13, 115

Citation : AIR 1981 AP 199 : (1981) 1 ALT 520 : (1981) 1 AnWR 316

Hon'ble Judges : P.A. Choudary, J

Bench : Single Bench

Advocate : C. Poornaiah, for the Appellant; T. Bhimsen, for the Respondent

Judgement

P.A. Choudary, J. 1. The all too familiar question whether absence of an advocate is a sufficient cause within the meaning of Order 9, Rule 13 of CPC for setting aside an ex parte decree arises in this plaintiff's revision petition.

2. CPC all through-out its provisions attempts at achieving a delicate balance between the rights and interests of the parties before the Court and at maintaining a proper proportion between the need to hurry justice without burying it. No wonder in this tight rope-walking it falls between the two stools, pleasing none and paining all. Several are the Court decisions interpreting Order 9, Rule 13 C. P. C. Indeed it is difficult to find any fresh ground upon which to stand. So much has been trampled down by armies of conflicting words. And yet peace has not come to this poor Section of the Civil Procedure Code.

3. The plaintiff in O. S. 30/67 had obtained a decree some time in the year 1973. The decree was for possession and mesne profits. The plaintiff had to work out her declared rights. For that purpose, the plaintiff filed I. A. 831/76 for the appointment of a Commissioner to ascertain the mesne profits. A Commissioner was accordingly appointed but his report was set aside by the Court on some technical ground. Thereupon, a second Commissioner was appointed. This Commissioner, after inquiring into mesne profits filed his report on 5-8-1978 into

the Court. The plaintiff-decree-holder filed her objections to this report on 24-8-1978 and four days thereafter the defendant-judgment-debtor filed his objections. After a lapse of four months on 19-12-1978 the Court started hearing arguments of the parties. The plaintiff was heard on that day itself. But the defendant was not ready to argue the matter on that day. The Court, therefore, adjourned the matter more than once to enable the defendant to advance his arguments. At every adjourned date the defendant was unready. After the matter thus underwent a few adjournments without the defendant being ready to argue his objections the Court posted the matter to 16-1-1979 finally for the arguments of the defendant. But the Court found that this time it was even worse. Neither the defendant nor his counsel appeared in the Court on that day. What is a Court to do in such a situation? is the Court to hold up its hands in despair and adjourn the matter once again ? I think not. I believe that the Courts are not that helpless. Under all circumstances the Courts should carry on their duty of administering justice. Under no circumstances should they concede power of veto either to parties or their pleaders. In this case the Court, without the defendant's presence, ascertained the amount of mesne profits payable by the defendant and passed a final decree against the defendant for Rs. 90,909-84 with interest at 51/2 p. a. To set aside that final decree passed by the Court after so much of protracted litigation the defendant had filed I. A. 191/79 which was allowed by the District Judge, East Godavari. Rajahmundry on 4-8-1979. Aggrieved by that order the plaintiff had filed this C. R. P.

4. The dates which I have mentioned above would tell a story of their own. It is clear from the above events narrated that defendant had been adopting all through delaying tactics and had been deliberately keeping himself away from the Court so as to prolong and protract this litigation of one-and-half decades old. Maybe, he is harboring a notion that it is the birth-right of a litigant to do so. If so, I must say that he is clearly mistaken.

5. From the order passed by the learned District Judge I find the defendant urged two grounds for setting aside the ex parte decree, (a) that he could not be present on the date of hearing on 16-1-1979. because he was busy with his official work as a village munsif in his village, (b) that his counsel could not be present in the Court on that day because he was engaged in another case in another Court. The learned Judge had allowed the defendant's application only on the second ground viz., that his counsel, though present in town, could not attend the Court to advance his arguments as he was held up in a part-heard suit in the II Additional District Court. The C. R. P. is concerned with the legality of that order of the Court below.

6. Mr. Bheemsen, appearing for the defendant-respondent argued that the order passed by the Court below in setting aside the ex parte decree was one within the discretion of the lower Court and therefore should not be interfered with by this Court. He had also argued that there was no failure on the part of the Court below to exercise that discretion on right lines because absence of an advocate is

a recognized ground on which an ex parte decree can be set aside. I am unable to agree with any of these grounds. It is correct to say that the trial Court has jurisdiction to set aside an ex parte decree. But the trial Court can only do this for right reasons. The matter is governed by Order 9, Rule 13 of Civil Procedure Code. Outside those provisions, an ex parte decree brought about by a defaulting party neglecting to be present in the Court cannot be set aside. This Court has therefore a duty to examine whether those statutorily laid down conditions are satisfied in a particular case or not. It follows that the discretion of the lower Court is not an unreviewable discretion. This leads us to examine the validity of the ground on which the ex parte decree has been set aside. In this case the only ground on which the final decree was set aside was that the defendant's counsel though present in town would not attend the Court on 16-1-1979, because he was engaged in some other case. This raises the question whether absence of counsel is a sufficient cause within the meaning of Order 9. Rule 13 of C. P. C. for a Court to set aside an ex parte decree. Order 9. Rule 13, C. P. C. may be read:

"13. In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, of that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit. and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside .as against all or any of the other defendants also."

Order 9. Rule 13, C. P. C. speaks only of a party to the judicial proceedings and his absence occasioned by sufficient cause as constituting legal justification for setting aside an ex parte decree and does not at all refer to a counsel or his convenience. It is so because counsel's convenience is not regarded as a relevant ground. As a mere matter of construction of Order 9. Rule 13 it follows that law does not recognize counsel's inability or inconvenience to be present in the Court for setting aside an ex parte decree. To set aside an ex parte decree on any such ground would amount to adding one more ground to the grounds permitted by law. That would be clearly impermissible. In general theory also there appears to me to be no warrant to doing any such thing. An advocate is an agent of a party to a judicial proceedings. So long as he acts as such an agent and is ready and willing to conduct the case and help the Court the Court is bound to hear him with attention and respect. But when an advocate totally abstains himself from the Court or for one reason or the other is unwilling to go on with the case and perform his duties undertaken by him on behalf of his client, the right of audience to which he was entitled, would stand forfeited and the bond that connects him to the Court would be snapped. Law would only

recognise his presence and takes no note of his absence. It is for those reasons Order 9, Rule 13, C. P. C. mentions only "a party" and omits to mention his counsel.

7. Megarry, Q. C. (before he became a Judge) in his Hamlyn Lectures on "Lawyer and Litigant in England" noted at page 78 the English position in the following words:

"If an adjournment is sought merely on the ground of counsel's inability to be in two places at once, the judge's answer will be courteous but firm. He will express his regret that he will not have the pleasure of hearing Mr. X, but add that he is confident that there are other members of the Bar fully Qualified to present the case to the Court; and there is no adjournment".

Megarry concludes,

"the rule is inexorable. Counsel's convenience is no around for adjourning a case".

Our Civil Procedure Code, like our Constitution, is modelled on the English Law. It therefore appears to me from the above that the Court below committed a clear error of law in setting aside an ex parte decree on the ground of counsel's inability to argue this much adjourned case. In view of the above principle which I consider to be clear I intentionally omit discussing the several decisions rendered on Order 9, Rule 13. C. P. C.

8. Mr. Bhimsen for the defendant cited a judgment of my learned brother Punnaiah J., in Tadikonda Sriramulu v. M. V. N. Brahmanandam. (1979) 2 Andh Pra LJ 177 to say that lawyer's absence can be a sufficient ground within the meaning of Order 9, Rule 13. C. P. C. But that case appears to me to say little on this point and more against the petitioner's contention. That ease decides that even in a case where there is sufficient cause existing for setting aside the ex parte decree, the Court should not set aside the ex parte decree without imposing a condition for payment of day costs. In other words, that judgment holds absence of a party to Court proceedings to be an absolute wrong. Thus understood, the ratio of that case would work against the defendant-respondent, because in the case under revision the Court below did not make any order regarding payment of day costs.

9. I do not intend to add to the difficulties of the busy practitioners who are devoted to law and still treat the practice of law as a jealous mistress. I realise that the English rule would work some hardship in our situation. But the language of Order 9, Rule 13, C. P. C. does not appear to me to permit any other meaning to be given. Further, in the moffussil Courts, the system of giving fixed dates for hearing the cases is prevalent. The archaic practice of listing large number of cases is happily not followed in the moffussil Courts. In those circumstances it should not normally be difficult for the busy practitioners to avoid these awkward situations of not being present in a Court even for a fourth

adjournment.

10. Having found that the going is too heavy for his client, Mr. Bhimsen suggested that this matter may be disposed of on some terms. I consulted the petitioner's counsel and I set down the following terms.

11 If the respondent-defendant deposits a sum of Rs. 15,000/- within four weeks from the day this order reaches The Court below, the order of the trial Court setting aside the ex parte decree will stand. But there would be a direction to the trial Court to hear the arguments of the defendant on the Question of mesne profits and pass a final order and decree within two weeks from the date of the deposit of the money by the defendant. On the other hand, if the defendant-respondent fails to deposit the said sum within the aforesaid period of time, the order of the Court below setting aside the ex parte decree would be deemed to have been set aside by this Court reviving the final decree already passed. The C. R. P. is ordered accordingly. No costs.