

THE COURT OF ADDL. SENIOR CIVIL JUDGE
AT RAMANAGARA

:PRESENT:

Smt. K.Srividya, B.A.L., LL.M.,
Addl. Senior Civil Judge,
Ramanagara.

Misc. Petition No.3/2013

DATED : THIS THE 16th DAY OF AUGUST 2017

Petitioners : Smt. A.S.Lakshamma and others.

-V/s-

Respondents : C.Chikkegowda @ Thammaiah
and others.

* * * *

I.A. No.1

Applicant : C.Chikkegowda @ Thammaiah & others.
(Plaintiff)

-V/s-

Opponents : Smt. A.S.Lakshamma and others.

(Def. No.1)

* * * * *

ORDERS ON I.A. DATED 21.01.2017

I.A. dated 21.01.2017 application is filed by the respondents U/s.151 of CPC to dismiss the petition as not maintainable. It is accompanied by affidavit. Objection is filed to the said application.

2. In the affidavit accompanying the application, the respondent No.2 states that, he is also swearing on behalf of respondent No.1. Further contend, the petitioners have filed the Miscellaneous Petition for setting aside the Judgment and Decree passed in OS 676/06 dated 17.12.2008 and consequential orders passed in execution petition 98/09 and for restoration of the suit and seeking permission to contest the suit on merits. After service of notice in the petition, the respondents have filed objection and have taken a specific contention that, the Miscellaneous Petition is not maintainable in view of the order in delay in filing the petition.

Further state, the Miscellaneous Petition has been filed by invoking the provisions of Order 9 Rule 13 of CPC. The Miscellaneous Petition is not maintainable in the eye of law because, the said provision is not application to the present facts of the case. Further contend, in OS 676/06 the defendants were duly served notice and they have entered appearance through their counsel and also the counsel filed application seeking extension of time to file written statement. In the meanwhile, the matter was referred to mediation for conciliation. Since, the petitioners/defendants did not appear before the conciliation. Hence, the case was proceeded with by leading evidence and it came to be decreed as per judgment and decree dated 17.12.2008 in favour of the respondents.

Further state, execution petition was filed in Ex.P.No.98/09 and in the said execution petition, the petitioners entered appearance but, did not contest the petition and the Hon'ble Court directed to execute the sale

deed and the registered sale deed has also been executed in favour of the respondents in respect of the suit schedule property. Further state, when the matter stood thus, when possession of the suit schedule property was to be taken, at that juncture, the present petition came to be filed by invoking the provisions of Order 9 rule 13 of CPC. The said provision is not applicable to the present fact of the case. Hence, the Miscellaneous Petition is not maintainable. Further state, if the petitioners are aggrieved by an order they have to prefer an appeal and cannot invoke the provision of Order 9 Rule 13 of CPC. Hence, prays for allowing the application and dismiss the Miscellaneous Petition as not maintainable.

3. In the objection, apart from usual denial of averments mentioned in the affidavit accompanying the application the petitioners state that, the intention of the respondent is to protract the proceeding on one or other pretext. Further state, the very provision under Order 9 Rule 13 of CPC

provides to file a petition for restoration of the suit as it was decided ex-parte. Further state, already this Hon'ble Court had condoned the delay in filing the Miscellaneous Petition by its Order dated 08.11.2016. Hence, the respondents are estopped from taking such contention at a belated stage. Further stating the respondents ought to have taken such a defence at the earliest possible opportunity as contemplated under Sec.21 of CPC. Further contend that, the respondents had filed writ petition before the Hon'ble High Court of Karnataka in WP No.62047/16 on the Order dated 08.11.2016 passed by this Hon'ble Court. The same is still pending consideration. Further contend, the respondents cannot be permitted to initiate parallel proceedings in respect of the same issue which is already subject matter before the Hon'ble High Court of Karnataka. Hence, the application is to be rejected.

Further state, the present petitioners have appeared before the Trial Court through the counsel and it was on the

negligence of the counsel, the written statement was not filed and the suit was decreed against them. Hence, the provision of Order 9 Rule 13 is clearly applicable to the case on hand since, the petitioners were prevented from appearing before the Court when the suit was called on for hearing. Hence, prays for dismissal of the application with exemplary cost.

4. The following points arise for my determination:

POINTS

- (1) *Whether the petition has to be dismissed as not maintainable U/s.151 of CPC ?*
- (2) *What order ?*

5. Heard the Counsels. The written argument was filed by both the counsels.

6. My findings on the above points are as under:

Point No.1 : In the Negative

*Point No.2 : As per final order
for the following :*

REASONS

7. Point No.1 : The counsel for the respondent submitted that, the Miscellaneous Petition is filed under Order 9 Rule 13 of CPC which is applicable only if the party has not been served due service of summons or he had sufficient cause for not appearing before the Court. However, in the present case, the petitioners had appeared through the counsel before the Trial Court. Hence, the decree passed was not an ex-parte decree. By contending so state that, when the Miscellaneous Petition is not maintainable it has to be dismissed U/s.151 of CPC by way of invoking inherent powers of the Court.

8. The counsel for the respondent relied on decision of Apex Court in AIR 2011 SC 1150 in Parimal -V/s- Veena, wherein it has been held that, if the case does not fall within four corners of Order 9 Rule 13 then, the Court has no jurisdiction to set aside ex-parte decree and Appellate

Court not to interfere with the ex-parte decree unless it meets the statutory requirement.

9. The counsel for the petitioners submitted that, when the written statement is not filed and the judgment is passed it amounts to ex-parte decree and the petition filed under Order 9 Rule 13 of CPC is very much applicable to the facts of the case. The counsel for the petitioners relied on the citations which is cited hereunder.

- (1) *2005 (7) SCC 791 (DB) (Harshad Chiman Lal Modi – V/s- DLF Universal and another)*
- (2) *(2007) 9 SCC 494 (DB) (M.Vishweshwara Shastry – V/s- M.Gopalakrishna Bhat and others)*
- (3) *(2007) 14 SCC 356 (DB) (Loh Vanizya Udyog (P) Ltd., - V/s- Rickie Khosla and another)*
- (4) *(20058) 10 SCC 803 (DB) (Pavan Sachdeva and another –V/s- S.M.S. Pharmaceuticals Ltd., and another)*
- (5) *(2010) 12 SCC 159 (DB) (Bhagmal & others –V/s- Kunwar Lal and others)*

10. Perused the principles laid down in the above said citations. The relevant citations which is applicable to the case on hand is noted hereunder.

In (2007) 9 SCC 494 (DB) cited above, it has been held that, if sufficiency of cause for not appearing on the date of hearing is satisfied then, the ex-parte decree passed against the defendants could be set aside by imposing cost and directing the defendants to file written statement.

In (2007) 14 SCC 356 cited above, the Apex Court has set aside ex-parte order passed against the defendants by imposing cost on the defendant.

In 2010 (12) SCC 159 cited above, it has been held that, where the appellant believed bonafide in assurance given by respondent No.1 and non-attendance by appellant/defendants was quite justifiable and application for setting aside ex-parte decree is allowed.

11. By referring to the said citations the counsel for the petitioners submitted that, since there was a justifiable reason for not filing written statement in the Trial Court, the decree passed is an ex-parte decree. As such, the petition filed under Order 9 Rule 13 is maintainable.

12. Perused the records, the petition is filed undisputedly under Order 9 Rule 13 of CPC to set aside the ex-parte

judgment and decree passed by the Trial Court in OS 676/06 and to permit the petitioners to contest the suit on merits after filing the written statement.

13. There is no dispute that, before the Trial Court the petitioners had appeared through the counsel but, had not filed written statement. There is also no dispute that decree is passed in favour of the plaintiff.

14. Now, the question arises when a party who has appeared before the Trial Court and does not file written statement then, can it be considered as ex-parte decree so as to file petition under Order 9 Rule 13 of CPC to set aside the decree passed by the Trial Court, has to be looked into.

15. This Court would like to rely on decision of **Hon'ble High Court of Karnataka in ILR 1997 KAR 1909 (Ansari Sakeenabi -V/s- Maligi Modeens)**. In the above said case it has been held that, "due to non-appearance of contesting defendants at subsequent stages in the suit and on his

failure to lead the evidence if the judgment and decree is passed then, it has to be considered as ex-parte decree and not as a decree passed on merits. Hence, the application filed under Order 9 Rule 13 of CPC to set aside the decree in question is maintainable". In the above said case, it has been held that, if the defendants who had appeared before the Court had not led the evidence then, the decree passed is said to be ex-parte decree and not a decree based on merits.

16. By relying on the principle laid down by the Hon'ble Karnataka High Court cited above, to the case on hand, in the present case, the appellants had appeared before the Trial Court but, at subsequent stages for the reason mentioned in the Miscellaneous Petition they have not appeared and led evidence in the suit and also not filed written statement. Hence, by applying the principle laid down by Hon'ble Karnataka High Court in the above cited case, the judgment passed by the Court in OS 676/06 is

considered as an ex-parte decree. As such, this Court views that, the application filed under Order 9 Rule 13 of CPC by the petitioners for setting aside the ex-parte decree is maintainable. Hence, based on the said reasoning, **Point No.1 is answered in the Negative.**

17. Point No.2 : Based on findings in point No.1, this court proceeds to pass the following:

ORDER

I.A. dated 21.01.2017 filed by the respondent U/s.151 of CPC for dismissing the petition as not maintainable is hereby rejected with cost of Rs.1,000/-.

The parties are directed to cooperate with the Court for speedy disposal of the petition.

(Dictated to the stenographer, transcribed & computerized by her, corrected, signed and then pronounced by me in the Open Court on this the 16th day of August 2017)

(K. SRIVIDYA)
Addl. Senior Civil Judge,
Ramanagara.