

Vijaya Laxmi Vs. V. Vijaya Kumar

Vijaya Laxmi Vs. V. Vijaya Kumar

SooperKanoon Citation : sooperkanoon.com/436161

Court : Andhra Pradesh

Decided On : Jul-03-1995

Reported in : 1995(2)ALT712; I(1996)DMC218

Judge : S. Parvatha Rao and ;Neelam Sanjiva Reddy, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13

Appeal No. : A.A.O. No. 1599 of 1992

Appellant : Vijaya Laxmi

Respondent : V. Vijaya Kumar

Advocate for Def. : K. Gangadhar, Adv.

Advocate for Pet/Ap. : M.V. Bharathi, Adv.

Disposition : Appeal allowed

Judgement :

S. Parvatha Rao, J.

1. The appellant questions the order of the III Additional Judge, City Civil Court, Secunderabad dated 25.10.1988 dismissing I.A. No. 943 of 1988 filed under Order IX, Rule 13 of the Code of Civil Procedure ('the Code' for short) for setting aside the exparte judgment and decree dated 28.6.1988 in O.P. No. 218 of 1987.

2. O.P. No. 218 of 1987 was preferred by the respondent herein for a decree of divorce dissolving his marriage with the appellant herein which took place on 24.5.1981. The docket notings in O.P. No. 218 of 1987 show that it was being posted for enquiry from 18.12.1987 onwards and it was being adjourned from time to time. On 8.2.1988 it was adjourned to 12.2.1988 at the request of both sides. On 12.2.1988 P.W. 1 was examined in part and it was posted to 22.2.1988 for cross-examination of P. W. 1. Thereafter, it was posted to 1.3.1988 and it was adjourned to 8.3.1988 as both were not ready. Thereafter, it was once again posted to 9.3.1988 and as both the parties as well as their Advocates were called absent, it was dismissed for default. I.A. No. 362 of 1988 was preferred by the respondent therein for restoration and on 7.6.1988 the said LA. was allowed and the O.P. was posted to 9.6.1988 and then to 13.6.1988. On 13.6.1988 it was adjourned to 17.6.1988 because appellant's Advocate was not ready. On 17.6.1988 it was noted that P.W. 1 along with his Advocate were ready and that appellant and her Advocate were called absent and that it was represented on behalf of her Advocate that he was not ready. The learned Additional Judge thereafter forfeited the right of the appellant to cross-examine P.W. 1 and at the request of the Advocate of the respondent herein, his side was closed. O.P. was then posted to 22.6.1988 for the evidence on the appellant's side. On 22.6.1988 Advocate of the respondent herein was ready, but the appellant and her Advocate were called absent and her side was closed and the matter was posted to 23.6.1988 for arguments and on that date also the appellant and her Counsel were called absent and after hearing the Advocate of the respondent herein, the matter was posted to 28.6.1988 for judgment.

3. In I.A. No. 943 of 1988, the plaintiff (sic. appellant) explained that she could not attend the Court as she was suffering from typhoid from 1.6.1988 and as she was bed-ridden. The learned Additional Judge did not disbelieve that averment of the appellant, but dismissed the I.A. with the following reasoning :

'It is to be noted that it is the case of the petitioner as averred in her affidavit that she could not attend this Court to give evidence on 17.6.1988, 22.6.1988 and 23.6.1988 as she was suffering from typhoid since 1.6.1988 and because she was under treatment and completely bed-ridden. Here it is to be noted that it is not as

though the petitioner herein was not having any Advocate to appear on her behalf in the main petition in O.P. No. 218/87. It is also to be noted that Mr. M.V. Bharati, Advocate for the petitioner herein in the said main O.P. failed to appear on all abovesaid given dates. The petitioner has failed to give any explanation in her affidavit about the absence of the said Advocate in this Court when the main O.P. was called on for enquiry. Under these circumstances I only find that there are no valid grounds and no satisfactory reasons to allow this petition and to set aside the ex parte decree dated 28.6.1988 and passed in the main petition in O.P. No. 218/87. I decide the point raised accordingly.'

4. We find it difficult to appreciate and approve this reasoning of the learned Additional Judge. When the appellant states that she was suffering from typhoid since 1.6.1988 and because of that she could not attend the Court, we fail to see how her Advocate could have done anything when especially the O.P. was posted for appellant's evidence. On the facts and circumstances of the case, therefore, the failure or lapse on the part of her Advocate should not be set against the appellant because even if he appeared he could not have proceeded with the matter in view of the illness of the appellant. The appellant obviously could not meet her Advocate and therefore could not have known the dates to which the matter was being adjourned. In *Rafiq v. Munshilal*, : [1981]3SCR509 , the Supreme Court held as follows :

'The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned Advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen Advocate defaulted.'

The observations of the Supreme Court aptly apply to the facts of the present case. After critically discussing *Rafiq* (supra), another two-Judges Bench of the Supreme Court recently observed in *Salil Dutta v. T.M. and M.C. Private Ltd.*, : [1993]1SCR794 , as follows :

'The Advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e., the party who engaged him. It is true that in certain situations, the Court may, in the interest of justice, set aside a dismissal order or an ex parte decree notwithstanding the negligence and/or misdemeanour of the Advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its Advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. The observations made in Rafiq (supra) must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition.'

It has to be noticed that Salil Duta, was a case where the defaulting parties felt piqued by their applications not being disposed of before the suit was taken up for final hearing and refused to appear before the Court and as the Supreme Court observed:

'May be, it was part of their delaying tactics as alleged by the plaintiff. May be not. But one thing is clear--they chose to non-cooperate with the Court. Having adopted such a stand towards the Court, the defendant has no right to ask its indulgence. Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and ought not to have been accepted.'

But, in the present case the facts are close to those of Rafiq (supra). They do not disclose any contumacy or obduracy on the part of the appellant. She says she was laid immobile by typhoid.

5. As we pointed out earlier, the learned Additional Judge did not doubt the appellant when she stated that she could not attend the Court because she was suffering from typhoid. Nor have we any good reason to doubt her veracity. She also filed a medical certificate to establish the same. The respondent, no doubt, very positively stated that she did not suffer from any typhoid. But it is not his case that he visited the appellant or that he had any means of knowing the condition of the appellant. A mere denial in the circumstances will not suffice.

6. In the result, we have to hold that the appellant was prevented by sufficient cause from appearing when the O.P. was called for hearing and we consequently set aside the order of the learned III Additional Judge, City Civil Court, Secunderabad dated 25.10.1988 dismissing I.A. No. 943 of 1988 and also set aside the ex parte judgment and decree of divorce in O.P. No. 218 of 1987 dated 28.6.1988. The Civil Miscellaneous Appeal is accordingly allowed. No costs.

7. The learned Counsel for appellant states that appellant undertakes to be present in Court and co-operate in the early disposal of O.P. The lower Court is directed to take up the trial of the O.P. immediately and dispose of the same at the earliest, at any rate, within six months from today.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com