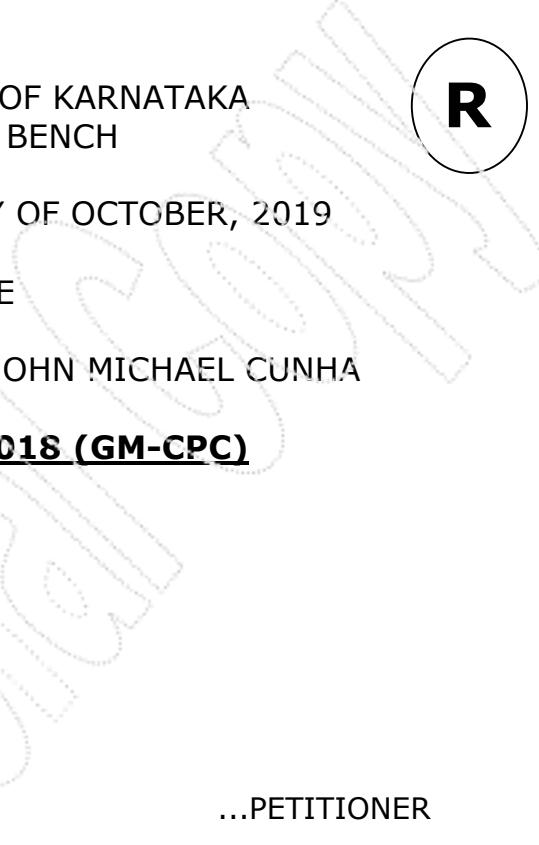


IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH



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DATED THIS THE 18TH DAY OF OCTOBER, 2019

BEFORE

THE HON'BLE MR. JUSTICE JOHN MICHAEL CUNHA

W.P.NO. 204679/2018 (GM-CPC)

BETWEEN:

SRI.ABDUL SHUKOOR
S/O GULAM RASOOL
AGE: 72 YEARS, OCC: BUSINESS
R/O TIPPU SULTAN ROAD
ANDROON QUILLA
RAICHUR.

...PETITIONER

(BY SRI,, MAHANTHESH PATIL, ADVOCATE)

AND:

1. SRI. SAMAD PASHA
S/O LATE GULAM DASTAGIR,
AGE: 54 YEARS, OCC: AGRICULTURE,
R/O H.NO.1-11-55/17A,
VENKATESHWAR COLONY,
LINGASUGUR ROAD, RAICHUR-584101.
2. THE COMMISSIONER, RAICHUR URBAN
DEVELOPMENT AUTHORITY,
DODDY COLONY, RAICHUR-5854101.

... RESPONDENTS

(BY SRI SHIVANAND PATIL, ADVOCATE FOR R1
AND NOTICE TO R2 SERVED)

THIS WRIT PETITION IS FILED UNDER ARTICLE 227 OF THE CONSTITUTION OF INDIA, PRAYING TO SET ASIDE THE ORDER DATED: 13.11.2018 PASSED BY THE LEARNED IIND CIVIL JUDGE, RAICHUR, ON ORDER I.A NO. IX IN O.S.NO. 75/2016, VIDE ANNEXURE-J AND CONSEQUENTLY ALLOW THE I.A NO IX IN O.S. NO.75/2016 PENDING ON THE FILE OF LEARNED IIND ADDL. CIVIL JUDGE, RAICHUR.

THIS PETITION COMING ON FOR PRL. HEARING IN 'B' GROUP THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

Whether an application under Order IX Rule 7 of CPC could be filed after the suit is posted for judgment is the short question that arises for consideration in this petition filed under Articles 226 and 227 of the Constitution of India.

2. The outline facts leading to the petition are as follows:

Respondent No.1 herein filed a suit for declaration and permanent injunction against the petitioner and respondent No.2 herein in O.S.No.53/2016 before the Principal Senior Civil Judge, Raichur. This plaint

was returned to respondent No.1/plaintiff to present the same before the jurisdictional Court on 16.03.2016. Respondent No.1 appears to have taken return of the plaint on the same day and presented the same before the Court of the Principal Civil Judge and JMFC on the same day i.e. on 16.03.2016. The records disclose that it was made over to the II Additional Civil Judge for disposal on 17.03.2016, but the order sheet in O.S.No.75/2016 manifests that on 16.03.2016 the learned Civil Judge issued summons to defendant Nos.1 and 2. It is recorded therein that the summons were served on the petitioner/defendant No.1, but he failed to appear before the Court and was placed ex-parte and the case was posted for further hearing from time to time and finally posted for judgment on 18.06.2018. At that stage, the petitioner herein (defendant No.1) filed an application under Order IX Rule 7 read with Section 151 of CPC which was numbered as I.A.No. IX, seeking to recall the *ex-parte* order by permitting him to file *vakalathnama* and to proceed with the matter. In the affidavit filed in support of

the application the petitioner affirmed that the suit summons were not served on him and therefore he was unable to appear before the Court and only recently he came to know about the presentation of the above suit before the Court.

3. Respondent No.1/plaintiff opposed the petition *inter alia* contending that the statement made in the affidavit that the summons were not served on him was false. According to the plaintiff summons were duly served on defendant No.1/petitioner as noted in the order sheet. Further he contended that the petitioner participated in the earlier suit namely, O.S.No.53/2015 and the learned senior Civil Judge had directed both the parties to the suit to appear before the jurisdictional Court on 16.03.2016. The act of the petitioner in keeping himself away from the Court until the conclusion of the trial and seeking intervention in the matter only when the matter was set down for judgment, is legally impermissible and thus sought to dismiss the petition.

4. In the course of the arguments both the learned counsel appearing for the parties appear to have relied on certain citations in support of their respective contentions before the trial Court, but there is no reference to these citations in the impugned order, yet, the trial Court judge, reiterating the principle that once the matter is posted for judgment nothing is required to be done by the Court except to pronounce the judgment and no application can be filed after the final argument is heard and the matter is posted for judgment, dismissed the application filed by the petitioner under Order IX Rule 7 read with Section 151 of CPC.

5. Learned counsel appearing for petitioner, placing reliance on the decision of the Hon'ble Supreme Court in the case of ***K.K.Velusamy vs. Palani Samy reported in (2011) 11 SCC 275*** would submit that there is no inflexible rule that once the arguments are commenced that no application could be filed even to set aside the *ex-parte* arguments. The Court is required to act in a

manner to achieve the ends of justice. If there is abuse of process of the Court or interest of justice is required the Court to do something or to take note of something, discretion to do those things do not disappear merely because the arguments are heard either fully or partly. In exceptional and extraordinary circumstances to meet the ends of justice, the Court is empowered with ample discretion under section 151 of CPC. It is the submission of the learned counsel that, Order IX Rule 7 of CPC empowers the Court to set aside the order placing the party to the suit *ex parte* at any stage where the party appears before the Court and assigns good cause for his non appearance. He further contends that in the instant case, the learned trial Judge has failed to consider the cause assigned by the petitioner for non appearance of the petitioner on the date of hearing. The impugned order has been passed solely relying on the proposition of law without considering the cause shown by the petitioner and the same has resulted in grave injustice and prejudice to the petitioner and thus sought to set aside the said order.

6. Learned counsel appearing for respondents has placed reliance on the decision in the case of **Rasiklal and Manickchand Dhariwal and Others vs. M.S.S.Food Products** reported in **(2012) 2 SCC 196** and the order passed by the Division Bench of this Court in **Rabiya Bi Kassim M. vs. The Country Wide Consumer Financial Service Limited** reported in **2004 (4) Kar.LJ 189** wherein it is held that "once the matter has been heard and posted for judgment nothing is required to be done by the Court except to pronounce the judgment - Interlocutory application to reopen the case and record further evidence after the matter is reserved for pronouncement of judgment, is not permissible". With regard to maintainability of an application under Order IX Rule 7 after posting the matter for judgment, the learned counsel has referred to the decision of this Court in the case of **Sujata vs. Indian Bank** in Cr.P.No.4641/1991 decided on 17.11.1995 wherein following the principle laid down in **Arjun Singh vs. Mohindra Kumar and Company [(1964) 5 SCR 946]**, it is held that once the

Court posted the case for judgment there cannot be re-opening of evidence or recalling of any witness or advance any hearing for the purpose other than pronouncement of judgment.

7. I have bestowed my careful thought to the rival contentions urged by the parties and have scrutinized the material on record in the light of the proposition of law laid down in the decisions cited at the bar.

8. Insofar as the legal contention urged by the petitioner is concerned, the issue is no more *res integra* in view of the authoritative pronouncement of the Hon'ble Supreme Court in *Rasiklal's* case wherein a contention was advanced before the Hon'ble Supreme Court that Order IX Rule 7 of CPC do not take away the right of the defendants to participate in further proceedings of the case if the defendants appear on subsequent dates before pronouncement of the judgment. The said plea was advanced based on the decisions of the various High Courts, but the Hon'ble Supreme Court in paragraph

Nos.34 and 35 of the judgment negated the contentions and held as under:

'34. The contention, at the first blush, appears to be attractive but has no substance at all. In the first place, once the hearing of the suit is concluded; and the suit is closed for judgment, Order IX Rule 7 of the Code has no application at all. The very language of Order IX Rule 7 makes this clear. This provision presupposes the suit having been adjourned for hearing. The courts, time out of number, have said that adjournment for the purposes of pronouncing judgment is no adjournment of the hearing of the suit'. On March 17,2005, the trial Court in the present case did four things namely, (i)closed the evidence of the Plaintiff as was requested by the plaintiff; (ii) ordered the suit to proceed ex-parte as Defendants failed to appear on that date; (iii) heard the arguments of the Advocate for the Plaintiff; and (iv) kept the matter for pronouncement of judgment on March 28, 2005. In view of the above, Order IX Rule 7 of the Code has no application at all and it is for this reason that the application made by

the defendants under this provision was rejected by the trial Court.

35. *Secondly, once the suit is closed for pronouncement of judgment, there is no question of further proceedings in the suit.* Merely, because the defendants continued to make application after application and the trial Court heard those applications, it cannot be said that such appearance by the Defendants is covered by the expression "appeared on the day fixed for his appearance" occurring in Order IX Rule 7 of the Code and thereby entitling them to address the Court on the merits of the case. The judgment of Bombay High Court in *Radhabai Bhaskar Sakharam AIR (1922) Bom 345* on which reliance has been placed by the learned senior counsel for the appellants, does not support the legal position canvassed by him. Rather in *Radhabai Bhaskar Sakharam AIR (1922) Bom 345*, the Division Bench of the Bombay High Court held that if a party did not appear before the suit was heard, then he had no right to be heard. This is clear from the following statement in the judgment:

....Until a suit is actually called on, a party is entitled to appear and defend. It may be

*that he is guilty of delay and if that is the case he may be mulcted in costs. **But if he does not appear before the suit is heard, then he has no right to be heard....”***

(underlining supplied)

9. Even in this decision the observations made by the Hon'ble Supreme Court in *Arjun Singh's* case has been reiterated in paragraph No.41 and the proposition laid down therein has been reproduced as under:

41.

....On the terms of Order IX, Rule 7 if the Defendant appears on such adjourned date and satisfies the Court by showing good cause for his non-appearance on the previous day or days he might have the earlier proceedings recalled- “set the clock back” and have the suit heard in his presence. On the other hand, he might fail in showing good cause. Even in such a case he is not penalized in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial, only he cannot claim to be relegated to the

position that he occupied at the commencement of the trial. Thus every contingency which is likely to happen in the trial vis-à-vis the non-appearance of the defendant at the hearing of a suit has been provided for and Order IX Rule 7 and Order IX, Rule 13 between them exhaust the whole gamut of situations that might arise during the course of the trial. If, thus, provision has been made for every contingency, it stands to reason that there is no scope for the invocation of the inherent powers of the Court to make an order necessary for the ends of justice. Mr. Pathak, however, strenuously contended that a case of the sort now on hand where a Defendant appeared after the conclusion of the hearing but before the pronouncing of the judgment had not been provided for. We consider that the suggestion that there is such a stage is, on the scheme of the Code, wholly unrealistic. In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit: (1) where the hearing is adjourned or (2) where the hearing is completed. Where the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the

Court that Order XX, Rule 1 permits judgment to be delivered after an interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by Order IX, Rule 7 is passed the next stage is only the passing of a decree which on the terms of Order IX, Rule 6 the Court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under Order IX, Rule 13. There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of Order IX Rule 7.....

(underlining supplied)

In the light of the above settled proposition, the first contention urged by the petitioner is liable to be rejected.

10. The decision relied on by the learned counsel for the petitioner in ***K.K.Velusamy vs. Palani Samy reported in (2011) 11 SCC 275*** may not come to the aid of the petitioner. In the said case, the application under

Order XVIII Rule 17 of CPC was filed in a pending suit to recall a witness who was already examined before the Court. It was contended that there is no specific provision in the Code enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross-examination. The respondent therein contended that once arguments are commenced there could be no re-opening of evidence or recalling of any witness. In that context, Hon'ble Supreme Court held that this contention was raised by extending the convention that once the arguments are concluded and case is reserved for judgment, the Court cannot entertain any Interlocutory application for any kind of relief. Hon'ble Supreme Court in paragraph No.13 of the judgment observed that the need of the Court to act in a manner to achieve the ends of justice (subject to the need to comply with the law) does not end when arguments are heard and judgment is reserved. If there is abuse of the process of the Court, or if interest of justice requires the Court to do something or take note of something, the discretion to do those things

does not disappear merely because the arguments are heard, either fully or partly. Even in this decision the Hon'ble Supreme Court observed that no application could be entertained once the trial or hearing is concluded and the case is reserved for judgment. Considering the peculiar and extra-ordinary circumstances of the case, Hon'ble Supreme Court proceeded to grant relief to the parties.

11. Thus the law on the point in question having been settled, I do not find any good reason to accept the argument canvassed by the learned counsel for the petitioner. The petitioner having invoked the jurisdiction of the Court by making an application under Order IX Rule 7 of CPC after the hearing was completed, the only course open for the petitioner is to take recourse to Order IX Rule 13 of CPC, and not under Order IX Rule 7 of CPC.

12. Insofar as the submission made by the learned counsel for the respondent that the petitioner herein failed to appear before the Court on 16.03.2016 as directed by

the Principal Senior Civil Judge, Raichur, while returning the plaint in O.S.No.53/2016 is concerned, as already noted in the preceding part of this order, though the petition was presented by the respondent herein before the Court on 16.03.2016, the same was put up before the learned Civil Judge only on 17.03.2016. As such there was no occasion for the petitioner to appear before the Court on 16.03.2016. Even otherwise, on account of his failure to appear on that day, the petitioner does not forfeit his right to get the order placing him *ex parte* set aside on showing that he was prevented by any sufficient cause from appearing when the suit was called for hearing. But since the petitioner appeared before the Court after the completion of the hearing, the only course open to the petitioner is to take recourse to Order IX Rule 13 of CPC. The trial Court therefore was justified in rejecting the application filed by the petitioner under Order IX Rule 7 of CPC when the case was posted for judgement. As a result, no grounds are made out to interfere in the impugned order. Consequently, the petition is dismissed with cost of

Rs.10,000/- payable to the respondent, out of
Rs.20,000/- deposited by the petitioner before this Court.
The remaining amount of Rs.10,000/- be returned to the
petitioner on proper identification.

**Sd/-
JUDGE**

VNR