

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment pronounced on: August 05, 2013*

+ **CM(M) No.882/2012 & CM No.13343/2012**

H.D. GUMBER Petitioner
Through Mr.Mayank Bansal, Adv. for
Mr.Milandeep Singh, Adv.

versus

VANDANA CHOPRA & ORS. Respondents
Through Mr.Jugal Wadhwa, Adv. with
Mr.Deepak Bhardwaj, Adv.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. Petitioner has filed a petition under Article 227 of the Constitution of India against the orders dated 2nd April, 2012 and 11th June, 2012 dismissing the application for leave to defend as well as the application under Order 47 Rule 1 CPC seeking review of order dated 2nd April, 2012.

2. The respondent Nos. 1 to 4 had filed a suit for recovery of ₹5,10,000/- under Order 37 CPC against the petitioner. The respondent Nos. 1 to 4 are legal heirs of late Shri Rakesh Chopra from whom the petitioner had taken a loan of ₹3,00,000/- in January 2003 for the period of one year for the interest @ 2.5% per month who had handed over a post dated cheque dated 15th April, 2003 for ₹3,00,000 at that time, as security. Subsequently late Shri Rakesh Chopra died but the cheque was not encashed. Respondent No.1 is a widow who alleged that the petitioner is not paying the amount taken from her late husband rather he is harassing her and other family members in view of pendency of litigation initiated by her.

3. The petitioner was served with summons by the registered post on 14th December, 2006 and through court process on 15th January, 2007. He filed the leave to defend on 23rd January, 2007. The application for leave to defend was dismissed on the ground that leave to defend application was not filed within the statutory period of service as the service was effected by registered AD post on 14th December, 2006 and the same had not been denied by the petitioner in his application to leave to defend.

4. According to the petitioner it was filed within the statutory period of 10 days of the service of summons by the court process on 15th January, 2007 as he alleged that service by registered A.D. is not a valid service and secondly if the service is effected by both the modes on different dates, the limitation would run from the latter date of service. As the petitioner was served with summons on 15th January, 2007, the starting point of limitation for making the application for leave to defend is to be taken from the said date and not from 14th December, 2006. Therefore, the leave to defend application was filed within the prescribed period of ten days and the learned trial court has wrongly dismissed petitioner's application for leave to defend.

5. After the dismissal of his application, the trial court passed the final decree against the petitioner, who assailed the order of trial court by filing of a review application.

6. The learned court below dismissed his review application by order dated 11th June, 2012 observing that two decisions referred to by him were passed under the Special Act i.e. the Delhi Rent Control Act, 1958 and had no bearing on the facts of the suit in hand filed under Order 37 CPC. It was observed by the learned trial court that "service by both the modes" in a suit under Order 37 is not the requirement of the statute. Order 37 CPC provides that the service has to be effected by ordinary post as well as through

process server. Second service in a suit filed under Order 37 CPC is not mandatory as provided in the Delhi Rent Control Act, 1958.”

7. Aggrieved by the impugned order, the present petition is filed inter alia on the ground that as per the rules of service under CPC, it is mandatory that the summons for service upon the defendant has to be sent by court process and besides that the court may, if think fit, at the expense of the plaintiff serve the defendant through registered AD post and other modes as prescribed under Order 5 Rules 9(3) CPC and in view of the same, the impugned order passed in his review petition is erroneous and not sustainable in law.

8. Coming back to the issue involved in the matter, it is admitted position that the trial court on 18th January, 2007 passed the following order:

“The summons for judgment has been served on the defendant as per AD card received back on 14.12.2006. Counsel for the defendant submits that as per the instructions given to me by the defendant, the summons had been served on him on 15.01.2007. The court record shows that the summons were served on the defendant by way of AD card received back on 14.12.2006. While the summons through process server were served on 15.01.2007. Hence, it is seen that the defendant had been duly served on 14.12.2006.”

The said order has not been challenged by the petitioner as the service of the summons for judgment by AD card bearing the signatures of the petitioner on 14th December, 2006 have not been denied in the application for leave to defend and the affidavit filed along with the application and by order dated 2nd April, 2012, the application for leave to defend was dismissed being time barred and the matter was put up for arguments on 23rd April, 2012. The petitioner on 16th April, 2012 filed the review application under Order XLVII, Rule 1 CPC mainly on the ground that the order dated

2nd April, 2012 passed by the learned trial court is erroneous in law in view of two decisions passed by this Court; ***Om Parkash Sharma Vs. Vijay Kumar Gupta***, 46 (1992) DLT 323 and ***Frank Anthony Public School Vs. Smt. Amar Kaur***, 1984 (6) DRJ 47.

9. After considering the case of the petitioner as well as two decisions referred by the petitioner, the review petition was also dismissed on 11th June, 2012. In the present petition, the petitioner has assailed both orders i.e. 2nd April, 2012 and 11th June, 2012 and prayed for quashing the said orders under Article 227 of Constitution of India.

10. Scope of interference in a petition under Article 227 of Constitution of India is discussed in the following judgments :

i. In ***Waryam Singh and Another v. Amarnath and Anr.***, AIR 1954 SC 45, the court observed; “This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in-“***Dalmia Jain Airways Ltd. V. Sukumar Mukherjee***”, AIR 1951 CAL 193 (SB) 1(B), to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.”

ii. In ***Mohammed Yusuf Vs. Faij Mohammad and Ors.***, 2009 (1) SCALE 71, Supreme Court held; “The jurisdiction of the High Court under Article 226 & 227 of the Constitution is limited. It could have set aside the orders passed by the Learned trial court and Revisional Court only on limited ground, namely, illegality, irrationality and procedural impropriety”.

iii. In ***State of West Bengal and Ors. Vs. Samar Kumar Sarkar***, JT 2009 (11) SC 258 Supreme Court held; “10. Under Article 227, the High Court has been given power of superintendence both in judicial as well as administrative matters over all Courts and Tribunals throughout the

territories in relation to which it exercises jurisdiction. It is in order to indicate the plentitude of the power conferred upon the High Court with respect to Courts and the Tribunals of every kind that the Constitution conferred the power of superintendence on the High Court. The power of superintendence conferred upon the High Court is not as extensive as the power conferred upon it by Article 226 of the Constitution. Thus, ordinarily it will be open to the High Court, in exercise of the power of superintendence only to consider whether there is error of jurisdiction in the decision of the Court or the Tribunal subject to its superintendence.”

iv. In ***Bathutmal Raichand Oswal Vs. Laxmibai R. Tarta***, AIR 1975 SC 1297 the Court again reaffirmed that the power of superintendence of the High Court under Article 227 being extraordinary was to be exercised most sparingly and only in appropriate cases. High Court’s function is limited to see that the subordinate court or Tribunal functioned within the limits of its authority. The Court further said that the jurisdiction under Article 227 could not be exercised as the cloak of an appeal in disguise.

v. In ***Laxmikant Revchand Bhojwani and Anr. Vs. Pratapsing Mohansing Pardeshi Deceased through his Heirs and Legal representatives***, JT 1995(7) SC 400, Apex Court observed; “The High Court under Article 227 of the Constitution of India cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes.”

11. Two judgments referred to by the petitioner are with regard to Delhi Rent Control Act, 1958 wherein Section 25B contains special provision in which it is mentioned to issue summons also through registered cover in

order to protect larger interest of residence of a tenant and it was intended by the legislature that there should be service upon the tenant through registered post also.

However, the legislature has not prescribed specifically service upon the defendant through registered post under the provision of Order XXXVII of CPC. Service by both modes in the suit filed under Order XXXVII CPC is not the requirement of suit. Order XXXVII CPC provides that service has to be effected by ordinary process as well as through process server.

12. Therefore, the benefit of limitation for filing the application for leave to defend from the latter date of service is not available under the provision of Order XXXVII CPC as legislature has not prescribed specifically service upon the defendant through registered post.

13. In the present case the summons were served upon the petitioner by way of registered AD post on 14th December, 2006. Thus, the contention of the petitioner cannot be accepted and it has been rightly held by court below that the application filed by the petitioner was not filed within the prescribed period, therefore, the same was dismissed. Thus, no interference in the petition filed under Article 227 of Constitution of India is called for. The petition is, therefore, dismissed as the same is without any merit. All pending applications stand disposed of.

(MANMOHAN SINGH)
JUDGE

AUGUST 05, 2013