

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.04.2015

CORAM

THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

**C.R.P. (NPD) No.4007 of 2007 &
M.P.No.1 of 2007**

Dharman

.. Petitioner

Vs

Sakuntala Ammal

.. Respondent

This Revision Petition is filed under Section 115 of the Code of Civil Procedure against the fair and decreetal order dated 16.07.2007 in I.A.No.395 of 2007 in O.S.No.46 of 2006 on the file Principal District Munsif Court, Thirukovilur.

For Petitioner : Mr.K.Selvaraj
For Respondent : Mr.V. Raghavachari.

ORDER

The present Civil Revision Petition is filed by the defendant in the suit against the order made in I.A.No.395 of 2007 in O.S.No.46 of 2006 on the file of the Principal District Court, Thirukovilur, dismissing the petition filed under Section 5 of the Limitation Act, to condone the delay of 202 days in filing the petition to set aside the exparte decree. The suit was filed for specific performance by the respondent herein, in which, summons was issued to the petitioner/defendant for the hearing on 13.04.2006. The summons was sent through Court Aameena (Process Server) Tmt.Tamilselvi, who visited the village concerned on 04.04.2006 and returned the summons unserved with the endorsement that the summons was refused by the

petitioner/defendant. The trial Court on the basis of the endorsement, held the service to be sufficient and called the defendant absent and set him *exparte* on the hearing date i.e. 13.04.2006 and passed an *exparte* decree on 04.07.2006. Thereafter, the petitioner/defendant came forward with the application in I.A.No.395 of 2007 under Section 5 of the Limitation Act to condone the delay of 202 days in filing the application under Order 9 Rule 13 of the Code of Civil Procedure, along with other consequential applications.

2.In the affidavit filed in support of the petition, the reasons stated by the petitioner/defendant are that he was not served with any summons in the suit and he had at relevant point of time, settled at Chennai for job purpose and he returned to his native place only after 1½ years and thereafter, he was informed about the *exparte* decree and his absence on the date of hearing was only due to non-service of summons.

3.The petition was seriously opposed by the respondent/plaintiff by denying the contention so raised on the side of the petitioner/defendant. It is the case of the respondent/plaintiff that the summons was sought to be served on the petitioner/defendant by Court Ameenah on 04.04.2006 and the same was returned unserved with an endorsement 'refused to receive'. The petitioner/defendant did

not take any steps to disprove the endorsement by summoning and examining the Aameena. The trial Court hence relied on the endorsement made by the Aameena. The trial Court also disbelieved the reasons given in the affidavit as factually incorrect and accordingly dismissed the petition. Hence, this revision before this Court by the petitioner/defendant.

4.The learned counsel for the petitioner submits that the trial Court has committed an error in relying on the endorsement made by the Aameena without calling for the evidence from Aameena and without examining her as contemplated under Order 5 Rule 19 CPC. It is also the contention of the learned counsel for the petitioner that the trial court has wrongly cast the burden on the petitioner/defendant to take steps to examine the Aameena, when the same under the statute, is on the plaintiff. The learned counsel for the petitioner has in support of such contention cited the following judgments: (i)Full bench decision in **PARASURAMA ODAYAR V. APPADURAI CHETTY AND OTHERS** reported in **83 LAW WEEKLY P.137**; (ii)**DOSS AND ANOTHER V. VAMANAN AND ANOTHER** reported in **2007 (5) CTC 847** and (iii)order made in **CRP No.482 of 2010**.

5.The Full Bench and the learned Single Judge of this Court have held that as per the procedure contemplated under Order 5 Rule

19 CPC, to examine the Aameena serving officer is mandatory and not directory and failure to follow the procedure would result in substantial injustice and accordingly set aside the ex parte decree which was passed without complying with the mandatory procedure.

6.The learned counsel for the petitioner has drawn the attention of this court to the observation of the Full Bench of this Court, while answering the question referred to them, as to whether the non-compliance of the requirements of Order V Rule 19 C.P.C would make the service of the summons ineffective or not, which reads as follows:

"It is necessary that there should have been strict compliance with the provisions of Order V Rule 19 by the executing court when it proceeded to hold the sale in the absence of the judgment-debtor. In particular, where the return of the process server under Rule 17 has not already been verified by the affidavit of the serving officer, the court shall examine the serving officer on oath or cause him to be so examined by another court touching his proceedings. It should also declare expressly that the summons has been duly served, though the exact form of that declaration may be in any convenient form, such as 'it is declared that the defendant has been duly served' or 'it is declared that the service is sufficient' or simply 'defendant duly served' or 'service sufficient'. What is important is that the endorsement of the court itself should indicate that the presiding officer has applied his mind and

considers that the summons has been duly served."

One of the Co-judges of the Full Bench, who supported the view of the Full Bench for different reason, has observed as follows:

"Where there is no affidavit of the serving officer and where the serving officer is not subsequently examined by the court, there is non-compliance with the first part of Order 5 Rule 19 CPC and the service is ineffective."

The Full Bench, after answering the reference as stated above, returned the case bundle to the concerned Bench for passing appropriate Judgment. The learned single judge has, having found that the process server had not verified the return by an affidavit and having found that the requirement of Order V Rule 19 CPC was not complied with, set aside the sale.

7.It is argued by the learned counsel for the petitioner that the principle laid down by the Full Bench of this Court which was followed by the learned Single Judge of this Court is squarely applicable to the facts of this case, wherein also the Mandatory provision under Order 5 Rule 19 CPC is not complied with. Applying the view of the Full Bench, the order holding the service as sufficient insofar as the petitioner is concerned, without fully satisfying the requirement of Order 5 Rule 19 CPC, is legally unsustainable and is liable to be set aside.

8.However, the learned counsel for the respondent by relying upon the judgment of the learned Single Judge of this Court in

SIDDHA GOUNDER V. MUTHUSAMY AND ANOTHER reported in **1998 – 2- L.W. 663**, would contend that refusal of summons will amount to knowledge of proceedings. The learned single Judge of this Court in the authority cited above relied on the judgment of the Hon'ble Apex Court reported in **BHABLA DEVI V. PERMANAND YADAV**, reported in **AIR 1997 SC 1919**, wherein the Hon'ble Apex Court is pleased to confirm the order of the trial Court regarding service of summons which was based on oral evidence of two witnesses one among whom is the process server, whereas in the present case, the process server is not at all examined at any point of time. In view of the settled legal position, the observation of the Hon'ble Apex Court as stated above, is not applicable to the facts of the present case, which stands factually distinguishable. Here is the case, wherein the finding of the trial Court regarding due service of summons is given without following the provisions under Order 5 Rule 19 CPC, as such, such finding is legally unsustainable.

9.Considering the nature of the averments raised in the affidavit filed in support of the petition and evidence adduced in support of the same, I find no reason to disbelieve the averments made in the affidavit by the petitioner/defendant that he was not duly served with any summons in the case and the same is sufficient enough to justify his non-appearance and the delay in approaching the

court for setting aside the exparte decree. As such, the petitioner/defendant having shown sufficient cause for his non-appearance before the Court concerned to condone the delay in filing the application to set aside the exparte decree belatedly, is entitled to get an opportunity for contesting the matter on merits.

10.In the result, the Civil Revision Petition is allowed by setting aside the order made in I.A.No.395 of 2007 and I.A.No.395 of 2007 stands ordered. The trial Court is directed to take up the application filed under Order 9 Rule 13 CPC and to decide the same as expeditiously as possible, in the light of the findings rendered herein for condoning the delay and in the event of the suit being restored to file, the same shall be proceeded with and be disposed of within a period of six months from the date of restoration of the suit. No costs. Consequently, connected miscellaneous petition is closed.

15.04.2015

Index : Yes/No
Internet : Yes/No
kal/rk
To

The Principal District Munsif Court,
Thirukovilur.

K.B.K.VASUKI,J

kal/rk

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