

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.No.4020 of 2015

ORDER :

This Revision is filed under Article 227 of the Constitution of India challenging the order dt.09.09.2015 in I.A.No.406 of 2014 in O.S.No.853 of 2012 on the of I Additional Senior Civil Judge, Warangal.

2. The petitioners herein are plaintiffs in the suit.
3. They filed the suit against respondents for recovery of possession of the plaint schedule property, for declaration of their title to the plaint schedule property and to direct the 3rd respondent to cancel the assessment of H.No.2-1-877/1 in favour of respondent nos.1 and 2.
4. On 01.04.2013, an *ex parte* decree was passed in the suit.
5. On 25.03.2014, I.A.No.406 of 2014 was filed by 1st respondent under Order 9 Rule 13 C.P.C. contending that he was suffering from ill-health and he came to know about the decree in the suit only on 15.03.2014; on enquiry he came to know that the said decree was passed on the basis that he had refused to receive the summons; that no process server had come to his house to serve the copies of the summons at any point of time; therefore, the question of refusing to receive the summons

does not arise; that the 2nd respondent had earlier filed a suit O.S.No.256 of 2007 against him on the basis of fraudulent documents but did not press the suit and got it dismissed on 17.09.2007 after the 1st respondent had exposed the fraud; that once the earlier suit was dismissed, the question of filing another suit for the same relief does not arise, and behind his back the decree had been obtained; that the suit schedule property stands in the name of his wife; and that there is no property in his name and he is suffering from heart problem.

6. Counter-affidavit was filed by petitioners opposing this application. They contended that since this application had been filed one year after the decree, it should not have been numbered without an application for condonation of delay in filing it; that the evidence on record shows that 1st respondent received the notices and summons in the suit, but did not turn up; that 1st respondent had also evaded the delivery warrant in E.P.No.337 of 2013 and the report of the field assistant in E.P.No.337 of 2013 clinchingly proves the 1st respondent has no regard for law; that notwithstanding the dismissal of O.S.No.256 of 2007, he is entitled to file the present suit.

7. By order dt.09.09.2015, the Court below allowed the said application. It held that the process server's report, no doubt, indicate that 1st respondent had refused

to give in writing that he is refusing to receive the summons and no witness came forward to sign in it, but the process server ought to indicate that he identified the individual to whom the summons was addressed; that the report of process server does not indicate as to how he identified the 1st respondent and which person refused to sign, though requested; that he had not taken assistance of a ward member and he did not comply with Rule 77 (4) of the Civil Rules of Practice. It held that since summons were not served, the date of knowledge has to be taken into consideration, and so, the I.A.No.406 of 2014 cannot be held to be barred by time. Therefore, it imposed costs of Rs.500/-, and directed 1st respondent to file written statement on or before 23.09.2015, and also imposed a default clause.

8. Challenging the same, the present Revision is filed.

9. Heard Sri T.P. Acharya, counsel for petitioners; and Sri K.V. Bhanu Prasad, counsel for 1st respondent.

10. The counsel for petitioners contended that the non-mention by the process server as to how he identified the 1st respondent when he refused the summons is only an irregularity, and on that basis, the Court below erred in presuming that the 1st respondent had no knowledge about the suit; that the wife of 1st respondent as well as 1st

respondent had refused to receive notices in the E.P.No.337 of 2013 filed by petitioners; and that there are no *bona fides* in the application filed by 1st respondent. He relied on a decision in **Sunil Poddar and others v. Union Bank of India**^[1] in support of his submission

11. The counsel for 1st respondent refuted the above contentions, and supported the order passed by the Court below.

12. Article 123 of the Limitation Act, 1963 fixes a (30) day limit for filing an application to set aside the *ex parte* decree and directs that the said period is to be reckoned from either the date of the decree or where summons or notice was not duly served, when the applicant had knowledge of the decree.

13. Order 9 Rule 13 C.P.C. empowers a court to set aside an *ex parte* decree if the Court is satisfied that summons were not duly served on the defendant or he was prevented by any sufficient cause from appearing when the suit was called for hearing. The 2nd proviso to Order 9 Rule 13 C.P.C., no doubt, states that the *ex parte* decree need not be set aside only on the ground of an irregularity in the service of summons, if the Court is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

14. In the present case, while petitioners assert that there was a refusal to receive the summons by 1st respondent and his wife, and they rely on the process server's report in support of this plea, the 1st respondent contends that no process server ever came to his house and offered to serve summons on him.

15. Rule 77 (4) of the Civil Rules of Practice states that if a person refused to accept process, an endorsement of refusal should be attested by a witness and the reasons thereof, if any given, should be mentioned and the attestation must also indicate that the individual to whom the process was addressed, was identified.

16. Unfortunately, in the present case, the report of process server does not indicate how he identified 1st respondent. The trial court found fault with the report on this ground and held that there is non-compliance with Rule 77 (4). This cannot be said to be a mere irregularity which can be ignored for the reason that if the process server had offered the summons to a stranger to the litigation and that stranger had refused to receive it, the defendant cannot be made to suffer for it. Therefore, identification of 1st respondent/1st defendant by the process server is critical to the issue. No material has been placed before the Court below by petitioners to show that 1st respondent had notice of the date of hearing of the suit and had sufficient time to appear and answer the

petitioner's claim. Therefore, there is no illegality or error in the conclusion of the Court below that proper service of summons has not been established, and that I.A.No.406 of 2014 is not time-barred since it was filed within (30) days from the date of knowledge, i.e., 15.03.2014.

17. Therefore, I do not find any merit in the Revision and it is accordingly dismissed. No order as to costs.

18. As a sequel, miscellaneous petitions pending, if any, in this Revision shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 01.10.2015

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[\[1\]](#) (2008) 2 SCC 326