

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA
RAO**

CRP.Nos.5232, 5233, 5235 and 5236 of 2015

COMMON ORDER:

Since the same issue arises for consideration in all these four matters they are being disposed of by this common order.

2. The petitioners in all these Revisions are defendants in O.S.No.419 of 2009 and O.S.No.166 of 2009 on the file of I Additional Senior Civil Judge, Warangal.

3. The said suits had been filed against them and 2nd respondent in all the Revisions by 1st respondent in CRP.Nos.5232 and 5236 of 2015 and her husband, who is petitioner in CRP.Nos.5233 and 5235 of 2015 for recovery of possession of two plots admeasuring 1210 Sq.yds. and other of extent 605 Sq.yds in survey No.32 of Lashkarsingaram, Palivelpula Road.

4. The above two suits had been decreed *ex parte* on 15.07.2011 and 09.02.2010, respectively in favour of respective 1st respondents herein.

5. The respective 1st respondents in CRP.Nos.5232 of 2015 and 5233 of 2015 then filed EP.No.285 of 2012 in

O.S.No.419 of 2009 and EP.No.286 of 2012 in O.S.No.166 of 2009 under Order 21 Rule 35 of C.P.C. for delivery of possession of 1200 Sq.yds and 605 Sq.yds of lane respectively in their favour pursuant to the decree dt.15.07.2011 in O.S.No.419 of 2009 and decree dt.09.02.2010 in O.S.No.166 of 2010 respectively.

6. Thereafter, the petitioners herein filed I.A.No.1143 of 2012 in O.S.No.419 of 2009 under Section 5 of the Limitation Act, 1963 to condone the delay of (446) days and (969) days respectively in filing applications under Order 9 Rule 13 C.P.C. to set aside the said *ex parte* decrees along with separate applications to set aside the said *ex parte* decrees.

7. In the affidavits filed in support of the said applications, the petitioners contended that the respective 1st respondents had managed the postal authorities and got returned the registered letters issued to petitioners, and got the *ex parte* decrees passed in their favour by playing fraud and that only on 24.09.2012 when they received notices in EP.Nos.285 of 2012 and 286 of 2012 respectively they came to know about the passing of the *ex parte* decrees, and therefore, the delay in filing the applications under Sec.5 of the Limitation Act,1963 be condoned.

8. Counter-affidavits were filed to these applications

by the respective 1st respondents denying the said allegations. They contended that clear address of petitioners was given in the notices and the notices were served on petitioners. They contended that the Court followed the procedure as per law and decreed the suit and that even in the execution petition, notices had been served on petitioners. They therefore prayed that the applications for condonation of delay be dismissed since the petitioners did not explain each days delay.

9. In the execution petitions, the petitioners herein filed a counter-affidavit stating that they had filed I.A.No.1126 of 2012 in O.S.No.166 of 2009 and I.A.No.1143 of 2012 in O.S.No.419 of 2009 seeking condonation of delay in setting aside the *ex parte* decrees and the same were pending disposal and till the said I.A.s are decided, the EPs should not be disposed of.

10. By separate orders dt.12.11.2015, the Court below dismissed I.A.No.1126 of 2012 in O.S.No.166 of 2009 and I.A.No.1143 of 2012 in O.S.No.419 of 2009, and allowed EP.No.285 of 2012 in O.S.No.419 of 2009 and EP.No.286 of 2012 in O.S.No.166 of 2009.

11. In the order passed in I.A.No.1143 of 2012, the Court below recorded that it had perused the docket orders in the main suit and the same disclosed that summons sent by registered post to petitioners were

returned with endorsement '*refused*' by petitioners; and that the endorsement of refusal as per the provisions of the General Clauses Act amounts to deemed service. It held that petitioners were set *ex parte* on 31.08.2010 in O.S.No.419 of 2009, and therefore *ex parte* decree came to be passed on 15.07.2011. It held that the contention of petitioners that 1st respondent got returned the summons in the main suit by managing postal authorities is not true and correct and that they had knowledge of the summons and intentionally refused to receive them. It held that the petitioners had not pleaded that they were bed-ridden or they were disabled from contacting an Advocate, and therefore, there is no valid reason for condonation of delay. It also held that petitioners had not come into the witness box and explained the delay in question.

12. In the order passed in I.A.No.1126 of 2012, the Court below held that the wife of 2nd petitioner had received the summons as per the report of the process server, and therefore, the allegation of petitioners that 1st respondent managed the postal authorities, is false.

13. In view of the orders dismissing I.A.No.1126 of 2012 in O.S.No.166 of 2009 and I.A.No.1143 of 2012 in O.S.No.419 of 2009, the Court below allowed EP.No.285 of 2012 in O.S.No.419 of 2009 and EP.No.286 of 2012 in O.S.No.166 of 2009.

14. Challenging the same, the present Revisions are filed.

15. Heard Sri P. Keshava Rao, counsel for petitioners in all the Civil Revision Petitions, and Sri P. Sadasiva Rao, counsel for 1st respondent in all the Civil Revision Petitions.

16. The counsel for petitioner contended that when there is a specific allegation made by petitioner that the registered letters got issued to them were managed to be got returned by the respective 1st respondents, the Court below is not correct in either relying on the endorsement '*refused*' on the summons sent to petitioners in O.S.No.419 of 2009 or on the report of the process server in O.S.No.116 of 2009 that the summons were served on one A. Sharada who is alleged to be the wife of 2nd petitioner, without the respective 1st respondents examining the postal authorities or the process server who is alleged to have served the summons in O.S.No.166 of 2009 on the wife of 2nd petitioner.

17. The counsel for 1st respondent in the Revisions however contended that the burden is on the petitioners to establish that they did not receive the summons in the suit either through post or through the process server and he placed reliance on the decision of the Supreme Court in

Basant Singh and another v. Roman Catholic

Mission^[1]. He also filed memo dt.04.12.2015 with photocopies of summons issued to petitioners in O.S.No.166 of 2009 which show that one A. Sharada had received the summons and process server report stating that summons were received by Smt. A. Sharada who is said to be the wife of 2nd respondent. He also filed the report of the process server in O.S.No.419 of 2009 wherein the process server stated that he went to the address of 2nd petitioner, found the door locked and that the neighbors informed him that 2nd petitioner had gone to attend marriage function at Peddapalli, and he therefore pasted the summons on the door. The process server also stated that the neighbors refused to sign on the summons as a witness. He also filed returned postal cover addressed to petitioners by the Court of the I Additional Senior Civil Judge, Hanumakonda bearing the endorsement 'refused'.

18. I have noted the submissions of both sides.

19. The point for consideration is *whether the orders of the Court below in refusing to condone the delay in filing the applications under Order 9 Rule 13 C.P.C. are sustainable or not.*

20. In **G.P. Srivastava v. R.K. Raizada**^[2], the Supreme Court observed :

“7. Under Order 9 Rule 13 CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any “sufficient cause” from appearing when the suit was called on for hearing. Unless “sufficient cause” is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex parte decree. The words “was prevented by any sufficient cause from appearing” must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The “sufficient cause” for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If “sufficient cause” is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.”

21. This principle was reiterated in **Rabindra Singh v. Financial Commissioner, Cooperation, Punjab and others**^[3].

22. Order 5 Rules 17 and 18 C.P.C. lay down the procedure of service when the defendant refuses to

accept service of the endorsement to be made by the serving officer. They state :

“17. Procedure when defendant refuses to accept service, or cannot be found.—Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant (who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time) and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

18. Endorsement of time and manner of service.—The serving officer shall, in all cases in which the summons has been served under Rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.”

23. In the process server report filed in O.S.No.419 of 2009 which is produced before this Court vide memo dt.04.12.2015, the process server does not state who identified the home address of 2nd petitioner and in whose

presence the copy of summons was affixed. He simply states that he enquired from some neighbours and came to know that 2nd petitioner had gone to Peddapalli to attend marriage and he was absent. Therefore, it cannot be said that the report of the process server filed in O.S.No.419 of 2009 is in accordance with Order 5 Rule 17 C.P.C.

24. No doubt, under Order 5 Rule 15 C.P.C. summons may be served on any adult member of the defendant's family, whether male or female, residing with him if at the time when the service of summons was sought to be affected on him at his residence, a defendant is not available.

25. However, the process server ought to have been examined by 1st respondent in CRP.No.5235 of 2015 to state how he identified the person who signed the summons as the wife of the 2nd petitioner. Also, the 1st respondent in CRP.No.5236 of 2015 had also not examined any postal department official in support of his plea that the summons sent through registered post to the address of 2nd petitioner were refused by petitioner, when the petitioners have specifically made an allegation that the 1st respondent had managed the postal officials and got the said endorsement issued on the registered letters sent through Court to them. It was incumbent on the 1st

respondent to examine the said officials and establish that the summons had indeed been offered to petitioners and were refused by them.

26. However, unfortunately neither party had adduced any oral or documentary evidence in the Court below in support of the above facts.

27. Although, the counsel for 1st respondent had placed reliance on the decision in **Basant Singh and another** (1 supra) in support of his plea that the burden is on the petitioner to show that summons were not properly served and it was for petitioner to examine the postal authorities in support of the said plea, a reading of the said judgment does not indicate that any such proposition of law had been laid down therein. The observations therein appear to be made on the basis of the facts arising in the said case. Therefore, I am of the view of that the said judgment cannot be of any assistance to 1st respondent.

28. In this view of the matter, I am of the opinion that the impugned orders in these Revisions cannot be sustained. The Civil Revision Petitions are accordingly allowed, and the impugned orders therein are set aside and the matters are remitted back to the I Additional Senior Civil Judge, Warangal to pass fresh orders after giving opportunity to both sides to lead evidence

regarding their respective contentions and then decide the matter in accordance with law within a period of twelve (12) weeks from the date of receipt of copy of the order. No order as to costs.

29. Miscellaneous petitions, pending if any in these Revisions, shall stand closed.

JUSTICE M.S. RAMACHANDRA RAO

Date: 22-12-2015

Ndr*

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[\[1\]](#) (2002) 7 SCC 531

[\[2\]](#) (2000) 3 SCC 54

[\[3\]](#) (2008) 7 SCC 663