

Reserved on : 22.09.2016

Delivered on : 20.10.2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.10.2016

CORAM

THE HONOURABLE MR.JUSTICE M.DURAIWAMY

C.R.P.(NPD).No.175 of 2016
and C.M.P.No.911 of 2016

S.Leelavathi

... Petitioner

Vs

K.Subramaniam

... Respondent

Civil Revision Petition under Section 115 of the Civil Procedure Code against the fair and decreetal orders dated 16.09.2015 in I.A.No.506 of 2014 in O.S.No.268 of 2008 on the file of the Principal District Court, Tiruppur.

For Petitioner : Mr.C.R.Prasanan

For Respondent : Mr.S.V.Jayaraman, Senior Counsel,
for Mr.P.Mathivanan

ORDER

Challenging the order passed in I.A.No.506 of 2014 in O.S.No.268 of 2008 on the file of the Principal District Court, Tiruppur, the 1st defendant has filed the above Civil Revision Petition.

2.The respondent/plaintiff filed the suit in O.S.No.268 of 2008 for specific performance.

3.The brief case of the petitioner/1st defendant is as follows:

Since the 1st defendant failed to appear before the trial Court, she was set exparte and an exparte decree was passed on 18.09.2009. Subsequently, the 1st defendant filed an application in I.A.No.506 of 2014 to condone the delay of 957 days in filing the application to set aside the exparte decree. In the affidavit filed in support of the petition, the 1st defendant has stated that the 2nd defendant is her daughter and the 3rd defendant is her son. Further, she has stated that her daughter is in the USA for more than 14 years. In paragraph-3, the 1st defendant has stated that she did not receive any notice or summon in the suit and that she is not in the habit of reading magazines and news dailies. Further, she has stated that she did not have good understanding with her son and the son had not cared to take care of her and they have quarrels and misunderstanding frequently. She has also stated that she and her son are not in talking terms. He also wanted to grab the entire property for himself, for which she did not agree. Keeping all these in his mind, he never disclosed anything to her. The 1st defendant has stated that only on 12.04.2012, when her relative anxiously enquiry her whether she had one-third share in the property and that she

had lost her property, then she immediately contacted her lawyer and verified all the facts and only then, it came to light that there is an exparte decree on 18.09.2009. The application has been filed by the 1st defendant on 01.06.2012. In these circumstances, the 1st defendant prayed for condonation of the delay of 957 days in filing the application to set aside the exparte decree.

4.The brief case of the respondent/plaintiff is as follows:

According to the plaintiff, the 2nd defendant was residing in India and now, residing in the USA. The 1st defendant used to stay with her daughter in the USA and majority of the days, she used to stay in her native place. The 1st defendant and 3rd defendant are residing in the same house. The defendants 1 & 2 had executed a Power of Attorney Deed in favour of the 3rd defendant. With the consent of all the defendants, the 3rd defendant and the plaintiff entered into an Agreement of Sale on 30.08.2007. Since the defendants were evading the execution of the Sale Deed in favour of the plaintiff, he issued a notice to the 3rd defendant through his lawyer. Though the 3rd defendant received the notice, he did not execute the Sale Deed in favour of the plaintiff, however, sent a reply to the plaintiff's notice. The summons sent to the defendants were served on them and an exparte decree was passed on 18.09.2009. Having knowledge about all these things,

with an idea to prolong the matter, the 1st defendant has filed the present application. The defendants 1 & 3 are in talking terms and are residing in the same house. Their relationship is also cordial. The alleged misunderstanding between the 1st defendant and the 3rd defendant is created only for the purpose of the application. The present application has been filed only after the filing of the Execution Petition in E.P.No.10 of 2012. The 1st defendant entered into a registered Sale Agreement with one Sivasubramaniam in respect of another property on 18.04.2011 and the 3rd defendant identified the executant viz., the revision petitioner before the Sub Registrar at the time of the registration of the document. In respect of the said Agreement also, a suit has been filed in O.S.No.109 of 2012 on the file of the I Additional District Court, Tiruppur for specific performance. In the said suit, the 1st defendant has stated that the 3rd defendant is taking care of all her affairs, which is contrary to the averment stated in the affidavit filed in support of the petition. In these circumstances, the plaintiff prayed for dismissal of the application.

5.The trial Court, taking into consideration the case of both parties, dismissed the application. Aggrieved over the same, the 1st defendant has filed the above Civil Revision Petition.

6. Heard Mr.C.R.Prasanan, learned counsel for the petitioner and Mr.S.V.Jayaraman, learned Senior Counsel for the respondent.

7.Mr.C.R.Prasanan, learned counsel appearing for the petitioner submitted that the 1st defendant/revision petitioner did not receive the suit summons and that the summons were taken to a wrong address, therefore, she was not aware of the exparte decree passed in the suit. Further, the learned counsel submitted that in the absence of service of summons, the trial Court should have condoned the delay and set aside the exparte decree passed against her. The learned counsel further submitted that the defendants 1 & 3 are not in talking terms, therefore, the 3rd defendant did not inform the 1st defendant about the filing of the suit and the decree passed on 18.09.2009.

8.In support of his contentions, the learned counsel for the petitioner relied upon the following judgments:

(i)(2007) 9 Supreme Court Cases 466 [Nahar Enterprises Vs. Hyderabad Allwyn Ltd and another] wherein the Hon'ble Supreme Court held as follows:

“The learned Judge did not address itself the question as to how a defendant, in absence of a copy of the plaint and

other documents, would be able to file his written statement. The Court, furthermore, in our opinion, committed a manifest error in so far as it failed to take into consideration that the summons having been served upon the appellant after the date fixed for his appearance, it was obligatory on its part to fix another date for his appearance and filing written statement and direct the plaintiff to take steps for service of fresh summons. This legal position is explicit in view of the provisions of order 9 Rule 6 (1) (C) of CPC which reads:

"6.(1)(c)When summons served but not in due time - If it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant."

(ii)(1997) 11 Supreme Court Cases 159 [Yallawwa (Smt) Vs. Shantavva (Smt)] wherein the Apex Court held as follows:

“He submitted that of the said proceeding was an appellate proceeding then the High Court was justified in interfering with the order passed by the learned Trial Judge for the obvious reason the respondent was tried to be served in way if substituted service under Order V Rule 20 C.P.C. That she being an illiterate lady had not read and could not have read the newspaper publication about the pendency of the Hindu Marriage Petition and consequently she had no

knowledge about the pendency of the said petition. Even otherwise it was not shown that any case was made out by the plaintiff in that case for getting the notice served by way of substituted service and no attempt was made to serve the respondent in ordinary manner as required by Order V Rule 12 as well as Order V Rules 15 and 17 C.P.C. Consequently, the ex parte decree was a nullity being passed against a party which was not served in accordance with law and in case of such a null and void decree, there was no question of limitation or in any case limitation ought to have been condoned in the interest of justice by the Trial Court itself and as that was not done, the High Court was justified in condoning the delay. It was not true that the respondent knew about the ex parte decree when she was served with notice on 1.3.1990.”

The Hon'ble Supreme Court further held as follows:

“...

8. It is now time for us to refer to the direction of different High Courts on which strong reliance was placed by either side. Learned counsel for the appellant in support of alternative contention that proceedings under Order IX Rule 13 C.P.C. would abate on the death of the husband who had obtained an ex parte decree against his wife relied upon a decision of the Madras High Court in the case of *Saraswati Ammal vs. Lakshmi* (A.I.R. 1989 Madras 216) wherein a learned Single Judge no doubt had taken the view which is canvassed by the learned counsel for the appellant. It has been observed by the learned Judge that where on application by husband

alleging that his wife deserted him intentionally and without any justification a decree of divorce was passed ex parte and the husband died subsequently on passing of the decree, the wife could not seek to set aside ex parte decree thereafter by impleading the legal representatives of the deceased husband. The proceedings for divorce initiated by deceased husband was purely personal to him founded on the subsistence of the marriage between him and his wife and on death the proceedings at whatever stage they were stood abated. When the husband alleged that wife deserted him without any justification that complaint was purely a personal complaint of husband against his wife with which the husband's legal representatives had nothing whatever to do. The very basis for the initiation of proceedings for divorce was purely personal to husband and when he died, there was no question of its survival in the estate of deceased husband either for his benefit or for the benefit of wife. The deceased husband was not seeking the enforcement of any right, which on his death, would vest in his heir at law or the representative of his estate. It is difficult to appreciate this line of reasoning. It is true that such decree is passed in a petition moved by the husband on the ground of desertion by his wife. It is also true that these proceedings remain purely based on personal cause of action till they reach finality at the trial, but once a decree of divorce is passed certain legal effects regarding the status of parties and even proprietary effects flowing from such decree as noted earlier would arise as a direct consequence of such a decree. That will have a straight impact on the estate of the deceased husband

or wife, as the case may be. Unfortunately learned Judge was not apprised of these legal pernicious effects flowing from ex parte decree of divorce against the aggrieved spouse. That had led the learned Judge to assume that there were no legal consequences of ex parte decree on the other spouse. It is also not correct to observe that legal representatives of the husband have nothing to do with these proceedings. As we have seen earlier, the proprietary right of other legal heirs of the deceased husband to get full share in the deceased husband's property would get directly affected and curtailed if such decree is set aside. On the other hand, such right would get enlarged if such a decree is sustained in appeal or is maintained under Order IX Rule 13 C.P.C. The aforesaid decision of the learned Single Judge of the Madras High Court, therefore, must be held to be erroneous. In *Mst. Bhan Kaur vs. Isher Singh* (A.I.R. 1959 Punjab 553) a view similar to that of the learned Single Judge of the Madras High Court had been taken which in our view also does not lay down the correct law. On the other hand, we find that a learned Single Judge of the High Court of Bombay in the case of *Kamalabai vs. Ramdas Manga Ingale* (A.I.R. 1981 Bombay 187) has correctly held that where an appeal was filed by wife against the decree of divorce and the respondent died during the pendency of the appeal, the appeal cannot be treated as having abated on the death of the respondent. It was further observed that where the position is not free from doubt equitable consideration must prevail and bearing in mind the nature of the conclusion, the far-reaching effect of the findings of the Court, both on personal status and

property rights, it is desirable that the party aggrieved by the decree of the trial court must have the opportunity to have the findings reversed and this opportunity must be assured irrespective of the death of the respondent. For coming to the aforesaid conclusion, the learned Judge had relied upon the earlier decision of the Division Bench of the High Court in the case of *Suhas Manohar Panda vs. Manohar Shamrao Pande* (A.I.R. 1971 Bombay 183) and the decision of the Division Bench of the Andhra Pradesh High Court in the case of *Vempa Sunanda vs. Vempa Venkata Subbarao* (A.I.R. 1957 Andhra Pradesh 424). It must, therefore, be held that after a decree of divorce is obtained by the petitioning husband against his wife she has right to file an appeal and such appeal does not abate on account of the death of the respondent husband whether such death takes place prior to the filing of appeal or pending the appeal. Similarly, if an ex parte decree of divorce is obtained against the wife and thereafter if the husband dies, the aggrieved wife can maintain an application under Order IX Rule 13 C.P.C., even though the husband might have died prior to the moving of that application or during the pendency of such application. In all such cases other legal heirs of the deceased husband can be brought on record as opponents or respondents in such proceedings by the aggrieved spouse who wants such decree to be set aside and when the other heirs of the deceased husband would naturally be interested in getting such decree confirm either in appeal or under Order IX Rule 13 C.P.C. The second alternative contention as canvassed by the learned counsel for the appellant, therefore stands rejected.

9. Before parting with the discussion on this point, we may mention that in a recent decision of two Member Bench of this Court consisting of B.P. Jeevan Reddy and K.S. Paripooran JJ. in C.A.Nos. 12664-65/96 dt.22.9.96 the decision of the learned Single Judge of the Madras High Court in *Saraswathi Ammal vs. Lakshmi* (AIR 1989 Mad 216) has been reversed and the learned Judges have taken the same view which we are inclined to take in the facts and circumstances of the present case.”

(iii) AIR 1970 Mad 271 [Parasurama Odayar Vs. Appadurai Chetty and others] wherein the Full Bench of this Court held as follows:

“...

45. In the result, I would answer the reference thus: Where the judgment-debtor files an application to have the execution sale declared void and the application is filed beyond thirty days from the date of the sale, if the decree-holder or the auction purchaser wants to defeat the application by urging that the application should have been filed within thirty days of the date of the sale under Article 166 of the Limitation Act of 1908 (or the corresponding Article 127 of the Act of 1963), for the reason that the summons had been duly served by affixture on the judgment-debtor as required by Order 5, Rule 19 it is necessary that there should have been strict compliance with the provisions of Order 5, 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.

46.RAMAKRISHNAN, J.:-- I had the advantage of perusing the judgment of my learned brother, Venkataraman, J., who has set out the facts as well as the several decisions cited at the Bar at length. It is not necessary for me to recapitulate them.

47.As mentioned by my learned brother, we did not allow arguments to reopen the finding of Kailasam, J., that in the present case the process server has not supplied an affidavit to verify the return. As a result there is non-compliance with the provisions of the first part of Order 5, Rule 19, Civil P. C. That itself would render the service invalid. No authority has been cited before us to show that the failure of the serving officer to verify the return by an affidavit can be condoned.

48.The learned Judge (Kailasam, J.) could have himself set aside the execution sale on the finding of fact about the non-compliance with the first part of Order 5, Rule 19, Civil P.

C., but the learned Judge apparently was of the opinion that, for the sake of giving a complete decision, It would be appropriate if he gave a finding also in regard to the compliance with the second part of Order 5, Rule 19, Civil P. C., namely, the making of a declaration by the Court that the summons had been duly served. Since in the view of the learned Judge there is a conflict of authority on this point, he has sought to obtain the opinion of a Full Bench. That is how the matter has come up before this Full Bench.

49. The notice by registered post sent to the judgment-debtor was returned as refused. When the Court notice was thereafter taken for service by the process server the judgment-debtor was reported to be absent in his house, and the process server then served the notice by affixture under Order 5, Rule 17, Civil P. C. He made a return as required under Order 5, Rule 18, Civil P. C. on the docket of the summons, mentioning the above facts. On 19-1-1959, when the execution petition came for hearing, the Court noted as follows!

"Respondent absent. Court notice affixed. Respondent called, absent Set ex parte."

The sale was thereafter fixed for 18-3-1959 and adjourned to a further date. The properties were sold and the sale was confirmed on 28-8-1959. The point to note is that only one attempt appears to have been made to serve the judgment debtor through Court. On that date the judgment debtor was reported to have been absent from the village. The prior attempt was by service by registered post. As is well known the postal peon cannot serve the notice by affixture. He can only

return the registered notice as 'unserved.' Therefore, the registered postal notice will be valid notice, only if it is actually served by delivery. In these circumstances, the Court has to ensure personal service by Court. If it is not possible to effect personal service either due to the refusal by the judgment debtor, or his absence from his house for an unreasonably long time, which would entail long and vexatious proceedings prolonging the execution, steps should be taken to effect service by affixture under Order 5, Rule 17, Civil P. C. It is to ensure that this method of service is not abused and that proceedings seriously affecting a party are not concluded behind his back, that Order 5, Rule 19, Civil P. C. lays down the for-mality of a declaration being made by the Court about due service of the notice by the affixture procedure. In the present case, there is the fact that the Court service had been taken only once. There is next the doubt which the learned Judge, Kailasam, J., felt about the existence of an affidavit by the serving officer. These circumstances clearly gave an occasion for the executing Court to apply its mind and make a declaration of due service. In the above context, one is entitled to look for an explicit declaration by the Court, which would show in unmistakable terms that the Court had applied its mind to the propriety of the service by affixture and was satisfied about the propriety. But the endorsement of the Court on the execution petition made on 19-1-1959 extracted above, might be equally consistent with a mechanical recording of the factum of service by affixture and then setting the defendant ex parte, without a conscious effort being made by the Court to

consider and approve the circumstances under which the service by affixture was effected. The consequence has been very grave to the judgment-debtor in this case. Valuable property, more than three acres in extent subject only to a Government loan of about Rs. 500 had been sold for Rs. 11. Further the thirty days bar of limitation under Article 164 of the Limitation Act automatically runs from the date of the sale. Therefore, when the affected judgment debtor comes to Court after the lapse of thirty days for setting aside the sale, the auction purchaser can non-suit him by urging the bar of limitation. These circumstances clearly call for a strict application of the rule requiring the Court to make a declaration in explicit terms about the adequacy of service as required under Order 5, Rule 19, Civil P. C. Such explicit declaration is absent in this case. It is at this stage that the question arises for consideration whether the direction about making a declaration of due service found in the second part of Order 5, Rule 19, Civil P. C. requires an express declaration or it can be implied from the surrounding circumstances. Since my learned brother has dealt with this question at length, I will content myself by giving the matter a briefer treatment.

...

56.To conclude, the point raised by Kailasam, J. for the answer of the Bench is whether the non-compliance of the requirements of Order 5, Rule 19, Civil P. C. would make the service of the summons ineffective. Our answer to this question is this: Where there is no affidavit of the serving Officer, and where the serving officer is not subsequently examined by the

Court, as found by the learned Judge in this case, there is non-compliance with the first part of Order 5, Rule 19, Civil P. C. and the service is ineffective. Next, the safe rule is to look for an explicit declaration of due service as enjoined by the second part of Order 5, Rule 19, Civil P. C. In its absence, particularly in cases where valuable rights of parties are sought to be placed in jeopardy for example by the application of the principle of the law of limitation or of the rule of constructive res judicata, and where it is doubtful if the affected party had notice of the proceedings proposed to be taken against him, grave prejudice can be caused. The case dealt with by Horwill, J. covered an exceptional situation where the circumstances left no doubt whatever that the executing Court would have made the necessary declaration about the sufficiency of service, and therefore, the failure to make an explicit declaration was treated as a mere omission which can be overlooked. In our view, this decision must be confined to the facts of that particular case, and cannot be taken as laying down any general rule. On the other hand, it may very well happen that the circumstances" are by no means conclusive, and there can be serious doubt about the sufficiency of the service for giving notice to the affected party. Therefore, I am inclined to the view that an explicit declaration should be insisted on. As stated by Venkataraman J., no precise form for such declaration need be laid down; any declaration or statement by the concerned Court, in the record, which would clearly show that it had applied its mind to the sufficiency of service will very well do for the purpose."

(iv)2008 (1) CTC 785 [1.Ravi Enterprises, rep by its Partner, T.S.Ravi, No.892, T.H.Road, Thiruvottiyur, Chennai - 600 019, 2.T.S.Ravi, 3.Smt.T.S.Sumathy, 4.Smt.T.S.Sulochana Vs. 1.Indian Bank, Thiruvottiyuur Branch, T.H.Road, Thiruvottiyur, Chennai - 600 019, 2.The Chairperson, Debt Recovery Appellate Tribunal, Chennai, 3.K.Lakshmi] wherein a Division Bench of this Court held as follows:

“...

14.We are of the view that refusal to condone delay can result in a meritorious matter being thrown at the early stage and cause of justice being defeated. Moreover, the law courts should not prefer to adopt a pedantic approach and on the other hand a pragmatic approach has to be made to deliver substantial justice overriding technical considerations as far as the present case is concerned. Furthermore, a party does not stand to benefit by adopting delay. *Per contra*, he runs a grave risk. It cannot gainsaid that judiciary is respected because it is capable of removing injustice and is expected to do so. Admittedly, the claim of the first respondent Bank is for Rs.20,71,776/- together with interest at the rate of 19.89% p.a. with quarterly rests from the date of the application till the date of realisation etc. The learned counsel for the writ petitioners informs this Court that already a sum of Rs.15 lakhs was paid and the petitioners/appellants/defendants are willing to pay the rest of the amount and to settle the matter. It

cannot be denied that the Debt Recovery Tribunal has power to recall the Recovery Certificate even after its issuance on the basis that the matter was settled between the creditor/Bank and the borrower/guarantor. No wonder the recovery of due is an essential function of any Bank. At this juncture, it cannot be lost sight of that the preamble of the Recovery of Debts due to Banks and financial Institutions Act, 1993 speaks of expeditious adjudication and recovery of debts due to banks and financial institutions. Moreover, merely because an application for setting aside the *ex parte* order having been allowed to go for wilful default and also allowed the restoration petition also dismissed for default, it cannot be said by any means that the writ petitioners lack *bona fides* in their endeavour to set aside the *ex parte* order. In short, the length of delay is immaterial, in our considered opinion.

15. In the light of the foregoing discussions and in view of the specific averment of the second writ petitioner/ second defendant, being the Managing Partner of the first defendant firm i.e., the sole individual engaged in business activity and to move quite often from place to place in order to secure business etc., and since he is ready to settle the matter consciously and judicially and taking note of all attendant circumstances together, we are of the considered view that the writ petitioners have furnished sufficient cause in M.A.SR.Nos.1274 and 1277 of 2006 filed to condone the delay of 1006 days to restore M.A.Nos.338 and 339 of 2002 and therefore, we are inclined to interfere with the orders passed in M.A.Nos.205 and 206 of 2006 dated 10.05.2007 passed by the

second respondent and also that of the order of the Debts Recovery Tribunal-I, Chennai dated 11.10.2006 passed in M.A.SR.Nos.1274 and 1277 of 2006 and accordingly, set aside their orders in the interest of justice. However, we direct the writ petitioners/appellants /defendants to pay a sum of Rs.25,000/- to the first respondent Bank as costs within 10 days from the date of receipt of a copy of this order.”

(v)2016 (3) CTC 859 [M.Subramaniya Gounder (deceased), 2.Visalakshi, 3.Jayalakshmi, 4.Velumani, 5.Renuka Devi, 6.Krishnasamy (petitioners 2 to 6 were brought on record as legal representatives of the deceased sole petitioner vide order of this Court dated 23.11.2011 made in MP.Nos.1 to 3 of 2011 in C.R.P.No.749 of 2010) Vs. V.Thavamani] wherein this Court held as follows:

“...

17.It is to be noted that the suit filed by the Respondent/Plaintiff is for Specific Performance whereupon ex parte Decree was passed. It is settled by the Hon'ble Supreme Court in a catena of decisions that the Courts are not supposed to legalise injustice but obliged to remove injustice. In the present case, there was no proper service of summons. In the light of the provisions of the Code of Civil Procedure grave irregularity was committed in the service of summons. The delay occasioned in filing the petition to set aside the exparte Decree is neither wanton nor deliberate but for the bona fide

reasons stated above. In such circumstances, this Court is of the considered view that this Court has to exercise its inherent power under Article 227 of the Constitution of India to interfere in the Rejection Order passed by the trial Court.”

(vi) 2014-1-L.W. 941 [V.Lakshmi Vs. R.Veerabathiran] wherein this

Court held as follows:

“...

8. With such a prayer the plaint was filed and along with the plaint, an application for interim injunction was filed. No doubt, the trial Court, while ordering summons in the suit, directed service of notice through Court and post in the injunction application and at the same time, gave permission to the plaintiff to serve notice in the injunction application privately and file proof. A permission given to the applicant/plaintiff to serve the notice privately shall not be taken as a substitute for the service of notice through Court. It shall be in addition to service of notice through Court. The fact remains that the batta paid by the plaintiff for service of summons in the suit and service of notice in the injunction application was returned pointing out certain defects. However, the plaintiff was able to produce a postal acknowledgment card evidencing service of notice in the injunction application privately. The learned trial Judge, could have, at the best, accepted the affidavit of service evidencing private service of notice for the grant of interim injunction. After granting such injunction, the trial Court could have very

well noticed the fact that batta memo filed by the plaintiff for service of notice in the injunction application and for service of summons in the suit had been returned and ought to have postponed the hearing of the suit as well as the injunction application to a future date for effecting due service of notice and summons.

9.As rightly contended by the learned Senior Counsel for the revision petitioner, the procedure adopted by the learned trial Judge to set the defendant ex-parte without ascertaining the service of notice and service of summons through Court is defective. If the trial Judge had passed an ad-interim order of attachment on the date on which affidavit of service was filed in the injunction application and posted the said application and the suit to a future date awaiting service of notice and summons in case batta had not been returned or directing service of notice and summons on payment of batta if batta had not been paid or representation of the batta memo in case the batta memo filed already had been returned, the trial Court order could be justified. Surprisingly, no interim order came to be passed. On the other hand, the application was directed to be called along with the suit. At the helm of the affairs, the procedure adopted by the learned trial Judge in setting the defendant ex-parte is totally erroneous. It did not ascertain whether any copy of the plaint was served on the defendant. The copy of the notice produced along with the affidavit of service does not contain details of the relief sought for in the suit. A private notice in the interlocutory application cannot be taken as due service of summons. When the first

batta itself has been returned pointing out defects and no fresh summons were issued, the trial Court could not have ventured to pass an order setting the defendant ex-parte in the suit. Having done such a mistake, the learned trial Judge failed to avail the opportunity given when an application under Section 5 of the Limitation Act came to be filed to condone the delay in filing the application under Order 9, Rule 13 C.P.C. On the contrary, the learned trial Judge chose to impute knowledge of the pendency of the suit to the defendant and citing the same as the ground, the learned trial Judge dismissed the application filed under Section 5 of the Limitation Act.”

(vii)2013 (3) CTC 220 [N.P.Srinivasan Vs. S.Santhalakshmi]

wherein this Court held as follows:

“...

11. The petitioner is aggrieved against the order passed by the Court below in condoning the delay of 1828 days in filing the application under Order 9 Rule 13 as well as allowing the application under Order 9 Rule 13. First of all, when the application under Section 5 of the Limitation Act was filed by the respondent, as stated supra, a detailed affidavit was filed in support of such application. The various averments made therein and are discussed supra have not been controverted by the petitioner by filing any counter affidavit even though sufficient time was granted for filing the same. Consequently, the Court below in the absence of any counter affidavit denying the averments made by the respondent and also by taking note

of the fact that the petitioner remained absent when the application was called on 2.6.2010 allowed the application. Even though the Court below has not passed any detailed order while allowing the application in I.A.No. 134 of 2010, however, a perusal of the order passed on 18.8.2010 in I.A.No. 278 of 2010 shows that the respondent was not served any notice at any point of time and the Court also found that petitioner has played fraud on the court with the help of others. When that being the factual finding rendered by the Court below and based on the same, it has also set aside the exparte decree, I find no merits in these Civil Revision Petitions to interfere with such factual findings, especially, when the Court below has set aside the exparte decree only for the parties to contest the matter on merits. No serious prejudice would be caused to the parties, if the matter is taken on file for contesting the same on merits.”

(viii)2011 (2) CTC 502 [1.P.Subramanian (died), 2.S.Kaliammai 3.R.Rameswari 4.S.Ramachandran, 5.S.Radhakrishnan 6.S.Ragavan 7.S.Rajaram, 8.S.Backialakshmi (petitioners 3 to 8 were impleaded as per order of this Court dated 07.12.2005 made in C.M.P.Nos.7651 to 7653 of 2005) Vs. S.Viswasam] wherein this Court extracted the finding of the Hon'ble Supreme Court of India made in ***1998 (7) SCC 123 [N.Balakrishnan Vs. M.Krishnamurthy]*** wherein the Apex Court held as follows:

“...

11. Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim *Interest reipublicae ut sit finis litium* (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.”

Further this Court held as follows:

“...

28. The mere fact that the sale deed was executed in favour of the respondent alone cannot be a reason to reject the application filed by the petitioners to condone the delay.

Admittedly, the property is in the possession of the petitioners. The judgment in O.S.No.109 of 1999 was also not on merits. It was purely an *ex parte* decree without considering the merits of the matter. There was nothing in the judgment and decree to show that the Court has considered the principles governing the grant of discretionary remedies before decreeing the suit. Absolutely, there were no reasons shown in support of the judgment.

...

31. The learned trial Judge, other than extracting a portion of the evidence in the order, appears to have not made a genuine attempt to consider the question as to whether the petitioners have made out a case for condoning the delay or there was sufficient cause which precluded them from filing the application to set aside the *ex parte* decree within the time permitted by law. In fact, other than recording that the reasons assigned by the petitioners for condoning the delay were not acceptable, the learned trial Judge has not supplemented reasons for arriving at such a conclusion. Therefore, I am of the view that the order impugned in this Civil Revision Petition is liable to be set aside.”

(ix)2009 (5) CTC 414 [Pavayammal and another Vs. 1.S.N.Chockalingam 2.S.N.Arumugam 3.S.N.Venugopal, 4.The State of Tamil Nadu, rep by its District Collector, Erode District, Erode.] wherein this Court held that under Section 5 of the Limitation Act “sufficient cause”

has to be interpreted in a purposeful and meaningful way and the judiciary is respected not on account of its power to legalise injustice on technical grounds, but it is capable of removing injustice and is expected to do so.

(x)1973 1 MLJ 255 [S.Ameeran Sahib and another Vs. Somanatha Nadar] wherein this Court held as follows:

“...

5. Thus, it is clear from the abovesaid decision that if the defendants are able to establish that the notice has not been duly served, it is enough that they file a petition to set aside the ex parte decree within thirty days from the date of the knowledge of the passing of the decree. In this case, according to the defendants they came to know of the passing of the decree only when the notice of the execution petition was served upon them on 3-9-1971. The trial Court, on the basis of service of summons and also observing that the defendants were aware of the suit being filed dismissed both the applications filed by them. But the decision in is a very clear authority for the proposition that when notice is not duly served the defendant against whom an ex parte decree has been passed is entitled to file a petition to set aside the ex parte decree within 30 days from the date of knowledge regarding the decree passed against him. The corresponding Article in the present Limitation Act for Art. 164 is Article 123. The wordings are the same in both these Articles. I am satisfied that the defendants have correctly proved that the

notice has not been duly served inasmuch as the plaint copy has not been sent along with the notice. It complies with the observations contained in the decision in 61 Mad LJ 920 = (AIR 1931 Mad 813) where in this court has stated certain circumstances to show that the notice has not been duly served. Article 124 contemplates only due service of notice. In view of the fact that there was no due service of notice the petition filed immediately after they came to know of the passing of the ex parte decree is within time. The trial Court has failed to exercise its jurisdiction inasmuch as it has completely ignored the provisions contained and the interpretation of Art. 123 of the Limitation Act. In these circumstances C. R. P. 1055 of 1972 is allowed.”

(xi)AIR 1976 Karnataka 97 [B.Padmavathi Rai Vs. Parvathiamma]

wherein the Karnataka High Court held that when the defendant was examined and stated that the endorsement of refusal of summon was not true, it is for the plaintiff to prove by cogent evidence and the endorsement made by the Postman, by adducing proper evidence.

9.Countering the submissions made by the learned counsel for the petitioner, Mr.S.V.Jayaraman, learned senior counsel appearing for the respondent submitted that the averments stated in the affidavit filed in support of the petition were not proved by the 1st defendant by adducing

any evidence before the trial Court. The learned senior counsel submitted that the defendants 1 & 3 are in talking terms and that the Sale Agreement executed by the 1st defendant in favour of one Sivasubramaniam on 18.04.2011 was also identified by the 3rd defendant. Further, the learned senior counsel submitted that the defendants 1 & 2 had executed a registered Power of Attorney document in favour of the 3rd defendant for selling the suit property and based on the said Power of Attorney, the 3rd defendant entered into an Agreement of Sale with the plaintiff, therefore, the 1st defendant now cannot contend that she is not in talking terms with the 3rd defendant. Hence, she was not informed about the exparte decree passed in the suit in O.S.No.268 of 2008. That apart, the learned senior counsel also submitted that the present application has been filed by the 1st defendant alone, in collusion with the other defendants, to prevent the plaintiff from enjoying the fruits of the decree.

10. In support of his contentions, the learned senior counsel relied upon the following judgments:

(i) AIR 1967 Supreme Court 1384 [Panna Lal Vs. Murari Lal (dead) by his legal representatives] wherein the Hon'ble Supreme Court held as follows:

“...

3. Under O.9, R.13, C.P.C., a decree passed *ex parte* against a defendant is liable to be set aside if the summons was not duly served or if the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. If the summons is not duly served, the defendant suffers an injury and he is entitled *ex debito justitiae* to an order setting aside the *ex parte* decree provided he applies to the Court within the prescribed period of limitation. Under Art. 164 of the Indian Limitation Act 1908, the period of limitation for an application by a defendant for an order to set aside a decree passed *ex parte* was 30 days from “the date of the decree of the summons was not duly served, when the applicant had knowledge of the decree.” The onus is on the defendant to show that the application is within time and he had knowledge of the decree within 30 days of the application. If the defendant produces some evidence to show that the application is within time, it is for the plaintiff to rebut this evidence and to establish satisfactorily that the defendant had knowledge of the decree more than 30 days before the date of the application.”

(ii)(2008) 1 MLJ 1214 (SC) [Mahabir Singh Vs. Subhash and others]

wherein the Apex Court held as follows:

“...

6. The approach of the High Court, in our opinion, was

not correct. There exists a presumption that the official act was been done in ordinary course of business. Admittedly, an *exparte* decree was passed. Defendant for getting it set aside was required to establish that either no summons was served on him or he had sufficient cause for remaining absent on the date fixed for hearing the suit *exparte*.”

(iii)(2013) 4 Supreme Court Cases 465 [Ayaubkhan Noorkhan Pathan Vs. State of Maharashtra and others]

“...

31.It is a settled legal proposition that an affidavit is not “evidence” within the meaning of Section 3 of the Indian Evidence Act, 1872 (hereinafter referred to as the ‘Evidence Act’). Affidavits are therefore, not included within the purview of the definition of “evidence” as has been given in Section 3 of the Evidence Act, and the same can be used as “evidence” only if, for sufficient reasons, the Court passes an order under Order XIX of the Code of Civil Procedure, 1908 (hereinafter referred to as the ‘CPC’). Thus, the filing of an affidavit of one’s own statement, in one’s own favour, cannot be regarded as sufficient evidence for any Court or Tribunal, on the basis of which it can come to a conclusion as regards a particular fact-situation. (Vide: *Sudha Devi v. M.P. Narayanan & Ors.*, (1988) 3 SCC 366 : AIR 1988 SC 1381; and *Range Forest Officer v. S.T. Hadimani*, (2002) 3 SCC 25 : 2002 SCC (L & S) 367 : AIR 2002 SC 1147).

...

36. Therefore, affidavits in the light of the aforesaid discussion are not considered to be evidence, within the meaning of Section 3 of the Evidence Act. However, in a case where the deponent is available for cross-examination, and opportunity is given to the other side to cross-examine him, the same can be relied upon. Such view, stands fully affirmed particularly, in view of the amended provisions of Order XVIII, Rules 4 & 5 CPC. In certain other circumstances, in order to avoid technicalities of procedure, the legislature, or a court/tribunal, can even lay down a procedure to meet the requirement of compliance with the principles of natural justice, and thus, the case will be examined in the light of those statutory rules etc. as framed by the aforementioned authorities.”

(iv)1997 (1) CTC 651 [Gomathi Ammal Vs. Madhusoodanan Nair and another] wherein this Court held as follows:

“...

7. In our case also, except the production of medical certificate, the petitioner herein has not explained the delay by examining herself. A reading of Order 9, Rule 3, C.P.C., clearly shows that the applicant must satisfy the Court that the summonses were not duly served or she was prevented by any sufficient cause from appearing when the suit was called on for hearing. In this case, as already stated, there is no averment that summons was not served on her. Failure to adduce

evidence for non-appearance, the vague allegation that she was ill and mere production of medical certificate are not sufficient to prove her illness unless the party gets into the box and speaks about the same. Admittedly in our case the petitioner has not entered the box and spoken in support of the medical certificate. In those circumstance, the decision referred to in the above case as well as the other decision of the learned Chief Justice reported in *Arukkani Ammal v. Guruswamy*, 100 L.W. 707 are squarely applicable to our case. Since we are concerned with the reason or reasons for condoning the delay in filing petition to set aside the ex parte decree, I am not discussing the merits of the case as argued by the learned counsel for the petitioner.”

(v)1992 MLJ 60 [Gnanambal Vs. Perumal Pillai and another]

wherein this Court held as follows:

“...

6.It is next contended that in any event when the memo was filed for amendment of the execution petition, it was very much out of time and it is as if a new relief is sought in the execution proceeding which is not available to the decree holder. There is no substance in this contention. So long as the execution petition is pending and it has been filed within time, it is open to the decree-holder to have the process of execution carried out by attaching the properties of the judgment debtor. There is no separate period of limitation for a prayer for attachment. If the execution petition is within the period of

limitation, any prayer for enabling the court to carry out the execution and realise the fruits of the decree is not subject to any period of limitation. Such a prayer can be made so long as the execution petition is pending.”

(vi)(1991) 1 M.L.J. 486 [Kandaswamy and another Vs. T.K.Ayyanan and another] wherein this Court held as follows:

“...

3. The grievance of the petitioners is that the District Munsif had no jurisdiction to return the plaint on the basis of the evidence recorded in the trial. I do not agree with the petitioners. The District Munsif has found that P. W. 1 has admitted the value of the suit claim to be worth Rs. 82,300. Hence, the District Munsif is right in taking the view that the suit was outside his pecuniary jurisdiction. However, the District Munsif was not right in holding that the suit should be dismissed. The District Munsif could only return the plaint and could not have dismissed the suit if the Court had no jurisdiction to entertain the claim.”

(vii)AIR 1954 Saurashtra 96 (vol 41, C.N.42) [Memon Ahmed Abdulla Vs. Vora Gulam Hussein Nathubhai and others] wherein the Saurashtra High Court held that if the trial Court gives a finding that the defendant had knowledge of the decree based on the interpretation of a telegram is a finding of fact and even it be held to be one of law the High

Court will not interfere in revision with such a finding though erroneous.

11. It is not in dispute that the 2nd defendant is the daughter of the 1st defendant and the 3rd defendant is the son of the 1st defendant. The suit was filed by the plaintiff for specific performance on an Agreement of Sale dated 30.08.2007. Since the defendants failed to appear before the trial Court, they were set *ex parte* and an *ex parte* decree was passed on 18.09.2009. It is not in dispute that the 3rd defendant, who is the son of the 1st defendant was duly served with the suit summons in O.S.No.268 of 2008. The 1st defendant contended that she is not in talking terms with the 3rd defendant, hence, her son did not inform her about the filing of the suit and the *ex parte* decree passed on 18.09.2009. The 1st defendant filed an application in I.A.No.506 of 2014 to condone the delay of 957 days in filing the application to set aside the *ex parte* decree. In the affidavit filed in support of the petition, the 1st defendant has stated that the 3rd defendant had not taken care of her and there was misunderstanding between them. Further, she has stated that she is not in talking terms with the 3rd defendant. In paragraph-7 of the affidavit, the 1st defendant has stated that only on 12.04.2012, she came to know about the *ex parte* decree passed in the suit through one of her relative. Thereafter, she contacted her lawyer

and verified the facts and only then, she came to know about the exparte decree passed on 18.09.2009.

12.It is pertinent to note that the Suit Agreement dated 30.08.2007 was executed by the 3rd defendant as Power Agent of the defendants 1 & 2. Pursuant to the Power of Attorney Deed executed by the defendants 1 & 2 dated 05.09.2006 and 18.09.2006, the 3rd defendant had executed the Sale Agreement in favour of the respondent/plaintiff. It is not the case of the defendants 1 & 2 that they have cancelled the Power of Attorney Deed executed in favour of the 3rd defendant. Nowhere in the affidavit, the 1st defendant has stated that she had cancelled the Power of Attorney Deed executed in favour of the 3rd defendant. That apart, the 1st defendant entered into a registered Sale Agreement with one K.Sivasubramaniam for the sale of other property. Since the Sale Deed was not executed by the 1st defendant, the prospective purchaser viz., K.Sivasubramaniam filed a suit in O.S.No.109 of 2012 on the file of the I Additional District Court, Tiruppur for specific performance.

13.On a perusal of the Sale Agreement dated 18.04.2011 executed between the 1st defendant herein and one K.Sivasubramaniam, it could be

seen that the 3rd defendant had identified the parties before the Sub Registrar, Udumalpet. When the 1st defendant is contending that she is not in talking terms with the 3rd defendant, the said averment is falsified by the Sale Agreement executed with K.Sivasubramaniam. If the 1st defendant is not in talking terms with the 3rd defendant she would not have brought her son, the 3rd defendant herein, to the Sub Registrar's office and allowed him to sign the document as an Identifying Witness. Even in O.S.No.109 of 2012, the 1st defendant has taken a plea that the Sale Agreement dated 18.04.2011 was executed only as a security for the loan availed by her and not for selling the property.

14.I am not adverting into the merits of the suit in O.S.No.109 of 2012 for the reason that the suit is still pending and any finding given by this Court with regard to the merits of the suit in O.S.No.109 of 2012 would affect the result of the suit.

15.Even according to the 1st defendant, she had the knowledge of the exparte decree on 12.04.2012. However, she chose to file the application to set aside the exparte decree only on 01.06.2012. She could have filed the application in the month of April 2012 itself to set aside the exparte decree.

The reason for not filing the application immediately was also not explained by the 1st defendant.

16.The next contention raised by the learned counsel for the petitioner that the suit summons were sent to a wrong address (i.e.) to the 3rd defendant's address, therefore, the 1st defendant was not served with the summons is concerned, even assuming that the suit summons were sent to the 3rd defendant's address, when there is no evidence let in by the 1st defendant to prove that she is not in talking terms with the 3rd defendant, definitely, the 3rd defendant would have informed the 1st defendant about the filing of the suit in O.S.No.268 of 2008. Therefore, the 1st defendant cannot now contend that she was not informed by the 3rd defendant about the filing of the suit and the exparte decree passed in the suit.

17.Pursuant to the decree passed in O.S.No.268 of 2009, the plaintiff filed an Execution Petition in E.P.No.10 of 2012 and the present application has been filed by the 1st defendant only after the filing of the said Execution Petition. The Executing Court also executed the Sale Deed in favour of the plaintiff on 21.09.2015. Now, the plaintiff has filed a petition before the

Executing Court under Order 21 Rule 11 (2) of the Civil Procedure Code for recovery of possession.

18. When the 1st defendant is contending that she is not in talking terms with the 3rd defendant and that he wanted to grab the entire properties for himself, the reason for not cancelling the Power of Attorney Deed executed by her in favour of the 3rd defendant would establish that the averment stated in the affidavit cannot be a true averment. The so called misunderstanding mentioned in the affidavit filed in support of the petition is invented for the purpose of maintaining the present application. In the case on hand, the 1st defendant should have examined herself and other independent witnesses to establish the averment stated in the affidavit filed in support of the petition. However, the 1st defendant has not let in any evidence to substantiate the averment stated in the affidavit. When the 1st defendant is contending that she was not served with notice, she should have let in evidence not only with regard to the non service of summons, but also with regard to the misunderstanding with the 3rd defendant. Since the present application has been filed under Section 5 of the Limitation Act, she should have let in evidence to prove that she had the knowledge of the exparte decree passed in the suit only on 12.04.2012. Since the time begins

to run from the date of decree or from the date when the applicant had knowledge of the decree, it is for the 1st defendant to establish as to when she came to know about the passing of the exparte decree. In the case on hand, the 1st defendant has not examined any witness on her side to prove the said contention. The onus is on the 1st defendant to show that she had knowledge only on 12.04.2012 and only in such circumstances, it is for the plaintiff to rebut the evidence let in by the 1st defendant and to establish satisfactorily that the defendant had knowledge much prior to 12.04.2012.

19.It is settled position that unless the party seeking for condonation of the delay shows sufficient cause for the delay, the delay should not be condoned.

20.In the case on hand, except the averment stated in the affidavit filed in support of the petition, the inordinate delay of 957 days in filing the petition to set aside the exparte decree was not proved to the satisfaction of the trial Court.

21. Even in the suit in O.S.No.109 of 2012, the 1st defendant, in her written statement, had stated that only the 3rd defendant, her son, is taking care of the pending litigations and her affairs. Having stated so in the written statement, the 1st defendant cannot take a contrary stand now and say that she is not in talking terms with her son. The decree was passed in O.S.No.268 of 2008 after issuance of paper publication. Since the 1st defendant has not explained the reasons for the delay in a proper manner by adducing evidence to establish the averment stated in the affidavit, the trial Court has rightly dismissed the petition.

22. In these circumstances, the judgments relied upon by the learned counsel for the petitioner are not applicable to the present case.

23. Therefore, I do not find any error or irregularity in the order passed by the trial Court. The Civil Revision Petition is devoid of merits and is liable to be dismissed. Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

Index : No
Internet : Yes
va

20.10.2016

To

The Principal District Court,
Tiruppur.

M.DURAIWAMY,J.
va

Order made in
C.R.P.(NPD).No.175 of 2016
and C.M.P.No.911 of 2016

20.10.2016