

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.04.2016

CORAM

THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR

C.R.P.(NPD) No.749 of 2010

1.M.Subramaniya Gounder (Deceased)

2.Visalakshi

3.Jayalakshmi

4.Velumani

5.Renuka Devi

6.Krishnasamy

... Petitioners

[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 CRP No.749 of 2010]

vs.

V.Thavamani

... Respondent

Civil Revision Petition filed under Section 115 of the CPC against the
fair and final order dated 8.12.2009 made in I.A.No.387 of 2009 in
O.S.No.164 of 2001 on the file of the Subordinate Judge, Udumalpet.

For Petitioners : Mr.Ravichandran

For respondent : Mr.R.Nalliyappan

ORDER

This Civil Revision Petition arises against the fair and final order
dated 8.12.2009 passed in I.A.No.387 of 2009 in O.S.No.164 of 2001 on the
file of the Subordinate Court, Udumalpet.

2. The respondent herein filed the suit in O.S.No.164 of 2001 before the Subordinate Court, Udumalpet, for the relief of specific performance and other reliefs. The said suit was set *exparte* on 3.9.2002. The respondent filed E.P.No.52 of 2009 before the said Court for execution of the same.

3. On receipt of notice in E.P.No.52 of 2009 in O.S.No.164 of 2001 from the Subordinate Court, Udumalpet, the revision petitioner filed an Interlocutory Application in I.A.No.387 of 2009 in O.S.No.164 of 2001 to condone the delay of 2400 days in filing the petition to set aside the *exparte* decree in O.S.No.164 of 2001 passed against the revision petitioner.

4. By order dated 8.12.2009, the Trial Court dismissed the Interlocutory Application in I.A.No.387 of 2009 in O.S.No.164 of 2001 on the ground that in the execution proceedings, he entered appearance on 28.4.2009 but he filed the instant Interlocutory Application only on 5.9.2009 and no proper explanation was given for four months' delay. Against this order, the present Civil Revision Petition has been filed by the defendant/revision petitioner.

5. Pending Civil Revision Petition, the sole petitioner died and his legal representatives were brought on record by order of this Court dated 23.11.2011 passed in M.P.Nos.1 to 3 of 2011 in the present Civil Revision

Petition.

6. Mr.Ravichandran, learned counsel appearing for the revision petitioners assailing the reasons stated by the trial court for the dismissal of the Interlocutory Application No.387 of 2009 would submit that though the learned counsel appearing for the respondents had no objection to condone the delay, the trial Court without considering the same, dismissed the Interlocutory Application, which needs interference at the hands of this Court.

7. Mr.R.Nalliyappan, learned counsel appearing for the respondent would submit that the revision petitioner/defendant filed I.A.No.387 of 2009 in O.S.No.164 of 2001 under section 5 of the Limitation Act to condone the delay of 2400 days in filing the petition to set aside the *exparte* decree passed against the petitioner in O.S.No.164 of 2001 on 3.9.2002. The trial Court found that in the execution petition, the revision petitioner entered appearance on 28.4.2009 but he filed the present Interlocutory Application only on 5.9.2009 and there was delay of four months in between and same was not properly explained. Therefore, the trial Court rightly dismissed the Interlocutory Application.

8. Heard Mr.Ravichandran, learned counsel appearing for the revision petitioners and Mr.R.Nalliyappan, learned counsel appearing for the respondent and perused the records.

9. The Trial Court dismissed the Interlocutory Application filed in I.A.No.387 of 2009 in O.S.No.164 of 2001 under section 5 of the Limitation Act to condone the delay of 2400 days in filing the petition to set aside the *exparte* decree passed in O.S.No.164 of 2001 against the petitioner on 3.9.2002. The trial Court found that in the execution petition, the revision petitioner entered appearance on 28.4.2009 but he filed the present Interlocutory Application only on 5.9.2009 and there was delay of four months in between and same was not properly explained.

10. According to Mr.Ravichandran, learned counsel for the revision petitioners, the summons of the suit has not been received by the first defendant/revision petitioner. Per contra, according to Mr.R.Nalliyappan, learned counsel for the respondent, summons was served on the first defendant/revision petitioner. Therefore, the factum of the said position has to be verified only from the original records in the suit. By order dated 11.4.2016, records were called for along with a report as to whether the summons was served on the defendant from the Subordinate Court, Udumalpet.

11. The report of the Subordinate Judge, Udumalpet, dated 20.4.2016 is extracted hereunder:-

“Further, I submit that the suit was taken
on file on 20.08.2001 and ordered summons to

defendant to appear on 24.9.2001 in this Court and for further hearing notes paper as follows:-

24.09.2001	Batta in a Week on 6.11.2001
06.11.2001	Batta paid issue for 18.11.2001
18.11.2001	Batta for D1 and D2 and Registered post by 09.01.2002
09.01.2002	Summons to D2 no residence, D1 not returned, Declare as holiday on 04.02.2002
04.02.2002	Batta, no sitting reposted to 27.02.2002
27.02.2002	Batta in a week – issue for 17.04.2002
17.04.2002	Batta no sitting reposted to 10.06.2002
10.06.2002	Fresh Summons to D1 and D2 – Batta paid issue for V 15.07.2002
15.07.2002	Fresh summons to D1 and D2 – Batta not paid fresh summons to D1, only paper publication in one issue for Dinamalar U.S. Filed Vakalath for D2, Written Statement of D2 by 19.08.2002.
19.08.2002	Paper publication for D1, Written Statement of D2 by 03.09.2002
03.09.2002	D1 Paper Publication, D2 Written Statement. D1 Paper Publication effected. D1 called absent set exparte, D2 Written Statement not filed. D2 Called absent set exparte. PW.1 examined. Claim proved. Suit is decreed as prayed for with costs. Time one month.

12. It is seen from the said report that the suit was taken on file on 20.8.2001 and summons was ordered to the defendants to appear on 24.9.2001 and subsequently, the case was posted on various dates for

payment of Batta. On 15.7.2002, when the case was posted, fresh summons was ordered for D1 and D2 as Batta was not paid. Paper publication in one issue for D1 in Dinamalar was ordered. D2 entered appearance through a counsel. Thereafter, the Case was posted for filing written statement of D2 by 19.8.2002. On 19.8.2002, Paper Publication was directed to be caused for D1 and Written Statement of D2 by 03.9.2002. On 03.9.2002, paper publication was effected on D1. D1 called, absent, set exparte. D2 had not filed written statement. D2 was called absent and set exparte. PW.1 was examined. The suit was decreed exparte.

13. Therefore, it is abundantly clear from the perusal of the records and report that summons was not duly served and only paper publication was effected on the first defendant/revision petitioner. It is the case of the first defendant/revision petitioner that he was unaware of the suit proceedings till he received notice in the execution proceedings.

14. Order V, Rule 17 and 20 of CPC reads as follows:-

"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 'whose presence the copy was affixed.

20. Substituted service -(1) Where the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(1A) Where the court acting under sub-rule (1)

orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

(2) Effect of substituted service—Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed—Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

15. From the report and records, it is surfaced that that the Trial Court has not complied with the above provisions of the Civil Procedure Code while ordering substituted service.

16. The Trial Court has come to the conclusion that on receipt of the notice in the Execution Petition, the revision petitioner entered appearance and thereafter, there was a delay of four months in filing the present Interlocutory Application. However, with regard to this aspect, the defendant/revision petitioner had explained that after his appearance in the Execution Petition, he collected copy of the judgments and other particulars in order to contest the case and as such, four month's delay has occasioned,

which was not considered by the Trial Court. It is also recorded by the Trial Court that even the respondent had no objection to allow the Interlocutory Application. However, the Trial Court has dismissed the Interlocutory Application for the reasons that no proper explanation was given for the period of four months from the date of receipt of notice in the Execution Petition.

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 ex parte 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.

18. ***In Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & others [2013 (5) CTC 547 (SC)]***, the Hon'ble Supreme Court has held that there should be a liberal, pragmatic,

justice oriented, non-pedantic approach while dealing with an Application for condonation of delay.

19. Subsequently, the ratio laid down in the said judgment has been followed by this Court in ***Ajay Kumar Gulecha Vs. J.Vijayakumar and another [2015 (1) CTC 811]***.

20. In the light of the above discussions and in the interest of justice, following the ratio laid down in the aforesaid judgments, this Court is inclined to pass the following orders:-

(i) The fair and final order dated 8.12.2009 passed in I.A.No.387 of 2009 in O.S.No.164 of 2001 on the file of the Subordinate Court, Udumalpet, is set aside.

(ii) The delay of 2400 days in filing the Interlocutory Application is condoned and I.A.No.387 of 2009 in O.S.No.164 of 2001 on the file of the Subordinate Court, Udumalpet is allowed.

(ii) In the event of allowing the petition filed under Order IX Rule 13 of CPC, the Trial Court is directed to dispose of the suit within a period of six months from the date of restoration of the suit.

21. Accordingly, the Civil Revision Petition is allowed. The connected Miscellaneous Petition is closed. No costs.

25.04.2016

Index : yes

Internet :yes / no

Note to Office:

The Registry is directed to return the original records received from the Court below forthwith.

B/o.

asvm

To

The Subordinate Judge,
Udumalpet.

D.KRISHNAKUMAR, J.

(asvm)

C.R.P.(NPD) No.749 of 2010
and
M.P.No.1 of 2010

25.04.2016