

THE HON' BLE SRI JUTICE M. SEETHARAMA MURTI

Civil Revision Petition No.3897 of 2016

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, by the unsuccessful respondents 1 and 2/ plaintiffs is directed against the order, dated 02.06.2016, of the learned District Judge, Mahabubnagar, passed in I.A.No.545 of 2015 in O.S.No.66 of 2012 filed under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure, 1908, ('the Code') requesting to set aside the *ex parte* decree and judgment dated 15.04.2013 passed in the aforementioned suit.

2. I have heard the submissions of the learned counsel for the plaintiffs/ revision petitioners (hereinafter, 'plaintiffs'). I have perused the material record. Though the defendants 1 and 2 are served with notices, they did not enter appearance. None appears for the said defendants. Respondents 3 and 4 in the revision are stated to be not necessary parties.

3. The facts, in brief, are as follows:

The plaintiffs brought the suit against the defendants including defendants 1 and 2 for a declaration that the registered agreement of sale-cum-General Power of Attorney dated 27.09.2007 in respect of the suit lands is illegal and void for violation of the terms therein and for a perpetual injunction and for costs. As the summonses could not be served on the said defendants 1 and 2, the plaintiffs filed an application for substituted service and for serving notice on the said defendants by advertisement in a newspaper. After the publication is filed before the trial Court, the defendants 1 and 2 were set *ex parte* and thereafter, the suit was decreed *ex parte*. Thereafter, the defendants 1 and 2 filed the subject application requesting to set aside the *ex parte* decree and judgment dated 15.04.2013. The said application was resisted by the plaintiffs. On merits, and by the orders impugned in this

revision, the trial Court allowed the said petition. Aggrieved thereof, the plaintiffs are before this Court.

4. The case of the defendants 1 and 2 in support of their request for setting aside the *ex parte* decree dated 15.04.2013, in brief, is as follows:

Admittedly, the suit summonses are not personally served on the defendants 1 and 2. Notices were published in newspaper and thus, substituted service under Order V Rule 20 of the Code was affected; and after publication of notices in a newspaper, the defendants were set *ex parte*. The defendants are not aware of the *ex parte* decree and judgment. When the defendants received information in the last week of November, 2014 from the office of the Tahasildar, Farooqnagar, that the plaintiffs are making efforts to get the entries recorded in the revenue records, the defendants 1 and 2 made enquiries through an advocate and came to know in the first week of December, 2014 about passing of the *ex parte* decree in the suit. In the said circumstances, the subject petition is filed for setting aside the *ex parte* decree.

5. The case of the plaintiffs, in brief, is this:

The suit summonses were sent to defendants 1 and 2 to their address at Hyderabad and other places. The Court waited for results of the summonses sent to the defendants on various dates including 03.10.2012, 29.10.2012, 15.11.2012 and 26.11.2012. Later, as per the directions of the trial Court, the plaintiffs have taken steps for service of notices by substituted service and an advertisement was published in 'Eeenadu' Telugu daily newspaper dated 03.01.2013 (Hyderabad & Secunderabad Editions) and also in 'Lok Nayak' newspaper, Maharashtra Edition, dated 13.02.2013, insofar as the 4th defendant. However, in response to the said notices advertised in the said newspapers, none of the defendants appeared before the trial Court. After having waited for sufficient time, the defendants were set *ex parte*. Since

substituted service was affected, the defendants 1 and 2 ought to have filed an application for condonation of delay that had occasioned from the date of the decree till the date of the filing of the application to set aside the *ex parte* decree. The defendants ought to have explained the day-to-day delay. The application filed for setting aside the *ex parte* decree without seeking condonation of delay is not maintainable. The defendants 1 and 2 already sold the property to the defendants 3 and 4. Therefore, they did not evince any interest in prosecuting their defence and they had intentionally remained *ex parte*. The defendants 1 and 2, who are no longer owners of the property, are not entitled to seek the relief. The petition may be dismissed.

6. Learned counsel for the plaintiffs while reiterating the contentions of the plaintiffs in the counter, which are already stated supra, *inter alia* contend as follows:

The trial Court ought to have seen that as directed by the Court only, suit notices were advertised in a newspaper; but for the Court orders, the plaintiffs ought to have taken steps for personal service of notices on the defendants. The conduct of the defendants in refusing notices sent to them in this revision and in selling away the property to the defendants 3 and 4 would reflect that they are not interested in prosecuting their defence and that they had intentionally remained *ex parte*. The trial Court did not consider the contention of the plaintiffs that the application seeking to set aside the *ex parte* decree is barred by law of limitation and is not maintainable. The trial Court failed to see that substituted service is also a valid service. Hence, the finding of the trial Court that the substituted service is not due service is not correct. The trial Court failed to examine all the contentions of the plaintiffs.

7. Though the defendants 1 and 2 have not entered appearance and are not resisting the revision, this Court is obligated under facts and law to examine the merits of the order of the trial Court. Therefore, this Court carefully

perused the pleadings of the parties and also the order impugned. In the first place, coming to the contention that the application filed by the defendants 1 and 2 to set aside *ex parte* decree unaccompanied by an application for condonation of delay is not maintainable and the aspect of limitation, it is necessary to refer to provision of Article 123 of the Limitation Act, 1963, which reads as under:

123.	To set aside a decree passed <i>ex parte</i> or to rehear an appeal decree or head <i>ex parte</i> . <i>Explanation – For the purpose of this article, substituted service under rule 20 of Order V of the Code of Civil Procedure, 1908 shall not be deemed to be due service.</i>	Thirty days	The date of the decree or where the summons or notice was not duly served when the applicant had knowledge of the decree.
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A plain consideration of the explanation appended to the said Article indicates that for the purpose of said Article, substituted service shall not be deemed to be due service. Therefore, as rightly held by the trial Court, when the defendants 1 and 2 were set *ex parte* after notices were advertised in a newspaper, the question of limitation does not arise, in view of the above referred proviso to Article 123 of the Limitation Act. Therefore, the defendants 1 and 2 are entitled under facts and law to file an application within 30 days from the date of knowledge of the decree. The defendants 1 and 2 clearly pleaded in the affidavit filed in support of the petition that on information received from the Tahasildar’s office concerned that the plaintiffs are making efforts for getting entries made in the revenue records, they got made enquiries through a counsel and came to know about the *ex parte* decree in the suit in the first week of December 2014. Admittedly, this subject application requesting to set aside the *ex parte* decree was filed in the last week of December 2014. Therefore, the application which is filed within 30 days from the date of knowledge of the defendants 1 and 2 cannot be termed as one barred by law of limitation. Therefore, the first contention of the plaintiffs is devoid of merit.

8. Be it noted that when an affidavit is filed by the defendants 1 and 2 in support of their case, the plaintiffs did not choose to file a counter affidavit but, only filed a counter. Coming to the merits of the matter, as already noted, the learned District Judge held that substituted service under facts and circumstances of the case is not due service. In support of the said finding, he placed reliance on the decision of this Court in Pattan Nazimunnisa Begum @ Nazimunnisa v. Shaik hamidunnisa¹ wherein it was held that unless the Court is satisfied that the defendants are keeping out of the way for the purpose of avoiding service or that the summonses cannot be served in the ordinary way, the Courts should not order substitute service by way of paper publication. From the ratio in the decision, it is clear that unless after exhausting all modes of service as contemplated under Order V Rule 20 of the Code, the Court shall not resort to permitting service by an advertisement in a newspaper. In the case on hand, even the counter of the plaintiffs indicates that the Court having waited for results on the summonses sent for service on the defendants directed for a publication to be made. The record of the Court also does not reflect that a finding was recorded before ordering substituted service that the defendants 1 and 2 kept out of the way for the purpose of avoiding service or that the summonses cannot be served in the ordinary way. The provision of law under Order V Rule 20 of the Code mandates that orders for service of notices by advertisement in a newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided shall be permitted if only 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. However, the trial Court permitted the plaintiffs to serve summons by advertising in a newspaper even though there is no reason to believe in this case that the defendants are keeping out of the way for the purpose of

¹ 2014 (3) ALT 31

avoiding service or that for any other reason, the summons cannot be served in the ordinary way. Viewed thus, this Court finds that even on merits also, the well reasoned order of the trial Court, which was passed after considering the facts correctly and the legal position in proper perspective does not warrant interference. Accordingly, this Court finds that there is no merit in the revision.

9. In the result, the Civil Revision Petition is dismissed.

No costs.

Miscellaneous Petitions, if any, pending in this revisions shall stand closed.

09th December, 2016
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M. SEETHARAMA MURTI, J