

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION No.5124 of 2015

ORDER:

The defendant in O.S.No.1411 of 2013, impugning the *ex parte* decree dated 28.10.2013 filed I.A.No.640 of 2014 under Section 5 of the Limitation Act (for short 'the Act'), to condone the delay of 114 days in filing an un-numbered application under Order 9 Rule 13 CPC to set aside the

ex parte decree. Said petition under Section 5 of the Act supra taken up for hearing and after contest dismissed by the trial Court by the impugned order dated 16.09.2015.

2. Pending disposal of the petition supra, there was no stay of execution and thereby the Executing Court pursuant to the *ex parte* decree of the summary suit for recovery of money obtained by the Decree Holder (for short 'D.Hr.') in E.P.No.185 of 2013 for arrest of the Judgment Debtor (for short 'J.Dr.') enquiry with means, to issue warrant for his arrest to recover the decree debt.

3. It is at that stage and from disposal of the application under Section 5 of the Act, impugning the dismissal order supra of the lower Court, present revision is maintained against the plaintiff/D.Hr. as respondent.

4. It is one of the contentions to grant interim stay pending disposal of the revision from the additional material filed of the so called summons said to have been served on the son of the defendant by name, Karthik through the Court Process Server as contemplated under Order 5 Rules 15, 16 and 18 C.P.C., is not correct for not served and said Karthik, who came to the witness box as RW2 also stated in his chief examination that the signature alleged is not that of him and even he was subjected to cross examination only with the suggestion of he signed, there is no further steps therein to prove that of him if at all, however the executing Court without considering the same ordered to issue arrest warrant for recovery of the decree debt.

5. From this material, if at all further to be said of the disputed signature claimed by

G.Karthik-RW.2 as not of him, is of him it requires from the specimen signature to be taken of him and with any admitted signatures of him to compare with the disputed signature to be send to expert to decide. In the absence of proof of any due service and if it is not the signature of son of defendant for nothing to say due service, the *ex parte* decree is liable to be set aside as without servicing, the question of passing any decree by setting

ex parte does not arise. Once such is the core issue, even according to the claim once there is no service of summons and no knowledge before passing the *ex parte* decree about the suit and after its passing before filing the application to set aside the *ex parte* decree but for having receiving summons in the E.P. the question of filing application of 114 days under Section 5 of the Act and considering the same on merits does not arise but for the application under Order 9 Rule 13 C.P.C.. Here, the Order 9 Rule 13 petition is it appears rejected from dismissal of Section 5 application by the impugned order of the lower Court mainly in saying the Court Process Server stated of the summons contains signature of the son of the defendant by name, Karthik and that is suffice to say the summon is duly served as address of the defendant to which the summons sent not in dispute. Here, the dispute is on the very signature of the summons by Karthik who deposed as RW.2 in E.P. by disputing the same. There is no application under section 47 C.P.C. in the Executing Court by the J.Dr. to separately decide therein on the very executability there from but for the application under Order 9 Rule 13 CP.C. associated with section 5 of the Limitation Act as referred supra.

6. Having regard to the above, it requires an enquiry including by sending of the signature disputed by Karthik with signatures to be taken and with any admitted signatures to expert and receive report for the Court to come to the conclusion on that and also necessary to examine the bailiff if at all to say it is said Karthik, son of defendant that signed in his presence to decide on own merits. It was not since done either way even the impugned order covered by the revision is set aside and the revision is allowed and the matter is remanded to the lower Court with a direction to restore the rejected application under Order 9 Rule 13 CPC and decide the Order 9

Rule 13 C.P.C. application along with this Section 5 of the Limitation Act together by common order on merits within two months from the date of receipt of a copy of this order. In the mean time, there shall be suspension of the order for arrest of the J.Dr. issued if any, in the execution proceedings. No order as to costs.

7. Miscellaneous petitions pending if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:03-08-2016

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