

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.1595 of 2016

ORDER:

This revision petition under Section 115 of the Code of Civil Procedure, 1908, is directed against the order dated 04.03.2016 of the learned Additional Senior Civil Judge, Gajuwaka, passed in I.A.No.614 of 2015 in O.S.No.340 of 2012 filed by the petitioner/ 2nd defendant under Section 5 of the Limitation Act requesting to condone delay of (18) days in filing the petition seeking to set aside the *ex parte* decree dated 24.11.2014 passed in the aforementioned suit.

2. I have heard the submissions of the learned counsel for the revision petitioner/ 2nd defendant (hereinafter, '2nd defendant'). The 1st respondent though served with notice, none appeared. The 2nd respondent is the 1st defendant in the suit. He remained *ex parte* and it is submitted that he is not a necessary party. I have perused the material record.

3. The facts necessary for consideration, in brief, are as follows:

The plaintiff brought the suit for declaration that he is the absolute owner of the plaint schedule property and for removal of the mud filled by the defendants over the property and for costs. It appears that the 1st defendant is served with suit summons, but, he remained *ex parte*. Insofar as the 2nd defendant is concerned, the suit summons could not be personally served upon him and therefore, service was caused by affixture. The order dated 10.04.2014 in the proceeding sheet maintained in the suit by the trial Court reflects that the suit summons were served on the defendant by affixture and therefore the 2nd defendant was set *ex parte* on that day. Later, the *ex parte* decree has come to be passed on 24.11.2014.

4. The case of the 2nd defendant as per the pleadings and submissions now made before this Court is that he is not served with suit summons and

therefore, he has no knowledge of the suit and that subsequently, he received notice in E.P.No.23 of 2015 on 13.08.2015 and that on coming to know of the *ex parte* decree in the suit, he filed the subject application for condonation of delay of (18) days along with a petition to set aside the *ex parte* decree dated 24.11.2014 and that the trial Court dismissed the petition for non-examination of the Process Server who caused service by affixture by erroneously holding that service by affixture is valid service under Order V Rule 17 of the Code of Civil Procedure, 1908 ('the Code') though the procedure contemplated under law was not followed in effecting such service.

5. The learned counsel for the 2nd defendant brought to the notice of this Court that the trial Court after noting that the summons were served on the 2nd defendant by affixture did not pass a speaking order that there is due service and that the trial Court before setting the 2nd defendant *ex parte* did not record a finding, as contemplated under Order IX Rule 6 of the Code, that 'service is sufficient' and that the trial Court failed to take note of the fact that the procedure contemplated under Order V Rule 19 read with Rule 17 of the Code is not followed.

6. In the light of the said contentions, it is profitable to refer to the said provisions of law:

Order IX Rule 6:

6. Procedure when only plaintiff appears.- (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then--

(a) *When summons duly served*:—If it is proved that the summons was duly served, the Court may make an Order that the suit be heard *ex parte*;

(b) *When summons not duly served*:—if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

(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.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall Order the plaintiff to pay the costs occasioned by the postponement.

Order V Rule 17:

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.

Order V Rule 19:

Examination of serving officer:- Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving Officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

7. A perusal of the said provisions of law reflects that whenever service by affixture is effected, the procedural discipline requires that an affidavit certifying service of summons by affixture shall be filed by the Process Server concerned and, if the Court so directs, he shall be examined on oath, before the Court concerned passes an order setting the defendant *ex parte* after satisfying itself that there was due service of summons.

8. In the case on hand, there has been violation of the mandatory provision of law. The view of this Court, regarding the procedure to be followed in case of service by affixture, finds support from the decision of this Court in Hari Gopal Lunani v. Sri Venkateswara Sugar Mills¹. In the cited case the contention of the JDr was that there was no service by affixture in accordance with the procedural discipline warranted under Order V Rules 15 and 19 of the Code, and no affidavit certifying affixture on the revision petitioner's door was filed by the process server concerned. In the context of such an affidavit not having been made by the process server, no examination on oath of the serving officer was recorded by the Court concerned as required by Order V Rule 19 of the Code. In the said setting of facts, this Court accepted the submission that there has been a violation of mandatory provisions of Order V Rule 19 of the Code and that no service of summons could be stated to have been effected justifying the order setting the JDr *ex parte*. Once this Court comes to the conclusion that there is no valid service of summons on the defendant, it must be held as a corollary that he is entitled to seek condonation of delay only from the date of knowledge of the decree. When the suit summons are not properly served and there is violation of the mandatory provisions of law, the Court below ought to have taken note of the said facts and granted relief to the petitioner more particularly when the delay is only 18 days.

9. On the above analysis, this Court finds that there is merit in the revision and the revision deserves to be allowed.

10. In the result, the Civil Revision Petition is allowed and the order dated 04.03.2016 in I.A.No.614 of 2015 in O.S.No.340 of 2012 is set aside and the said petition is allowed. The trial Court is now directed to take up the application to set aside the *ex parte* decree filed by the 2nd defendant and consider the same, however, after giving liberty to the plaintiff to file counter.

¹ 2007 (5) ALT 2

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this Civil Revision Petition shall stand closed.

M. SEETHARAMA MURTI, J

25th October, 2016
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