

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

CMA No. 553 OF 2015

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JUDGMENT:

Both the learned counsel have advanced arguments in the main appeal itself and requested this Court to dispose of the same. Hence, the main CMA itself is being taken up for disposal.

2. This Civil Miscellaneous Appeal is filed against order dated 16.04.2015 in I.A.No.547 of 2013 in O.S.No.69 of 2010, wherein the Court below had dismissed the application filed by the appellant/1st defendant under Order 9 Rule 13 CPC to set aside the *ex parte* order dated 14.11.2011 in O.S.No.69 of 2010.

3. It is the case of the appellant that he had filed I.A.No.547 of 2013 for setting aside the *ex parte* order dated 14.11.2011 in O.S.No.69 of 2010 stating that only on 03.04.2013, he came to know through his vendees that the respondents 1 and 2 have obtained *ex parte* decree from the Court in respect of the suit schedule property in collusion with the respondents 3 to 5. Then the petitioner verified the records with the assistance of his counsel and came to know that the respondents 1 and 2 have obtained an *ex parte* decree on 14.11.2011 by playing fraud on the court, without serving summons on him by showing wrong address and subsequently obtained permission from the court for substituted service of summons. Subsequently, after one month, they have filed execution petition and got executed the document through the Court under registered document No.16106/12, dated 05.11.2012.

4. The respondents 1 and 2 filed their counter denying all the allegations made in the petition stating that they have filed the suit in O.S.No.280 of 2006 on the file of Principal Junior Civil Judge, Sangareddy, seeking perpetual injunction against the appellant/defendant No.1. The appellant/defendant No.1 filed his written statement on 14.12.2006 and subsequently in the above suit,

the respondents 1 and 2 have filed an interlocutory application seeking to amend the plaint and same was allowed and the amendment was carried out and thereafter, the appellant/1st defendant filed additional written statement on 19.03.2010 raising objection with regard to the jurisdiction of the Court and the said objection was upheld and docket order was passed on 26.07.2010 directing the office to return file for resubmission before the competent court. Thereafter, the said suit was resubmitted before the Spl. Judge for trial of offences under SC/ST (POA) Act cum-V Additional District and Sessions Judge, Medak at Sangareddy and the same was numbered as O.S.No.69 of 2010 and subsequently E.P.No.23 of 2011 was filed to execute and register the sale deed in their favour and the Court of V Addl. District Judge, Sangareddy executed the sale deed on 05.11.2012 as per the decree dated 14.11.2011. Since then, the respondents 1 and 2 are in peaceful possession and enjoyment of the suit schedule property and sought for dismissal of the appeal.

5. Heard both sides.

6. Learned counsel for the appellant submits that after the suit is returned for presentation before the proper Court, no summons were served on him and after the suit is renumbered as O.S.No.69 of 2010 before the District Court, by giving wrong address, summons were taken out and later substituted service was taken out. He submits that the respondents 1 and 2 have played fraud on the Court and obtained *ex parte* decree and same is liable to be set aside. He further submits that no notice was issued after the suit is renumbered as OS No.69 of 2010. He further submits that the *ex parte* decree and order should be set aside on certain terms. He further submits that the date of knowledge about the *ex parte* decree is relevant for calculating limitation period as per Article 123 of the Limitation Act, 1963. In support of his contention, he relied on the judgments reported in

G.P.Srivastava v. R.K.Raizada and others^[1], Bharat Singh and others v. Narender Kumar and others^[2] and K.Naveen Kumar v. M.Suresh Babu^[3].

7. On the other hand, learned counsel for the respondents 1 and 2 submits that even according to the appellant, he came to know about the *ex parte* decree on 03.04.2013, whereas the application for setting aside the *ex parte* order is filed on 20.06.2013, which is also beyond the period of limitation as per Article 123 of the Limitation Act. As such, the trial Court has rightly dismissed the application filed by the appellant for setting aside the impugned *ex parte* order. He further submits that the appellant had not filed any petition for condonation of delay in filing the setting aside the *ex parte* order. He also submits that summons were taken out on the address given by the appellant in their vakalat filed in O.S.No.280 of 2006 and that the appellant contested the said suit by filing written statement and additional written statement, as such, the question of serving summons on the appellant in wrong address does not arise.

8. In the instant case, it is to be seen that initially the suit OS No.280 of 2006 was filed on the file of Principal Junior Civil Judge, Sangareddy seeking perpetual injunction. When the appellant raised an objection with regard to the jurisdiction, the said Principal Junior Civil Judge passed docket order directing the office to return the said file for resubmission. Thereafter, the said suit was resubmitted before the court of competent of jurisdiction and same is renumbered as OS No.69 of 2010. There is a clear finding that the address shown in OS No.280 of 2006 and in OS No.69 of 2010 is one and the same. It is not in dispute that the appellant also contested the suit OS No.280 of 2006 by filing written statement. When summons issued in OS No.69 of 2010 could not be served, substituted service was taken out. The trial Court came to the conclusion that the appellant is having knowledge about the filing of OS No.69 of 2010. It is not the case of the

appellant in the affidavit filed in support of the application that the address shown in the suit does not exist or he has shifted from that place. As such, at this juncture, different stand cannot be taken in the appeal that summons were taken on the wrong address. Moreover, the appellant is having knowledge about passing of *ex parte* order on 14.11.2011, but he filed the application for setting aside the said order on 20.06.2013, which is beyond the period of limitation, as per Article 123 of the Limitation Act. As such, without filing an application for condonation of delay, the application for setting aside the *ex parte* order is not maintainable. In **Bharat Singh and others v. Narender Kumar and others (supra)**, an application for setting aside the *exparte* decree was filed. But in the instant case, no application was filed for condonation of delay in filing the application for setting aside the *exparte* decree. As such, the said citation is not applicable to the present case on hand.

In **G.P.Srivastava v. R.K.Raizada and others (supra)**, the Hon'ble Supreme Court held as follows:

“8. In the instant case, it is not disputed that the nephew of the counsel of the appellant had died in a road accident on the date of hearing and that the appellant himself was not at the station on account of his employment and illness. The mere fact of obtaining a certificate from a private doctor could not be made a basis for rejecting his claim of being sick. Both the Trial Court as also the High Court have adopted a very narrow and technical approach in dealing with a matter pertaining to the eviction of the appellant despite the fact that he had put a reasonable defence and had approached the Court for setting aside the *ex-parte* decree, admittedly, within the statutory period. Even if the appellant was found to be negligent, the other side could have been compensated by costs and the *ex-parte* decree set aside on such other terms and conditions as were deemed proper by the Trial Court. On account of the unrealistic and technical approach adopted by the courts, the litigation between the parties has unnecessarily been prolonged for about 17 years. The ends of justice can be met only if the appellant-defendant is allowed opportunity to prove his case within a reasonable time.”

But in the present case on hand, the facts are otherwise. The

finding of the trial court is very clear that summons were taken out to the address given in OS No.280 of 2006 and substituted summons were also taken on the appellant. Even from the date of knowledge of passing of an ex parte order, the appellant has not filed any application for condonation of delay.

In view of the above facts and circumstances, I do not see any merit in the appeal and same is liable to be dismissed.

Accordingly, the Civil Miscellaneous Appeal is dismissed. No costs. As a sequel thereto, miscellaneous petitions, if any, pending shall stand dismissed.

A.RAJASHEKER REDDY, J

04.01.2016

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[\[1\]](#) (2000) 3 Supreme Court Cases 54
[\[2\]](#) (2004) 13 Supreme Court Cases 691
[\[3\]](#) 2009 (5) ALT 187