

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.1049 of 2016

ORDER :

Heard both sides at length and perused the material on record. It is one of the contentions of the petitioner/3rd defendant in the application in I.A. No.166 of 2016 in the pending suit O.S. No.18 of 2009 among 4 defendants of whom 4th defendant is no other than her husband, that she was not served with summons. What Order IX Rule 7 C.P.C speaks is where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance. From this, the question of appearance arises once there is a due service of summons as contemplated by Order V C.P.C. No doubt, Order V rule 15, 17 and 19 C.P.C from its combined reading among Order V Rules 15 to 19 C.P.C speak that a service even on agent or adult male member is a sufficient service and where the defendant to whom personally to be served was not found and there is no possibility of serving by securing within a reasonable time from the affirmation by officer of the Court (process server) of due affixture on oath at conspicuous part of the residence of that factum it can be

treated as a sufficient service and if the endorsement of process server of such affixture of not on oath, the Court before setting the party exparte under Order IX Rule 7 C.P.C for proceeding exparte, shall examine the process server on oath for the statement earlier made not on oath of not found and affixed or specifying with not securing within a reasonable time. Here it is not even shown from the record muchless from counter of contesting defendants 1 and 2 in opposing the petition of 3rd defendant for no separate counter filed by plaintiff, of there is service on the husband of the petitioner/D-3 i.e., D-4 to say as a due service.

2) If there is no service as contemplated above, the question of setting exparte does not arise and once even set exparte, if that could be demonstrated from record of the Court, for that could be a sufficient cause and nothing more is required to satisfy to set aside the exparte order under Order IX Rule 7 C.P.C. Even the factum of the suit ripen for argument stage not at all a ground as there is no limitation to file such an application, but what is contemplated from the wording of Order IX Rule 7 C.P.C referred supra is showing of good cause for earlier hearings of non appearance. A non-service itself when a good cause that is also required to be adjudicated. No doubt, the impugned order speaks from the conclusive para No.7, running in three pages of petitioner has not placed any material muchless assigned good cause for

her previous non-appearance that results in dismissal and preceded by para No.6 of there is a deemed knowledge to her from proof of service on her husband/D-4. There is no law in the absence of showing husband acts as an agent of wife of a deemed service when it is not received by husband, of the summons of the wife, as an adult male member as contemplated by Order V Rule 15 and 17 and 19 referred supra. Thus, the matter requires remand for fresh consideration, as to whether there was service on the 3rd defendant, either personally or on her husband or any other person as adult male member or either through Court or by registered post or any other person of the residential address even received by registered post or there is with such an observation of not found and not likelihood of securing to serve, made by affixture and if it is on oath to take it as a sufficient service, if not on oath to examine the bailiff on oath in proof of any such statement to take as a sufficient service from the Court record. Once such is the case if any from the record of service from that sufficient service and in between after the year 2009 to 2010 till filing of the application for several years waiting with no any cause shown sufficient to construe any good cause to set aside the exparte order muchless to permit to participate in the trial proceedings reached finality and at the arguments stage.

3) Accordingly and to the limited scope, the matter is

remanded for fresh consideration and disposal. There shall be no order as to costs. Pending miscellaneous petitions, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

18.08.2016

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