

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA
RAO**

C.R.P.No.702 of 2016

ORDER:

Heard the learned counsel for the petitioners and the learned counsel for 2nd respondent.

2. This Revision Petition is filed challenging the order dt.12-08-2015 in I.A.No.1174 of 2012 in O.S.No.185 of 2008 of the Principal Senior Civil Judge, Warangal.

3. Petitioners herein are plaintiffs in the said suit which was filed by the plaintiffs in the said suit. It was filed for specific performance of an agreement of sale allegedly executed by the respondents in favour of the petitioners on 24-07-2005.

On 28-06-2008, an *ex parte* decree was passed therein.

On

03-02-2012, the respondents filed I.A.No.1174 of 2012 under Order 9 Rule 13 CPC to set aside the *ex parte* decree alleging that they did not receive summons in the suit.

4. Counter affidavit was filed by 2nd petitioner opposing the said application and specifically asserting that the Process Server served a copy of the summons in the suit on the wife of the petitioner, that the same was acknowledged by her by putting her thumb impression on

the reverse of the summons and the son of 1st respondent by name R.Srinivas also signed as a witness on that document. Thus, there is a clear dispute as to whether at all service of summons was affected on the respondents.

5. In the impugned order, passed by the Court below, this point is not decided and it is stated by the Court below that the said question cannot be considered at this stage without receiving evidence. It however felt that it would be unfair to shut the doors against the respondents by not allowing them to participate in the suit proceedings and on payment of costs of Rs.1,000/-, the said application was allowed.

6. Learned counsel for the petitioners contends that the Court below should have first decided the question about service of summons on the respondents and it cannot say that the said question cannot be decided at the stage and simply allow the said application on payment of costs. He further contended that the respondents ought to have also filed an application under Section 5 of the Limitation Act, 1963 seeking condonation of delay in filing application to set aside the *ex parte* decree and since this has not been done, the Court below should have dismissed the said I.A.No.1174 of 2012.

7. Learned counsel for the respondents supported the order passed by the Court below and

contended that the respondents were not aware of the pendency of the suit since the summons were not served on them. So there was no necessity to file an application under Section 5 of the Limitation Act, 1963.

8. I have noted the submissions of both sides.

9. Order 9 Rule 13 CPC empowers the Civil Court to set aside an *ex parte* decree if it is proved to the satisfaction of the Court that summons were not duly served on the defendants or if the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing.

10. In the present case, it is the specific case of the respondents that the summons were not duly served on them. This plea was specifically denied by the petitioners who asserted that the Process Server did serve the summons on the wife of the 1st respondent, that she also affixed her thumb impression on the reverse of the summons and the son of the 1st respondent also signed on it as a witness. Therefore, the Court below was bound to conduct an enquiry by asking the parties to lead evidence to prove their respective contentions. Its failure to do so is an error of jurisdiction warranting interference by this Court with its order.

11. Therefore, the order dt.12-08-2015 in I.A.No.1174 of 2012 in O.S.No.185 of 2008 of the

Principal Senior Civil Judge, Warangal is set aside; the said I.A. is remitted back to the same Court to give opportunity to both sides to adduce evidence on the aspect of service of summons; and to then decide the matter in accordance with law. This exercise shall be completed by the Court below within six weeks from the date of receipt of a copy of this order. It is made clear that this Court has not expressed any opinion on the merits of the contentions of the either parties.

12. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 26-02-2016

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