

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.01.2017

CORAM :

THE HONOURABLE MS.JUSTICE R.MALA

C.R.P(NPD).No.209 of 2017
and C.M.P.No.904 of 2017

S.Selvaraj

.. Petitioner

Vs.

E.Balasubramani

.. Respondent

Prayer:- Civil Revision Petition is filed under Article 227 of the Constitution of India, against the decree and judgment dated 01.07.2014 made in C.M.A.No.139 of 2013 on the file of III Additional City Civil Court, Chennai, confirming the fair and decreetal order dated 29.08.2013 in I.A.No.2686 of 2013 in O.S.No.1604 of 2011 on the file of II Assistant City Civil Court, Chennai.

For Petitioner : Mr.PA.Sudesh Kumar

ORDER

Civil Revision Petition is filed against the decree and judgment dated 01.07.2014 made in C.M.A.No.139 of 2013 on the

file of III Additional City Civil Court, Chennai, confirming the fair and decreetal order dated 29.08.2013 in I.A.No.2686 of 2013 in O.S.No.1604 of 2011 on the file of II Assistant City Civil Court, Chennai.

2.At the time of admission, argument of the learned counsel for the petitioner is heard in length.

3.The respondent as a plaintiff filed a suit in O.S.No.1604 of 2011 for recovery of money due on promissory note. Since the petitioner called absent, exparte decree was passed on 11.01.2012. The petitioner, who is the defendant, received notice in E.P.No.40 of 2012 on 28.09.2012 and came to know that exparte decree was passed against him on 11.01.2012. So the petitioner has filed an application in I.A.No.2686 of 2013 under Order IX Rule 13 C.P.C. to set aside the exparte decree, within thirty days from the date of knowledge. The said application was dismissed, against which, the petitioner preferred C.M.A.No.139 of 2013. The first appellate Court has also confirmed the fair and decreetal order passed by the trial Court and dismissed the CMA. Challenging the same, the present revision is preferred by the petitioner/defendant.

4. During argument, learned counsel for the petitioner would submit that the petitioner had the knowledge about the ex parte decree only after receipt of summons in E.P.No.40 of 2012 i.e. on 28.09.2012. So as per the Article 123 of the Limitation Act, he has filed the application within 30 days from the date of knowledge. So there is no necessity to file an application to condone the delay of 30 days. That factum was not considered by the trial Court while deciding the application under Order IX Rule 13 C.P.C. For the reason, he has relied upon the decision reported in 1956-69-LW-563 (Murugayyan Kangiar v. Marudayyamal).

5. Learned counsel for the petitioner would further submit that the first appellate Court held that notices in execution petition and the suit have been sent to same address and though the petitioner received notice in execution petition, he has not received notice in suit, which shows that the petitioner has wantonly evaded to receive the notice in suit proceedings. On that basis, both the trial Court and the first appellate Court held that since the petitioner had knowledge about the suit, he ought to have filed the application to condone the delay in filing the petition for setting

aside the exparte decree under Section 5 of the Limitation Act. But the petitioner would submit that the knowledge of the suit is entirely different from the knowledge of passing of decree. For the reason, he has relied upon the decision reported in (1996) Supp 6 SCR 627 (C.K.Lokesh v. P.E.Panduranga Naidu). Further, he has relied upon the ratio decidendi of the decision reported in 1995 Suppl 4 SCR 764 in (Gauhati University v. Niharlal Bhattacharjee). Thus, he prays for allowing the revision.

6.Considered the submissions made by the learned counsel for the petitioner and perused the typed set of papers.

7.The respondent as a plaintiff filed the suit for recovery of money due on promissory note. After issuance of notice, exparte decree was passed on 11.01.2012. The petitioner received notice in E.P.No.40 of 2012 on 28.09.2012 and then only, he filed the application to set aside the exparte decree. According to the petitioner, he has filed the application within thirty days from the date of knowledge of passing of exparte decree.

8.In the counter filed by the respondent/plaintiff in the

application, it is stated that notice in E.P.No.40 of 2012 has been served in the same address, to where suit summons was sent, but it was not served and returned as 'refused'. According to the respondent, the same has to be considered as duly served on the petitioner and deemed service as per Order 5 Rule 17 of C.P.C. and under Order 5 Rule 19A, service was also effected against the petitioner through a publication and therefore, the petitioner/defendant had every possibility to get knowledge of the institution of the suit.

9.Now it is appropriate to consider para-1 to 3 of the affidavit filed by the petitioner in I.A.No.2686 of 2013, in which, he has stated that he received notice in execution petition and entered appearance through his counsel on 28.09.2012. In para-2, he has stated that no summons was duly served upon him in the suit proceedings and he was not aware of the suit until he received notice in E.P.No.40 of 2012. Further, he stated that notice in the execution petition was served on him without petition copy.

10.The trial Court after perusing entire records held that the petitioner had got every opportunity to know about the suit even

prior to the receipt of notice in E.P.No.40 of 2012, because the address given in the execution proceedings as well as in the suit are one and the same. Further, the first appellate Court held that as per the direction of the Court, the plaintiff had sent notice by RPAD and the same was also returned as 'refused' and more over, the substitute service was also effected.

11.At this juncture, it would be appropriate to consider the decision relied upon by the learned counsel for the petitioner in **(1996) Supp 6 SCR 627 (C.K.Lokesh v. P.E.Panduranga Naidu)**, para-5 is extracted hereunder:

“5. It is contended by Sri Sampath, learned Counsel for the respondent, that the respondent had taken all the steps available under Order 5 CPC including of effecting service through substitute service under Rule 20A, Order 5 CPC. Therefore, the Court was right in setting the appellant ex parte and passing the ex-parte decree. The learned District Judge after going through the entire material on record came to the above conclusion that the appellant had not been served with a notice and, therefore, he was entitled to file the application under Article 123 of the Schedule of Limitation Act, which is 30 days

from the date of knowledge. Accordingly, the application came to be filed, though belated by 2015 days. Under these circumstances, the learned District Judge was right in holding that the appellant had filed the application to set aside the ex-parte appeal within 30 days from the date of knowledge. The High Court was clearly in error in interfering with the order passed by the District Judge."

In the above decision, it is specifically held that the Court has after going through entire material facts, came to the conclusion that no notice has been served and on that basis, ex-parte decree is set aside. In the case on hand, the trial Court has considered all the material documents and came to the conclusion that the petitioner had knowledge about the pendency of the suit and notice has been refused, service is sufficient. So it is appropriate to incorporate Order 5 Rule 17 and Order 5 Rule 19 and 19A C.P.C., which run as follows:

Order 5 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 do, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

Order 5 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 enquiry 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.

Order 5 Rule 19A:

19-A. Simultaneous issue of summons for service by post in addition to personal service.

[Calcutta]-Add after rule 19:-

“19-A. A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons.”

[Madras] For rule 19-A, the following rule shall be substituted, namely:-

“(1) The Court shall, in addition to and simultaneously with the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive) also direct the summons to be served by registered post, acknowledgment due; either through an officer of Court or by the plaintiff personally, addressed to the defendant or his agent empowered to accept the service at the place where the defendant or his agent, actually and voluntarily resides or carries

on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case, the Court considers it unnecessary.

(2)(i) Where an acknowledgment purporting to be signed by the defendant or his agent is received by this Court, or is filed into Court by the plaintiff together with an affidavit, sworn to by the plaintiff as to the manner of service, such service shall be deemed to be sufficient proof of service of summons in the suit.

(ii) Where the summons sent by registered post by an officer of Court is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing such summons may declare that the summons had been duly served on the defendant.

(iii) Where, however, the plaintiff files into Court an affidavit sworn to by him, stating that the postal article containing the summons is received back by him with an endorsement purporting to have been made by a postal employee that the defendant or his

agent had refused to take delivery of the postal articles containing the summons, together with the returned postal article containing the summons, the Court issuing such summons shall not declare that the summons had been duly served on the defendant.”

12.In the instant case, summons was sent to the petitioner by post and the same was returned as 'refused'. The Court has ordered substituted service by publication in 'Dinamalar' and that the publication was effected and the same was filed. On that basis, the petitioner was called absent and then set exparte. It is not the case that the petitioner was not residing in the said address. Because the petitioner has received notice in execution petition, which was sent to the same address, to which, suit summons was sent and he has appeared before the Court in execution proceedings.

13.Now this Court has to decide that when did the petitioner had knowledge about the exparte decree? According to the petitioner, he has received notice in execution petition on 28.09.2012 and from that date onwards, he had knowledge about

the passing of decree. But he has not filed the document before the Court for substantiating the same and he has not examined himself as a witness before the Court and filed the served notice copy to state that on that date i.e. 28.09.2012 only, he is aware of the fact that the exparte decree has been passed.

14.It is true, as per Article 123 of the Limitation Act, the date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree, period of limitation is thirty days. In the case on hand, it is the duty of the petitioner/defendant to prove that he got knowledge about the decree on 28.09.2012 and within 30 days, he has filed the application to set aside the exparte decree. But the petitioner has not filed any scrap of papers to show that he had knowledge about the passing of decree only on 28.09.2012. In such circumstances, the petitioner has not proved that he has filed the application within 30 days from the date of knowledge.

15.As per the decision reported in **1995 Suppl 4 SCR 764 in (Gauhati University v. Niharlal Bhattacharjee)**, in the ratio decidendi, it is stated as follows:

"Limitation began to run only when party has knowledge of exparte decree"

There is no quarrel over the ratio decidendi of the above decision.

16.In **1956-69-LW-563 (Murugayyan Kangiar v. Marudayyamal)**, in para-4 it is held as follows:

"4. The application was admittedly filed after the expiry of 30 days from the date of the decree. Under Article 164 of Schedule I of the Limitation Act, the period of 30 days can be computed either from the date of the decree, or where the summons was not duly served, when the applicant has knowledge of the decree. I have already found that the summons was not duly served in this case.

Therefore, time should be computed from the date when the applicant had knowledge of the decree. According to the defendant he had knowledge only a few days before he filed the application. What was relied on by the plaintiff was that even before the passing of the decree, the defendant must have known about the pendency of the suit, because the postman told him that the summons

came from the Munsiff's Court. Assuming that the defendant knew that there was a suit pending against him, that does not necessarily mean he was aware of the fact that a decree had been passed against him. The statement of the petitioner-defendant that he became aware of the decree within thirty days of the date of the application stands uncontradicted and undisproved. The application must therefore be held to be within time."

It is true, as per article 123 of the Limitation Act, if the petitioner had not served with notice, an application under Order 9 Rule 13 C.P.C. can be filed within 30 days from the date of knowledge about the passing of decree. As already stated that the petitioner has not examined any witness before the trial Court to substantiate his averment that he had knowledge about the passing of decree only after receipt of notice in execution petition on 28.09.2012.

17. In my opinion, both the Courts below have considered all the aspects and came to the correct conclusion that the application is barred by limitation as it was not filed within 30 days of the

knowledge of the decree. Therefore, I do not find any reason to interfere with the concurrent findings rendered by both the Courts below and that they are hereby confirmed. Consequently, the Civil Revision Petition is dismissed.

18. In the result, the Civil Revision Petition stands dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

31.01.2017

Index: Yes/No

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To

1. II Assistant City Civil Court, Chennai.
2. III Additional City Civil Court, Chennai.

R.MALA,J

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