THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.1994 of 2014

ORDER:

This Civil Revision Petition, under Section 115 of the Code of Civil Procedure, 1908, ('the Code', for brevity), by the unsuccessful petitioner/2nd defendant is filed assailing the order and decretal order passed by the learned Principal District Judge, Guntur, in C.M.A.No.1 of 2013, whereby, the learned Principal District Judge, while dismissing the said appeal confirmed the order and decretal order, dated 14.11.2012, of the learned Principal Senior Civil Judge, Guntur, passed in I.A.No.1376 of 2010 in O.S.No.443 of 1997, filed under Order IX Rule 9 read with Section 151 of the Code requesting to set aside the *ex parte* decree, dated 30.10.1998, in the aforesaid suit.

2. I have heard the submissions of *Sri K.V.Raghuveer*, learned counsel for the 2nd defendant/petitioner herein, and of *Sri E.Madan Mohan Rao,* learned senior counsel appearing for the plaintiff/1st respondent herein. I have perused the material record.

3. The parties shall hereinafter be referred to as they are arrayed in the suit. Before proceeding further, it is necessary to refer to the pleadings and submissions of the parties.

3.1 The case of the 2nd defendant in support of her request to set aside the *ex parte* decree, dated 30.10.1998, made in the suit, in brief, is as follows:

The 2nd defendant is a house wife and a permanent resident of Ponnur, Guntur District. Her marriage was performed in the year 1986. She used to live with her husband till the year 2001. During her matrimonial life from 1996 to 2001, her children studied upto intermediate at Ponnur. Her husband used to run a readymade shop under the name and style, 'Pavan Dresses', near old bus stand, Ponnur. In the year 2001, for better education of her children, she along with her family shifted to Guntur. From the beginning, she and her family used to reside in Arundelpet, Guntur. She never resided at Saifabad, Hyderabad, at any point of time. Through her neighbours, she came to know that there was a publication in 'Visalandhra' Telugu Daily Newspaper with her name. When she verified, she came to know, to her surprise, that there is an execution petition filed and pending against her. In that paper advertisement, it is stated that she is required to appear before the Court to give reply in the said execution petition. She approached her counsel and got verified the record after entering appearance in E.P.No.187 of 2001 in the aforesaid suit. It is revealed from the record that she stood as a guarantor to the 1st defendant in respect of a business loan granted by the plaintiff-Bank. Her address particulars were also mentioned throughout the proceedings as if she is a resident of SBH Officers Colony, Saifabad, Hyderabad. She also got verified the suit records in the record room two days before filing of the subject interlocutory application. She came to know that she was set *ex parte* in the main suit and that later, a preliminary decree was passed and that in I.A.No.853 of 1999 notice is only served through substituted service by way of publication and a final decree was also passed. On verification of the documents, she came to know that all the signatures, which are stated to be of her signatures, are forged. She filed a complaint with the Sub Inspector of Police, Ponnur Town Police Station, in the year 1991 stating that she lost her cloth bag while traveling from Ponnur to Chebrolu in the APSRTC bus. Along with the cloth bag, she lost her original title deed in respect of the house property besides some of her other belongings. The same was not traced by the police. On the basis of the certificate issued by the police she had obtained a registration extract of her sale deed from the office of the Sub-Registrar, Chebrolu Mandal. On verification of the Court record, she came to know that her original document related to her property, which was lost in the year 1991, is in the suit documents filed by the plaintiff; and that it was filed along with the suit. She has no facial acquaintance with the 1st defendant. Therefore, there is no chance of her standing as a guarantor for him. If the disputed documents are sent to an expert, he can easily come to a conclusion that the signatures said to be of the 2nd defendant are forged. The execution petition is filed for execution of the decree for realization of the decree debt by sale of the schedule property. Now, the EP is pending enquiry. If the execution petition is disposed of during the pendency of the proceedings for setting aside the *ex parte* decree, she (2nd defendant) suffers serious and irreparable loss. Hence, stay of execution proceedings may be granted and the *ex parte* decree, dated 30.10.1998, in the suit may be set aside and an opportunity may be given to the 2nd defendant to contest the suit on merits.

4. Per contra, the case of the plaintiff, in brief, is this:

The material allegations in the affidavit of the 2nd defendant are false. The contentions that she never resided at Saifabad, Hyderabad, and that she came to know through her neighbours that there was a publication in 'Visalandhra' Telugu Daily with her name and that she engaged a counsel and entered appearance in the execution petition and on verification she came to know that in the suit it was stated that she stood as guarantor to the 1st defendant and that she was set *ex parte* in the main suit and that later, a preliminary decree and final decree were passed and that on further verification, she came to know that all the signatures which are stated to be her signatures are forged and that in the year 1991 she lost her cloth bag containing the title deeds and, therefore, she lodged a complaint and that based on the certificate given by the police, she obtained a registration extract of the sale deed and that she had no facial acquaintance with the 1st defendant and that there is no chance of her standing as a guarantor for the loan of the 1st defendant obtained from the plaintiff-Bank and all the further allegations are invented and are false. A preliminary decree was passed on 30.10.1998 and a final decree was passed on 04.06.2001. E.P.No.187 of 2001 is pending since a long time. The 2nd defendant came to know about the suit proceedings only two days prior to filing of the interlocutory application to set aside the *ex parte* decree is also false. There is a delay of eleven years in filing the petition to set aside the *ex parte* decree. The petition filed without an application seeking condonation of delay is liable for rejection *in limine*. There are no valid grounds for setting aside the *ex parte* decree. After the final decree was passed, the property was auctioned on 13.10.2011. The auction purchaser deposited the entire sale amount into Court. There are no valid grounds to stay the execution proceedings or to set aside the *ex parte* decree. Hence, the petition may be dismissed.

5. Learned counsel for both the parties made submissions in line with the respective contentions of the parties. I have given earnest consideration to the facts and submissions.

6. From the material borne out by the record and the pleadings & submissions, the following facts emerge for consideration: The plaintiff/1st respondent brought a suit against the 1st defendant, principal debtor, and the 2nd defendant, guarantor, i.e., the petitioner herein, on the foot of a mortgage by deposit of title deeds for recovery of a sum of Rs.3,06,800/- being the principal amount and interest due to the plaintiff bank in respect of the loan availed by the 1st defendant for which the 2nd defendant stood as a guarantor. The suit was filed, on 18.09.1997; and, a preliminary decree was passed against the defendants including the 2nd defendant on 30.10.1998, for a sum of Rs.3,19,552/- inclusive of costs, charges and expenses. As the debt was not discharged despite granting of a preliminary decree, the plaintiff bank filed an application under Order XXXIV Rule 5 read with Section 151 of the Code for passing a final decree in terms of the preliminary decree.

Subsequently, a final decree was passed. Thereafter, an execution petition was filed for sale of the property of the 2nd defendant, guarantor. At that stage, the 2nd defendant filed the subject interlocutory application before the trial Court for setting aside the *ex parte* decree, dated 30.10.1998, in the aforesaid suit. The said application was filed on 20.07.2009. The said petition was resisted by the plaintiff bank. At the time of enquiry before the trial Court, no oral and documentary evidence was adduced. On merits, the trial Court dismissed the application *inter alia* observing as under: 'Even if the plaintiff's document was lost it cannot be imagined that it was found by the 1st defendant. Even if is to be imagined that it was found by the 1st defendant, it cannot be imagined that without the presence of the owner of the property and the signatures of the said owner, the transaction of mortgage by deposit of title deeds was created and the Bank advanced the loan. Simply because the property is situated within the limits of this Court and the loan was sanctioned at Hyderabad, it does not mean that the contention of the petitioner is correct. There is nothing unusual or unnatural in sanctioning a loan to a person at a different place away from the place where the property is situated.' As already noted, the aggrieved 2nd defendant filed a Civil Miscellaneous Appeal in C.M.A.No.1 of 2013. The same was also dismissed by the Court below, by order dated 01.05.2014. In the impugned order, the Court below *inter alia* held as under: 'Nothing prevented the 2nd defendant, who is claiming that she is initially a resident of Ponnur and that thereafter a resident of Guntur, to produce proof of her residence at the relevant time at Ponnur and thereafter at Guntur. She failed to produce any evidence in support of her said contention. She also did not produce any evidence to show that she lost her title deed in the year 1991 and that she gave a complaint to the police and that the police issued a certificate. If her contention is true, nothing prevented her from producing the certificate issued by the police. Her explanation that the 1st defendant found her lost document and took it to a Nationalized Bank and presented it for creating a mortgage by deposit of title deeds is imaginary as for creation of such a loan transaction the presence of the owner of the property also at the Bank, as well as the signing of the loan documents by the owner is necessary. The loan transaction would not have taken place without her presence. In a case, where the plaintiff is a Bank and where the preliminary decree and final decree are passed about eleven long years back, the explanation should be of a standard, which can be accepted without any hesitation. But, the 2nd defendant failed to offer valid and sufficient explanation. Therefore, there are no grounds to interfere with the order of the trial Court.' Having been aggrieved of the above said order of the Court below, the 2nd defendant filed the present revision.

7. Learned counsel for the 2nd defendant, while reiterating her pleaded case, which is stated supra, would submit as follows:

She has not even got facial acquaintance with the 1st defendant, the alleged principal debtor. Therefore, the question of the 2nd defendant standing as a guarantor for the loan advanced by the plaintiff bank to the 1st defendant and the further question of depositing of the title deed of her house property for creation of mortgage by deposit of title deeds does not arise for consideration. In fact, her sale deed was lost as stated by her in her affidavit. Obviously, the same fell into wrong hands. By depositing the said sale deed with the Bank and by impersonating her and forging her signatures, the 1st defendant might have played fraud on the plaintiff bank and obtained the loan. Either in the suit, i.e., before the passing of the preliminary decree or after the suit, i.e., before passing the final decree, admittedly summonses/notices were not served on the 2nd defendant. Only notice was served by way of an advertisement in 'Visalandhra' Telugu Daily Newspaper, i.e., by substituted service. There is no direct service of suit summonses and notices at any stage on the 2nd defendant. In the proceedings throughout, a wrong address was mentioned as if the 2nd defendant is a resident of Saifabad, Hyderabad. The 2nd defendant never resided at that place. She is a resident of Ponnur and Guntur. When summonses and notices are not served either through Court or by post, the said service should not be admitted to be due service under Article 123 of the Limitation Act. The 2nd defendant is entitled to file an application to set aside the *ex parte* decree within (30) days from the date on which the she had knowledge of the decree. Two days after such knowledge, she filed the application to set aside the *ex parte* decree. Without her knowledge and by playing fraud on the plaintiff bank, the 1st defendant obtained loan by depositing her title deed, which was lost by her. Both the preliminary and final decree were passed without due service of summonses/notices on the 2nd defendant. The 2nd defendant is prepared to abide by the terms that may be imposed by the Court. Hence, the *ex parte* decree may be set aside. Both the trial Court and the Court below were carried away by the fact that there is a delay of eleven years. On imaginations and surmises, the Courts below erroneously observed that her explanation is highly improbable, though, in fact, what is stated in her explanation is true. When an affidavit is filed offering a plausible explanation, not even a counter affidavit is filed and a bare counter is filed on behalf of the plaintiff bank. The police certificate is not filed due to improper advice by the learned counsel in the trial Court. A copy of the said certificate is filed with the material papers before this Court. No Bank would advance loan on deposit of title deed of a property which is situate at a different place. A valuable house property worth lakhs of rupees was auctioned and was sold for a paltry sum of less than Rs.5 lakhs. Great injustice has occasioned to the 2nd defendant.

8. Learned senior counsel appearing for the plaintiff bank would submit as follows: 'The entire explanation of the 2nd defendant is invented and it is a concocted story. As held by the Courts below, the version of the 2nd defendant that her title deed, which was lost, was mis-utilized by the 1st defendant for obtaining a loan from the bank without her presence and her signatures is highly improbable and unbelievable. Simply because the property is within the territorial limits of Guntur District and the loan was sanctioned by a Bank at Hyderabad, it cannot be said that the said fact itself shows that the loan transaction is a suspicious transaction, as held by the Courts below. There is nothing wrong in the Bank at Hyderabad advancing a loan in respect of the property situated within Guntur District limits. Both the Courts below recorded concurrent findings that the explanation offered by the 2nd defendant is unbelievable and untenable and that no valid and sufficient grounds are made out to set aside the *ex parte* decree. The well reasoned orders of the Courts below do not call for interference while exercising the jurisdiction under Section 115 of the Code. Hence, the petition may be dismissed.'

9. The first submission of the 2nd defendant is that the 1st defendant, who is the principal debtor and to whom the plaintiff bank advanced loan, is a total stranger to her and that she does not even have facial acquaintance with him. It is not the case of the plaintiff bank that the 2nd defendant is related to the 1st defendant or that he is a friend or a person known to the 2nd defendant. When the 2nd defendant raised a serious question that her lost title deed fell into wrong hands and that the 1st defendant mis-utilized her title deed and impersonated her and obtained a bank loan from the plaintiff bank by virtue of mortgage by deposit of title deeds by forging her signatures, in the well considered view of this Court, the said contentions require appropriate examination. That is so, more particularly, in the light of the

fact that neither the summonses nor the notices were ever served on the 2nd defendant throughout the proceedings and only a notice was advertised once in 'Visalandhra' Telugu daily newspaper before passing the preliminary decree and further notice was thereafter served by means of substituted service before passing of the final decree. The specific case of the 2nd defendant is that she never resided in Saifabad, Hyderabad, i.e., the alleged address mentioned in the suit proceedings. Her case is that she resided at Ponnur till her children completed Intermediate education and that later, they shifted to Guntur and lived at Arundelpet, Guntur and that she is not aware of the suit till her neighbours informed about appearance of her name in the advertisement in 'Visalandhra' Telugu newspaper. It is also her case that from the said advertisement, it is revealed to her that she is required to file a counter in the execution proceedings. Her further case is that only on verification of the record, she came to know about the proceedings and the *ex parte* decree, just two days before filing the interlocutory application to set aside the *ex parte* decree. No doubt, by the time she had knowledge of the *ex parte* decree, a long delay of eleven years had occasioned. The only defence of the Bank is that after eleven years, the application for setting aside the ex parte decree is filed and that no valid explanation was offered for setting aside the ex parte decree. As already noted, when there is no direct service of summons through Court or by post, and the service of summonses or notices is only by means of substituted service, the said service shall not be deemed to be due service and hence, as per the provision under Article 123 of the Limitation Act, she can file an application within (30) days from the date she had knowledge of the *ex parte* decree. Therefore, on the mere ground of delay of eleven years, her request cannot be denied. It is to be noted that the learned counsel for the plaintiff bank stated that the property was already auctioned on 13.12.2011 and that a third party auction purchaser in whose favour the sale was knocked down deposited the entire sale amount. Nonetheless, during the course of hearing, it is brought to the notice of the Court that the sale warrant amount is Rs.4,41,000/- and odd. It is also fairly conceded that by now, with interest, the amount would be more and if the *ex parte* decree is set aside, the trial of the suit may take some more time and the money due to the Bank with interest would be much more by the time the suit may come to be disposed of in favour of the Bank after *de nova* trial. In view of the contention of the 2nd defendant that she does not even have facial acquaintance with the 1st defendant and her preparedness to deposit reasonable amount to the credit of the suit without prejudice to the rights and contentions of both the parties, this court, in the facts and circumstances of the case, finds that her statement in her explanation and her further case that her signatures on the bank loan documents are forged require a detailed examination.

10. On the above analysis, this Court holds that the *ex parte* decree deserves to be set aside to meet the ends of justice, however, subject to imposition of heavy terms to protect the interests of the plaintiff bank and the auction purchaser, who is not a party to this proceeding. For the aforestated reasons, this Court accordingly holds that the orders impugned in this revision and the orders of the trial Court are liable to be set aside and that the application of the 2nd defendant seeking to set aside the *ex parte* decree deserves to be allowed on terms to afford a reasonable and fair opportunity to the 2nd defendant to have the cause decided on merits.

11. In the result, the Civil Revision Petition is allowed. As a sequel, the impugned order, dated 01.05.2014, passed in C.M.A No.1 of 2013, and the order, dated 14.11.2012, passed by the trial Court in I.A.No.1376 of 2010 in O.S.No.443 of 1997 are set aside. Consequently, I.A.No.1376 of 2010 is allowed without costs, subject to the condition that the 2nd defendant shall, without prejudice to the rights and contentions of both the parties, deposit

Rs.8,00,000/- (Rupees Eight Lakhs only) to the credit of the suit before the trial Court within one month from the date of the receipt of a copy of this order. Needless to state that on failure to comply the said condition, I.A.No.1376 of 2010 in O.S.No.443 of 1997 shall stand dismissed and the orders of the Courts below shall stand revived. It is made clear that no extension of time will be granted for depositing the amount as directed in these orders. It is made clear that in case the 2nd defendant complies with the conditional order and the suit stands restored, the trial Court shall make an endeavour to dispose of the suit as expeditiously as possible and preferably within two months from the date of such restoration.

Pending miscellaneous petitions, if any, shall stand closed.

There shall be no order as to costs.

M. SEETHARAMA MURTI, J

26.04.2017
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