

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.4284 of 2017

ORDER:

This civil revision petition, under Section 115 of the Code of Civil Procedure, 1908 ['the Code', for short], by the petitioner-defendant is directed against the orders, dated 25.07.2017, of the learned III Additional Chief Judge, City Civil Court, Hyderabad, passed in IA.No.247 of 2016 in OS.No.8 of 2011.

2. I have heard the submissions of Sri P. Shiv Kumar, learned counsel for the petitioner-defendant, and of Sri Aadesh Varma, learned counsel for the respondents-plaintiffs. I have perused the material record.

3. The parties in this revision shall hereinafter be referred as the plaintiffs and the defendant as arraigned in the suit for convenience and clarity.

4. The plaintiffs brought a suit against the sole defendant for recovery of money in a sum of Rs.40,40,212/- with future interest and costs. The suit was decreed *ex parte* on 18.04.2012. Thereafter the defendant filed the afore-stated application under Order IX Rule 13 read with Section 151 of the Code requesting to set aside the *ex parte* decree. The plaintiffs have not filed any counter. On merits and by the orders impugned in this revision, the trial Court allowed the petition of the defendant subject to deposit of 10% of the decretal amount due as on the date of the decree along with costs on or before 16.08.2017 and also held that failing compliance of the said condition the petition of the defendant shall stand dismissed. Aggrieved of the said orders, the defendant is before this Court.

5. The case of the defendant in support of his request for setting aside the *ex parte* decree, in brief, is this:

The suit was decreed *ex parte* on 18.04.2012. The plaintiffs filed an execution petition (E.P.No.15 of 2015) for recovery of the decretal debt. A notice was issued to the defendant in the said E.P. The defendant received the notice in the EP, on 08.02.2016. On the said date the defendant for the first time came to know about the passing of the *ex parte* decree against him. He has not received summons in the suit at any point of time. On 29.07.2011, the plaintiffs obtained a report from the Process Server as 'door locked and hence affixed'. The process server submitted a report to the Court on 30.07.2011. Thus, the plaintiffs played fraud on the Court and also on the defendant in connivance with the Process Server of the Court. The Process Server never visited the residence of this defendant. On the basis of such report, this defendant was set *ex parte* on 04.08.2011 in the suit. Thereafter, the *ex parte* decree was passed. Hence the *ex parte* decree may be set aside.

6. As already noted, the plaintiffs have not filed a counter in spite of opportunities given to them by the trial Court. The trial Court simply observed in the order impugned that the allegation of the defendant is that he came to know about the *ex parte* decree on receipt of notices in the EP and that the suit is decreed in the year 2012 and accordingly set aside the *ex parte* decree subject to the afore-stated condition by further observing that to do substantial justice and to give opportunity to the defendant and to dispose of the case on merits such a course is necessary. Thus, the trial court did not at all advert to the case pleaded by the defendant that the summonses in the suit were not served on the

defendant and also the other contentions raised by the defendant. Be that as it may.

7. Learned counsel for the defendant would submit as follows:

The mode of service even according to the Court record is service by affixture. However, when the service is by affixture certain procedure contemplated under law is to be followed and that procedure is not followed in this case. The order was passed without adverting to the contentions of the defendant and without assigning any reasons much less valid reasons for imposing a condition to deposit 10% of the decretal amount though the contention of the defendant is that no suit summonses were ever served or offered to be served on the defendant and the defendant was set *ex parte* merely on obtaining a report from the Process Server that the door was locked and, therefore, the suit summons were affixed. When the service is by affixture, the Process Server is required to file an affidavit; and, if only the procedure contemplated under law is followed, the trial Court is obligated to set the defendant *ex parte*. Since the said procedure was not followed, the order setting the defendant *ex parte* is illegal. Therefore, the *ex parte* decree passed against the defendant without service of summons on the defendant is unsustainable and is liable to be set aside.

8. Learned counsel for the plaintiffs in reply submitted that the amount due and payable to the plaintiffs is a huge sum of more than Rs.40,00,000/- and that in the facts and circumstances of the case, the condition imposed by the trial Court is just and fair and the order impugned does not warrant interference.

9. At this stage it is also appropriate to note the cryptic judgment that was passed by the trial Court in the suit which reads as follows:

'Heard the advocate for the plaintiffs. Perused the documents. The plaintiff suit is decreed with costs interest is awarded at the rate of 12% p.a from the date of the suit till the date of realisation and at the rate of 6% on principal amount of Rs.40,40,212/- from the date of decree till the date of realisation.'

On the face of it, the judgment was not passed in accordance with law. The plaint averments are not stated and it is not even stated that whether the plaintiff was examined as a witness and it is only stated that the documents are perused and the suit is decreed. Therefore, the judgment of the trial Court passed in the afore-stated suit is no judgement in the eye of law is one of the contentions of the learned counsel for the defendant.

10. I have given earnest consideration to the facts and submissions. Admittedly, the suit summons were not served personally on the defendant either through the process department of the Court or by post. On a report of the Process Server that the door of the defendant's residence was locked and that suit summonses were affixed, the defendant was set *ex parte*. Though the principal ground of attack of the petitioner-defendant is that the report of the Process Server as 'door locked and hence affixed' was obtained in connivance with the Process Server, the fact remains that the suit summons were not served personally on the defendant either through the Process Server of the Court or by post and there was only a service by affixture. However, there was no service by affixture in accordance with the procedural discipline warranted under Order V Rule 19 & 15 of the Code and no affidavit certifying affixture on the revision petitioner-defendant's door was filed by the Process Server concerned and in the context of such an affidavit not having been filed by the Process Server, no examination on oath of the serving officer was recorded by the Court concerned as

required under Rule 19 of Order V of the Code. Thus, there was no service by affixture as per the procedure envisaged under law. The law is also well settled that before the service by affixture can be affected, the other efficacious known modes of service namely personal service, service by delivery and service by registered post etcetera have to be exhausted and notice by affixture should not be resorted to unless it is not possible to affect service in any of the above efficacious modes. Be that as it may. It is also apt to note that the trial Court also agreed with the contention of the defendant that the *ex parte* decree is liable to be set aside. For the reasons assigned supra, this Court also finds that the *ex parte* decree passed in the suit is liable to be set aside. However, the aspect which requires consideration is as to what are the terms to be imposed while setting aside the *ex parte* decree. As already noted there is no service even by affixture as envisaged under law. Hence, for no fault of the defendant, the defendant cannot be mulcted with onerous conditions while setting aside the *ex parte* decree which is passed without proper service of summons even by affixture. The contention of the defendant is also that he came to know about the *ex parte* decree only on receipt of the notices in the EP filed by the plaintiffs. In that view of the matter, this Court finds that the condition imposed by the trial Court directing the defendant to deposit 10% of the decretal amount as on the date of the decree along with costs is onerous, unjust and inequitable and is, therefore, liable to be set aside, in the facts and circumstances of the case.

11. On the above analysis, this Court finds that the revision can be disposed of with appropriate directions.

12. Accordingly, the Civil Revision Petition is disposed of and while confirming the order of the trial Court insofar as it related to the setting

aside the *ex parte* decree passed in the suit, the condition directing the defendant to deposit 10% of the decretal amount as on the date of the decree along with costs is set aside and instead the defendant is directed to deposit the costs in a sum of Rs.42,958/- to the credit of the suit within three weeks from the date of receipt of a copy of this order.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this civil revision petition shall stand closed.

M. SEETHARAMA MURTI, J

07.09.2017
Vjl

