

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.03.2018

Coram

THE HON'BLE MR.JUSTICE A.SELVAM
AND
THE HON'BLE MR.JUSTICE P.KALAIYARASAN

C.M.A.No.2886 of 2017
and
C.M.P.Nos.6031 of 2018
C.M.P.No.16914 of 2017

Mr.S.Jagan Soosai Appellant/Petitioner/
Respondent

vs.

Mrs.Christina Rafya Respondent/Respondent/
Petitioner

This Civil Miscellaneous Appeal is filed under Section 19 of the Family Court Act, 1984, against the order dated 17.08.2017 passed by the V Additional Family Court, Chennai, in I.A.No.1699 of 2015 in O.P.No.362 of 2014.

For Appellant : Mr.R.Sreerangan for
Mr.J.Gowthaman

For Respondent : Mr.J.Saravanel

JUDGMENT

(Judgment of the Court was passed by A.SELVAM.J.)

This Civil Miscellaneous Appeal has been directed against the order dated 17.08.2017, passed in I.A.No.1699 of 2015 in O.P.No.362 of 2014, by the V Additional Family Court, Chennai.

2.The respondent herein, as petitioner, has filed O.P.No.362 of 2014, on the file of the trial Court, praying to pass a decree of divorce, wherein, the present appellant has been shown as sole respondent.

3. In O.P.No.362 of 2014, an ex-parte decree has been passed on 28.07.2015 and in order to set aside the same, the respondent, as petitioner, has filed I.A.No.1699 of 2015, on the file of the trial Court under Order 9 Rule 13 of the Code of Civil Procedure, 1908 and the same has been dismissed, by way of passing the impugned order dated 17.08.2017. The impugned order dated 17.08.2017 is being challenged in the present Civil Miscellaneous Appeal.

4. The learned counsel appearing for the appellant/petitioner has contended to the effect that in O.P.No.362 of 2014, no notice has been served to the appellant/respondent therein and even without serving notice to the appellant/respondent, an ex-parte decree has been erroneously passed on 28.7.2015 and for the purpose of setting aside the same I.A.No.1699 of 2015 has been filed under Order 9 Rule 13 of the Code of Civil Procedure, 1908, but the trial Court, on the basis of Ex.R7, has come to an erroneous conclusion to the effect that on 24.03.2014, notice sent to the appellant/respondent has been served and ultimately dismissed I.A.No.1699 of 2015 by way of passing the impugned order and therefore, the impugned order passed by the trial Court is liable to be set aside.

5. The learned counsel appearing for the respondent/respondent has repeatedly contended to the effect that the private notice sent to the appellant/petitioner has been served and further, the parents of the appellant/petitioner have filed CrI.O.P.No.8336 of 2014 for getting anticipatory bail on 01.04.2014 and the appellant/petitioner has filed CrI.O.P.No.18867 of 2015 on 24.07.2015, for getting anticipatory bail and in both the petitions, it has been clearly mentioned about the pendency of O.P.No.362 of 2014. Under the said circumstances, the appellant/petitioner is having sufficient knowledge about the pendency of O.P.No.362 of 2014, but he failed to make appearance and under the said circumstances, the order of dismissal passed in I.A.No.1699 of 2015 in O.P.No.362 of 2014 by the trial Court is perfectly correct and the same does not require any interference.

6. On the basis of the divergent submissions made on either side, the Court has to analyse as to whether in O.P.No.362 of 2014, a notice has been served to the appellant/respondent/petitioner.

7. On factual aspects, on the side of the respondent/respondent, the private notice alleged to have been sent to the appellant/petitioner and also Criminal O.P.Nos.8336 of 2014 and 18867 of 2015 are relied upon.

8. It is seen from the records that the private notice

alleged to have been sent to the appellant/petitioner has been received by a signatory therein.

9.The defence put forth on the side of the appellant/petitioner is that the signature found therein is not his signature.

10.In fact, on the side of the appellant/petitioner, his Passport has been submitted for the scrutiny of the Court; wherein, his signature is found place. As per Section 73 of the Indian Evidence Act, 1872, the Court is having ample power to compare the disputed signature with admitted signature and in fact, this Court has compared the signature found in the private notice alleged to have been sent to the appellant/petitioner and also his signature found in the passport and ultimately found that the signature in the private notice is not at all the signature of the appellant/petitioner. Under the said circumstances, the Court cannot rely upon the private notice alleged to have been sent to the appellant/petitioner.

11.As mentioned supra, the parents of the appellant/petitioner have filed CrI.O.P.No.8336 of 2014 for getting anticipatory bail and likewise, the appellant/petitioner has filed CrI.O.P.No.18867 of 2015 for getting similar relief and copies of the same have been marked as Exs.R1 and R3. Ex.R1 has been filed on 01.04.2014 and Ex.R3 has been filed on 24.7.2015.

12.As rightly pointed out on the side of the respondent/respondent, both in Ex.R1 and Ex.R3 it has been clinchingly mentioned to the effect that the respondent herein has filed O.P.No.362 of 2014 on the file of the trial Court for getting a decree of divorce. Only on the basis of the aforesaid materials, on the side of the respondent, it is contended to the effect that the appellant/petitioner is having sufficient knowledge about the pendency of O.P.No.362 of 2014.

13.At this juncture, the Court has to meticulously analyse the particulars found in the Passport of the appellant/petitioner, wherein it has been clearly stated that the appellant/petitioner has come down from USA to India only on 07.08.2015.

14.It is true that in Ex.R3 it has been clearly mentioned about the pendency of O.P.No.362 of 2014. Ex.R3 has been filed on 24.07.2015. Even the appellant/petitioner is in a Foreign country, he could have given proper instructions to his counsel to file CrI.O.P.No.18867 of 2015. Under the said circumstances and also the fact that he has come down to India only on 07.08.2015, this Court is of the view that on the basis of the

materials available in Exs.R1 and R3, this Court cannot come to a conclusion that a notice has been properly served to the appellant/petitioner.

15.Now coming to the legal aspects, the learned counsel appearing for the respondent/respondent has relied upon the second proviso to Order 9 Rule 13 of the Code of Civil Procedure, 1908 and the same reads as follows:

"Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim

16.Even a cursory reading of the second proviso to Order IX Rule 13, it is easily discernible that if there is any irregularity in the service of summons to the defendant and since the defendant is having knowledge of hearing, an ex-parte decree passed against him cannot be set aside.

17.On the side of the respondent/respondent, the following decisions are relied upon:

(i)In (2011) 3 Supreme Court Cases 545 - Parimal vs. Veena alias Bharti, at paragraph No.16, the Hon'ble Supreme Court has observed as follows:

"16.In order to determine the application under Order 9 Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the Court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straitjacket formula of universal application."

(ii)In (2008) 2 Supreme Court Cases 326 - Sunil Poddar and Others vs. Union Bank of India, at paragraph No.23, the Hon'ble Supreme Court has observed as follows:

"23.It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the

summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiffs claim, he cannot put forward a ground of non service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code. Since the said provision applies to Debt Recovery Tribunals and Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before the DRT, they had no sufficient time to appear and answer the claim of the plaintiff-bank and on that ground, ex parte order deserves to be set aside."

18. From a conjoint reading of the decisions mentioned supra, it is made clear that for setting aside an ex-parte decree, the Court has to look into as to whether the defendant has had notice of date of hearing of the suit and he has had sufficient time to appear and answer the claim of the plaintiff. Once these conditions are satisfied, an ex-parte decree cannot be set aside, even if it is established that there was irregularity in the service of summons. If the Court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non-service of summons for setting aside ex-parte decree passed against him by invoking Order 9 Rule 13 of the Code of Civil Procedure, 1908.

19. As mentioned supra, an ex-parte decree cannot be set aside if the defendant has had notice of hearing and also he has had sufficient time to make appearance.

20. In the instant case, as observed supra, the signature found in the private notice alleged to have been sent to the appellant/petitioner is not at all his signature and further, he has come down to India only on 07.08.2015, whereas, the ex-parte decree has been passed on 28.07.2015. It is not an exaggeration

to say that no piece of paper is available for the purpose of showing that notice has been sent to the appellant/petitioner and the same has been served to him.

21.Considering the aforesaid factual aspects and also considering that no sufficient document is available for the purpose of showing that the appellant/petitioner, after receipt of notice, has evaded appearance, this Court is of the view that the contentions put forth on the side of the respondent cannot be accepted. Further, the trial Court in paragraph No.7 of the order has erroneously stated to the effect that through Ex.R7, the notice sent to the appellant/petitioner has been served on him, on 24.03.2014. In fact, Ex.R7 is otherwise. Therefore, viewing from any angle, the order passed by the trial Court in I.A.No.1699 of 2015 is not factually and legally sustainable and the same is liable to be set aside and further O.P.No.362 of 2014 has been filed for getting a decree of divorce and sufficient opportunity must be given to the appellant/petitioner. Under the said circumstances, the present Civil Miscellaneous Appeal is liable to be allowed.

In fine, this Civil Miscellaneous Appeal is allowed without cost. The order passed in I.A.No.1699 of 2015 in O.P.No.362 of 2014 by the trial Court is set aside and the petition filed in I.A.No.1699 of 2015 is allowed without cost. The ex-parte decree dated 28.07.2015 passed in O.P.No.362 of 2014 is set aside. The appellant/petitioner is strictly directed to file a detailed counter in O.P.No.362 of 2014, within a period of one month and the trial Court is directed to dispose of O.P.No.362 of 2014, after giving proper opportunities to both parties, before the end of November 2018 and report the disposal to the Registry without fail. Connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

msk

To

1. The V Additional Principal Judge,
Family Court, Chennai
2. The I Additional Principal Judge,
Family Court, Chennai

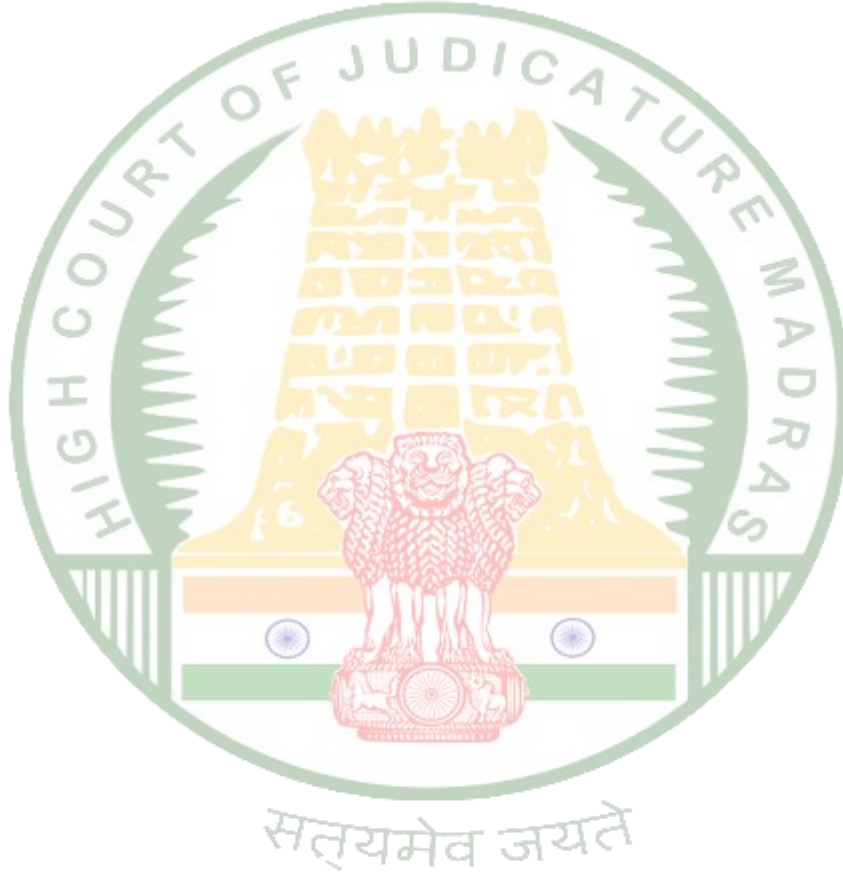
+1cc to Mr.J.Saravanavel, Advocate, S.R.No.22067

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VR Section, High Court,
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+3ccs to Mr.J.Gowthaman, Advocate, S.R.No.22786 (19/04/18)

C.M.A.No.2886 of 2017

GJII (CO)
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