

HON'BLE SRI JUSTICE S.V. BHATT

C.R.P.No.2403 OF 2012

ORDER:

Heard Mr.A.Prabhakar Rao for petitioner and Mr.Ghanshyamdas Mandhani for respondent.

The plaintiff is the revision petitioner. The revision is directed against the order in C.M.A.No.79 of 2010 on the file of the II-Additional District Judge, Warangal. The circumstances relevant for disposing of the revision are briefly stated thus:

On 31.12.2000, agreement of sale is said to have been entered into between the petitioner and the respondent herein. The respondent being the vendor issued notice dated 19.04.2005, followed by a reply issued by the petitioner on 07.05.2005. On 23.09.2005, the suit is filed for specific performance of agreement of sale dated 31.12.2000. The suit summons ordered by the Court below, at the first instance, was returned with the endorsement 'party left the house' and the second endorsement as 'whereabouts not known'. Thereafter, on the application filed by the revision petitioner, substituted service through paper publication was permitted and the case is that the petitioner got the notice published in the paper having local circulation and known as 'Janatha Daily'. On 14.06.2006, *ex parte* evidence was recorded resulting in O.S.No.503 of 2005 being decreed. The respondent, in the month of December, 2008, filed I.A.No.28 of 2009 praying for setting aside the *ex parte* decree dated 14.06.2006.

The gist of the averments in the affidavit filed in support of I.A.No.28 of 2008 is that her father settled first floor portion to her sister towards pasupu kumkuma and ever since her sister has been in peaceful possession and enjoyment; that since the plaintiff was trying to interfere with her sister's property, her sister filed O.S.No.1529 of 2004 in the Court of the Principal Junior Civil Judge, Warangal seeking permanent injunction; the said defendant lost contact of her father who is staying in Saudi Arabia and could not communicate to him about filing of O.S.No.503 of 2005 for specific performance of agreement of sale, which was decreed *ex parte* on 14.05.2006 and that plaintiff got executed sale deed on 01.07.2008 in pursuance of *ex parte* decree; that she contacted her father on 06.11.2008 and informed him about the same; that her father has not entered into any such agreement and also not aware of the proceedings in the suit and instructed her to take steps for setting aside the *ex parte* decree; that plaintiff got published the suit summons in Janatha Daily which does not have circulation in Warangal Town; that as per the instructions of her father she filed the present application as his GPA holder and prayed for setting aside the *ex parte* order dated 14.05.2006.

The revision petitioner filed counter and on all fours objected to each one of the averments made by the respondent in support of the prayer for setting aside the *ex parte* decree dated 14.06.2006. For convenience, the gist of the stand taken by the revision petitioner is stated thus:

The gift settlement deed is a sham and bogus document brought into existence to defeat the rights of the plaintiff. The plaintiff and her sister were aware of filing of the present suit and also passing of decree. As the summons in the suit, which were sent to the last known address, could not be served on the plaintiff, the trial Court ordered substituted service and posted the matter to 12.04.2006. Vakalath was filed in the suit and the matter was posted to 25.04.2006, on which date the plaintiff was set *ex parte*. As seen from the above developments, the plaintiff was aware of the pendency of the suit. The petition filed by the plaintiff for setting aside the *ex parte* order is not maintainable and is liable to be dismissed.

The trial Court, by referring to Exs.C1, C2 and C3 substantially has recorded the finding that the respondent herein had knowledge of the pendency of O.S.No.503 of 2005 and filing the application under Order IX Rule 13 CPC firstly without praying for condonation of delay is untenable and secondly as the reasons stated are inconsistent with the exhibits marked in the enquiry, dismissed I.A.No.28 of 2009.

The learned II-Additional District Judge on 31.01.2012 allowed the civil miscellaneous appeal. Hence, the revision.

Mr.Prabhakar Rao contends that the consideration of the prayer for setting aside the *ex parte* decree dated 14.06.2006 by the appellate Court is completely perfunctory. The appellate Court committed an error in law by not taking note of a few

circumstances, which, if are considered would have had due weight in deliberating whether the reason stated on the absence and lack of knowledge of the respondent about filing of O.S.No.503 of 2005 is tenable or not. According to him, the fact that a vakalath was presented through one Mr.Jithendra Prasad and returned by the officer is a strong circumstance which would contradict the findings recorded by the appellate Court. He further contends that the observation of the appellate Court that the revision petitioner except raising objection available under Article 32 did not raise other substantive objections of the facts in issue between the parties is incorrect. Therefore, the final conclusion recorded by the appellate Court warrants interference of this Court under Article 227 of the Constitution. Firstly, he prays for setting aside the order under appeal and alternatively he submits that this is a case where this Court ought to set aside the order under appeal and remit the matter to appellate Court for consideration afresh.

Mr.Ghanshyamdas Mandhani, on the other hand, contends that the revision petitioner either by choice or otherwise has described the address of respondent as residing in India. According to him, the revision petitioner had knowledge of the respondent residing in Muscat at the relevant point of time can be easily appreciated from the exchange of notices. The respondent is unaware of the proceedings and, therefore, the notices by referring to which the *ex parte* decree is passed cannot be treated as proper service on the defendant. In other words, there is no need to file a petition for condoning the delay. Therefore, he places

strong reliance on the findings of fact recorded by the appellate Court and prays for dismissing the revision.

Before I appreciate the contentions above, I find it convenient to preface the operative portion of the order under revision:

“In the suit filed by plaintiff, summons were sent to the defendant’s address at Warangal through court and registered post and the summons could not be served, therefore a publication was taken out in “Janatha Daily” newspaper and one G.S.R.R Advocate filed Vakalath for defendant and the court on 12.4.2006 found that a third party filed Vakalath and the same was returned on 25.4.2006 and the defendant was set ex parte.

The trial Court relied upon Exs.C1 to C3 holding that the G.P.A holder of the petitioner was aware of the proceedings and she is aware of filing of suit since 17.1.2018, therefore, the version that she contacted her father on 6.7.2000 is not believable in view of her relationship with her father Sadanandam and she must have been in contact with her father regularly and since she had already filed Exs.C1 to C3 the petitioner who is the defendant in the suit has got knowledge of the filing of suit against him.

In the present case, the allegations in the affidavit of the deponent who filed affidavit in support of I.A.No.28/2009 are not denied by the respondent/plaintiff in the counter, except the contention that the application was not maintainable in law for non-compliance of Rule 32 CRP, and no other allegations were made denying the allegations made by the alleged G.P.A holder of the petitioner in her affidavit. Even as per the respondent, the petitioner Sadanandam has been residing abroad since the year 2000 and plaintiff instead of taking out summons to the address of Sadanandam, the defendant simply got issued summons to the house address of Sadanandam, the petitioner at Warangal in India. When the plaintiff is aware that the defendant is not residing in India he should have been taken steps to get

publication published in abroad, but the respondent has not done so. In view of non-denial of allegations made by defendant's deponent has not done so. In view of non-denial of allegations made by defendant's deponent in the affidavit and also in view of the above said facts that the plaintiff being aware that the defendant is residing abroad take out publication in "Janatha Daily" newspaper at Warangal is not sufficient service and in my opinion the order of the trial Court is erroneous and the same is liable to be set aside. Hence appeal is allowed".

In the case on hand, the circumstances which have bearing on the discretion exercised by the appellate Court are that the respondent issued the notice which was replied by the revision petitioner/plaintiff. The plaint refers to the reason for not filing the suit within the period of three years, to the absence of respondent from the territorial jurisdiction of the Court. In other words, the revision petitioner had knowledge that the respondent was living in Muscat when the suit was filed. The revision petitioner has taken out notice to the last resided address or as given in the agreement of sale but not to the known address where the respondent resided. This aspect of the matter is at the first instance considered by the appellate Court and thereafter taking note of the totality of circumstances was of the view that ordering substituted service by referring to previous two endorsements is unsustainable and found that the respondent is required to be heard before a decree is passed.

In the circumstances, though some attempt is made by Mr.A.Prabhakar Rao, keeping in view the totality of circumstances of the case, I am convinced that the grounds now canvassed by

the petitioner do not come within the scope of Article 227 of the Constitution. This Court is particularly convinced that with full knowledge of the respondent staying in Muscat, the notices have been taken out to an address not actually resided by respondent. The discretion or the issue is considered on understanding the totality of circumstances by the learned Appellate Judge. The order of the appellate Court, hence, does not warrant interference under Article 227 of the Constitution of India.

The revision fails and is, accordingly, dismissed. The suit is directed to be disposed of within three months from the date of receipt of a copy of this order. There shall no order as to costs.

Pending miscellaneous petitions, if any, stand closed.

23rd November, 2018

Lrkm



S.V.BHATT, J

