

* HONOURABLE SRI JUSTICE D.V.S.S. SOMAYAJULU

+ CRP No.3387 of 2015

% 31-12-2018

M.S. Naudine Pharma,
rep.by its Partner
and another.

... Petitioners/
Defendants

Vs.

\$ M/s. Med Manor Organics Pvt. Ltd.,
rep.by its Director

.. Respondent/
Plaintiff

! Counsel for the appellant: Sri M.R.K. Chakravarthy

Counsel for the Respondents: Palanki Rama Mohan

< Gist:

> Head Note:

? Cases referred:

- ¹ 2002 (6) ALD 473
2. (2018) 2 SCC 649
3. 2003 (4) ALD 481



HONOURABLE SRI JUSTICE D.V.S.S. SOMAYAJULU

CRP No.3387 of 2015

ORDER:

This Civil Revision Petition is filed by the defendants questioning the order dated 24.07.2015 in IA No.61 of 2015 in OS No.540 of 2013 passed by the VII Senior Civil Judge, City Civil Court, Hyderabad.

The suit OS No.540 of 2013 was filed for recovery of an amount of Rs.7,96,443.78 paise with interest, costs etc. The Court ordered notice to the defendants in the suit. The summons were not served, and substituted service of summons appear to have been ordered and the defendants were set *ex parte*. Thereafter, an *ex parte* judgment and decree was passed on 08.11.2013.

The plaintiff in the suit who is the respondent herein thereafter took out execution and filed E.P.No.537 of 2014 in Kerala. After receipt of notice in the said application, the present application was filed to condone the delay of 357 days in filing the application to set aside the *ex parte* judgment and decree dated 08.11.2013.

The respondent/plaintiff filed a counter opposing the application. Thereafter, the impugned order came to be passed by which the lower Court rejected the application stating that the delay of 357 days was

abnormal. Questioning the same, the present revision is filed.

This Court has heard Sri M.R.K. Chakravarthy, learned counsel for the revision petitioners/defendants and Sri Palanki Rama Mohan, learned counsel for the respondent/plaintiff.

The learned counsel for the revision petitioners/defendants argued that the entire procedure adopted by the lower Court is incorrect and that the Court was in a hurry to set his clients *ex parte*. He pointed out that even before the summons were returned, an application under Order V Rule 20 CPC was filed and the same was ordered on the very same day. Thereafter, the plaintiff was set *ex parte* based on the substituted service. In addition, the learned counsel pointed out that they were aware of the judgment and decree only after a receipt of the notice in the execution petition filed in Kerala. They made their appearance in that Court and thereafter filed the present the application to set aside the *ex parte* decree and judgment after condoning the delay of 357 days.

The learned counsel for the revision petitioners argued that as a result of the above, sufficient cause is made out to condone the delay. He relied upon

M. Narasimha Reddy v. Begari Samuel¹ and the explanation to Article 123 of the Limitation Act and submitted that when substituted service is ordered under Order V Rule 20 CPC, it shall not be deemed to be service for the purpose of deciding the limitation. In addition, the learned counsel also relied upon **Neerja Realtors Private Limited v. Janglu (Dead) through LRs.**² and argued that substituted service cannot be routinely ordered. The Court should apply its mind to the situation and the provisions of Order V Rule 20 CPC before passing an order for substituted service. The learned counsel also submitted that the more than sufficient cause has been made out for condoning the delay.

The learned counsel for the respondent/plaintiff, on the other hand, argued that the defendants are guilty of suppression of facts and that there is no clarity as to when they were aware of passing of the decree and judgment and the enquiries that are supposedly made in Hyderabad are not clearly established. The learned counsel also argued that every days delay should be explained. On the other hand, he submitted that even after appearing in the execution petition in Kerala, the petitioners did not take steps to file the application

¹ 2002 (6) ALD 473

² (2018) 2 SCC 649

within time. Last but not least, the learned counsel submitted that even a written statement has not been filed till date. Therefore, it is his submission that the entire explanation given in the affidavit is not correct and that the application deserves to be rejected.

This Court after hearing both the learned counsel notices that the docket orders of the proceedings that are filed are not really disputed. It appears that the publication was ordered even without recording that the summons were returned un-served. The application for substituted service was also filed and ordered on the same day.

The lower Court did not record its reasons as mandated by Order V Rule 20 CPC. The judgment of the Hon'ble Supreme Court of India relied upon by the learned counsel for the revision petitioners is very clear on this subject. The Hon'ble Supreme Court has clearly held that the lower Court must apply its mind to the requirements of Order V Rule 20 CPC and its order while making and directing substitute service should reflect the due consideration of all the factors. The satisfaction that is to be recorded is clearly not visible in this case. The record does not show that the defendant was avoiding to receive the summons or that the summons could not be

served in the ordinary way. This recording of the satisfaction is absent.

The second point that arises for consideration is Article 123 of the Limitation Act. This article of the Limitation Act prescribes a period of 30 days to set aside the decree passed *ex parte*. The 30-day period commences from the date of the decree or in case summons or notice is not duly served from the date of knowledge of the decree. The explanation of Article 123 of the Limitation Act makes it clear that substituted service under Order V Rule 20 CPC shall not be deemed to be due service. Therefore, the date of knowledge is the critical factor. The judgment of the learned single Judge of this Court relied upon by the learned counsel for the revision petitioners in **M. Narasimha Reddy** (1 supra) is squarely applicable to the facts of the present case.

Coming to the question of delay, the need to explain every days delay is no longer necessary. The length of the delay is not the criteria but the correctness of the reasons or the explanation for the delay is the important factor. As per the settled law on this subject, sufficient cause has to be liberally interpreted provided negligence, inaction, lack of bona fides etc. are not made out. The purpose of the Courts are established to render justice,

therefore, as held in ***Neerja Realtors Private Limited's*** case (2 supra), the Court should take a liberal pragmatic justice oriented approach. If the Court finds that the explanation is concocted or created, then the application can be rejected. However, if the reading of the entire facts goes to show that there is no issue of lack of bona fides or any allegation of fraud etc., the Court should be liberal towards condoning the delay. There is no hard and fast rule for condoning the delay and each case should be dealt with on its own merits. The learned counsel also argued that a separate application is also not necessary to condone the delay.

In the case on hand, the petitioners have pointed out that the service of summons is not as per the procedure mandated under the law. The procedure prescribed under Order V Rule 20 CPC was not followed. The date of knowledge as can be seen is only after receipt of notices in the execution proceedings. Thereafter, the petitioner appeared on 09.12.2014 before the executing Court in Kerala and soon thereafter they filed the present application. The time lag between their appearance in Kerala in December 2014 and filing of the present application is not very long. In addition, the Court notices that in the plaint, the address of the revision petitioner is

given as H.No.11-533/A Kaudine Towers, Thrissur, but in the execution petition, the words ‘Opposite to the Police Station, Lallur’ are added. Both the learned counsel relied upon this so called addition and argued that this was deliberately done to avoid service while the respondent said it was merely clarificatory. This Court notices that there is a difference between the addresses furnished in the plaint and the addresses mentioned in the execution application. This could have facilitated the service in the EP and the lack of this detail could have been the cause for the non-service in the original court.

The last point that arises for consideration is the finding of the lower Court that the defendants did not file their written statement and that was a factor that is highlighted by the counsel for the respondent. In the lower Court, a decision reported in ***K. Vasudevreddy v. B. Chandrakala***³ cited for this proposition appears to have weighed with the court.

The learned counsel for the revision petitioners submitted that according to them there is an arbitration clause in the agreement between the parties and that therefore they did not file their written statement, since the filing of a written statement would amount to

³ 2003 (4) ALD 481

submitting the jurisdiction of the Court. This Court is of the opinion that the submission is wrong. The defendants who want to rely upon the arbitration clause can appear under protest before the lower Court and state that it has no jurisdiction to try suit in view of the arbitration clause by filing an appropriate memo or an affidavit stating that their appearance is under protest in view of the arbitration clause. The defendant can also file a written statement with the said protest about the lack of jurisdiction of the court in view of the arbitration clause. The written statement can also be filed after the application is filed under Sec 8 of the Arbitration Act raising the issue and seeking an order to refer the parties to arbitration. It is only if the defendant unconditionally submits to the jurisdiction of the Court and does not follow the time lines mentioned in sec 8 of the Arbitration Act 1996 he may lose his right to invoke the arbitration clause. The law does not prohibit a party to raise a protest about the lack of jurisdiction in a court and then appear in the Court without prejudice to the protest raised. This Court is therefore of the opinion that the conclusion of the lower Court that the non-filing of the written statement is a factor for disallowing the application is wrong.

Ultimately, this Court after reviewing the entire case, after hearing the submissions made etc., is of the opinion that sufficient cause is made out to condone the delay in the case on hand. The reasons mentioned by the revision petitioners are cogent and they offer a reasonable explanation which is a sufficient cause to condone the delay. The service of notice under Order 5, the filing of the EP in the executing court in Kerala, the notice served in the said E.P and the consequent knowledge of the proceedings are a sufficient explanation for the delay. This court holds that the actions of the revision petitioners do not suffer from a lack of bona fides etc.

Therefore, this Court is of the opinion that the impugned order that is passed is not correct and it should be set aside.

Accordingly, the Civil Revision Petition is allowed. The impugned order dated 24.07.2015 in IA No.61 of 2015 of the VII Senior Civil Judge, City Civil Court, Hyderabad, is set aside. IA No.61 of 2015 is therefore allowed and the delay of 357 days in filing the application to set aside the *ex parte* decree and judgment dated 08.11.2013 is condoned. The lower Court is directed to hear the other application that is filed to set aside the *ex*

parte order without in any away being influenced by what is mentioned in this order. In the circumstances of the case, there shall be no order as to costs.

Miscellaneous Petitions, if any pending in this revision shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 31.12.2018

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