

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.10.2019

CORAM :

THE HON'BLE MR. JUSTICE M. DURAISWAMY

C.R.P. (PD) No.4455 of 2013

and

M.P. No.1 of 2013

M.Kokila

... Revision Petitioner

Vs.

1.A.Ganesan

2.Dhanalakshmi

... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the order of the learned Additional District Munsif, Vellore, dated 30.08.2013 made in I.A. No.1082 of 2012 in O.S. No.568 of 2007 and allow the Civil Revision Petition.

For Petitioner : Mr. G.Jeremiah

For Respondents : Mr. A.Gowthaman

ORDER

Challenging the fair and final order passed in I.A. No.1082 of 2012 in O.S. No.568 of 2007 on the file of the Additional District Munsif Court, Vellore, the plaintiff has filed the above Civil Revision Petition.

2.The plaintiff filed a suit in O.S. No.568 of 2007 for specific performance and for other reliefs. Since the defendants failed to appear before the trial Court, they were set *ex parte* and an *ex parte* decree was passed on 02.04.2009. Thereafter, the defendants filed an application in I.A. No.1082 of 2012 in O.S. No.568 of 2007 to condone the delay of 1220 days for filing an application to set aside the *ex parte* decree, passed on 02.04.2009. In the affidavit filed in support of the application, the defendants have stated that they came to know about the filing of the suit only on 29.06.2012 through the Court aamin at the time of executing the Court warrant. Further, in the affidavit, the defendants have stated that, in the year 2010, an unclear notice was served on the 1st defendant and immediately he approached the plaintiff's husband, namely, Margasagayam, who gave assurance to him that he will settle the dispute between him and the plaintiff amicably. Since the suit summons were not served on the defendants, they have filed the application to set aside the *ex parte* decree with a delay of 1220 days. Further, the 1st defendant has also stated that the 2nd defendant, who is his wife, often fall ill due to severe diabetes and blood pressure and she was also taking treatment for her ailments and hence, the application could not be filed immediately.

3.The plaintiff, in her counter affidavit, while disputing the averments in the affidavit filed in support of the application, also submitted that the defendants refused to receive the summons and therefore, they were set *ex parte* and an *ex parte* decree was passed on 02.04.2009.

4.The trial Court, after taking into consideration the case of both parties, on verifying the Court bundle, found that no Court summons were taken to the defendants and there was no order passed for taking private notice to them. The private notices were taken to the defendants by the plaintiff without any order being passed by the trial Court to that effect. The private notices sent to the defendants were returned with an endorsement "refused". When the plaintiff has taken private notices without any order being passed by the trial Court, the same have no legal sanctity. Hence, the same cannot be looked into. When the trial Court has specifically stated that Court summons were not taken to the defendants, that has to be accepted.

5.Since the issue involved in the present Civil Revision Petition is with regard to the service of summons, this Court also called for the original records from the trial Court and on perusing the same, found that no Court summons were available in the bundle. On 10.06.2008, the trial Court erroneously recorded that notice sent by RPAD was refused. Hence, the

defendants were set *ex parte*. In the absence of service of suit summons, the trial Court should not have even considered the private notices, sent by the plaintiff without any order passed by the trial Court to that effect.

6.The learned counsel appearing for the petitioner relied upon a judgment of the Hon'ble Supreme Court reported in **2013 (5) CTC 547** [*Esha Bhattacharjee v. Managing Committee of Raghunathpur, Nafar Academy & others*], wherein, the Hon'ble Apex Court has held as follows :

"13. Recently in *Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai*, 2012 (5) SCC 157, the learned Judges referred to the pronouncement in *Vedabai v. Shantaram Baburao Patil*, 2001 (3) CTC 763 (SC) : 2001 (9) SCC 106, wherein it has been opined that a distinction must be made between a case where the delay is inordinate and a case where the delay is of few days and whereas in the former case the consideration of prejudice to the other side will be a relevant factor, in the latter case no such consideration arises. Thereafter, the two-Judge Bench ruled thus: -

"23. What needs to be emphasized is that even though a liberal and justice-oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.

24. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

Eventually, the Bench upon perusal of the application for condonation of delay and the affidavit on record came to hold that certain necessary facts were conspicuously silent and, accordingly, reversed the decision of the High Court which had condoned the delay of more than seven years."

7. Though, there is no dispute with regard to the ratio laid down by the Hon'ble Supreme Court in the above referred judgment, since the suit summons itself were not sent to the defendants, the said ratio cannot be applied to the present case.

8. The learned counsel appearing for the respondents, in support of his contentions, relied upon a judgment of the Hon'ble Supreme Court reported in **2018 (15) SCC 166** [Auto Cars v. Trimurti Cargo Movers Pvt. Ltd. & others], wherein, the Hon'ble Supreme Court held as follows :

"27. The object behind sending the summons is essentially threefold- First, it is to apprise the defendant about

the filing of a case by the plaintiff against him; Second, to serve the defendant with the copy of the plaint filed against him; and Third, to inform the defendant about actual day, date, year, time and the particular Court so that he is able to appear in the Court on the date fixed for his/her appearance in the said case and answer the suit either personally or through his lawyer.

...

32.The aforesaid wording in the summons insofar as it pertains to giving 15 days' time without mentioning a specific day, date, year and time is not in conformity with the requirements of Section 27 read with Appendix B.

33.In the light of the foregoing discussions, service of summons on the defendants without mentioning therein a specific day, date, year and time cannot be held as "summons duly served" on the defendants within the meaning of Order IX Rule 13 of the Code. In other words, such summons and the service effected pursuant thereto cannot be held to be in conformity with Section 27 read with the statutory format prescribed in Appendix B Process (I and IA) and Order 5 Rule 20(3) of the Code.

34.It is for this reason, we are of the considered opinion that the appellant (Defendant No.1) was able to make out a ground contemplated under Order IX Rule 13 of the Code for setting aside the ex parte decree.

35. Once the Appellant (Defendant No.1) is able to show that "summons were not duly served on him" as prescribed under Section 27 read with Appendix B Process IA and Order V Rule 20(3) of the Code then it is one of the grounds for setting aside the ex parte decree under Order IX Rule 13 of the Code. In our view, the appellant (defendant No.1) is able to make out the ground.

36. In view of the foregoing discussion, we need not consider any other ground though raised by the appellant (defendant No.1) in support of their case because the aforesaid ground which we have dealt with though not raised by the appellant in the Courts below but being a pure question of law and going to the root of the matter affecting the very jurisdiction of the Court could be allowed to be raised in this Court for doing substantial justice.

37. Before parting, we consider it apposite to remind ourselves with the apt observations of a learned Judge - Vivian Bose, J., which His Lordship made while dealing with the scope of Order IX in a leading case of Sangram Singh vs. Election Tribunal (MANU/SC/0044/1955 : AIR 1955 SC 425).

38. The learned Judge speaking for the Bench in his distinctive style of writing reminded the Courts to keep the following observations in mind while deciding the rights of the parties which reads as under:

"A code of procedure must be regarded as such. It is procedure something designed to facilitate justice

and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

39. In the light of the foregoing discussion, the appeal succeeds and is allowed. The judgments of the Single Judge and Division Bench are set aside. The appellant's (defendant No.1) application filed under Order IX Rule 13 of the Code (GA No. 766/2016) is allowed. As a consequence, the ex parte decree dated 09.02.2015 passed in C.S. No. 15/2014 is set aside. The civil suit is restored to its original file."

9. Since the defendants were able to show that the summons were not duly served on them, as prescribed under Section 27 read with Appendix-B Process-IA and Order V Rule 20 Sub-clause 3 of the Code of Civil Procedure, it is one of the grounds for setting aside the *ex parte* decree under Order IX

Rule 13 of the Code. In the case on hand, the trial Court itself found that no suit summons were served on the defendants. The ratio laid down by the Hon'ble Supreme Court in the judgment relied upon by the learned counsel for the respondents squarely applies to the present case.

10.The trial Court, considering all these aspects, rightly condoned the delay of 1220 days in filing the application to set aside the *ex parte* decree, on payment of cost of Rs.6,000/-. I do not find any error or irregularity in the order passed by the trial Court. Thus, this Civil Revision Petition is devoid of merits and the same is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

11.Since the suit is pending from the year 2007, I direct the Additional District Munsif, Vellore, to dispose of the suit in O.S. No.568 of 2007 on merits and in accordance with law, within a period of four months from the date of receipt of a copy of this order.

Note :

Registry is directed to return the original records pertaining to O.S. No.568 of 2007, received from the Additional District Munsif's Court, Vellore, forthwith, along with a copy of the order passed in the above Civil Revision Petition.

Issue order copy on 03.10.2019.

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01.10.2019

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M. DURAISWAMY, J.

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Index : Yes / No
Internet : Yes / No
Speaking order / Nonspeaking order

To

The Additional District Munsif,
Vellore.



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