

**HIGH COURT FOR THE STATE OF TELANGANA :
HYDERABAD**

CIVIL REVISION PETITION NO.4309 OF 2015

Between:

Syed Ghouse Mohiuddin, S/o. Syed Ahmed.

.... Petitioner

Vs.

1. The Singareni Collieries Company Limited, rep.by its General Manager, RG-III, Godavarikhani, Karimnagar District and one other.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 24.07.2019

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

1. Whether Reporters of Local newspapers may be allowed to see the Judgments?
2. Whether the copies of judgment may be marked to Law Reports/Journals?
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?

JUSTICE M.S.RAMACHANDRA RAO

*** THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO**

CIVIL REVISION PETITION NO.4309 OF 2015

% Dated 24.07.2019

Between:

Syed Ghouse Mohiuddin, S/o. Syed Ahmed.

.... Petitioner

And

\$ 1. The Singareni Collieries Company Limited, rep.by its General Manager, RG-III, Godavarikhani, Karimnagar District and one other.

.... Respondents

! Counsel for the petitioner : Mr. T. S. Praveen Kumar

^ Counsel for respondents : Mr. J. Sreenivasa Rao,
Standing Counsel

<GIST:

> HEAD NOTE:

? Citations:

1. 1993(1) Civil L.J. 629
2. (1988)1 ALT 783
3. (2002)5 SCC 377

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION NO.4309 OF 2015

ORDER:

This Revision is filed under Section 115 of the Code of Civil Procedure, 1908 (CPC), challenging the order dt. 25.06.2015 in C.M.A.No.14 of 2014 on the file of the Principal District Judge, Karimnagar, confirming the order dt. 08.07.2013 in I.A.No.595 of 2011 in O.S.No.22 of 2000 on the file of the Senior Civil Judge at Peddapalli.

Petitioner herein is defendant in O.S.No.22 of 2000 filed by the respondents against the petitioner for recovery of a sum of Rs.2,26,349-50 ps.

Petitioner was set *ex parte* and an *ex parte* decree was passed against the petitioner on 07.11.2002 by the Senior Civil Judge at Peddapalli.

Thereafter, E.P.No.22 of 2011 was filed by the respondents against the petitioner. Notice in the said E.P. was served on the petitioner on 27.08.2011 at 8.30 am.

Petitioner then filed I.A.No.595 of 2011 in O.S.No.22 of 2000 before the Senior Civil Judge at Peddapalli invoking Order IX Rule 13 CPC to set aside the *ex parte* decree dt. 07.11.2002 passed in O.S.No.22 of 2000.

In the affidavit filed in support of the said application, petitioner stated that he joined in the first respondent-organization and was later promoted as Head-Master in 1980. He stated that during his

service with the first respondent, he was residing in a quarter allotted to him in Godavarikhani.

He alleged that he had no knowledge about filing of the suit by the respondents against him and he did not receive any summons from the Court of the Senior Civil Judge at Peddapalli. He alleged that only to harass him, the suit appears to have been filed and an *ex parte* decree was obtained without serving summons on him. He also alleged that the respondents played fraud on him and obtained *ex parte* decree by taking out publication of summons in newspaper which had no circulation in Godavarikhani widely.

Counter affidavit was filed by the first respondent opposing the application and alleging that the petitioner, when he was employed in the first respondent-organization, had misappropriated grant-in-aid amount pertaining to a school to the tune of Rs.2,26,347-50 ps and committed other irregularities. It alleged that a charge sheet was issued to the petitioner and after conducting enquiry, petitioner was dismissed from service w.e.f. 30.05.1998. It is alleged that the petitioner participated in the enquiry, and thereafter, the first respondent issued a notice to him advising him to remit the amount misappropriated through its advocate to the residential address of the petitioner at Godavarikhani, and the petitioner received it, but did not pay it.

It is alleged that the suit summons issued to the petitioner sent to Godavarikhani residence of the petitioner were returned unserved with endorsement “no addressee is available at the said address”; that

the Headmaster of the school informed the petitioner's address as "Brilliant Real Estates, Abids, Hyderabad", and summons were sent to that address also. It is alleged that, that such summons were also returned unserved, and so summons were published on 13.10.2002 in the "Eenadu" daily Newspaper Hyderabad edition as per the direction of the Court informing the petitioner to appear before the Court on 21.10.2002.

It is alleged that the petitioner did not give his address at the last residence or to the local post-office and so the respondents had no option to publish the summons in the daily Newspaper. It is contended that the petitioner did not attend the Court on 21.10.2002; so he was set *ex parte* and the suit was posted to 07.11.2002 for the respondents' evidence; and after examining P.W.1 on the said date, suit was decreed.

It is alleged that the respondents, after thorough enquiry, located the whereabouts of the petitioner after nine years of the date of decree and got transferred the decree to the Court of Senior Civil Judge, Khammam, for execution. It is also contended that the respondents had filed a criminal complaint on 25.11.1997 before the Station House Officer, I Town Police Station, Godavarikhani, against the petitioner regarding misappropriation committed by him and apprehending legal action from the police, the petitioner evaded to receive the summons and avoided attending the Court intentionally.

Lastly, it is contended that the application filed by the petitioner after a lapse of nine years of the date of decree is not maintainable and therefore, should be dismissed.

The second respondent adopted the counter filed by the first respondent.

By order dated 08.07.2013, I.A.No.595 of 2011 was dismissed by the Senior Civil Judge, Peddapalli, observing that petitioner did not file application to condone the delay in filing the petition under Order IX Rule 13 CPC to set aside the *ex parte* decree dt. 07.11.2002. It is also held that the contentions of the petitioner did not disclose why Article 123 of the Limitation Act, 1963 (“Act, 1963” for brevity), should be dispensed with when only thirty days was prescribed to file petition to set aside the *ex parte* decree. Reliance is placed by the trial Court on the judgment of the Supreme Court in **Sri Lal Sah v. Gulabchand Sah**¹.

Challenging the said order, petitioner filed C.M.A.No.14 of 2014 before the Principal District Judge, Karimnagar. The said Court also dismissed the said appeal by order dt. 25.06.2015.

It firstly referred to the allegations against the petitioner in the complaint and observed that the submission of the petitioner that he does not know why the suit was filed against him, cannot be believed. It then held that the petitioner participated in the enquiry conducted against him by the respondents in connection with allegation of misappropriation of funds of the first respondent-company; that there

¹ 1993(1) Civil L.J. 629

was a notice issued by the first respondent after conclusion of the enquiry and on a report received showing that petitioner committed misappropriation of funds, the petitioner was asked to pay back the amount. It held that the said notice was received by the petitioner but he did not make payment. It held that since the petitioner was aware of the enquiry conducted against him for alleged misappropriation of funds and also report of the enquiry and he had been issued a notice before filing of the suit, it was the duty of the petitioner to be in touch with the respondents and settle the matter amicably. It also took note of the request made allegedly by the petitioner in the trial Court that he is prepared to clear all the dues by way of disbursement with his retirement dues which was reiterated in the lower appellate Court and held that this indicates that the petitioner has got full knowledge about the amounts claimed by the respondents on which notice was already issued to him before filing of the suit.

Assailing the same, this Revision is filed.

Counsel for the petitioner contended that the orders passed by the Court below are contrary to law and are unsustainable and placed reliance on the decisions of the Supreme Court in **M. A. Qader v. Mohd. Azmat Ali**² and **Sushil Kumar Sabharwal v. Gurpreet Singh**³.

Counsel for the respondents supported the order passed by the Court below and relied on **Sri Lal Sah** (1 supra).

² (1988)1 ALT 783

³ (2002)5 SCC 377

From the facts narrated above, it is clear that petitioner was the defendant in O.S.No.22 of 2000 filed by the respondents against him for recovery of money which he allegedly misappropriated from the respondents while in service as a Headmaster.

In the suit, the address of the petitioner was shown as a resident of Quarter No.C/38, Sector-I, Godavarikhani.

According to the petitioner, he did not receive any summons in the suit and he had no knowledge about filing of the suit.

According to the respondents, there was a disciplinary enquiry conducted against the petitioner and the petitioner was dismissed from service w.e.f. 30.05.1998 and he had participated in the enquiry. It is alleged that the petitioner was issued a notice by the respondents after the conclusion of the disciplinary enquiry to remit the amount and the petitioner received it at the address shown in the plaint.

Even according to the respondents, the suit summons issued by the Court to the address shown in the plaint as that of the petitioner were returned unserved with an endorsement “no addressee available at the said address”.

According to the respondents, the Headmaster of the school also informed the respondents that the petitioner was residing at Brilliant Real Estates, Abids, Hyderabad and summons were sent to that address also but they were also returned unserved; that summons were then got published on 13.10.2002 in “Eenadu” daily Newspaper, Hyderabad edition as per the directions of the Court fixing 21.10.2002

for appearance of the petitioner and that on that date, he was set *ex parte*. Later, on 07.11.2002, suit was decreed.

Thus, there is no dispute that there is no service of summons on the petitioner at the address at Godavarikhani shown in the plaint as the address of the petitioner.

If the petitioner is dismissed from service w.e.f. 30.05.1998 and the suit itself was filed on 23.11.1999 more than one year later, the respondents cannot proceed on the assumption that the petitioner, who is no longer in the service of the respondents, would be residing in the same place where he was residing while he was in the service.

It is the duty of the respondents to find out the correct address of the petitioner and ensure service of summons on him. But deliberately they showed the address of the petitioner at Godavarikhani as if he was still residing there and proceeded with the suit.

Further, no evidence is adduced by the trial Court or the lower appellate Court on what basis the respondents believed that the petitioner was residing at Hyderabad and got published the summons in “Eenadu” daily Newspaper, Hyderabad edition.

The trial Court, without going into the issue whether there was proper service on the petitioner or not, digressed into the question whether application for condonation of delay ought to have filed by the petitioner along with application under Order IX Rule 13 CPC. Article 123 of the Act, 1963, states that to set aside an *ex parte* decree, the period of limitation is thirty days from the date of the decree or

where summons or notice was not duly served when the applicant has knowledge of the decree.

A Division Bench of this Court in **M. A. Qader** (2 supra) held that as per Article 123 of the Act, 1963, the period of thirty days for filing an application to set aside an *ex parte* decree commences from the date of knowledge of the decree where summons are not served. It held that in a case of no due service, the application for setting aside the *ex parte* should be made within thirty days of the knowledge of passing of the *ex parte* decree. In the said case, it was held that since the party had knowledge of the order only on 21.10.1983 when decision was taken; and his application to set aside the *ex parte* decree was filed on 25.10.1983 i.e. within four days from the date when he had knowledge of the order, it is within time. It also observed that Section 5 of the Act, 1963, does not in terms say that a separate application should be filed. It held that filing of separate application to condone the delay in filing restoration application is hyper technical in nature and in view of the provisions of Section 5 of the Act, 1963, all that is necessary is that the Court must be satisfied on the material on record before admitting any application or appeal which is filed beyond the period of limitation. It observed that in case where summons are not served, period of limitation for filing an application to set aside the *ex parte* decree starts from the date of knowledge of the decree.

In **Sushil Kumar Sabharwal** (3 supra), the Supreme Court observed that as per second proviso to Rule 13 of Order IX CPC, 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. It explained that it is the knowledge of the "date of hearing" and not the knowledge of "pendency of suit" which is relevant for the purpose of the proviso. It observed that there is a distinction between a mere irregularity in service of summons and a case of non-service of summons. It observed as under:-

"The provision contained in Order 9 Rule 6 CPC is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the Court depending on the given situation. The three situations are: (i) when summons duly served, (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard *ex parte*. The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being "proved" that the summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard *ex parte*. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or causal approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an *ex parte* decree or proceedings in the

suit wherein he was deprived of hearing for no fault of his. If only the trial Court would have been conscious of its obligation cast on it by Order 9 Rule 6 CPC, the case would not have proceeded *ex parte* against the defendant-appellant and a wasteful period of over eight years would not have been added to the life of this litigation.”

In **Sri Lal Sah** (1 supra), the Supreme Court did not say that the date of knowledge of a decree cannot be taken into account in the case of non-service of summons. On the contrary it reiterated that in a situation where summons were not served, as per Article 123 of the Limitation Act, 1963, the period of thirty days prescribed for filing an application to set aside an *ex parte* decree should be counted from the date when the applicant had knowledge of the decree. On the facts of that case, it was found that the person who filed application to set aside the *ex parte* decree claiming that he had knowledge of the decree just prior to filing of the application under Order IX Rule 13 CPC, in fact had knowledge of the *ex parte* decree four years prior to filing of the application under Order IX Rule 13 CPC. Unfortunately, the trial Court did not note this and proceeded to presume that the Supreme Court insisted on filing of an application for condonation of delay along with other application under Order IX Rule 13 CPC if it is filed beyond thirty days from the date of the *ex parte* decree. Therefore, the trial Court order is contrary to law and is unsustainable.

Coming to the order passed by the lower appellate Court in C.M.A.No.14 of 2014, the lower appellate Court presumed that the petitioner had knowledge of the suit on the ground that there was a

disciplinary enquiry conducted against him for alleged misappropriation of funds and he was dismissed from service by the respondents on the said basis. It is clear that the lower appellate Court misdirected itself and instead of proceeding to examine whether summons were served to the petitioner at the address where he was residing or not, it digressed into the question whether he had knowledge about the civil Suit because he participated in the disciplinary enquiry. The approach of the lower appellate Court is clearly perverse and is unsustainable.

Accordingly, the order dated 08.07.2013 in I.A.No.595 of 2011 in O.S.No.22 of 2000 on the file of the Senior Civil Judge at Peddapalli as well as order dated 25.06.2015 in C.M.A.No.14 of 2014 on the file of the Principal District Judge, Karimnagar, are set aside and the Revision is allowed with costs of Rs.10,000/- (Rupees ten thousand only) to be paid by the respondents to the petitioner within four weeks from the date of receipt of a copy of this order.

Miscellaneous applications, if any, pending shall stand closed.

(M.S.RAMACHANDRA RAO, J)

24th July 2019

NOTE: LR Copy to be marked
B/O
RRB