

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 5TH DAY OF FEBRUARY 2020

THE HON'BLE MR.JUSTICE M.SUNDAR

A.No.6100 of 2019

IN

C.S.No.626 of 2006

M/s.Kone Elevator India Pvt., Ltd.,
KRD Gee Gee Crystal
No.89-92 Radhakrishnan Salai
Mylapore, Chennai-600 004.
Rep. by its General Manager (P & A)
Mr.B G K Reddy ..Plaintiff

Verses

St.Alfred Educational Trust,
No.22, Casa Major Road,
Egmore,
Chennai-600 008,
represented by its Trustee
Mr.D.John Alfred ..Defendant

A.No.6100 of 2019:-

St.Alfred Education Trust,
No.22, Casa Major Road,
Egmore, Chennai 600 008
Rep., by its Trustee
D.John Alfred
Presently having its Office at
AA Matriculation School,
Sponsored by St. Alfred Educational Trust
No.41/1, Srinivasa Nagar,
Koyambedu,
Chennai-600 107. ..Applicant/Defendant

Verses

M/s.Kone Elevator India Pvt. Ltd.,
Rep. by its Manager - Legal
Mr.Bharath Kumar,
KRD Gee Gee Crystal,
No.89-92, Radhakrishnan Salai,
Mylapore, Chennai 600 004. ..Respondent/Plaintiff

Application praying that this Hon'ble Court be pleased to set aside the exparte decree dated 24.04.2009 passed in C.S.No.626 of 2006.

This Application coming on this day before this Court for hearing, the Court made the following order:

There is a sole plaintiff and a lone defendant in the main suit. Lone defendant in the main suit has taken out instant application. Parties in instant application shall be referred to by their respective ranks in the main suit for the sake of convenience and clarity. Instant application has been taken out *inter alia* under Order IX Rule 13 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) with a prayer to set aside *ex parte* decree dated 24.04.2009 which was made in the main suit. *Ex parte* decree dated 24.04.2009 in the main suit reads as follows:

'The suit is filed by the plaintiff seeking the following relief:

"to pay the plaintiff the sum of Rs.21,00,350/- (Rupees twenty one lakhs three hundred and fifty only) with further interest on the principal amount of Rs.11,90,000/- at 18% per annum from the date of the suit till the date of payment."

(extracted as found in the plaint)

2. Despite service of suit summons, the defendant did not appear and hence they were set *exparte*.

3. Before the Master, the Business Manager of the plaintiff company was examined as P.W.1 and Exs.P1 to P22 were marked. The issues to be decided

would run thus:

"1. Whether the plaintiff undertook the task of manufacturing two elevators and supplying the same and also erecting those elevators in the premises of the defendant, at the request of the defendant? And if so, whether the plaintiff performed their part of the contract.

2. Whether the defendant committed default in paying the dues under the contract, to the plaintiff? And if so, whether the plaintiff is entitled to recover the sum of Rs.21,00,350/- with interest at the rate of 18% per annum on the principal amount of Rs.11,90,000/- from the date of suit till the date of payment?

4. The learned counsel for the plaintiff would detail and delineate that the plaintiff, in accordance with the contract, supplied the two elevators and as per the agreement, stage wise payment was contemplated. The defendant earlier paid only a sum of Rs.1,70,000/, which is 10% of the total contract amount. Thereafter, the defendant did not pay any amount, despite reminders.

5. Ex.P1 is the Power Deed, so as to enable the plaintiff to initiate the suit. Ex.P2 is the contract concerned, which emerged between the plaintiff and the defendant. Ex.P3 is the letter sent by the defendant to the plaintiff.

6. The learned counsel for the plaintiff also would highlight that the defendant issued a post-dated cheque bearing No.20289 dated 15.6.2002 for a sum of Rs.15,33,000/- drawn on Indian Bank, Casa Major Road, Egmore, Chennai, however, subsequently,

the defendant sent a communication-Ex.P.9 dated 12.4.2002 intimating that the post dated cheque as contained in Ex.P11, would not be allowed to be encashed by the plaintiff, as within the stipulated time, the work was not carried out by the plaintiff. Ex.P.10 would reveal that the defendant was not co-operative in making the site available in a fit condition for installation of the machines. Accordingly, the learned counsel for the plaintiff would submit that even though the plaintiff were ready and willing to perform in letter and spirit their part of the contract, yet the defendant alone committed the default and in fact, the two elevators concerned also reached the premises of the defendant and accordingly, the learned counsel would pray for decreeing the suit.

7. Perused the records.

8. I am of the opinion that in the absence of any representation on the defendant's side and any counter evidence, there is no reason to disbelieve the evidence of P.W.1 and the Chief Examination Affidavit and also the plaintiff's line of reasoning as found exemplified in the plaint and the argument put forth by the learned counsel for the plaintiff, the suit has to be decreed with costs. The interest claimed before filing of the suit was at 18% and the plaintiff could claim the same rate of interest till recovery, since the suit transaction is a commercial one.'

2. Instant application taken out by defendant is supported by two and quarter page affidavit dated 21.6.2019 consisting of four paragraphs. Before proceeding further with the instant application, this Court deems it

'TAMIL NADU MEDIATION AND CONCILIATION CENTRE
(TNMCC),

MEDIATION REPORT

Dated: 10/12/2019

<https://hcservices.ecourts.gov.in/hcservices/>

3. Therefore as there is no settlement between the parties, instant application was taken up with the consent of both sides though the matter was listed under the caption 'FOR REPORTING SETTLEMENT'.

4. The second aspect of the matter is, instant application has been filed on 03.07.2019 vide Diary No.25448 and admittedly no application for condonation of delay in filing instant application has been filed. There is no mention about the date of knowledge of ex parte decree with specificity (though there is a vague reference to second week of March 2019) and it is rather baffling as to how instant application was processed and numbered.

5. Be that as it may, plaintiff has filed a counter affidavit dated 26.09.2019 in instant application.

6. I have heard Mr.Muthappan, learned counsel for defendant who has taken out instant application and Mr.K.K.Muralidharan, learned counsel for plaintiff, who is the respondent in instant application.

7. Two and quarter page affidavit filed in support of instant application reads as follows:

'I, D.John Alfred, son of V. Devadoss, Christian, aged about 64 years, the Chairman of St.Alfred Education Trust, having office at AA Matriculation School, sponsored by St.Alfred

Educational Trust, No.42/1, Srinivasa Nagar, Koyambedu, Chennai - 600 107 do hereby solemnly affirm and sincerely state as follows:

1. I am the Chairman of the St. Alfred Education Trust and as such I am well acquainted with the facts of the case.

2.I respectfully submits that the applicant has received an order of attachment of immovable properties passed in E.P.No.202 of 2018 in C.S.No.626 of 2006 dated 27.2.2019. The said order has been handed over in the school during the second week of March, 2019. On seeing the order only this applicant came to understand that the respondent/plaintiff has filed suit against the applicant for recovery of alleged sum of Rs.27,66,908/- with interest.

3.I respectfully submits that this applicant has no knowledge at all about the filing of the suit. No summon was issued to this applicant in the suit. Originally the applicant has been carrying on activities in running the Trust at No.22m Casa Major Road, Egmore, Chennai - 600 008. We have shifted our office from this address in 2002 itself and we have been in the present above address for the past over 15 years. Our place of operation is well known and in spite of the same, the respondent/plaintiff has shown our erstwhile address. As summon was not served on us, we are in dark about the suit proceedings. Because of our non appearance, this Hon'ble court was pleased to pass an exparte decree against the applicant. The exparte decree passed is liable to be set aside, for want of proper service.

4. I respectfully submits that in the services rendered by the respondent/plaintiff we have also got serious dissatisfaction and as we are not having the copy of the plaint, we are unable to state our defense in the suit. We are filing this application within 30 days from the date of our knowledge. Hence the application is in time. Unless the exparte decree passed against the applicant is set aside and the applicant is given an opportunity to defend the suit, the applicant will be put into seriously irreparable loss and injury.

Therefore it is prayed that this Hon'ble Court may be pleased to set aside the exparte decree dated 24.4.2009 passed in C.S.No.626 of 2006 and thus render justice.'

8. A perusal of the aforesaid affidavit and submissions made by learned counsel for defendant make it clear that this entire application is predicated on two main grounds, which are as follows:

a) Suit summons were not served on the sole defendant;

b) Defendant has changed its office address from the one shown in the plaint in the short and long cause titles.

9. The response of the plaintiff to the aforesaid two points are as follows:

The plaintiff contends in the counter affidavit that

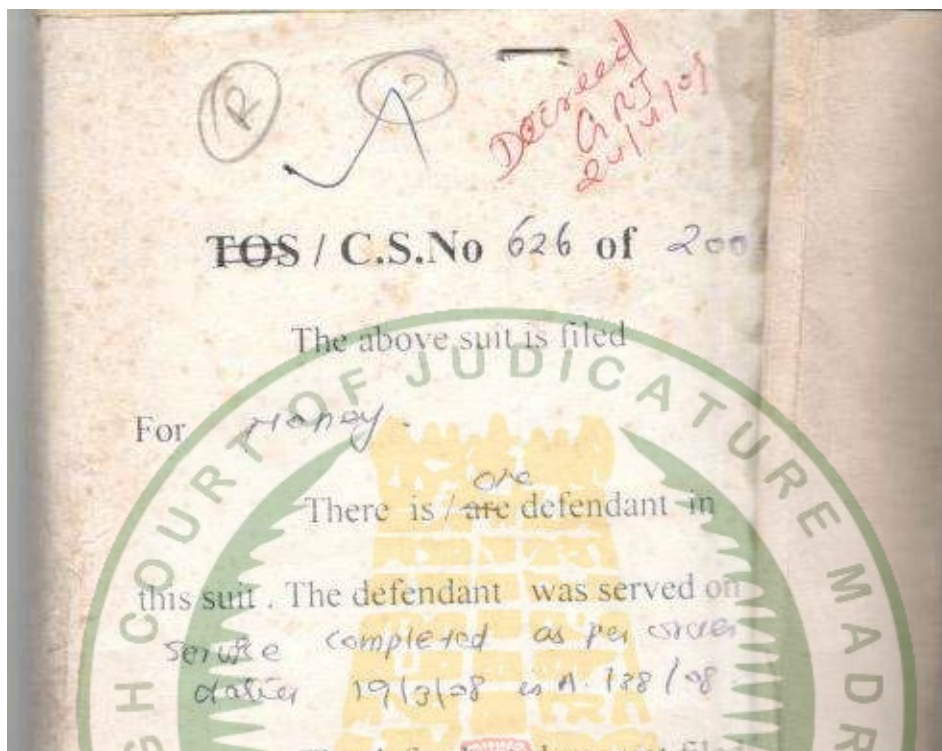
<https://hcservices.ecourts.gov.in/hcservices/> all modes of service, namely Court Notice Board (CNB) Last Known Residence (LKR), and publication ordered by this

Court have been exhausted and therefore service of suit summons has been made in accordance with law. With regard to second point, it is submitted by learned counsel for plaintiff that change of address was never communicated to the plaintiff. These aspects of the matter have been articulated in Paragraph 6 of the counter affidavit and most relevant portion of Paragraph 6 of the counter affidavit reads as follows:

'6.....In the present case, it is reiterated that only after exhausting the other modes of service namely court notice, CNB, LKR, publication was ordered by this Hon'ble Court and against the allegation of the Applicant/Defendant, they very well had their office at Casamajor Road, Egmore at the time of filing of the suit and only since the Applicant/Defendant evaded court notice, notice had to be affixed on the office premises of the Defendant by the bailiff attached to this Hon'ble Court.....'

10. This Court carefully examined both the points raised by the defendant and response of the plaintiff to the same.

11. With regard to the first point i.e., suit summons not being served on the plaintiff, a perusal of the suit file placed before this Court reveals that suit summons has been served on the defendant as per order dated 19.03.2008



12. No typed-set of papers have been filed along with the counter affidavit filed by the defendant to demonstrate when the defendant changed the office address. More particularly, there is nothing to demonstrate that change of address was communicated to the plaintiff.

13. Be that as it may, with regard to date of knowledge of ex parte decree, alluded to supra, though there is a vague averment that the defendant came to know about the 'order' in the second week of March 2019, no date has been mentioned with specificity. In the submissions, learned counsel submitted that they came to know from service of notice in execution petition that has been launched by the plaintiff for executing the ex parte decree, but the execution petition number or the date of service has not been mentioned in the affidavit filed in support of instant

application.

14. In any event as this Court finds that the first submission that suit summons was not served on the defendant falls flat in the light of case file placed before this Court, considering the nebulous averments in the affidavit filed in support of instant application, this Court is not inclined to entertain instant application. As already mentioned supra, the *ex parte* decree is dated 24.04.2009 and instant application has been filed on 03.07.2019 more than a decade later. This Court is of the considered view that it cannot but agree with the submission of learned counsel for plaintiff that if the applications for setting aside *ex parte* decree filed in such a casual manner more than a decade later after launch of execution petition are entertained, there would be no end to litigations.

Owing to all that have been set out above, instant application is dismissed, but considering the facts of the case and constitution of defendant, this Court refrains itself from imposing costs.

Sd./-M.S.J
05.02.2020

//Certified to be true copy//
Dated at Madras this the day of 2020.

JJ 19/02/2020

COURT OFFICER(O.S.)