

**HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
HONOURABLE SRI JUSTICE T.AMARNATH GOUD
CIVIL MISCELLANEOUS APPEAL NO.1078 OF 2019**

J U D G M E N T

(Per Honourable Sri Justice M.S.Ramachandra Rao)

This Appeal is preferred against the order and decree dt.04.09.2019 in I.A.No.1528 of 2017 in O.S.No.792 of 2013 of the Special Sessions Judge for Trial of Cases under SCs and STs (POA) Act-cum-VII Additional District and Sessions Judge, Ranga Reddy District at L.B.Nagar.

2. The appellant herein is the 1st defendant in the suit.
3. The 1st respondent/plaintiff filed the said suit against the appellant and the 2nd respondent for declaration of title of the 1st respondent to the suit schedule property, for a permanent injunction and also for mandatory injunction directing the appellant and the 2nd respondent to hand over the sale deed of his vendor i.e., Document No.6752/1999 dt.16.08.1992.
4. Summons was issued by the Court below and the Bailiff filed a report stating that he was not able to find the appellant at the address mentioned in the summons.
5. Then, summons was ordered by substituted service by way of publication in Prajashakthi.

6. Thereafter, the appellant and the 2nd respondent were set *ex parte* and *ex parte* decree was passed by the Court below on 22.09.2014.

7. On 31.08.2017, the appellant filed I.A.No.1528 of 2017 to set aside the said *ex parte* decree and judgment dt.22.09.2014 in O.S.No.792 of 2013 specifically taking the plea that the suit summons was not served on him. He denied that he had any knowledge about filing of the suit against him by the 1st respondent and contended that the publication in Prajashakthi newspaper is a fraudulent one. He also contended that a subsequent suit was filed by the 1st respondent against him, i.e., O.S.No.867 of 2017 and after he received summons in the said suit through counsel, he came to know about the decree dt.22.09.2014 in O.S.No.792 of 2013 and therefore, he is filing the Application to set aside the *ex parte* decree invoking Order IX Rule 13 CPC.

8. The 1st respondent filed a counter-affidavit opposing the said Application. He alleged that two times suit summons was ordered against the appellant and the 2nd respondent; that process was deposited and the appellant and the 2nd respondent deliberately avoided to receive the summons from the Court even though the address shown in the suit cause title and the address in the summons was one and the same and summons is therefore deemed to be served on the appellant. He denied that the appellant came to know about the decree in the suit only after seeing the plaint in O.S.No.867 of 2017. He alleged that a fraud was played on him and the 2nd respondent and the Agreement of Sale-cum-

GPA dt.22.11.2006 was created subsequent to his sale deed dt.18.01.2003; FIR No.177 of 2010 was lodged by him in Madhapur Police Station; Criminal Petition No.5779 of 2010 was also filed in the High Court by the appellant stating that the suit schedule property owned by him was to be alienated and some third parties arranged for sale of the plot to the 1st respondent. Therefore, it was contended that this admission of the appellant indicated that the appellant had sold the suit plot to the 1st respondent and the 1st respondent became absolute owner thereof. It is also stated that the said Criminal Petition was dismissed on 10.11.2011.

9. By order dt.04.09.2019, the Court below dismissed the said Application after giving a finding that the Bailiff report was not trust worthy. But the Court below referred to the proviso to Order IX Rule 13 CPC and said that since summons was ordered to be served by substituted service, and prior to the filing of the suit Criminal Petition No.5779 of 2010 was filed and there was a reference in the same to the registered sale deed under which the appellant purported to sell the subject property to the 1st respondent, the appellant was not entitled to any relief. It also gave a finding that the appellant had knowledge about the suit proceedings and intentionally avoided to appear therein.

10. Assailing the same, this Appeal is filed.

11. Counsel for the appellant contends that once the Court below gave a finding that the Bailiff report was not trust worthy, the Court below

should have ordered the Application under Order IX Rule 13 CPC and could not have dismissed it. He also contends that Prajashakthi newspaper in which substituted service was done did not have much circulation and the 1st respondent played fraud on the appellant by getting the summons published in the said newspaper instead of a newspaper having wider circulation. He also contends that no attempt was made to serve summons on him by registered post with acknowledgement due.

12. Counsel for the 1st respondent however refuted the said contentions and supported the order passed by the Court below.

13. We have noted the contentions of both sides.

14. The second proviso to Order IX Rule 13 CPC relied upon by the Court below states:

“Provided further that 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.”

15. For the proviso to operate, there must be evidence to show that the appellant had notice of the date of hearing and he had sufficient time to appear to answer the 1st respondent’s claim in the suit. In the instant case, there is no such evidence.

16. When the Bailiff report itself was disbelieved by the Court below, it cannot be said that the appellant had intentionally evaded service of summons particularly when there is no evidence to show that the summons was sought to be served by registered post with acknowledgement due on the appellant.

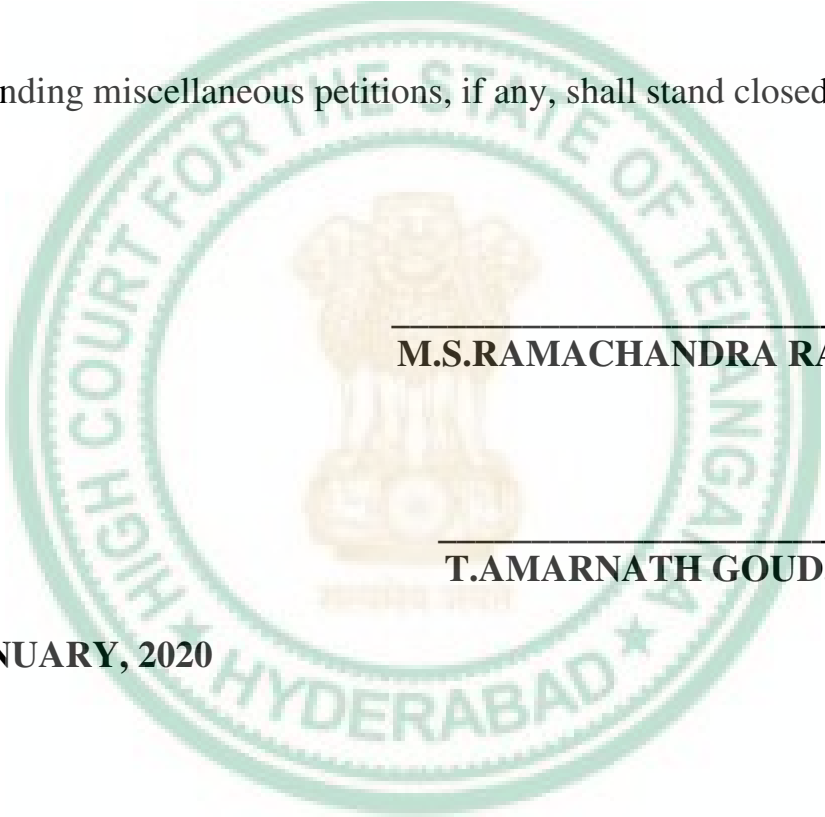
17. Also as rightly contended by the counsel for the appellant, Prajashakthi newspaper, in which substituted service was ordered, does not have wide circulation and on the basis of the substituted service in the said newspaper, it cannot be contended that the appellant had notice of the date of hearing and had sufficient time to appear to answer the 1st respondent's claim.

18. Therefore, the finding of the Court below that the appellant had knowledge about the suit proceedings and intentionally avoided to appear in the suit cannot be sustained.

19. Its further finding about the truth of the claim of the 1st respondent in the suit on the basis of the alleged pleadings of the appellant in Criminal Petition No.5779 of 2010 is wholly unwarranted because in an Application to set aside an *ex parte* decree, the merits of the case of the parties cannot be gone into and the Court is only to see whether the defendant had notice of the suit proceedings or not, and whether he had adequate time to appear to answer the plaintiff's claim.

20. Accordingly, the CMA is allowed; order dt.04.09.2019 in I.A.No.1528 of 2017 in O.S.No.792 of 2013 is set aside and the said I.A. is allowed; the suit O.S.No.792 of 2013 is restored to the file of the Court below; the Court below shall give opportunity to the appellant to file a written statement and further opportunity to both parties to lead evidence in support of their respective pleadings and then decide the suit in accordance with law, preferably within one year from the date of receipt of a copy of this order.

21. Pending miscellaneous petitions, if any, shall stand closed. No costs.

A large, faint, circular watermark seal of the High Court for the State of Telangana, Hyderabad, is centered in the background. It features the court's name in English and Telugu, and the state emblem of India in the center.
M.S.RAMACHANDRA RAO, J

T.AMARNATH GOUD, J

22nd JANUARY, 2020

Svv