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OSA No. 251 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 16-11-2023

CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

Original Side Appeal No. 251 of 2020
and
C.M.P. No.12377 of 2020

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

.. Appellant

Versus

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

.. Respondent

Original Side Appeal filed under Order XXXVI Rule 1 of High Court
Original Side Rules read with Clause 15 of Letters Patent against the fair and
decreetal order dated 05.02.2020 passed by the learned Judge in Application
No. 6100 of 2019 in C.S. No. 626 of 2006.



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For Appellants : Mr. S. Parthasarathy, Senior Advocate
for Mr. M. Muthappan

For Respondent : Mr. M.S. Krishnan, Senior Advocate
for Mr. K.K. Muralitharan

JUDGMENT

(Judgment of the Court was delivered by R. MAHADEVAN, J)

This intra-court appeal is preferred by the appellant / defendant aggrieved by the order dated 05.02.2020 passed in Application No. 6100 of 2019 in C.S. No. 626 of 2006, whereby the application filed by them for setting aside the *ex parte* decree dated 24.04.2009 passed in the suit was dismissed.

2. The respondent herein, as plaintiff, has filed the aforesaid suit against the appellant / defendant for the relief of recovery of Rs.21,00,350/- (Rupees Twenty One Lakh 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 plaint till the date of realisation.

3. For the sake of convenience, the parties are referred to hereunder, as per their litigative status in the suit in CS.No.626 of 2006.



4.(i) According to the plaintiff as averred in the plaint filed by them, the defendant had placed indent for supply, erection and commission of 2 Nos. 8 Passengers capsule escalators for their project at DDJ Centre, Opposite to Vadaseri Bus Stand, Nagercoil, Kanyakumari District. Such an order was placed from the local office of the defendant at Chennai. The Plaintiff through their letter dated 16.08.2001 offered to supply and install the lift as per the specification of the defendant and the defendant also accepted the offer so made by the plaintiff through their letter dated 21.08.2001.

(ii) The plaintiff further averred that the total contract price offered and accepted by the defendant was Rs.17,00,000/-. As per the terms and conditions of the contract, the defendant has to pay 10% of total contract price, which is Rs.1,70,000/- on placement of purchase order by the defendant, 40% of the total contract price amounting to Rs.6,80,000/-on intimation of material readiness by the plaintiff and another 30% of the contract price on commencement of erection work. The plaintiff has admitted that the defendant had paid 10% of the total value of the contract i.e., Rs.1,70,000/- as advance through a cheque bearing No. 547933 dated 21.08.2001 drawn on Indian Bank, Casa Major Road, Egmore, Chennai. However, the defendant failed to honour the remaining terms of the contract and did not make the balance stage payments totalling Rs.11,90,000/- i.e., 70% of the total contract price.



(iii) In spite of non-payment, the plaintiff, in order to continue the good business relationship, supplied machineries and commenced the erection work. For this purpose, the site Engineer of the plaintiff inspected the project site and found that even the preliminary civil construction work for the machine room and lift were not started by the defendant and it was intimated through a letter dated 16.11.2001. The plaintiff also sent another letter dated 14.12.2001 intimating the defendant about the completion of the machine room floor markings by them on 11.12.2001 and requested for the payment of material cost of Rs.6,80,000/- representing 40% of the contract value. On 14.01.2002, the plaintiff sent a reminder to the defendant intimating the non-completion of construction work by the defendant *inter alia* to release the balance payment. However, even after expiry of four months, the defendant failed and neglected to make the payment. The plaintiff therefore sent a letter dated 12.03.2002 as a reminder for payment, but the defendant deliberately failed to fulfil the terms of the contract. In response, the defendant sent a letter dated 12.04.2002 requesting to accept post dated cheque for Rs.15,30,000/- on 15.06.2002 and informed the plaintiff that if erection and commissioning of lifts were not completed before 26.05.2002, the payment of the cheque will be stopped and the balance contract price of Rs.15,30,000/- would not be paid. In reply, the plaintiff sent a letter dated 28.05.2002 to the defendant intimating



that even the civil work was not completed in the project site by the defendant.

Similar letter was sent by the plaintiff on 01.07.2002 *inter alia* reminding the defendant of their payment obligation under the contract. In response, on 15.07.2002, the defendant sent a reply containing false and untenable allegations against the plaintiff. While denying the allegations made in the letter dated 15.07.2002, the plaintiff sent letters dated 17.07.2002, 22.08.2002, 06.03.2003 and 09.04.2003 for payment of 70% of the total contract price and completion of civil construction work in the project site to enable the plaintiff to complete the erection and commissioning of elevators. The defendant, by reply dated 20.10.2003, admitted the commencement of erection work by the plaintiff in the site *inter alia* admitting their liability to make balance 70% of the total contract value as per the agreed terms of contract. Immediately, the plaintiff sent a reply dated 29.10.2003 calling upon the defendant to confirm whether the payment will be made as per the contract or not. As there was no reply, a final reminder dated 15.06.2005 was sent calling upon the defendant to make payment of Rs.11,90,000/-, but the letter dated 15.06.2005 was returned by the postal authorities with an endorsement "door locked".

(iv) According to the plaintiff, they have incurred considerable amount for transportation of machineries and for inspection of the project site through their technical Engineers. By including all those expenses, the



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plaintiff had calculated the total amount payable by the defendant, together with interest at the rate of 18% per annum, and filed the suit for recovery of Rs.21,00,350/- with future interest.

5. In order to prove the plaint averments, the plaintiff examined the Business Manager of their company as PW1 and marked Exs. P1 to P22 documents.

6. On the side of the defendant, despite the service of summons, the defendant did not appear and therefore, they were set *ex parte*.

7. By the Judgment dated 24.04.2009 passed in C.S. No. 626 of 2006, the learned Judge passed an *ex parte* decree and directed the defendant to pay the suit amount with costs. Since the transaction involved in the case is commercial in nature, the defendant was directed to pay the suit claim with future interest at the rate of 18% per annum till the date of payment.

8. In order to execute the decree and judgment passed in Civil Suit No. 626 of 2006, the plaintiff has filed E.P. No. 202 of 2018 praying for an order of attachment of the properties described in the schedule mentioned



petition. The Execution Petition was allowed on 27.02.2019 and an order of attachment was passed.

9. On receipt of the order of attachment, the defendant has filed the instant Application No. 6100 of 2019 in Civil Suit No. 626 of 2006 praying to set aside the *ex parte* decree dated 24.04.2009 passed in the suit. In the application, it was stated by the defendant that the order of attachment was received by them during second week of March 2019 and only on receipt of it, they came to know about the suit filed by the plaintiff for recovery of amount. The defendant also feigned ignorance about the filing of the suit as they have not received any summons at all. According to the defendant, they originally carried on business activities in running the Trust at No.22, Casa Major Road, Egmore, Chennai, and shifted their office from that address as early as in the year 2005. Thus, they have been carrying on their business in Koyambedu, Chennai for about 15 years. Even though the plaintiff is fully aware of the place of business, they have wantonly shown the old address and filed the suit. It was also stated that the defendant had serious dissatisfaction over the services offered by the plaintiff. It was further stated that the application to set aside the *ex parte* decree dated 24.04.2009 was filed within 30 days from the date of knowledge of the order of attachment and therefore, the same is in time.



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10. Per contra, the application to set aside the *ex parte* decree was resisted by the plaintiff by filing a counter. According to them, in the suit, summons were sent to the defendant through the court bailiff, who has filed a report dated 03.02.2007 stating that the defendant had gone to Nagercoil and therefore, the notice was returned unserved. Subsequently, as directed, service of summons was effected by way of Court Notice Board and to the last known residence by affixing the notice at the address of the defendant. Even substituted service was effected through paper publication on 10.01.2008. Subsequently, by recording that the service has been completed on the defendant, the *ex parte* decree was passed on 24.04.2009. Thereafter, the plaintiff has filed E.P. No. 202 of 2018, in which, an order of attachment was passed and it was served on the defendant. During the execution proceedings, the plaintiff caused a search for the correct address of the defendant and they could find it out at Koyambedu. The property at Koyambedu belongs to the defendant Trust and therefore, notice was duly served on the defendant/Judgment Debtor. Above all, it was contended that as per Article 123 of the Limitation Act, an application to set aside the *ex parte* decree can be filed within 30 days from the date on which an *ex parte* decree was passed. In this case, the *ex parte* decree was passed on 24.04.2009 and the present application to set aside the *ex parte* decree has been filed in the year 2019



without even an application for condonation of delay. As per proviso 2 to Order XI Rule 13 of the Code of Civil Procedure, unless there is an irregularity in service of summons, an *ex parte* decree passed cannot be set aside. Therefore, the plaintiff prayed for dismissal of the application filed by the defendant to set aside the *ex parte* decree dated 24.04.2009.

11. By the order impugned herein, the learned Judge, taking note of rival submissions, dismissed the application with the following observations:

"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.



12. As against the aforesaid order of dismissal passed by the learned Judge dated 05.02.2020 in Application No. 6100 of 2019 in Civil Suit No. 626 of 2006, the present appeal is filed by the applicant / defendant.

13.(i) Mr. Parthasarathy, learned Senior counsel appearing for the appellant/defendant submitted that the *ex parte* decree dated 24.04.2009 has been passed without even serving summons on the appellant/defendant. Even as early as in the year 2005, the appellant relocated their business premises, which could be inferred from the report of the bailiff, who attempted to serve summons in the suit. However, the learned Judge was carried away by the service of summons through last known address, summons affixed on the Court Notice Board and through substituted service in adherence to the procedures contemplated under the Code of Civil Procedure. The fact remains that the appellant had no knowledge about the filing of the suit and the *ex parte* decree passed thereof. The learned Judge did not see that the summons in the Execution Petition No. 202 of 2018 was consciously served on the matriculation school run by the appellant / defendant Trust and only by then the appellant came to know about the suit filed by the plaintiff. In such circumstances, for entertaining the application to set aside the *ex parte* decree, only the date of summons in the Execution Petition has to be reckoned and if it



is reckoned, there is no delay in filing the application to set aside the *ex parte* decree.

(ii) The learned Senior counsel for the appellant/defendant further submitted that the pre-suit notice dated 08.09.2005 sent to Casa Major Road, Egmore was returned un-served and that, the plaintiff was fully aware of the change and/or shift of the place of business of the defendant even in the year 2005. While so, the plaintiff ought not to have instituted the suit by showing the address where the defendant was not running their business.

(iii) The learned Senior counsel for the appellant/defendant also submitted that the observation of the learned Judge that the defendant ought to have informed the plaintiff about the change of address is not sustainable. There was no occasion for the defendant to inform the plaintiff about the change in the address and the failure to communicate the address does not at all arise herein. The learned Judge also did not take note of the fact that the plaintiff has not made out even a *prima facie* case for grant of an *ex parte* decree especially when the liability on the part of the appellant/defendant has not been shown in the pleadings or through the documentary evidence. Exs. P2 to P22 marked by the plaintiff would prove that the appellant trust is in no way connected with the alleged transaction with the plaintiff. All the communications made and marked by the plaintiff would only show that John



Alfred, who is the Trustee of the appellant Trust, has placed order in his personal capacity and not on behalf of the Trust. Therefore, the *ex parte* decree dated 24.04.2009 is liable to be set aside and an opportunity must be given to the appellant/defendant to disprove the claim of the plaintiff on merits.

(iv) With respect to service of summons, the learned Senior counsel for the appellant/defendant submitted that the provisions contained under Order V Rule 12 of the Civil Procedure Code have not been fulfilled. Even the attachment order passed in the Execution Petition was not served on the appellant/defendant, but it was served only on the staff of A.A. Matriculation School. Therefore, it is contended that for non-service of summons in the suit, all further proceedings including the order of attachment, deserve to be set aside and the appellant must be given an opportunity to contest the suit, on merits. That apart, the learned Senior counsel relied on the decision of the Full Bench of this Court in ***Parasurama Odayav vs. Appadurai Chetty and others*** [AIR 1970 MADRAS 271 (FB)] to contend that the date of knowledge of institution of the suit through service of summons is significant for reckoning the delay in filing an application for setting aside the *ex parte* decree. In Para No.16 of the judgment, it was held thus:

" 16.....Thus in Arts. 164 and 169 knowledge becomes a material factor only when the summons or notice was not duly served. But there



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are no such words in Art.166 even in a case where the notice was not duly served. This is a clear indication that even in a case where the notice was not duly served and the judgment debtor came to know of the date of the sale only subsequently, the limitation was not thirty days from the date of the subsequent knowledge. At the same time it should be clear that in such a case where the notice was not duly served, it would be unreasonable to apply Art.166 and oblige him to apply within thirty days of the date of sale. The solution for this difficulty is simple, namely, that in such a case Art. 166 was not meant to apply at all and the residuary Art. 181 would apply. Similarly, under the Act of 1963 Art. 127 (corresponding to Art. 166 of the Act of 1908) would not apply and the residuary Art. 137 (corresponding to Art. 181) would apply. Where the Legislature simply mentioned "the date of the sale" as the starting point in Art. 166 of the Act of 1908, (or Art. 127 of the new Act), it would not be open to the Court to add words substituting the date of the judgment-debtor's subsequent knowledge as the starting point but preserving the period of thirty days. To add such words make the words "the date of the sale" thoroughly useless, because in every case the judgment-debtor would by-pass the provision and file the application within thirty days of his subsequent knowledge. If that was the intention of the legislature, it could simply have enacted the third column of Art. 166 as "the date of the judgment-debtor's knowledge of the sale".

(v) The learned Senior counsel for the appellant also referred to the decision of the Honourable Supreme Court in ***Sushil Kumar Sabharwal vs. Gurpreet Singh and others [(2002) 5 Supreme Court Cases 377]*** wherein in Para No. 8, it was observed as under:

8. We find several infirmities and lapses on the part of the process server. Firstly, on the alleged refusal by the defendant either he did not affix a copy of the summons and the plaint on the wall of the shop or if he claims to have done so, then the endorsement made by him on the back of the summons does not support him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy of the plaint on the wall should have been witnessed by persons who identified the defendant and his shop and witnessed such procedure. The endorsement shows that there were no witnesses available on the spot. The correctness of such endorsement is difficult to believe even prima facie. The tenant runs a shoe shop in the suit premises. Apparently the shop will be situated in a locality where there are other shops and houses. One can understand refusal by unwilling



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persons requested by the process server to witness the proceedings and be a party to the procedure of the service of summons but to say that there were no witnesses available on the spot, is a statement which can be accepted only with a pinch of salt. Incidentally, we may state that though the date of appearance was 23-02-1993 the summons is said to have been tendered on 22-02-1993 i.e., just a day before the date of hearing."

Therefore, the learned Senior counsel prayed for allowing this appeal by setting aside the order of dismissal passed by the learned Judge in the application filed to set aside the *ex parte* decree in the suit.

14.(i) Per contra, Mr. M.S. Krishnan, learned Senior counsel for the respondent/plaintiff submitted that even prior to the institution of the suit, there were exchange of notices and the defendant is fully aware of the failure on their part to adhere to the terms and conditions of the contract. After issuing several reminders, the plaintiff has filed the present suit for recovery of money. The defendant ought to have exercised prudence in settling the dispute arising out of the transaction, but has remained as a mute spectator in repayment of the amount. Even in the suit, after serving summons in the manner known to law, an *ex parte* decree was passed. In order to execute the *ex parte* decree, the plaintiff has filed E.P. No. 202 of 2018 in which an order of attachment was passed. At this stage, the appellant/defendant has filed the instant application to set aside the *ex parte* decree, but it was rightly dismissed



by the learned Judge by citing the delay on the part of the appellant in approaching the Court. In any event, after filing of the present appeal, the Execution Petition was listed before the learned Master on 14.10.2020 and the same was therefore directed to be posted for hearing on 03.12.2020. Thus, the appellant was given opportunity to contest the execution petition and he has also filed their counter. While so, the attempt on the part of the appellant/defendant to set aside the *ex parte* decree is untenable.

(ii) The learned Senior counsel for the respondent/plaintiff also submitted that the order of attachment passed by the learned Judge in EP No. 202 of 2018 was handed over to the appellant during March 2019 and thereafter, he has come up with the present application. The learned Senior counsel further submitted that in Ex.P3, which is a letter of acceptance dated 21.08.2001, the address was given as No.22, Casa Major Road, Egmore, Chennai. Subsequently, several communications were sent to the same address of the Trust in which Mr. John Alfred is one of the Trustees. When there is a dispute on the subject transaction, the appellant/defendant is obligated to intimate the change of address to the plaintiff and this was rightly pointed out by the learned Judge. In fact, the plaintiff made earnest efforts to identify the whereabouts of the defendant and that is the reason the *ex parte* decree passed on 24.04.2009 was sought to be executed in the year 2018 by filing EP No.



202 of 2018. The learned Judge, taking note of the fact that summons have been served on the defendant, proceeded to dismiss the application to set aside the *ex parte* decree. The delay in filing the instant application, if allowed, would cause irreparable loss and hardship to the respondent/plaintiff, which is waiting for enjoying the fruits of the decree for more than a decade. The contract in this case has been concluded even in the year 2001 and after issuing various notices, the suit was filed in the year 2006. Now, after 19 years have passed, but till date, the plaintiff could not realise the hard labour and money spent by them in the project of the defendant.

(iii) The learned Senior counsel appearing for the respondent/plaintiff placed reliance on the decision of the Honourable Supreme Court in the case of ***Jagdish Singh vs. Natthu Singh [(1992) 1 Supreme Court Cases 647]*** and submitted that the defendant was served with the notice in the suit and such service of notice must be presumed to have been served as contemplated under Section 27 of the General Clauses Act.

(iv) Reference was also made to the decision of the Honourable Supreme Court in the case of ***Karnataka Public Service Commission vs. P.S. Ramakrishna [1996 (2) Supreme Court Cases 519]***. In that case, the notice sent to the respondent therein on 28.09.1993 came back with an endorsement



"not present" hence returned to sender. In such circumstances, it was held that it would be obvious that the respondent is avoiding service and notice must, therefore, be deemed to have been served on the respondent.

(v) Further reliance was placed by the learned senior counsel appearing for the respondent on the decision in **K. Bhaskaran vs. Sankaran Vaidhyan Balan and another [(1999) 7 Supreme Court Cases 510]** wherein it was held in para No.24 as follows:

"24. No doubt Section 138 of the Act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque, who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice."

(vi) In relation to the plea of service of summons through substituted service, the learned Senior counsel for the respondent/plaintiff relied on the decision of the Honourable Supreme Court in the case of **Basant Singh and another vs. Roman Catholic Mission [AIR 2002 Supreme Court 3557]** wherein in para Nos.9 and 11, it was held thus:

"9. Order 5, proviso to sub-rule (2) of Rule 19-A of C.P.C. provides that where the summons are properly addressed, prepaid and duly sent by registered post with acknowledgment due, notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the court within thirty days from the date of the issue of the summons, the Court shall presume that notice is duly served. Further, S.27 of the General Clauses Act, 1897 (in short



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'Act') provides similar provision. The presumptions are rebuttable. It is always open to the defendants to rebut the presumption by leading convincing and cogent evidence.

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11. Once it is proved that summons were sent by registered post to a correct and given address, the defendants' own conduct becomes important. Before the trial court, the appellants were allowed to lead evidence in support of their contentions. As order to this effect was passed by the trial court on 11-01-1991. The premises in question is occupied by two defendants jointly Hari Singh and Basant Singh. Hari Singh appeared and examined himself stating that he did not receive the registered letter. However, the defendant- Basant Singh did not appear and no evidence whatsoever, on his behalf, has been led to rebut the presumption in regard to service of summons sent to him under registered post with acknowledgment due. His own conduct shows that the registered summons had been duly served on him. As already noticed, Hari Singh appeared and save and except the bald statement that registered letter was not tendered to him, no evidence whatsoever was led to rebut the presumption. He could have examined the postman, who would have been the material witness and whose evidence would have bearing for proper adjudication. He has failed to discharge the onus cast upon him by the statute. This apart, it is inherently improbable that the registered summons were duly served on Basant Singh but not to Hari Singh when they occupied the tenanted premises jointly."

(vii) The learned Senior counsel for the respondent also placed reliance on the decision of the Honourable Supreme Court in the case of **V. Raja Kumari vs. P. Subbarama Naidu and another [(2004) 8 Supreme Court Cases 774]** and submitted that the burden is always on the defendant to show that the address to which the summons were served was incorrect and that he was not residing or carrying on the business there at the material point of time.

In Para No.19, it was observed as follows:

"19. Burden is on the complainant to show that the accused has managed to get an incorrect postal endorsement made. What is the effect of it has to be considered during trial, as the statutory scheme unmistakably shows the burden is on the complainant to show the service of notice. Therefore, where material is brought to show that there was



false endorsement about the non-availability of notice, the inference that is to be drawn has to be judged on the background facts of each case."

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(viii) The learned Senior counsel for the respondent/plaintiff further placed reliance on the decision of the Honourable Supreme Court in the case of ***P.T. Thomas vs. Thomas Job [(2005) 6 Supreme Court Cases 478]*** wherein in para Nos. 14 and 15, it was held as under:

"14. We have also perused the order of the learned Single Judge of the High Court in revision. The learned Single Judge, in our view, has misunderstood the terms of the award. The obligation was on the Respondent to evince his willingness to execute the sale deed within two years and not vice-versa as assumed by the High Court. There was already a decree of ejectment against the Respondent in the suit in the trial Court and it was his appeal that was sought to be settled in the Lok Adalat. The settlement was a concession in his favour giving a breathing time to vacate and give vacant possession. Therefore, the initiative had to come from the Respondent after offering to execute the sale deed where upon it became necessary to comply with his obligations. However, without taking any initiative the Respondent has adopted the delaying tactics by alleging that the appellant was not able to provide the requisite funds for purchase and forgetting the facts that the Appellant's brother is in USA and providing the requisite funds for purchase. It was he, in fact, who had provided the amount which was deposited on 7.4.2003 and not on 8.4.2003 as assumed by the High Court. It is, thus, seen that the Appellant has performed his obligation. He had sent the notice on 3.10.2001 and it was 4.10.2001 well before the expiry of time on 5.10.2001. Though the notice was correctly addressed and despite the intimation by the post office, the notice was not accepted by the Respondent and was returned unserved. In such circumstances, the presumption of law is that the notice has been served on the Respondent.

15. The High Court, in our view, has also misinterpreted Section 27 of the Post Office Act. The requirement of Section has been complied with in this case. The reasoning of the High Court on this issue is not correct and not in accordance with factual position. In the notice issued, the Postman has made the endorsement. This presumption is correct in law. He had given notice and intimation. Nevertheless, the respondent did not receive the notice and it was returned unserved. Therefore, in our view, there is no obligation cast on the appellant to examine the Postman as assumed by the High Court. The presumption under Section 114 of the Evidence Act operates apart from that under the Post Office Act."



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(ix) Reliance was also placed on the decision of the Honourable Supreme Court in the case of ***Parimal vs. Veena [AIR 2011 Supreme Court 1150]*** wherein it was held as follows:

"8. It is evident from the above that an ex-parte decree against a defendant has to be set aside if the party satisfies the Court that summons had not been duly served or was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the Court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the Court. The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the court to allow the application in utter regard of the terms and conditions incorporated in the second proviso herein.

9. "sufficient cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously."

With these submissions and case laws, the learned Senior counsel prayed for dismissal of the present appeal.

15. We have heard the learned Senior counsel for the appellant as



well as respondent and also perused the materials placed on record.

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16. The challenge made in this appeal is to the order passed by the learned Judge in dismissing the application filed by the appellant / defendant to set aside the *ex parte* decree dated 24.04.2009 in CS. No. 626 of 2006. It is the main contention of the learned senior counsel appearing for the appellant that the appellant was not served with summons in the suit and after coming to know about the *ex parte* decree, they preferred the application to set aside the *ex parte* decree and hence, there is no delay in approaching the court. On the other hand, it is submitted by the learned senior counsel for the respondent that after service of summons as contemplated under law, the suit was decreed as *ex parte* on 24.04.2009 and the appellant has preferred the application seeking to set aside the same, only in the year 2019, i.e., after a decade.

17.(i) Before appreciating the rival contentions, it may be relevant to refer to the various correspondences exchanged between the appellant and the respondent prior to the institution of the suit. By the communication dated 21.08.2001, the appellant, in his personal capacity, has placed order for two capsule Lifts with the respondent and it was duly signed by him. This letter dated 21.08.2001 was marked as Ex.P3 in the suit. Ex.P5 is the letter dated



14.12.2001 sent by the respondent, in which, it was stated as follows:

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"As you are aware the 100% materials for the above referred elevators are already despatched and received in your site at Nagercoil. Normally we don't supply the materials without collecting the material payment. However, as a special case on the basis of urgency to complete the installation in time, supply had been made.

Since the installation crew can start the work only after the commercials are cleared, we request you to release the payment of Rs.6,80,000/- immediately.....

(ii) In another letter dated 14.01.2002 (Ex.P6) sent by the respondent, it was intimated that even on 04.12.2001, the materials required for installation of the Elevators have been supplied and certain works have to be completed by the appellant before commencing the lift installation activities. It was also intimated that the appellant has agreed to complete those works on or before 01.02.2002. Even in that letter dated 14.01.2002, request was made for the outstanding payment of Rs.6,80,000/-. By another communication dated 12.03.2002 of the respondent (Ex.P7), reminder was made for payment of the outstanding amount as per the payment schedule.

(iii) In response, by a communication dated 12.04.2002 (Ex.P8), the appellant enclosed a cheque for Rs.15,30,000/- and called upon the respondent to complete the work relating to commissioning and erection of work as per the schedule before 25th May 2002.

(iv) By a communication dated 06.03.2003 of the respondent (Ex.P16), it was stated as follows:



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"We have received advance of Rs.1,70,000/- (10% of contract value) for the above work and subsequently we supplied material for which Rs.11,90,000/- (70% of contract value) is still outstanding.

We are holding your cheque No.020289/ 15.06.2002/ Rs.15,30,000/- drawn on Indian Bank, and in lieu of this, kindly issue a separate cheque for Material supply of Rs.11,90,000/- (70% of contract value) on current date, which can be enhanced immediately and release our final payment of Rs.3,40,000/- (20% of contract value) on completion of work."

(v) In Ex.P-17, letter dated 09.04.2003 of the respondent, the appellant was informed about the extent of completion of the work relating to commission and erection of capsule lift. It was stated that the Machine alignment and sling assembly have been completed, but they could not complete the installation unless the appellant completes the pending items mentioned therein in item Nos. ii, iv and v.

(vi) Under Ex.P-19, letter dated 20.10.2003 of the appellant, it was stated that the respondent did not complete the installation work as per the schedule and that, the delay is attributable on their part. In this letter, while blaming the respondent for not completing the work, it was stated thus:

"Further, it is your responsibility to extract work from the available supervisors and utilize the manpower and complete the work before the due time. The due date is over more than one year and 10 months. Therefore, stop finding lame excuses putting your faults on somebody, you concentrate in the erection work and complete the entire work as early as possible and hand over both the lifts then your cheque will be honoured. In between please don't act smart and ask material payments, 40% payment, 10% payment, erection payment etc., since you have agreed for the 100% payment and collected the same.

(vii) By a reply dated 15.06.2005 marked as Ex.P21, the respondent

<https://www.mhc.triunfo.in/judis> has informed that unless the balance payment is released, they are unable to



complete the work or at least make the material payment due of Rs.11,90,000/- for the supply of materials effected 3 years back. Ultimately, the respondent, through their lawyer, sent a notice on 08.09.2005 (Ex.P22) to the appellant calling upon them to pay Rs.20,92,075/- with interest on the principal sum of Rs.12,49,000/- failing which appropriate legal action will follow. The notice dated 08.09.2005 sent to the appellant, was returned unserved to the respondent.

(viii) Thus, the communications referred to above would stand testimony to the fact that without collecting payment as per the terms of the contract, the respondent started to supply materials and after some time, they demanded the payment on various dates. However, payment has not been made. Therefore, the suit was instituted by the respondent for recovery of money. The above communications between the parties would also show that the appellant was fully aware of the demand for payment made by the respondent and the action likely to be taken by the respondent, if the payment is not forthcoming and hence, the appellant could have perceived and anticipated the action to be resorted to by the respondent to approach the Court, but they maintained stoic silence without paying the admitted amount for the supply of materials by the respondent. Even assuming that the appellant was not aware of the institution of the suit, they themselves could have



contacted the respondent, engaged in a dialogue and settled the dispute once and for all. Thus, the appellant could have been pro-active that the dispute with respect to non-payment for the materials supplied by the respondent would be snow-balled into a litigation and acted accordingly.

18. In the suit proceedings, in spite of service of notice, the appellant did not come forward to contest it and hence, the suit was decreed *ex parte* on 24.04.2009. However, after ten years, to execute the *ex parte* decree, the application in EP No. 202 of 2018 in C.S. No. 626 of 2006 was filed by the respondent/plaintiff stating that the whereabouts of the appellant could not be found and therefore, there was delay in filing the Execution Petition. Admittedly, in the Execution Petition, notice was served on the appellant. Thereafter, the appellant has filed the instant application in I.A. No. 6100 of 2019 to set aside the *ex parte* decree dated 24.04.2009 passed in the suit.

19. In the application seeking to set aside the *ex parte* decree, it was vehemently contended on the side of the appellant / applicant that no summons were served on them, in the suit and hence, they have no knowledge about the institution of the suit. In this context, the learned Judge pointed out that in the suit, notice was duly served on the appellant, but they did not choose to



contest the same. In the order dated 05.02.2020 passed in the application, the scanned copy of the suit summons served on the appellant, has been referred to. The learned Judge therefore refused to set aside the *ex parte* decree and dismissed the application on the ground that there was enormous delay in seeking to set aside the *ex parte* decree.

20. It was further pointed out by the learned Judge that the appellant has not filed an application seeking to condone the delay in filing the application to set aside the *ex parte* decree, but merely filed the application to set aside the *ex parte* decree dated 24.04.2009, after ten years. In this regard, it was contended on the side of the appellant that they were not aware of the institution of the suit and only when notice was received in an order of attachment, they came to know about the *ex parte* decree and immediately, they filed application seeking to set aside the *ex parte* decree and hence, there was no need to file an application to condone the delay in filing the application to set aside the *ex parte* decree. Taking note of the same, the learned Judge, while dismissing the application, ultimately observed 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.



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21. In the light of the communications exchanged between the parties, the aforesaid conclusion reached by the learned Judge, in our view, is perfectly correct. In the suit, the respondent / plaintiff has taken all efforts to serve summons on the appellant / defendant. It is settled law that if the notice is sent to the correct and last known address of the defendant, the same has to be deemed to be served, whether it is actually served or not. In the present case, summons have been served to the correct and last known address of the appellant. It is not the case of the appellant that summons have been sent to a wrong address. Further, the appellant has not informed about their change of business place. In such circumstances, it can be inferred that summons have been duly served on the appellant, but they failed to contest the suit. Therefore, the application filed by the appellant in the year 2019 to set aside the *ex parte* decree dated 24.04.2009, after a decade, was rightly dismissed by the learned Judge, by the order impugned herein, which need not be interfered with, at the hands of this court.

22. Accordingly, the Original Side Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

(R.M.D., J) (M.S.Q., J)

16.11.2023

Index : Yes / No

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Neutral Citation : Yes / No
Speaking / Non-Speaking Order
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