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Rev.Appl. Nos.125 & 126 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :12.09.2023

CORAM :

THE HONOURABLE MRS. JUSTICE T.V. THAMILSELVI

Review Application Nos.125 & 126 of 2019
and
C.M.P.Nos.475 & 473 of 2020

V.R. Pattabiraman

.. Petitioner in both Rev.Appls

Vs.

R. Prabhu

.. Respondent in both Rev.Appls

PRAYER in Rev.Appl.No.125 of 2019 : Review Application is filed under Order XLVII Rule 1 read with Section 114 of the Code of Civil Procedure, against the order dated 12.02.2019 in CMA.No.2834 of 2018, passed before this Court.

PRAYER in Rev.Appl.No.126 of 2019 : Review Application is filed under Order XLVII Rule 1 read with Section 114 of the Code of Civil Procedure, against the order dated 12.02.2019 in CRP(NPD).No.3819 of 2018, passed before this Court.

For Appellant : Mr. N.C. Ramesh, Senior Counsel
for Mr.D.Rajagopal

For respondent : Mr. Bijay Sundar
for Mr.P.Chandrasekar

COMMON JUDGMENT

These Review Applications have been filed to review the common order dated 12.02.2019 made in CMA. No. 2834 of 2018 & CRP (NPD).

<https://www.mhc.tn.gov.in/Orders>
No.3819 of 2018 passed by this Court.



2. The petitioner in CRP. No. 3819 of 2018 as well as CMA. No. 2834 of 2018 has preferred these Review applications by contending that there is an error apparent on the face of the record in the common order passed by this Court. It is further stated that this Court did not consider the mandate under Order V Rule 19 of Code of Civil Procedure (in short CPC), in its proper perspective which led to dismissal of the CRP. No. 3819 of 2018 as well as CMA. No. 2834 of 2018 and it warrants a review.

3. Notice has been served on the learned counsel for the respondent in the CRP (NPD) No. 3819 of 2018 and CMA No. 2834 of 2018.

4. The learned Senior counsel for the review petitioner argues that the Review Applicant is the defendant in the suit filed by the respondent herein, as plaintiff, for the relief of specific performance of the agreement. While dismissing the above revision, the learned Judge failed to appreciate the requirements contemplated under Order V Rule 19 of CPC, which is mandatory in nature. As per the said provision, whenever notice is served by affixure, the procedures contemplated therein have to be followed. Further he argues that the learned Judge failed to appreciate that the question of delay would not arise in the case in filing an application for setting aside the ex-parte



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order especially when the mandate of the provision of Order V Rule 19 has not been complied with, and therefore the revision petition as well as the Civil Miscellaneous Appeal ought not to have been dismissed on the ground of delay, rather the delay ought to have been condoned. It is also submitted that the learned Single Judge has committed a serious error in relying upon the judgment reported in (2012) 5 SCC 157 rendered by the Hon'ble Supreme Court, which deals with the question of sufficiency of cause shown for condonation of delay hence, it will not apply to the facts of the present case, especially when, the mandatory provision laid down in Order V Rule 19 and Order XLVIII Rule 2 has not been complied with. Therefore the learned Senior counsel prays to Review the common order passed by this Court in CMA.No.2834 of 2018 & CRP.No.3819 of 2018.

5. By way of reply the learned counsel for the respondent submits that while dismissing the CMA.No.2834 of 2018 & CRP.No.3819 of 2018, the learned Judge has elaborately discussed the facts and circumstance of the case as well as applicability of provisions of law with regard to the service of the summons. According to the learned counsel for the respondent, the order was passed on merits which needs no interference by this Court nor there is error on the face of the record in the order passed by the learned Single Judge. The



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learned Judge was satisfied that summons were duly served on the review applicant and he has knowledge about the institution of the suit for specific performance. While so, the review applicant cannot feign ignorance about the pendency of the suit against him. This was appreciated by the learned Judge in detail while passing the common order dismissing the CMA.No.2834 of 2018 & CRP.No.3819 of 2018. Hence he prays to dismiss the Review Applications as devoid of merits.

6. Heard the submissions of the counsel for both sides in CRP. No. 3819 of 2018 and CMA. No. 2834 of 2018.

7. The respondent herein has instituted the suit in O.S. No. 95 of 2009 for specific performance of the agreement dated 24.07.2006. The suit was decreed exparte on 03.12.2009. To set aside the exparte decree, an application was filed under Order 9 Rule 13 of CPC and it was dismissed on 22.10.2008. As against this order, the CMA No. 2834 of 2018 was filed. Similarly, in filing the application to set aside the exparte decree, a delay of 2090 days occurred and to condone the delay, the review applicant has filed IA No. 187 of 2016 in OS No. 95 of 2009. This was also dismissed by the trial court on 22.10.2008 and therefore, CRP No. 3819 of 2018 was filed.



8. The original Suit in O.S. No. 95 of 2009 was filed by the plaintiff/respondent herein, against the defendant/review applicant for specific performance praying to give direction to the defendant to execute the sale deed by receiving the balance consideration. The said suit came to be decreed ex-parte on 03.12.2009. Thereafter execution application was filed to execute the decree in E.P. No.204 of 2015. On receipt of the notice in the said application the review applicant has filed the application to condone the delay of 2090 days by stating that the suit summons were not properly served and behind his back, the ex-parte decree was obtained. Therefore, the review applicant prayed to condone the delay of 2090 days.

9. The said application was strongly objected by the plaintiff stating that the process server attempted to serve the notice, but the defendant refused to receive the same, and at that time the plaintiff was also present. In fact, the plaintiff accompanied the process server as he could not identify the office of the defendant as well as the defendant. As the defendant refused to receive the notice, the process server affixed the summons on the wall of the petitioner's office and obtained signature from one Udhayakumar. To this effect, the process server submitted his report before the court below on 29.09.2009. On the next day i.e. on 30.09.2009, the defendant was called absent and set



ex-parte. Even in the application for condonation of delay, the process server was examined as RW2 and he deposed about the manner in which summons were served on the defendant. PW2 also deposed that when he attempted to serve the summons, the review applicant-defendant refused to receive the same, hence the summons were returned with an endorsement "refused" based on which the trial Court held that the service of summons is held sufficient and thereafter decreed the suit ex-parte. Furthermore, the delay of each and every day was not properly explained. The learned Judge, on appreciation of the entire factual aspects, has rightly passed the order, which are sought to be reviewed by the present Review Applications. Therefore, the learned counsel prayed for dismissal of the Review Applications.

10. Heard, Mr. N.C. Ramesh, learned Senior Counsel for Mr. D. Rajagopal, learned counsel for the review petitioner and Mr. Bijay Sundar, learned Senior Counsel for Mr. P. Chandrasekar, learned counsel for the respondent and perused the materials available in the record.

11. The main objection in the review applications is that the summon was not properly served on the review applicant-defendant. The review applicant-defendant denied the contention that the process server served the



summons but he refused to receive it. On the other hand he submits that the process server colluded with plaintiff and returned the summon as "refused".

Even assuming that the summon was refused, the process server ought to have filed an affidavit to that effect, by complying the mandatory provision as required under Order V Rule 19. He also contended that the plaintiff colluded with the Court ameen even if summons were served but the review applicant refused to receive the same as such, the service cannot be held to be sufficient or proper service.

12. But the learned counsel for the respondent / plaintiff argues that before the trial Court, the process server was examined as R.W.2 and he clearly deposed that when he attempted to serve the summons to the review applicant-defendant, he refused the same therefore, he returned the summons as "refused" . He also deposed that he obtained the witness signature from one UdhayaKumar. Based on the report of RW2, the Court below rightly held that the summons were refused by the defendant and accordingly he was set ex-parte.

13. On considering both sides submissions, the learned Judge while dismissing the CRP. No. 3819 of 2018 and CMA. No. 2834 of 2018, discussed



the facts and circumstances of the case in Para Nos. 16,17 and 18, which reads as follows:

"16. The grievance of the petitioner is that he is the defendant in the suit and the respondent filed suit against him for specific performance of the agreement dated 24.07.2006 and the said suit was decreed ex-parte on 03.12.2009. According to the petitioner, he was not served with suit summons and only after receiving notice in E.P.No.204 of 2015 filed by the respondent, he came to know the ex-parte decree passed in the suit and immediately, he had filed petition to set aside the ex-parte decree and petition to condone the delay of 2090 days in filing the petition to set aside the ex-parte decree.

17. The case of the petitioner is that with the collusion of the process server, the respondent manipulated and entry that the petitioner refused to receive the summons. Further case of the petitioner is that unless there is a specific order that service of notice is sufficient and it is due and proper, the order setting ex-parte is not legal and correct.

18. On the other hand, it is a the say of the respondent that on 03.09.2009 the process server approached the respondent that on 03.09.2009 the process server approached the respondent to identify the petitioner to effect service of summons in the suit. Accordingly, the respondent went to the office of the petitioner along with the process server and identified the petitioner while serving the summons. The petitioner read over the summons and wantonly refused to receive the same. Since the petitioner refused



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to receive the summons, the process server affixed the same on the wall of the petitioner's officer and had obtained signature from the respondent as well as witness one Udayakumar, who was present at that time. Thus, it is the say of the respondent that knowingly the petitioner refused to receive the summons and he had knowledge about the filing of the suit way back on 03.09.2009."

14. It was held that as per the evidence of P.W.1 as well as the evidence of process server/ RW2 it is clear that there was no manipulations of the entry made by R.W.2 and it clearly indicates that the petitioner had refused to receive the suit summons, which was also witnessed by one UdhayaKumar. So the objection raised by the revision petitioner/review applicant was not accepted by the learned Judge. The reason for the delay was also found to be not properly explained, so the revision petition as well as Civil Miscellaneous Appeal were dismissed by a common order.

15. Now the Review Application has been filed on the ground that while dismissing the revision as well as Civil Miscellaneous Appeal, the learned Judge has failed to take note of the mandatory provision contained under Order V Rule 19 which requires an affidavit to be filed by the process server with regard to refusal of the summons by the defendant and the same was not



been discussed. According to the learned Senior counsel for the review applicant it is an error apparent on the face of records and it warrants a review.

Considering this submission, on a perusal of the grounds raised by the revision petitioner in the Civil Revision Petition, the main objection is with regard to the compliance of the provisions under Order V Rule 19 CPC as well as the allegation that the respondent-plaintiff colluded with Court ameen in the matter of service of summons. Therefore, it is stated that the service of summons is not proper. In this regard, he relied on the provisions of Order V Rule 19, which reads as follows:

"19.Examination of serving officer:- Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."

16. Considering that scope of Order V Rule 19 in the proper perspective, whenever summons have been refused to be received by the defendant or respondent as the case may be, the serving officer, in compliance with Order V Rule 17 has to file an affidavit narrating the circumstances which led to the



returning of the summons unserved. Order V Rule 17 reads as follows:

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"17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

17. So if the defendant refused to sign in acknowledgment, the serving officer has to return the original summon to the Court with a report endorsed thereon stating that (i) the defendant has refused (ii) he has affixed the copy of the summons in a prominent place (iii) narrate the circumstances in which he did so (iv) the name and address of the person by whom the house was



identified and in whose persons the copy was affixed. To that effect, the summon has to be returned by the process server. Even though R.W.2 process server was examined, on perusal of his deposition, it is evident that he has not complied with the procedures contemplated above.

18. On a perusal of the summon, the hearing date was fixed on 30.09.2009 in O.S.No.95 of 2009 and the endorsement made by the process server mentioned that he attempted to serve the summons to the defendant in person but he refused to receive the same. Hence, he was unable to serve the summon and affixed the same on the outside wall in the presence of one UdhayaKumar. Admittedly, as per the evidence of R.W.2 the said UdhayaKumar is the associate of plaintiff, on the back side of the summon, the plaintiff also signed and as he was also presence there, in order to identify the defendant. By assigning the said reason the process server returned the summon with an endorsement that the defendant refused and he affixed the same in the door. But, on the next day the learned trial Judge, by considering the endorsement in the summon, called the defendant absent and set him ex-parte and posted the matter for recording ex-parte evidence. The process server has not complied with the procedures contemplated under Order V Rule 17.

The process server is also bound to comply the rule contemplated in Order V



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Rule 19. Now the duty is casted upon the Court to examining whether the serving officer has complied with the above said procedures under order V Rule 19.

19. The Court has to consider as to whether summons were duly served on the party to a case. The serving officer is required to file an affidavit to that effect, the trial Court has to proceed further with regard to service of notice to the party concerned. On examining the statement of the serving officer on oath. But this Court of the view that no such affidavit has been filed in this case. If the trial Court satisfies that the service is sufficient, then the Court can declare that the summons has been duly served or order of such service to be published through paper publication. But case in hand, neither such affidavit was filed by the process server/ R.W.2, nor the trial Court had examined the processor server on oath about the refusal made by the defendant. Besides the learned trial Judge also not directed the plaintiff to take steps to serve summons through other mode of service, by issuing paper publication. Simply on the first hearing itself, the learned trial Judge set the defendant ex-parte and posted the matter to record ex-parte evidence. In fact the said suit is for a relief of specific performance filed before the District Court by invoking the jurisdiction of the District Court. The property value is more than crores with



the extent of 22 cents of land along with residential house. The learned District Judge without following all those procedures contemplated as required under law erroneously set the defendant ex-parte. The right of the review applicant ought to have been protected by the trial court and an opportunity ought to have been given to him to defend the case, but by curtailing such right, he was set ex-parte. When the non-compliance of the procedure was brought to the notice of this Court, while dismissing the Civil Revision Petition as well as Civil Miscellaneous Appeal, the learned Judge also not appreciated the non-compliance of the said mandatory provision as required under Order V Rule 17 and Rule 19. So this Court is of the view that there is an error apparent on the face of the record. The entire facts clearly reveals that, neither the Court below nor the process server complied with the procedures to be followed serve summons properly. The fact reveals that the summons was served by the Process Server/RW2 by accompanying the plaintiff, in the presence of the plaintiff's friends and making endorsement in the summons as if it was refused by the defendant creates suspicion in the mind of this Court about the manner in which the summons were attempted to be served. But the contention of the plaintiff is that already he was residing in the same address and purposely evaded and not receiving summons said address. But, that cannot be taken in to consideration for the reason that at every stage of serving of summon the



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procedure contemplated has to be followed. But case in hand, such procedures have not been followed. Besides the learned trial Judge not adopted other mode of service nor assigned any reason which itself shows that there is an error committed by the Court by not complying with the mandatory provision of Order V Rule 19. So the learned trial Judge ought to have ensured compliance of the said procedure while setting the defendant-review applicant exparte.

20. Furthermore, there is no explanation on the side of the plaintiff as to why he has not taken any steps immediately after the passing of the ex-parte decree. He has not filed the execution petition immediately, but after six years, he has filed the Execution Petition No. 204 of 2015 and it shows that there is an ulterior motive in the minds of the plaintiff. The parties concerned are not entitled to abusing the process of law and the same should not be encouraged at any point of time. The defendant is 75 years old and appearing before this Court to defend the case. He has to be given a fair opportunity to defend the suit on merits.

21. Accordingly, this Review Application is allowed. The common order passed by this Court in CMA. No. 2834 of 2018 & CRP. No. 3819 of 2018, on



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12.02.2019 are set aside. The review applicant is directed to file his written statement forthwith. The learned trial Judge is directed to dispose of the suit in O.S. No. 95 of 2009 on merits by giving opportunity to both the parties, within a period of five month from the date of this order. Consequently, connected Miscellaneous petitions are closed. No costs.

12.09.2023

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Index : Yes/No

Speaking Order: Yes/No

Neutral Citation: Yes/No

To,

1. The Principal District Judge, Vellore.
2. The Section Officer, VR-Section,
High Court of Madras, Chennai.



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T.V.THAMILSELVI, J.

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