



A.No.4314 of 2023
in C.S.No.87 of 2020

P.T.ASHA, J.

This application is filed seeking to condone the delay of 321 days in filing the present application to set aside the *ex-parte* decree dated 30.08.2022.

2. Heard Mr.P.Giridharan, learned counsel for the applicant / defendant and Mr.Vijay Narayanan, learned Senior Counsel appearing for Mr.P.Solomon Francis, learned counsel for the respondent / plaintiff.

3. Mr.P.Giridharan, learned counsel for the applicant/defendant, would argue that summons had not been served on the applicant / defendant. He would argue that the provisions of Order 4 of the Original Side Rules clearly mandates that the summons has to be served as per Form 13 of the Original Side Rules, and the failure to comply with the said provisions would clearly entitle the defendant to have the *ex-parte* decree set aside. He would rely upon the judgment of the Bombay High Court reported in **2007 SCC Online Bom 614 [Tordeo Properties Pvt. Ltd Vs. Bank of Baroda]**. The Division Bench of the



Bombay High Court clearly states that the service of summons is a procedural law, and any non-compliance to this could not be treated as an irregularity and is therefore a jurisdictional error. The Bombay High Court went on to hold that since the defendant was not served with the summons, he was not under the obligation to file the written statement till such time as the summons was served on him, which applies to the issue on hand. He would also rely on the judgment of the Hon'ble Supreme Court reported in **2022 SCC Online SC 909 [Union of India and Others Vs. Mahendra Singh]** and the judgment of the Hon'ble Supreme Court reported in **AIR 2005 SC 514 [Iridium Media Telecom Ltd Vs. Motorola Inc.]** to buttress his argument that where a particular procedure is contemplated and that the procedure has not been followed, then all further proceeding would become redundant. He would therefore submit that the application should be ordered.

4.The learned senior counsel appearing for the respondent / plaintiff has vehemently opposed the said application, contending that the applicant/defendant has been served with the private notice on 14.03.2022 which clearly states that the Assistant Registrar-I(O.S) had ordered private notice returnable on 22.03.2022 and the applicant was



directed to appear on the said date. Though this notice was received by them as early as on 14.03.2022, the applicant / defendant had not taken any steps whatsoever to appear before the learned Master on 22.03.2022. He would submit that when the leave to sue application was argued, the applicant/defendant who had entered caveat had opposed the leave application vehemently. Therefore, on receiving the notice they could have directed their counsel, who had appeared and contested the leave to sue application to enter appearance on 22.03.2022. The learned senior counsel would further submit that since notice had been served and they had failed to enter appearance, this Court had proceeded to pass the *ex-parte* decree, which is now sought to be set aside. It is also his case that before the Court at Hong Kong, the applicant had filed an affidavit in which they have clearly and categorically admitted the receipt of the letter dated 09.03.2022 from the respondent's lawyer on 14.03.2022. It is the case of the learned senior counsel that the only explanation given was that the affidavit was not accompanied with the relevant documents, and it was only a single page that had been received by them, and that they have been awaiting the service of the executed plaint, summons, etc., indicating the hearing on



22.03.2022. The learned senior counsel placed reliance upon the judgment of the Hon'ble Supreme Court reported in **2008(2) SCC 326 [Sunil Poddar and Others Vs. Union Bank of India]** with particular reference to paragraphs 11, 20 and 27, wherein it has been held by the Hon'ble Supreme Court that once there is sufficient knowledge about the proceedings, the defendant was not entitled to have the *ex-parte* decree set aside. He would also rely upon the judgment of the Delhi High Court reported in **2021 SCC Online Del 5398 [HT Media Limited and Another Vs. Brainlink International, Inc and another]** and the judgment of the Hon'ble Supreme Court reported in **1993 (4) SCC 406 [Siraj Ahmed Siddiqui Vs. Prem Nath Kapoor]** where the earlier judgment of the Allahabad High Court reported in **1981 SCC Online All 445 [Sri Nath Agarwal Vs. Sri Nath]** had been confirmed. Therefore, he would submit that the order cannot be set aside and he would also present an argument that the application has been filed under the provision of Order 9 Rule 13 C.P.C and the second proviso to the provisions of Order 9 Rule 13 C.P.C makes it clear that the reasons given for setting aside the *ex-parte* decree is barred by this proviso. The proviso would read as follows:



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“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.”

He would also submit that the non-service of the summons is a mere irregularity and a reading of the second proviso to Order 9 Rule 13 C.P.C. would also support to this argument. He would also submit that Section 16(3) of the Commercial Courts Act clearly states that where there is a conflict with any rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908 (5 of 1908), by the State Government, then the provisions of the Code of Civil Procedure as amended by the Act would prevail. Therefore, he would pray that the application be dismissed.

5. Heard the arguments of the learned counsels. A summons which is served in the Civil Court and the summons which is served on the Original Side of this Court are not similar but different. The notice sent by the Civil Court gives details of the name of the parties to the date hearing of suit and to inform the Court if he proposes to contest the



suit. On the contrary, the summons as directed by Order 4 Rule of the Original Side Rules is to be issued in Form 13. The form gives directions to the defendant to appear, file a written statement within 30 days after the service of summons and also informing the defendant that if he does not filing written statement the suit would be entered in the general list of cases. The summons also contains a concise statement of the relief. The main defense to the application for setting aside the *ex-parte* decree dated 30.08.2022 is the prior knowledge by means of a private notice which admittedly is not in the prescribed format.

6. Be that as it may. After these elaborate arguments were made on either side, ultimately, the learned counsel for the respondent/plaintiff is agreeable to the *ex-parte* decree being set aside, subject to the applicant /defendant being put on terms. Therefore, this Court, taking note of the documents filed and arguments made, is of the view that the *ex-parte* order dated 30.08.2022 should be set aside subject to the condition that the applicant/ defendant deposits 75% of the suit claim. The learned counsel for the applicant / defendant sought four weeks' time for making the deposit.



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7. This Court directs the applicant / defendant to deposit 75% of the suit claim within a period of four weeks from the date of receipt of a copy of this order. The deposit shall be in the form of a fixed deposit taken in the name of the Registrar General, High Court, Madras. Upon filing the compliance of this order, the application for condoning the delay of 321 days in filing the application to set aside the *ex-parte* decree dated 30.08.2022 is ordered.

14.09.2023

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