



C.R.P.[NPD].No.4832 of 2023

THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 10.12.2024

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

C.R.P.[NPD].No.4832 of 2023
and C.M.P.No.28642 of 2023

Kumar

... Petitioner

Versus

Sivaramakrishnan

... Respondent

PRAYER : Petitions filed under Section 115 of Civil Procedure Code to set aside the final order and decretal order in I.A.No.2 of 2022 in O.S.No.4 of 2016 dated 05.09.2023 on the file of II Additional District Judge, Tindivanam.

For Petitioner : Mr.Avinash Wadhwani

For Respondents : Mr.D.Rajagopal

ORDER

Challenging the dismissal of the application filed under Section 5 of the Limitation Act to condone the delay of 1583 days in setting aside the exparte decree, the present revision has been filed



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2. Brief background in filing this revision is as follows:

2.a. The respondent has filed a suit for specific performance based on the agreement said to have been entered on 13.12.2007, wherein, it is agreed between the parties that sale shall be completed within a period of thirteen months. However, it appears that agreement has been extended from time to time and ultimately extended upto 31.08.2012, thereafter, the suit came to be filed on 31.08.2015. Be that as it may, in the suit, the defendant was set ex parte. Application to condone the delay of 1583 days in setting aside exparte decree was filed after receipt of notice in EP. The reasons assigned in the application is to the effect that the petitioner was residing in the Pondicherry for the last 20 years and the respondent having known the petitioner had taken summons only to the Villupuram address. Therefore, he was set exparte without service of summons.

2.b. Counter has been filed by the respondent disputing the allegations, wherein, it is the case of the respondent that notice has been served to the petitioner only to the Villupuram address, where, he was



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residing and the application is filed only to delay the proceedings. However, the Trial Court dismissed the application on the ground that the delay has not been properly explained. Challenging the said order, the present revision.

3. The learned counsel for the petitioner submitted that admittedly, the Trial Court has noted that the summons has not been served, however, there is no evidence to show that before effecting substituted service, there was a proper procedure followed and the suit for specific performance is filed only after five years. Therefore, submitted that the substantive right of the petitioner cannot be shut citing technical grounds. Hence, seeks for allowing this revision.

4. Whereas, the learned counsel for the respondent submitted that revision is not maintainable as against the dismissal of the application filed under Section 5 of the Limitation Act. In support of the submission, he placed reliance on the judgment of the Hon'ble Supreme Court in the case of *Koushik Mutually Aided Cooperative Housing Society vs. Ameena Begum*



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and another reported in 2023 SCC OnLine SC 1662. Further, it is his contention that substituted service was effected properly and therefore, the service is deemed to be a proper service. It is his further contention that the Hon'ble Apex Court has clearly held that revision is not maintainable and only appeal is maintainable. In the execution petition, notice has been served to the proper address. Hence, seeks for dismissal of this revision.

5. Heard both sides and perused the materials placed on record

6. As far as the facts with regard to filing of the suit as narrated above, though the agreement dated 13.12.2007 was entered between the parties setting out time-limit of 13 months for payment of balance sale consideration, time has been repeatedly extended upto 2012 and the suit came to be filed during the year 2015. Be that as it may, the fact remains that the suit property involves an extent of 7 acres 16 cents. It is the specific case of the petitioner that summons was not served as he was not residing in Villupuram, the Trial Court has also verified the original records and



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recorded the fact that summons has not been served and returned as not residing in the particular address. When the petitioner was not residing in the address, proper way was to serve summons in the residing address whereas, straight away substituted service has been effected, that too, without following any procedure for issuance of substituted service.

7. It is relevant to note that before adopting procedures for issuance of substituted service, proper procedures contemplated under Order V Rules 17, 19 and 20 of CPC are to be followed. It is useful to extract the provisions of Order V Rules 17, 19 & 20 of CPC, which reads as follows:

"17. Procedure when defendant refuses to accept service, or cannot be found.—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



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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.

...

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.

20. Substituted service.—(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any



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other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

[(1A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.]

(2) Effect of substituted service.—Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed.—Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require. "

8. The above provisions makes it clear that when the serving officer cannot find the defendant, he has to affix a copy of the summons on the outdoor door or some other conspicuous part of the house in which the



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defendant ordinarily resides and return the original to Court with a report endorsed thereon. When the summons is returned under Rule 17, the serving officer ought to have been examined mandatorily by the Court. Only thereafter, if the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, then the question of effecting substituted service will arise. Even before effecting substituting service, it has to be ensured by the Court that the summons has been properly affixed in the last known address of the defendant. However, in this case, no procedures whatsoever have been followed in this case. The matter has been dealt casually and service is held to be sufficient. Therefore, once the mandatory procedures have not been followed, it cannot be said that service is proper and notice has been served properly. It is also to be noted that suit has been filed for specific performance in the year 2015 and agreement is of the year 2007.

9. Though the Trial is also referred as if there was reply given to the legal notice, whether, legal notice is given by the petitioner or not is not a matter of evidence. Without proof of the same, the Court cannot assume that



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the defendant is residing in the same address. Once the mandatory procedures have not been followed, the Trial Court ought to have granted an opportunity to agitate their rights on merits. The Hon'ble Apex Court in the case of *Robin Thapa vs. Rohit Dora* reported in (2019) 7 SCC 359 has held that a litigation is based on adjudication on the merits of the contentions of the parties. Litigation should not be terminated by default, either of the plaintiff or the defendant. The cause of justice does require that as far as possible, adjudication be done on merits.

10. That apart, the Hon'ble Apex Court in the case of *Pathapathi Subba Reddy vs. Special Deputy Collector* reported in 2024 SCC OnLine SC 513 has held as follows:

" 26. On a harmonious consideration of the provisions of the law, as aforesaid, and the law laid down by this Court, it is evident that:

(i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself;



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(ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time;

(iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense whereas Section 5 has to be construed liberally;

(iv) In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;

(v) Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;

(vi) Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the court is not satisfied with the cause shown for the delay in filing the appeal;

(vii) Merits of the case are not required to be considered in condoning the delay; and

(viii) Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision."

11. The contention of the learned counsel for the petitioner on relying the judgment of Koushik Mutually Aided Cooperative Housing Society (cited supra) that appeal alone is maintainable and revision is not



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maintainable. On perusal of the judgment, it would indicate that application filed to condone the delay as well as setting aside the exparte decree were simultaneously ordered. Once the application to condone the delay has been dismissed, application filed under Order IX Rule 13 is also dismissed in that case. As against the dismissal under Order 9 Rule 13, there is a specific provision made under Order 43 Rule 1(d) of CPC to file appeal. Only in that context, the Hon'ble Apex Court has held that revision is not maintainable. Since the challenge was also against the dismissal of the application under Order 9 Rule 13, therefore, the judgment cannot be applied. Further, this Court has already dealt this issue in a judgment in the case of *N.Saravanan vs. M.Ponnurangam* reported in 2024 6 CTC 449.

12. Accordingly, the impugned order stands set aside. The Trial Court shall number the application filed under Order 9 Rule 13 of CPC and in the event of allowing that application, thereafter, the suit shall be disposed of expeditiously within a period of six months from the date of receipt of a copy of this Order.



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13. In view of the above, revision stands allowed. No costs.

Consequently, connected miscellaneous petition stands closed.

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Index : Yes / No

Internet: Yes

Speaking/non speaking order

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To

1.II Additional District Court

II Additional District Judge, Tindivanam.



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N. SATHISH KUMAR, J.

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