Doss and Vs. Vamanan and

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Court : Chennai

Decided On : Apr-30-2007

Reported in : 2007(5)CTC847; (2007)3MLJ1018

Judge : K. Venkataraman, J.

Acts : Limitation Act - Sections 5; Code of Civil Procedure (CPC) - Sections 115 - Order 5, Rules 1, 9 to 19 and 19A - Order 9, Rules 6, 6(1) and 13

Appeal No. : C.R.P. (NPD) No. 905 of 2007 and M.P. No. 1 of 2007

Appellant : Doss and ;malliga

Respondent : Vamanan and ;gurunathan

Advocate for Def. : V. Kannan, Adv.

Advocate for Pet/Ap. : Ravichandran, Adv. for L. Dhamodaran, Adv.

Disposition : Petition allowed

Judgement :
ORDER

K. Venkataraman, J.

1. The present revision is directed against the order of the learned District Munsif, Alandur dated 18.9.2006 made in I.A. No. 2287 of 2003 in O.S. No. 2077 of 1997.

2. The backdrop of the case which is necessary for the disposal of the present revision is as follows:

The respondents herein filed the suit against the petitioners in O.S. No. 2077 of 1997 before the learned District Munsif, Alandur for delivery of vacant possession of the property, damages for use and occupation, and for costs. In the said suit, the petitioners have been set exparte and an exparte decree has been passed against them. To set aside the same, the petitioners have preferred an application under Order 9 Rule 13 C.P.C. along with an application under Section 5 of the Limitation Act to condone the delay of 1014 days. The said application has been dismissed by the learned District Munsif and the present revision is directed against the said order.

3. Mr. Ravichandran, the learned Counsel appearing for the petitioners, contended that the petitioners have not at all received the summons and they were not at all aware of the decree that has been passed against them. Only on 3.10.2003, when the Bailiff came for executing the warrant of eviction in E.P. No. 20 of 2003 they came to know of the fact that the suit has been levied against them and an exparte decree has been passed against them. Immediately, they have filed an application to set aside the exparte decree along with an application to condone delay for preferring the said application. The learned Counsel further urged that when the summons is refused, as per the endorsement of the Bailiff, he should have been directed to file an affidavit and he should have examined on oath as per Order 5 Rule 19 C.P.C. and this has not been followed by the Court below and hence, the Court below should have to considered the application filed by the petitioners under Section 5 of the Limitation Act.

4. Per contra, Mr. V. Kannan, the learned Counsel appearing for the respondents, submitted that the petitioners have not established that the summons have not been served on them. Further, according to the learned Counsel for the respondents, when once the Bailiff made an endorsement that the petitioners have refused to receive the summons and when it is sought to affixed, the same has been objected to by the petitioners, it should be taken that the petitioners are aware of the suit and hence, no indulgence can be shown to them.

5. I have heard the learned Counsel for the petitioners and the respondents.

6. In their application, the petitioners have averred that they have not received the summons for the hearing on 30.11.2000. Further, they have averred that only on 3.10.2003, when the Bailiff came to the premises for executing the warrant, they came to know about it and immediately they have filed the application to set aside the exparte decree along with an application to condone the delay. Further, they have averred that the first petitioner is employed as a watchmen in a private apartment and his wife is employed as domestic servant, due to their job, they used to go early in the morning and come late in the evening and they have not served with any summons and also they have not refused to receive any of the processes at any point of time. In the counter affidavit, the respondents have stated that the petitioners have deliberately refused to accept the court summons. Further, it has been stated in the said counter that the Bailiff endorsement in the process shows that the petitioners have refused to receive the summons, the same has to be taken as the true state of affairs and on the basis of the said endorsement, it can be presumed that the petitioners have refused to receive the summons and now after a long period, they cannot file an application to set aside the decree along with an application to condone the delay in preferring the said application.

7. It is not the case of the petitioners or the respondents that the suit summons have been served on the petitioners. It is the case of the petitioners that they never refused to receive the process when it is sought to be served on them by the process server. It is the case of the respondents that the petitioners have refused to receive the summons when it is sought to be served on them. The Bailiff made an endorsement on 16.8.1995 stating that 'D-1 refused to receive summons and objected to affixure, D-2 gone out and copy affixed'. Thereafter, on 9.4.1999, the endorsement reads that when enquired about the first petitioner/first defendant, it has been informed by the villagers that the first petitioner has gone out and hence, the copy of the summons has been affixed. Again on 4.11.2000, there was an endorsement by the Bailiff saying that the first petitioner refused to receive the summons and prevented him to affix it and hence, it could not be affixed. On 6.11.2000, there has been endorsement that the first defendant refused to receive

the summons and objected to affixure. D-2 gone out and hence copy returned.

8. Now, the question is whether the endorsement made by the Bailiff has to be considered or the statement made by the petitioners in their affidavit that they never refused to receive the summons has to be considered. The Court below accepted the report of the Bailiff without making an enquiry to find out whether the report of the Bailiff is correct or not. Order 5 Rule 19 C.P.C. contemplates that in case if the summons is being refused by the parties and the endorsement has been made to that effect by the process server, he should be directed to file an affidavit to that effect and he should be examined by the concerned Court. Order 5 Rule 19 C.P.C. 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 fits.

9. The said provisions have been made to safeguard the interest of the defendants who do not appear before the Court in spite of the process server's report that summons have been served on them and to prevent the plaintiff from getting exparte decree in collusion with the process server. That is why it is incumbent on the part of the Trial Court to ensure that the defendants have willfully remained exparte in spite of the knowledge of the suit that has been levied against them. Thus, the trial Court is called upon to examine the process server and other witnesses, as it thought fit before deciding to hear the suit exparte.

10. The petitioners have clearly stated that as far as the first petitioner is concerned, he is a watchmen in a private apartment and that his wife is a domestic servant and they used to go for job early in the morning and come late in the evening. To this specific averments, counter has been filed denying the said statement. But, the denial is a simple denial. The said portion in the counter is extracted as follows:

Hence, the averments in the affidavit of the first petitioner that he worked as watchmen and that the second petitioner was a domestic servant and that they were absent when the Court Amin went to the premises and that they knew about the exparte decree only when the court Bailiff came to the premises with notice in D.P. No. 20 of 2003 on 3.10.2003, are denied as totally false and mischievous.

Except this simple denial, the respondents have not stated that the first petitioner is not working as a watchmen and the second defendant is not a domestic servant and they are not used to go for job early in the morning and coming late in the evening.

11. The learned Counsel appearing for the petitioners cited a decision reported in : AIR1978 Ker143 N. Nabeessu v. P. Kunhamina, wherein it has been held as follows:

We regret to observe that the learned Judge has not kept in mind the relevant provision of the C.P.C. in regard to the setting aside of an exparte decree; nor borne in mind the two aspects of the said provision. Under Order IX Rule 13 C.P.C., the question for consideration would be whether summons was not duly served or, whether the applicant was prevented by sufficient cause from appearing when the Suit was called on for hearing. Either of these grounds would suffice. We have noticed the two termini from which time for filing the application has to be reckoned. Addressing ourselves first to the question, whether the summons had been duly served, we see that the summons was returned with the endorsement that the appellant had refused to accept the summons. Under the Civil Procedure Code in force at the relevant time, which had application to the case, this cannot constitute sufficient service - vide Order V Rule 19 of the C.P.C. - in the absence of a declaration of sufficiency of service. If authority is needed for the proposition, it is enough to notice the direct ruling of a Division Bench of this Court in Daveed Aseervadam v. Krishna Pillai Govinda Pillai 1970 KER. L.T. 907. It is regrettable that the learned Judge did not address herself either to the relevant provisions of the Civil Procedure Code or to the judicial decisions which are innumerable on this aspect of the matter.

12. Another decision that has been relied on by the learned Counsel for the petitioner is reported in Shila Nath Mallik v. Balabhadra Sutradhar wherein it has been held as follows:

In the instant case, the defendants never made appearance before the trial Court. The learned Munsif, however, readily accepted the report of process-server and without making an enquiry to ensure the correctness of the process-server's report that he had served the summons by hanging it on the dwelling houses of the defendants - he at once heard and decreed the suit exparte. Thus, he has failed to comply with the requirements of Order 5, Rule 19 and Order 9, Rulrl 6(1) and (1)(a) C.P.C. Mr. B.C. Sarma, learned Counsel for the opposite party, however, contended that in a revision under Section 115 C.P.C. the petitioners cannot question the order passed by the trial Court unless it affects the jurisdiction of the Court. I do not think that the contention is correct. The failure to comply the said provisions of the C.P.C. affects the jurisdiction of the Court to proceed on with the suit. The trial Court thus acted illegally in hearing and passing the decree exparte. The enquiry made after passing of exparte decree does not cure the illegality.

13. Another decision that has been relied on by the learned Counsel for the petitioners is reported in : AIR1988 Pat166 Bhagwan Singh v. Ram Balak Singh, wherein it has been held as follows:

19. Normally, under Order V rule 1 of the Code of Civil Procedure (hereinafter referred to as 'the Code'), when a suit is duly instituted a summons is issued to the defendant to appear and answer the claim on a day specified therein and where a summons has been issued, the court directs the defendant to file the written statement on the date of his appearance and an entry to that effect is made in the summons. The defendant to whom a summons has been issued under Sub-rule (1) of order V of the code may appear in person or by a counsel duly instructed and able to answer all the material questions relating to the suit.

Such was the normal procedure till before Rule 19A to order V of the Code was inserted in 1976. It is pertinent to quote Rule 19A of Order V of the Code (inserted in 1976):

19-A(1). The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgment due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain;

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case, the Court considers it unnecessary.

Thus, a perusal of the proviso to Rule 19-A shows that the issuance of summons for service by registered post is not required only, where, in the circumstances of the case, the court considers it unnecessary; otherwise under Rule 19-A the Court in addition to and simultaneously with the issue of summons for service in the manner provided in Rules 9 to 19 shall also direct the summons to be served by registered post, acknowledgment due, addressed to defendant or his agent empowered to accept the service at the place where the defendant, or his agent actually and voluntarily resides or carries on business or personally works for gain.

20. In the present case, the Court on 5.12.78, ordered for issuance of summons on the defendant under Order V, Rule 1 of the Code; in other words, the Court thought that under the proviso to Rule 19-A issuance of summons for service by registered post also was not necessary. It is true, the court could exercise its power under the proviso to Rule 19-A in not ordering issuance of summons for service by registered post also, but it could do so if it considered it unnecessary in the circumstances of the case. In the instant case, the Court has not recorded anything to that effect and order for issuance of summons for service only under Order V, Rule 1 of the Code was passed.

14. Another decision that has been cited by the learned Counsel appearing for the petitioners is the Full Bench decision of this Court reported in 1983 L.W. 137 Parasurama Odayar v. Appadurai Chetti, wherein Their Lordships have held as follows:

To conclude, the point raised by Kailasam, J. for the answer of the Bench is whether the non-compliance of the requirements of Order 5 Rule 19 C.P.C., would make the service of the summons ineffective. Our answer to this question is this: Where there is no affidavit of the serving officer, and where the serving officer is not subsequently examined by the court, as found by the learned Judge in this case, there is non-compliance with the first part of Order 5, Rule 19 C.P.C., and the service is ineffective.

15. The above decisions make it very clear that if the process server makes an endorsement to the effect that the defendants refused to receive the summons, it is incumbent on the part of the trial Court to direct the process server to file an affidavit and examine him on oath.

16. Per contra, the learned Counsel appearing for the respondents cited the decision reported in 2007 (1) Supreme 1012 Indu Bhushan v. Munna lal and Anr. and submitted that the endorsement made by the process server has to be considered as true unless and otherwise some materials are shown to prove that it is false and erroneous. In that case, the process server has made an endorsement that it has been served on the concerned defendant, but in the given case on hand, the process server has made an endorsement saying that when the first defendant is sought to be served, he refused to receive the summons and that it was affixed. In none of the endorsements made by the process server, it has been stated that the second defendant was present and that she refused to receive the summons.

17. The next decision that has been cited by the learned Counsel for the respondents is reported in : [2002]3SCR352 Sushil Kumar Sabharwal v. Gurpreet Singh. But, even in the said judgment, Their Lordships of the Supreme Court in para 12 has held as follows:

The provision contained in Order 9 Rule 6 C.P.C. is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the court depending on the given situation. The three situations are : (i) when summons duly served, (ii) when summons not duly served, and (iii) when summons served but

not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the court may make an order that the suit be heard ex parte. The provision casts an obligation on the court and simultaneously invokes a call to the conscience of the court to feel satisfied in the sense of being 'proved' that the summons was duly served when and when alone, the court is conferred with a discretion to make an order that the suit be heard ex parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the court to satisfy itself on the service of summons. Any default or casual approach on the part of the court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the trial court would have been conscious of its obligation cast on it by Order 9 Rule 6 C.P.C., the case would not have proceeded ex parte against the defendant-appellant and a wasteful period of over eight years would not have been added to the life of this litigation.

18. Even in the said judgment, Their Lordships have clearly stated that the Court should not approach the matters in a casual manner and deprive a person's valuable right in participating the hearing. In the case on hand, as stated already, the petitioners have averred that summons have not been served on them, since according to the first petitioner, he is employed as a watchman in a private apartment and his wife is a domestic servant and they used to go for their job early in the morning and come late in the evening and they have not served with any suit summons.

19. Since the suit summons have not been served on them and the same has not been served in the manner as provided under the Code of Civil Procedures, I am constrained to hold that the petitioners have shown sufficient cause for not appearing before the Court when the case was listed. Since I arrived at the conclusion that the petitioners have shown sufficient cause in their application to set aside the exparte decree and their application to condone delay in preferring the said application, the order passed by the Court below is liable to be set aside.

20. In the result, the order of the learned District Munsif, Alandur made in I.A. No. 2787 of 2003 in O.S. No. 2077 of 1997 dated 18.9.2006 is set aside. The Civil Revision Petition stands allowed. Consequently, M.P. No. 1 of 2007 is closed. However, there will be no order as to costs.