M/S NAHAR ENTERPRISES

v.

M/S HYDERABAD ALLWYN LTD. AND ANR.

FEBRUARY 9, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Code of Civil Procedure, 1908:

Or. 5,r.2—Service of summons on defendant—When a summons is sent to defendant to appear in court and to file a written statement, it is obligatory on Court to send along with it a copy of plaint and other documents appended thereto.

Or. 9, r.6(1)(c)—Summons not served in due time—Held, in such a case Court would direct plaintiff to take steps for fresh summons.

Or. 9, r.13—Application for setting aside **ex-parte** *decree—Limitation—Held, summons having not been duly served in terms of Or. 5, r.2 or provisions of Or.9, r.6(1)(c) having not been complied with, second part of Article 123 of Schedule to Limitation Act would be attracted and limitation will begin to run from date of knowledge of* ***ex-parte*** *decree—***Ex-parte** *decree set aside—Defendant would deposit the specified amount before trial court—Limitation Act, 1963—Schedule—Art. 123.*

Respondent filed a suit for recovery of money against the appellant. Summons for appearance on 10.10.1988 was sent to appellant which was served on him on 14.10.1988 without enclosing a copy of the plaint. Meanwhile the Court adjourned the case for 2.12.1988. Without issuing any further summons the Court fixed another date for *ex-parte* hearing and the suit was ultimately decreed ex-parte on 13.12.1988. The appellant was served with summons in execution case on 2.12.1991 whereupon he filed an application on 13.12.1991 for setting the ex-parte decree, which was dismissed on the grounds that (1) non-receipt of copy of the plaint and other documents alongwith the summons could not be a ground to set aside ex-parte decree; (2) since there was no report about service of summons on 10.10.1988, there was no necessity to serve fresh summons; and (3) the ex-parte decree having

A been passed on 13.12.1988, the application for setting aside the same filed on 13.12.1991 was barred by limitation. The appeal of the defendant having been dismissed by the High Court, he filed the present appeal.

Allowing the appeal, the Court

B HELD: 1.1. When a summons is sent calling upon a defendant to appear in the Court and file his written statement, it is obligatory on the part of the Court to send a copy of the plaint and other documents appended thereto, in terms of Order V, Rule 2 CPC. [Para 8] [416-B]

1.2. The trial Court, furthermore, committed a manifest error in so far C as it failed to take into consideration that the summons having been served upon the appellant after the date fixed for his appearance, it was obligatory on its part to fix another date for his appearance and filing written statement and direct the plaintiff to take steps for service of fresh summons, as envisaged by Order IX Rule 6(1)(c) of CPC. [Para 9] [416-D-E]

D 1.3. Thus, the summons having not been duly served upon the appellant inasmuch as the provisions of Order V Rule 2 CPC or provisions of Order IX Rule 6(1)(c) having not been complied with, the second part of Article 123 of the Limitation Act will be attracted and the date of knowledge of passing of the said ex-parte decree would be the date from which the limitation will begin E to run. The ex-parte decree dated 13.12.1988 is set aside. However, in view of Order IX, Rule 13 CPC the defendant-appellant shall deposit a sum of Rs.15,000/- before the trial Court. [Paras 11,12 and 14]

[416-H; 417-A-B; 418-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 714 of 2007.

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From the Judgment and Order dated 28.6.2004 of the High Court of Judicature, Andhra Pradesh at Hyderabad in C.M.A. No. 1253/1996.

Prakash Shrivastava for the Appellant.

G The Judgment of the Court was delivered by

S.B. SINHA. J. 1. Leave granted.

2. Heard the learned counsel for the parties.

H 3. The appellant is before us aggrieved by and dissatisfied with the

judgment and order dated 28.6.2004 passed by a learned Single Judge of the High Court of Andhra Pradesh at Hyderabad dismissing the appeal preferred against an order dated 19.7.1996 passed by Addl. Civil Judge Hyderabad in I.A. No. 6/1992.

4. The respondent herein filed a suit for recovery of a sum of Rs. 1,87,904.62 with future interest at the rate of 18.5% per annum against the appellant. It appears that in the summons sent to the appellant. 10.10.1988 was fixed for his appearance. However, as the summons had not been served the Court adjourned the matter to 2.12.1988. Summons were served on the appellant on 14.10.1988. but according to him a copy of the plaint was not annexed thereto. He sent a telegram on 17.10.1988 and also a letter to the Court concerned but, admittedly, the same was not responded to. Without issuing any further summons fixing another date for his appearance, the Court fixed a date and having found the appellant absent on that date, fixed another date for ex-parte hearing. On 13.12.1988 the suit was decreed with costs.

5. An execution case was filed by the respondent herein to execute the said decree. According to the appellant, the bailiff came to serve a copy of summons on him on 2.12.1991. The said summons having been served upon the appellant, he came to learn that ex-parte decree has been passed. An application for setting aside the said ex-parte decree filed on 13.12.1991. By an order dated 17.1.1992 the learned Judge. City Civil Court, Hyderabad dismissed the said application *inter alia* opining:

> (1) Non-receipt of a copy of the plaint and documents along with the summons cannot be a ground to set aside an ex-parte decree.
>
> (2) Moreover, Since there was no report about the service of summons on 10.10.1988, there was no necessity to serve fresh summons.
>
> (3) An ex-Parte decree having been passed on 13.12.1988 and an application for setting aside the *ex-parte* decree having been filed on 13.12.1991, the same was barred by limitation.

6. An appeal preferred thereagainst was dismissed by the High Court by reason of the impugned judgment.

7. Mr. Prakash Shrivastava, learned counsel appearing on behalf of the appellant would submit that the Trial Court as also the High Court committed

A a manifest error in passing the impugned judgment in so far as it failed to consider the implication of : (i) the provisions of Order V Rule 2 of CPC: (ii) provisions of Order IX Rule 6 (1) (C) of CPC: and (iii) the Provisions of Article 123 of the Limitation Act.

8. The Learned Counsel appears to be correct. When a summons is sent
B calling upon a defendant to appear in the Court and file his written statement, it is obligatory on the part of the court to send a copy of the plaint and other documents appended thereto, in terms of Order 5, Rule 2 CPC.

Order V Rule 2 of the CPC reads as under:

C "Copy of plaint annexed to summons - Every summons shall be accompanied by a copy of the plaint."

9. The learned Judge did not address itself the question as to how a defendant, in absence of a copy of the plaint and other documents, would be able to file his written statement. The Court, furthermore, in our opinion,
D committed a manifest error in so far as it failed to take into consideration that the summons having been served upon the appellant after the date fixed for his appearance, it was obligatory on its part to fix another date for his appearance and filing written statement and direct the plaintiff to take steps for service of fresh summons. This legal position is explicit in view of the
E provisions of order IX Rule 6 (1) (C) of CPC which reads:

"When summons served but not in due time - if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be
F fixed by the Court, and shall direct notice of such day to be given to the defendant."

10. The court, therefore, committed an illegality in dismissing the application for setting aside the *ex-parte* decree. It was a fit case where the Court should have exercised its jurisdiction under order IX Rule 13 of CPC.

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11. The third ground on which the learned Trial Judge dismissed the application for setting aside the *ex-parte* decree was that it was barred by limitation. The said ground in our opinion, is also without substance. The summons had not been duly served upon the appellant inasmuch as the provisions of order IX Rule 2 CPC or provisions of order IX Rule 6 (1) (C)

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had not been complied with. In that view, the second part of Article 123, in terms whereof an applicant would be deemed to have knowledge of passing of the said ex-parte decree would be the date from which the limitation will begin to run, would be attracted in the instant case and not the first part thereof. A

12. We, therefore, are of the opinion that the impugned judgments cannot be sustained and they are accordingly set aside. The ex-parte decree dated 13.12.1988 is also set aside. B

13. However, such an order need not be wholly unconditional one. Imposition of such condition is permissible under order IX Rule 13 of CPC, as would appear from a recent decision of this Court in *Tea Auction Ltd.* v. *Grace Hill Tea Industry & Anr.*, (2006) 9 SCALE 223, wherein this Court held: C

> "However, the interpretation of the expression 'Payment into Court' did not directly fall for consideration in those cases.
>
> Order IX Rule 13 of CPC did not undergo any amendment in the year 1976. The High Courts, for a long time, had been interpreting the said provisions as conferring power upon the courts to issue certain directions which need not be confined to costs or otherwise. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex-parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when the decree was passed, even on the date when the decree was passed, but also other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to put the defendants to terms. It is, however, tritc that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith. But, it would not be correct to hold that no error has been committed by the Division Bench in holding that the learned Single Judge did not possess such power. The Learned Single Judge exercised its discretionery jurisdiction keeping in view that the matter has been disposed of in fact finally at the interim stage at the back of defendant and it was in that view of the matter a chance was given to it to defend the suit, but, then the learned Single Judge was not correct to D E F G H

A direct securing of the entire sum of Rs. 37 lakhs in the form of bank guarantee or deposit the sum in cash. The condition imposed should have been reasonable. What would be reasonable terms would depend upon facts and circumstances of each case."

14. We, therefore, direct that the appellant shall deposit a sum of Rs. B 15,000/- before the learned court below, within a period of six weeks from today. The appeal is allowed. In the facts and circumstances of this case, there shall be no order as to costs.

R. P. Appeal allowed.