

(2009) 12 MAD CK 0246
In the Madras High Court
Case No : C.R.P. (NPD) No. 3580 of 2009

P. Saravana Kumar

APPELLANT

Vs

Mars Dye Chem

RESPONDENT

Date of Decision : 23-12-2009

Acts Referred:

Arbitration Act, 1940 — Section 34
Arbitration and Conciliation Act, 1996 — Section 8
Civil Procedure Code, 1908 (CPC) — Order 5 Rule 17
Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Section 5

Citation : (2009) 12 MAD CK 0246

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : V. Raghavachari, for the Appellant; N. Manokaran, for the Respondent

Final Decision : Dismissed

Judgement

M. Venugopal, J.—The petitioner/defendant has filed the civil revision petition praying for issuance of an order to reject the suit in O.S. No. 335 of 2009 on the file of the Learned District Munsif, Erode.

2. According to the learned Counsel for the revision petitioner/defendant it is the admitted case of the respondent/plaintiff that the petitioner/defendant is a partner and hence a suit for injunction is not maintainable in law and as against the Copartner a suit for bare injunction is not maintainable and as a matter of fact the suit itself is fraudulent and mischievous one without any iota of truth at all and further the trial Court has not verified whether the suit summons has been served and an endorsement has been made in the H4 notice for I.A. No. 517 of 2009 as if there has been "refusal" to receive the notice and in fact no notice has been served on the petitioner/defendant and an exparte order of interim injunction has been granted on 30.7.2009 by the trial Court without even discussing the reasons and moreover, fraud has been played upon the Court by the Bailiff making a false endorsement and obtaining the signature of Village

Administrative Officer on 1.7.2009 and the Bailiff returned the summons on 6.7.2009 and the said Bailiff has not stated the time at which the summons has been served as contemplated under Order 5 Rule 18 of CPC and that he has not verified the Oath of the said return as per Order 5 Rule 17 of Civil Procedure Code.

3. Continuing further, the learned Counsel for the petitioner contends that the trial Court has accepted the false endorsement and blindly granted an order of injunction against the Copartner is clearly an abuse of process of law and therefore prays for allowing the civil revision petition in the interest of justice.

4. In support of the contention that the injunction is not a proper remedy for the respondent/plaintiff, the learned Counsel for the petitioner/defendant cites the decision in *Bishambhar Dayal, Appellant v. Moolchand and Ors.* AIR 1994 Raj 179 (V 51 C 46) wherein it is held as follows:

But where a partner filing a suit for injunction restraining other partners from interfering with the business of the partnership fails to prove that the defendants have been illegally interfering in the management of the partnership affairs by him or have been acting in violation of the terms of partnership or have so grossly misconducted themselves as to render the carrying on of the business impossible in a proper manner but merely shows that some differences have arisen between the parties and their relations have become strained, the court will not grant relief by way of an injunction as the proper remedy for the plaintiff is to sue for the dissolution of partnership.

Even if the partnership is held to be illegal where the defendants have made some investments in the business the plaintiff cannot be granted the equitable relief of injunction. The granting of an injunction in such a case would be oppressive as the interest of the defendants cannot properly be safeguarded.

5. He also cites the decision in *Doss and Malliga Vs. Vamanan and Gurunathan*, wherein it is held that,

the word "shall" "under Order 5 Rule 19 C.P.C indicates that the said provision is mandatory and not directory" and further it is also not mandatory for the Court to accept the service of summons merely because it is verified by an affidavit process of server.

6. He draws the attention of this Court to the Hon''ble Supreme Court's decision in *Sushil Kumar Sabharwal Vs. Gurpreet Singh and Others*, , wherein at paragraph 8 which is observed thus:

We find several infirmities and lapses on the part of the process server. Firstly, on the alleged refusal by the defendant either he did not affix a copy of the summons and the plaint on the wall of the ship or if he claims to have done so, then the endorsement made by him on the back of the summons does not support him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy of the plaint on the wall should

have been witnessed by persons who identified the defendant and his shop and witnessed such procedure. The endorsement shows that there were no witnesses available on the spot. The correctness of such endorsement is difficult to believe even prima facie. The tenant runs a shoe shop in the suit premises. Apparently, the shop will be situated in a locality where there are other shops and houses. One can understand refusal by unwilling persons requested by the process server to witness the proceedings and be a party to the procedure of the service of summons but to say that there were no witnesses available on the spot is a statement which can be accepted only with a pinch of salt. Incidentally, we may state that though the date of appearance was 23rd February, 1993 the summons is said to have been tendered on 22nd February, 1993, i.e., just a day before the date of hearing.

7. Contending that this Court has powers under Article 227 of the Constitution of India, the learned Counsel for the revision petitioner relies on the decision Varada Reddiar and Another Vs. Jayachandran and Others, wherein it is held that

if a decree results in miscarriage of justice, the High Court exercised its power under Article 227 of the Constitution of India.

8. Further more, the learned Counsel for the revision petitioner cites the decision of the Hon'ble Supreme Court Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company, (pertaining to the matter under Arbitration and Conciliation Act 1996 wherein it is held as follows:

Section 8 confers a power on the judicial authority. He must refer the dispute which is the subject-matter of an arbitration agreement if an action is pending before him, subject to the fulfilment of the conditions precedent. The said power, however, shall be exercised if a party so applies not later than when submitting his first statement on the substance of the dispute.

Once the conditions precedent are satisfied, the judicial authority is statutorily mandated to refer the matter to arbitration. What is necessary to be looked into therefor, inter alia, would be as to whether the subject matter of the dispute is covered by the arbitration agreement or not.

Section 8 of the 1996 Act contemplates some departure from Section 34 of the 1940 Act. Whereas Section 34 of the 1940 Act contemplated stay of the suit; Section 8 of the 1996 Act mandates a reference. Exercise of discretion by the judicial authority, which was the hallmark of Section 34 of the 1940 Act, has been taken away under the 1996 Act. The direction to make reference is not only mandatory, but the arbitration proceedings to be commenced or continued and conclusion thereof by an arbitral award remain unhampered by pendency of the proceedings before the judicial authority.

9. The learned Counsel for the revision petitioner also cites the decision in Brigadier Man Mohan Sharma, FRGS (Retd.) Vs. Lt. Gen. Depinder Singh, wherein it is held that

in the present case, she raised in the Arbitration application or issues which cannot be decided the suit filed by the third party etc.

10. Moreover, besides this in the aforesaid judgment at paragraph 17 it is observed as follows:

The learned Counsel also submitted that the civil suit filed by Shri Arora covered all the said issues, and as, had been rightly held by the learned Designated Judge, continuance of the suit as well as the arbitration proceedings simultaneously, could result in conflicting decisions

and also in paragraph 19 which is observed as follows:

Having considered the submissions made on behalf of the parties and having further perused the materials on record, we find ourselves unable to agree with the decision of the learned Designated Judge as also that of the Division Bench of the High Court impugned in this appeal.

11. On the side of the petitioner/defendant, the learned Counsel relies Decision of the Hon'ble Supreme Court's Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits and Wovens and Others, wherein at paragraph No. 22 it is observed as follows:

Section 8 of the 1996 Act is preemptory in nature. In a case where there exists an arbitration agreement, the court is under obligation to refer the parties to arbitration in terms of the arbitration agreement. (See Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, and Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company, . No issue, therefore, would remain to be decided in a suit. Existence of arbitration agreement is not disputed. The High Court, therefore, in our opinion, was right in referring the dispute between the parties to arbitration.

12. Also, the learned Counsel for the petitioner relied on the decision State of Andhra Pradesh Vs. P.V. Hanumantha Rao (D) thr. Lrs. and Another, at page 124 wherein it is observed as follows:

Remedy of the writ petition available in the High Court is not against the "decision" of the subordinate court, tribunal or authority but it is against the "decision-making process". In the "decision-making process" if the court, tribunal or authority deciding the case, has ignored vital evidence and thereby arrived at erroneous conclusion or has misconstrued the provisions of the relevant Act or misunderstood the scope of its jurisdiction, the constitutional power of the High Court under Article 226 and 227 can be invoked to set right such errors and prevent gross injustice to the party complaining.

The High Court has right to interfere with orders of subordinate courts and tribunals where (1) there is an error manifest and apparent on the face of the proceeding such as when it is based on a clear misreading or utter disregard of the provisions of law, and (2) a grave injustice or gross failure of justice has been occasioned thereby.

Surya Dev Rai Vs. Ram Chander Rai and Others, , relied on

Though neither in exercise of the power of writ under Article 226 nor in supervisory jurisdiction under Article 227 the High Court will convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence, but the High Court has power in writ jurisdiction to interfere where important evidence has been over looked and the legal provisions involved are misinterpreted or misapplied.

13. In response, the learned Counsel for the respondent/plaintiff contends that as on date no suit is in existence and further that the petitioner/defendant has filed an application for Condonation of delay under Order 9 Rule 13 along with Section 5 of the Indian Limitation Act and the civil revision petitioner has not disclosed these matters in the revision petition and the request of the petitioner/defendant to reject the suit which is not in existence as on date is not maintainable and that in regard to the service of summons, satisfaction of the Court is very much necessary and the trial Court has held the service "as sufficient" and the petitioner/defendant cannot deny his address and the Bailiff has taken the signature of a responsible person viz., Village in the summons and therefore, the same cannot be doubted and also the Process Server has signed before the Nazir and therefore prays for dismissing the civil revision petition.

14. The learned Counsel for the respondent/plaintiff further submits that the petitioner/defendant cannot invoking the powers of this Court under Article 227 of the Constitution of India and in this connection he relies on the decision of this Court Ganapathy Subramanian v. Ramalingam and Ors. (2007) 7 MLJ 13 wherein it is held that

Power of General Superintendence under Article 227 of the Constitution of India has to be exercised most sparingly only in appropriate cases and suit for injunction and only wrong decisions may not be a ground for the exercise of jurisdiction under Article 227 of the Constitution, unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate Courts and Tribunals resulting in grave injustice to a party.

15. He also cites the decision Alladi Kuppuswami and Madhava Rao AIR 1975 Andhra Pradesh 366 wherein it is held

it is the description of the Court to examine the serving Officer on oath or not.

16. He also cites another decision Mali Ram Sharma and Anr. v. Smit. Gayatri Devi, Opposite Party wherein it is held thus:

whether the affidavit sworn by the process server was not precisely in the form prescribed by the court it was held that the form prescribed in the Code is contained in a schedule as a matter of construction, it may be said that strict compliance with the terms of the Form are not necessary. It is sufficient if the affidavit is in substantial compliance of the said Form.

17. He also draws the attention of this Court to the Full Bench decision of this Court Parasurama Odayar Vs. Appadurai Chetty and Others, wherein it is held thus:

There is no provision in Order 21 as to the manner of service of the notice under Order 21, Rule 66 and hence Order 48, Rule 2 will apply, which means that the provisions of Order 5 relating to the manner of service will apply even to the notice issue under Order 21 Rule 66. Hence, the provisions of Order 5, Rule 19 will apply, (1985) ILR 15 AII 106 (PC) and Dokku Bhushayya Vs. Katragadda Ramakrishnayya, , Ref.

18. In regard to serving of suit summons on the petitioner/defendant for the hearing 29.7.2009, the Bailiff in his return endorsement has stated that he has gone to the address of the petitioner/defendant on 1.7.2009 and upon enquiry made by him, he has come to know the whereabouts of the petitioner/defendant and after meeting him, he has requested to receive the petition copy for which the petitioner/defendant has refused to receive the same and further he has affixed the copy of the summons in the front door of the petitioner's house and to this effect he has obtained the signature of the Village Administrative Officer, Veerappanchathiram also it appears that the petitioner/defendant has refused to receive the copy of the ad interim injunction granted by the Court till 10.7.2009 and also, the petitioner/defendant has refused to affix the signature in token of the receipt of the same and therefore the copy of the same has been affixed by the Process Server at the outer door of the house and to this effect the Process Server got the signature of the witness Village Administrative Officer of Veerappanchathiram on 1.7.2009 and accordingly submitted his return endorsement to the Court on 6.7.2009.

19. In the present case before us in the main suit in O.S. No. 335 of 2009 an Exparte Decree has been passed on 7.8.2009. It is open to a party to prefer an appeal against an Exparte Decree in O.S. No. 335 of 2009 or to file an application under Order 9 Rule 13 of CPC in the manner known to law.

20. Admittedly, the petitioner/defendant has filed an application before the trial Court under Order 9 Rule 13 of CPC along with condonation of delay application filed u/s 5 of the Indian Limitation Act. The present stage of the matter is for filing of the counter and enquiry is said to be pending in this regard.

21. It is true that the respondent/plaintiff has filed a suit for permanent injunction restraining the petitioner/defendant, his men and agent from entering into the partnership premises either at Head Office or Branch office from interfering in any manner with the internal management of plaintiff's firm. As on date no suit is pending in view of the fact that an exparte decree has been passed against the petitioner/defendant by the trial Court on 7.8.2009.

22. On a careful consideration of respective contentions and taking note of the fact that as on date there is no suit in existence and also bearing in mind of the fact that the application under Order 9 Rule 13 of CPC along with Section 5 of the

Indian Limitation Act for condonation of delay are pending for final adjudication before the trial Court, this Court, at this stage is of the considered view that the power of Judicial Superintendence under Article 227 of the Constitution of India has to be sparingly exercised and when the petitioner/defendant has exercised his remedy of filing an application under Order 9 Rule 13 of CPC along with Section 5 application before the trial Court, he cannot invoke the aid of Article 227 of the Constitution of India and mere wrong decision is not a ground to interfere under Article 227 of the Constitution of India and moreover the procedural wrangle cannot be allowed to be shaken or shackled with and viewed in that perspective this civil revision petition is devoid of merits and the same fails.

23. In the result the civil revision petition is dismissed. However, it is made clear that the dismissal of the civil revision petition will not preclude the petitioner/defendant in prosecuting the application under Order 9 Rule 13 of CPC along with Section 5 of the Indian Limitation Act raising all factual and legal pleas in the manner known to law and to seek proper remedy thereto. Further, the trial Court shall provide opportunities to respective parties to adduce oral and documentary evidence if they so desire. If need be the petitioner can take steps to examine the Process Server in regard to the proof of service in the matter in issue. Having regard to the facts and circumstances of the case there shall no order as to costs. Consequently, connected miscellaneous petition is closed.