

**IN THE COURT OF THE I ADDITIONAL CIVIL JUDGE &
JMFC, CHANNAGIRI.**

Present: Kum.Shama Srivatsa.

B.A ,LL.B, (Hons.), LL.M.

I ADDL. Civil Judge & JMFC, Channagiri.

O.S. No. 292/2021

PLAINTIFF : Sri. Kotebasappa

/Vs/

DEFENDANTS : Smt. Gangamma

PARTIES IN I. A.No. 6

APPLICANT : Smt. Gangamma
----- (Defendants)

/Vs/

OPPONENTS : Sri. Kotebasappa ----- (Plaintiff)

The defendant herein has filed this application under Order IX Rule 7 of CPC, when the matter was posted for judgement, to set aside the Order dated: 09.12.2021 placing defendant as exparte.

2. The averments made in the affidavit annexed to the application states that, suit summons issued by this court was not duly served to defendant and the summons returned with shara as “want of time”, but due to oversight it was mentioned as served personally in the records. On this guise this court passed an order

on 09-12-2021 placing defendant herein as Exparte. It is also averred that, defendant has got good grounds to resist the claim of the plaintiff in the suit. Thus, pray to allow the application by setting aside the order placing defendant as exparte.

3. On receipt of this application, the counsel for plaintiff has filed detailed objections to said application contending that, the instant application is not maintainable either in law or on facts as such liable to be dismissed in limini. The application filed by defendant is also barred by time therefore prayed to reject the application.

4. In view of the application and objections filed to application, following points arise for my consideration.

- i. Whether the defendant has made out sufficient grounds to allow this application?
- ii. What order ?

5. Heard learned counsels for defendant and plaintiff. Perused materials and placed on record and my answers to the above points are as under: -

6. My answers to the aforementioned points are as under :

Point No.i : **In the Affirmative**

Point No.ii : **As per the final order
for the following ;**

REASONS

7.Point No. i:

The plaintiff/Opponent has filed the present suit against the defendant for the relief of permanent injunction and declaration. The defendants/ applicant herein has filed this instant application. It is the specific case of the defendant that, due to the oversight/ mistake of the court, the defendant was not served with the summons issued on 10-11-2021 by this court . On 23-11-2021 the summons was returned with the shara as “ want of time” , but due to oversight / mistake it was mentioned wrongly as served personally . On this guise defendant was placed exparte . Therefore, the defendant herein has filed this application to set aside the order dt. 09-12-2021 placing defendant exparte .

*In this regard the Defendant/ Applicant herein referred a decision laid down in, **Dansingh Bist V/s Additional collector, Bijnor and other reported in AIR 1960 All 152** Wherein it is held that, Courts have inherent power to recall and cancel an invalid order passed inadvertently or by oversight and it is not simply permitted but it is the duty of the court , which should be vigilant not to allow any act of itself or mistake of counsel do wrong to the suitor.*

8. The plaintiff/Opponent filed his objections and contented that, summons was duly served on defendant, inspite of that, she did not appear before this court hence, this court placed her exparte. Thereafter plaintiff has filed affidavit in lieu of his examination in chief and got marked the documents, as defendant was placed exparte this court posted the matter for arguments on merit. Plaintiff further submits that, he has filed written arguments and also argued before this court. Thereafter this court posted the matter for judgment on 05.11.2022. The plaintiff/Opponent further contended that, when the matter was posted for judgment after giving sufficient opportunity to defendant, the same cannot be recalled by filing an applications.

*In this regard the plaintiff/Opponent herein refered a decision laid down in, **"Rabiya bi Kassim M V/s The Country wide consumer financial service limited", reported in ILR 2004 KAR 2215, Wherein the Hon'ble High Court of Karnataka held that, " Making an interlocutory application to reopen the case and record further evidence after the matter is reserved for pronouncement of judgment is not permissible".***

In this case sufficient opportunity was given to plaintiff to complete his evidence, but he has not availed the opportunity at

appropriate time and there after his evidence was closed. The case was fixed for defendants evidence and ultimately posted for judgment. But in the present case opportunity was not provided.

9. After hearing both sides and perusal of records placed before me , in the instant case , the defendant was not provided with sufficient opportunity to appear before this court and it is apparent on the face of records .

*At this juncture it is apt to consider the following decision in **M.T Jamna Kuer V/s Lal Bahaddur, AIR 1950 FC 131** held that, “ We have no doubt that , error was apperant on the face of the record and in our opinion the question as to how the error occurred is not relevant to this enquiry.” And*

*In **Syud Tuffazal Hossein Khan V/s Raghunath Prasad**, wherein the privy counsel held, “ To recall and cancel an invalid order is not simply permitted to but it is the duty of a judge who should always vigilant not to allow the act of court itself to do wrong to the suitor.” And*

10. Therefore in my view due to the mistake of court the defendant/applicant cannot put to loss and to avoid multiplicity of cases, it is just and proper to afford an opportunity to the defendant to contest this case and defend her rights in the suit schedule property. Accordingly the defendant has made out sufficient grounds to allow this application. Accordingly I answer in this point No. 1 in the Affirmative.

11. Point No. ii:

In view of discussion and conclusion arrived at point No. 1 the application filed by the defendant deserves to be allowed. Accordingly I proceed to pass following:

ORDER

I.A No. 6 filed under order 9 rule 7 by learned counsel for defendant is hereby allowed.

The order dated 09.12.2021 placing the defendant as exparte is hereby recalled.

The defendant is permitted to file written statement by next date of hearing.

(Typed by me on my laptop, corrected by me, print taken by stenographer and then pronounced by me in open court on this **09th day of November, 2022**)

Sd/-
(Kum. Shama Srivatsa)
I Addl Civil Judge & JMFC.,
Channagiri.