
(1982) 09 MAD CK 0022
In the Madras High Court
Case No : C.R.P. No. 2979 of 1981

Jayammal

APPELLANT

Vs

Valliammal

RESPONDENT

Date of Decision : 13-09-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 15, Order 5 Rule 9, Order 5 Rule 9(4) (iii), 115

Citation : (1982) 09 MAD CK 0022

Hon'ble Judges : Mohan, J

Bench : Single Bench

Advocate : Aruna Jagadeesan, for the Appellant; P. Veeraraghavan, for the Respondent

Judgement

Mohan, J.—The short question that arises for consideration in this revision is whether the revision petitioner had notice in execution. Both

parties tried their level best to establish their stand, because it was well settled in law that failure to serve notice in execution would vitiate the entire

sale. Pursuant to the final decree in a mortgage, the property was brought to sale and the sale had taken place. Thereafter it was contended on

behalf of revision petitioner that there was no service of summons on her as required under O.5. R. 9 (4)(iii) of the C.P.C. while it was contended

on behalf of the purchaser that there has been proper service since service had been effected on the husband of the petitioner herein which was

permissible as per the provisions of O.5, R. 15, C.P.C. The executing Court found that the service effected on the husband is not in accordance

with O.5, R. 9 (4) (iii) C.P.C. which contemplates personal service. Therefore, service on the husband would not tantamount to service in law. He

accordingly allowed the application. Aggrieved by the same, the matter was taken by the decree holder in appeal and the Appellate Court was of

the view that O.5. R. 9 (4) (iii) C.P.C. had been repealed and therefore, he found that the procedure prescribed under O.5, R. 15 can be adopted

and consequently he held that the service was proper. Accordingly, he reversed the finding of the Executing Court. Thus, the revision. The

argument advanced on behalf of the revision petitioner is two fold : (1) There has been no personal service on the petitioner as required under O.5.

R. 9 (4) (iii) of the C.P.C. and the procedure prescribed under O.5, R. 15, C.P.C., would apply to proceedings other than those which are

contemplated under sub-rule 4 of O.5, R. 9, C.P.C., and (2) there has been an endorsement made by the plaintiff at the time of return of

summons, only to suit his convenience. Hence for both these reasons, the order of the lower appellate court is liable to be set aside.

2. In opposition to this, the learned counsel for the respondent would submit that once the courts below have found that there has been a proper

service, this Court exercising revisional jurisdiction, cannot interfere with that finding as laid down in Harendra Nath Chatterjee Vs. Sailendra

Krishna Saha and Others, and Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others, The other point that is argued

before me is that it was not the case of the wife that the service on the husband would not constitute proper service. I have given my careful

consideration to the above arguments. It is true that if there has been proper service of summons and the courts below have in fact found that there

has been such a service, I am not going to interfere in revisional jurisdiction under S. 115 of the C.P.C. To that proposition of law which is based

upon the decisions in Harendra Nath Chatterjee Vs. Sailendra Krishna Saha and Others, and Manindra Land and Building Corporation Ltd. Vs.

Bhutnath Banerjee and Others, there, can be demur whatsoever. But, in this case, I have grave doubt as to whether there was service of summons.

When I say that I have grave doubt, that is borne out by a mere perusal of the endorsement made by the bailiff in the case which I may do well if I

extract the same in Tamil itself½

The above endorsement, first of all appears to be very curious. In that the husband is claimed to say that the judgment-debtor happens to be his

wife and she is living with him and further he would accept summons on her behalf. These recitals, in my view, are tell tale recitals to which no

credence could be given. Then again, the same recitals are found when the bailiff submits return of the summons to the office. Therefore, I am of

the view that even the husband of the petitioner herein has not been served. Assuming that the husband of the petitioner has been served, the

learned District Judge has incorrectly applied the provisions of law. The correct provision that has to be made applicable is O.5, R. 9 (4) (iii) of the

C.P.C., which reads as follows:

R.9 (4). Notwithstanding anything contained in sub-R.(1) where proceedings in court are taken from...(iii) bringing to sale any property in

execution of a decree or order of court, notices shall be served only in the manner provided for in sub-Cl.(2).

It should be noted that this sub-R.4 used the language "notwithstanding". Therefore, it is mandatory in its terms. This is not a distinction with regard

to the manner of service as is argued on behalf of the respondent. On the contrary, it contemplates "personal service". That will be illustrated by a

case of contempt of court, because the alleged contemner will have to be present on the date fixed in the summons. Therefore, it is not another

mode of service to be taken on any adult member of the family as contemplated under O.5. R. 15, C.P.C. But, what is required is "personal

service". Therefore, assuming that the husband had been served, though I have found it to the contrary, this is not a case in which it will be open to

the decree-holder or the auction purchaser to contend that the service on the husband of the petitioner is enough having regard to the mandatory

terms of O.5, R. 9 (4) (iii). C.P.C. Therefore, on this point I agree with the learned District Munsif. Accordingly, the order of the District Judge is

set aside and that of the Executing court is restored. However, I make it clear that the sale in so far as the share of the petitioner is concerned,

alone is set aside. C.R.P. allowed. There will be no order as to costs.