

(2008) 12 BOM CK 0039

In the Bombay High Court

Case No : Notice of Motion No. 3791 of 2008 in Suit No. 2633 of 2007

Khairrunisa Haji Mohammed

APPELLANT

Vs

Afzal Haji Mohammed and Others

RESPONDENT

Date of Decision : 05-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 15 Rule 1, Order 20 Rule 18, Order 9 Rule 13

Citation : (2009) 3 BomCR 370

Hon'ble Judges : Dalvi Roshan, J

Bench : Single Bench

Advocate : Pradeep Sancheti, Akshay Patil, Sachin Chandarana and Priyanka Vegad, instructed by Manilal Kher Ambalal and Co, for the Appellant; Chetan Kapadia, Vishal Kanade and P.P. Patankar for defendant No. 7, Kishore Jain, Sweta R. Moghe and Sheetal S. Shah, instructed by Mehta and Girdharlal for defendant No. 8, Gautam Patel and Ivov D'Cruz for defendant Nos. 10 and 11, for the Respondent

Judgement

Dalvi Roshan, J.—This Suit is for partition between the two branches emanating from a common ancestor. One branch is of the plaintiff and defendant Nos. 1 to 7. The other branch is of defendant Nos. 8 to 17. The Suit for partition was filed. Both the branches are equally entitled to the suit property. The suit property is essentially an immovable property. The relief in the Suit is with regard to that immovable property. The immovable property is a building consisting of 6 flats, 1 garage and 1 ground-floor portion. The Complaint was stated to have been served upon all the parties. The Notice of Motion for interim reliefs came up before the Court. The admission of the parties of the 1/2 share of the two branches came to be seen. The relief prayed for in the Notice of Motion was seen not required to be granted. The Suit itself was required to be disposed of upon admission of the parties of their equal shares in the suit premises, it being a partition Suit. An order came to be passed partitioning the suit property equally between the two branches. The relief against defendant Nos. 18 and 19, who are third parties,

was not pressed.

2. The defendants were ostensibly being represented by defendant No. 9 who was present in Court at the time the parties were heard and the order was passed on 23.9.2008.

3. It is this order that defendant No. 8 has challenged in this Notice of Motion to set aside on the ground that defendant No. 8 was not served. No other defendants from the branch consisting of defendant Nos. 8 to 17 has taken exception to the order of partition.

4. The applicant must satisfy the Court that he was not duly served or that he was prevented by any sufficient cause from appearing when the Suit was called for hearing. Under the proviso to Order 9, Rule 13, if the decree is of the nature that it cannot be set aside as against the defendant only it may be set aside as against all or any other defendant also. Under the second proviso to Order 9, Rule 13, the Court would not set aside the decree passed ex parte merely on the ground that there was irregularity in the service of the summons, if the Court is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

5. The basic contention on behalf of defendant No. 8 is that he was not served with the Notice of Motion or the writ of summons. It is his case that he is a Non Resident Indian (NRI). He is settled in Leicester, England. It is claimed that the plaintiff, who is his paternal aunt and "very close to him", is aware of and "conscious of" the said fact.

6. Further case of defendant No. 8 is that for the last one year he has been residing in England and for 17 years prior thereto, he was residing in Malawi, Central Africa. His Affidavit-in-support has been affirmed on 22nd October, 2008. This would show that he was resident in England since about October 2007 and prior to that, he was residing in Malawi, Central Africa.

7. The plaintiff has been imputed notice and knowledge of this fact on the ground she is the paternal aunt and close to him.

8. Mr. Jain contended that the service of the Notice of Motion is not correctly made which fact is reflected in the Affidavits of service filed by the plaintiff. I have been shown certain Affidavits of service filed in this Suit. It has been the plaintiff's case in paragraph 4 of the Plaint that defendant No. 8 controls one of the flats in the suit property being flat No. 5 and has permitted third party one M/s. Impact to occupy the flat. The plaintiff has further contended that defendant No. 9 controls flat Nos. 4 and 7 and has permitted defendant No. 18 to unlawfully occupy flat No. 4. These are the 3 out of 6 flats which would otherwise be a part of the undivided equal share of the branch of defendant Nos. 8 to 17.

9. These averments show that defendant No. 8 was not residing in the suit property at the time of the filing of the Suit. There is nothing to show that the plaintiff knew the exact address of defendant No. 8 either in England or in

Malawi. The last known address of defendant No. 8 is, therefore, flat No. 5 in the suit property. The Affidavit proving service of the Plaint, the Notice of Motion and the Affidavit-in-support thereof taken out by the plaintiff shows that defendant No. 8 was sought to be served at flat No. 5 in the suit property. He was, therefore, sought to be served at the last known address as required under the procedure relating to service of the Plaint and the proceedings. It is the plaintiff's case that the service sought to be effected as above was accepted at that address, though defendant No. 1 was not available personally to accept the service he having permitted M/s. Impact to occupy his flat. The list of the defendants and the signatures against their names under the list annexed to the said Affidavits show that it has been accepted on 17.9.2007 at 6.15 p.m. Incidentally, the service upon defendant No. 9 has also been accepted by some other person. Defendant No. 9 appeared in Court at the hearing of the Notice of Motion; defendant No. 8 did not.

10. Since defendant No. 8 was not served personally, the plaintiff applied for and obtained a Chamber order on 29.2.2008 to effect substituted service by publication upon defendant No. 8; the other defendants having been served by personal service. A publication came to be made in Free Press Journal and Urdu Times in respect of the Notice of Motion which was sought to be moved by the plaintiff for interim relief.

11. In the Notice of Motion, defendant Nos. 9, 10 and 11 have filed their Affidavits in reply. The other defendants did not. Out of the defendants, who did not file their Affidavits, only defendant No. 8 has challenged the order passed in the Notice of Motion.

12. The first Affidavit of defendant No. 9 with regard to this aspect is dated 10.12.2007. In paragraph 2 of the Affidavit, he has stated that he was keen in settling the matter amicably. However he complained that the matter could not be settled because the plaintiff has deliberately and mischievously not served all the defendants. In Para-3 of the Affidavit, he has stated that defendant No. 8, his brother was residing in Malawi, Central Africa. He contended that not only the suit property but other properties were also required to be partitioned. He has enumerated four such other properties.

13. It may be mentioned that it has been the case of defendant No. 8 in the present application that he has been residing in U.K. since the last one year. This Affidavit is made in October, 2008. Hence he was residing in U.K. since October 2007. However, defendant No. 9 has stated on 10th December, 2007 that he was residing in Malawi, Central Africa. It is, therefore, seen that his actual address at the time of the Suit was not known even to defendant No. 9, his brother. There is nothing to show that it was known to the plaintiff who sued him for partition of the properties and which Suit he proposes to defend upon challenging the plaintiff's right by setting aside the order already passed in Notice of Motion.

14. It is interesting that in reply to the Affidavit of defendant No. 9 dated 10th

December, 2007, the plaintiff has stated in paragraph 12 of the Affidavit-in-rejoinder to the Notice of Motion that the Constituted Attorney of defendant No. 8 was in Bombay and had attended out- of-Court settlement meetings on behalf of defendant No. 8. This fact is not disputed by defendant No. 8. Hence in this application the interest of defendant No. 8 was represented in the out-of-Court settlement of the suit dispute. He, therefore, had knowledge of the Suit and the Interim Application and authority from defendant No. 8 to settle the dispute.

15. A further Affidavit of defendant No. 9 in reply to the plaintiff's Affidavit dated 14.12.2007 mentions that the plaintiff knew that defendant No. 8, brother of defendant No. 9, was not residing in the suit building but at Malawi, Central Africa and "still the correct address is not mentioned so as to snatch ex parte order against the said defendant No. 8." This Affidavit has been filed on 7th April 2008. Seeing the statement of defendant No. 8 in paragraph 10 of the Affidavit-in-support of the present Notice of Motion, this statement of defendant No. 9 is seen to be entirely incorrect. Defendant No. 8 was not residing in Malawi, Central Africa in April 2008, if defendant No. 8 has stated the correct facts on oath. Even if defendant No. 8 was residing in Malawi, and expected his family members to know the residence in Malawi, defendant No. 9 also would have known the address in Malawi, but no such address is set out in his Affidavit.

16. A reading of all these Affidavits shows that though the plaintiff knew that defendant No. 8 was not residing in the flat otherwise controlled by him in the suit premises, she did not know and was not given any other address of defendant No. 8. It was her case that defendant No. 8 had created rights in favour of a third party in that flat. That was the last known address of defendant No. 8. The plaintiff was required to serve defendant No. 8 only at that address. That was done. The service was accepted. Nevertheless, upon exception being taken by defendant No. 9, the plaintiff obtained a Chamber order for substituted service. The plaintiff served by publication. That was the correct mode of serving defendant No. 8 who was stated to be not in India. No further affixation on the premises, which was the last known address, was again required because service on behalf of defendant No. 8 was accepted at that address earlier.

17. Though defendant No. 9 did not represent the interest of defendant No. 8, he made a grievance on behalf of defendant No. 8 with regard to lack of service. His grievance only showed the country in which defendant No. 8 was, according to him, residing. That has turned down to be an incorrect assertion.

18. The plaintiff is not expected to know better. The plaintiff had tried her best to serve interim proceedings upon defendant No. 8 as much as on any other defendant. It appears that there was a lot of acrimony between the parties though the parties accepted that there were two branches and the properties had to be equally divided between the two branches. It also appears that there were certain negotiations for settlement about the division of the properties. It has further been shown that there are certain other properties also which the defendants required to partition but which were not the properties in this Suit.

The service of the Notice of Motion having been correctly shown, the contentions of the parties on merits were considered. Defendant No. 9 accepted the division of the suit property in two equal parts. Defendant Nos. 10 and 11 also accepted the partition of the suit property in two equal parts. Since the other defendants were not represented, though served, and had not even filed Affidavits to show contest, the partition which was most equal and equitable as well as simple and straightforward was required to be made. Interim relief of injunction or appointment of Court Receiver was not called for.

19. Upon the admissions of all the parties who appeared before the Court pursuant to service, the Suit for partition is required to be disposed of by a preliminary decree. By the aforesaid order dated 23.9.2008, the Suit itself came to be disposed of in view of total absence of any contest. It was noted that defendant Nos. 8 and 12 to 17 were served as the Affidavit of service in that regard was filed. Defendant No. 9 appeared in person.

20. It is contended on behalf of defendant No. 8 by Mr. Jain that the Suit was not on Board. The writ of summons was not served. The Suit could not have been disposed of and since defendant No. 8 was not served with the writ of summons, the order dated 23.7.2008 must be set aside. Indeed, the Suit was not on Board.

21. Under the provisions of Order 12, Rule 6 of the C.P.C., if an admission of fact is made either orally or in writing any where by the defendant, the Court is required to pass a decree on admission. Under the provisions of Order 15, Rule 1 of the C.P.C. if parties are not at issue, the Court is required to at once pronounce judgment. Similarly if the relationship of the parties and the partible property is admitted, the Court must pass a preliminary decree under the provisions of Order 20, Rule 18 of the C.P.C. At the hearing of the interim proceedings, these aspects have to be noticed by the Court. If that is done, the Suit does not have to be separately served or kept on Board. The service of the interim proceedings upon the parties constitutes knowledge of the issues of the property in dispute and the Court is required to pass an order in the Notice of Motion as the nature and circumstances of the case require.

22. No Suit which can be disposed of upon the substance and merits of the case being seen, can be kept alive merely because it is not on Board, though the parties show no dispute which is required to be agitated. Mr. Jain contended that it is not mentioned in the order that the Suit is not on Board and is brought on Board and then disposed of. Such a technicality need hardly be commented upon. The order shows that the Suit was disposed of when no dispute between the parties was seen at the interim stage and no issues remained to be tried between the parties with regard to the suit property.

23. It appears that there are disputes inter se between defendant Nos. 9 to 11 with regard to certain other properties. The Affidavit of defendant No. 9 shows four other properties which also he required partition of. Those properties are not the subject-matter of this Suit and hence no order in that regard could be

passed. Paragraph 10(d) of the last Affidavit dated 21.4.2008 shows that dispute, if any between defendant Nos. 9 to 11 or their branch is not the subject-matter of the present Suit.

24. Every party in a partition Suit is in the nature of a plaintiff. Hence defendant No. 9 or any other defendant may bring into the suit or other properties available for distribution. They have to pay ad valorem Court fees upon valuation of those properties. Until that is done, no adjudication with regard thereto can be made.

25. In paragraph 8 of the Affidavit-in-support of this Notice of Motion, Defendant No. 8 has also stated that under a certain Deed of Gift he has become entitled to 1/3rd of 1/2 share in the suit property i.e. 1/6th undivided share. He, therefore, accepts and admits 1/2 equal partition of the suit property between the two branches. Upon such partition, he claims 1/3rd of the 1/2 share which would otherwise go to defendant Nos. 8 to 17 which includes defendant Nos. 8 to 11 who are the brothers and defendant Nos. 12 to 17 who are the sisters in that branch of the family.

26. Statement in paragraph 8 of the Affidavit-in-support of the Notice of Motion of defendant No. 8 itself shows that the purview of the Suit would be as was shown to Court at the time of the disposal of the Notice of Motion under the order dated 23.9.2007.

27. Mr. Sancheti justifiably contended that even if that order is set aside and the Notice of Motion is restored to file once again a judgment on admission under Order 12, Rule 6 of the C.P.C. would be required to be passed based upon the present admission of defendant No. 8 in paragraph 8 of his Affidavit-in-support of this Notice of motion and consequently this Suit being a partition Suit a preliminary decree for ascertainment of the share and separate possession would be required to be passed.

28. The clock has turned full circle. It appears that defendant No. 9, though having accepted the 1/2 share of the two branches, has desired to have further partition in the same Suit without he being transposed as the plaintiff or without any of the defendants paying any additional Court fee. The Notice of Motion itself appears to be collusive and is completely misconceived. It is seen that defendant No. 8 was duly served the copy of the Notice of Motion. There is no doubt about service. He did not appear and show any cause against the Notice of Motion. His interest in the suit property to the extent of the claim in the Suit was protected. Though defendant No. 9 stated that he was residing in Malawi, Central Africa and was not served there, he did not provide address to the plaintiff. Defendant No. 8 himself states that he was, at that time, residing in Leicester, England. He not having shown the knowledge of either of these addresses upon the plaintiff, he was served at the last known address as well as by publication and an order in the Notice of Motion, which came to be passed, is binding upon him, whether or not it disposes of the entire Suit depending upon the facts of this case.

29. The plaintiff has tried her best to serve defendant No. 8. The service is

required to be made of the Notice of Motion and not of the writ of summons in the Suit.

30. Strangely, defendant No. 8 has stated in paragraph 2 of the Affidavit-in-support of this Notice of Motion that he was informed by defendant No. 9 of the order having been passed. Defendant No. 9 complained in the Notice of Motion that defendant No. 8 was not served. He never sought to represent defendant No. 8. If defendant No. 9 could inform defendant No. 8 of the order that is passed in the Notice of Motion, he could have also informed defendant No. 8 of the Interim Application having been taken out against him. Defendant No. 8 would have had sufficient time to appear and answer the plaintiff's claim given the fact that the parties have filed a number of Affidavits before the Notice of Motion came up for hearing.

31. Even an irregularity in the service of the writ of summons would not entitle a Court to set aside the decree passed ex parte if the defendants had notice of the date of hearing and had time to appear to answer the claim. In this case, defendant No. 8 must be taken to have had notice of the plaintiff's Interim Application but did not appear to defend it.

32. The entire application appears to be collusive and misconceived. Defendant No. 8 appears to have been put up at the instance of defendant No. 9. There is no reason why the order passed for partition without dispute amongst the two branches is required to be set aside merely because of the internal disputes between defendant Nos. 9 to 11, for which defendant No. 8 has been put up by defendant No. 9. Of course, the defendants would be entitled to bring in a fresh action in law for the other properties which they require to have partitioned and also for the extent of the share of the defendants inter se with which this Suit is not concerned. Hence, the following order:

ORDER

The Notice of Motion is dismissed with costs, fixed at Rs. 3,000/-. The ad interim order already passed in this Notice of Motion shall continue till 15th January, 2009.