

(2013) 10 MAD CK 0194

In the Madras High Court

Case No : C.R.P. (NPD) No. 1934 of 2003 and C.M.P. No's. 20321 and 20322 of 2003

M. Dharmalingam

APPELLANT

Vs

Anbu, G.R. Jeeva, G.R. Ravichandran and G.R. Bhavan Rep.
by mother and natural guardian Anbu

RESPONDENT

Date of Decision : 30-10-2013

Acts Referred:

Citation : (2013) 5 LW 538

Hon'ble Judges : B. Rajendran, J

Bench : Single Bench

Advocate : M.R. Murali, for the Appellant;

Final Decision : Dismissed

Judgement

B. Rajendran, J.—The revision petitioner is the second defendant in O.S. No. 9165 of 1994 on the file of the learned XI Assistant Judge, City Civil Court, Chennai. The first defendant in the suit is the brother's wife of the second defendant/revision petitioner. The suit was filed by the respondents herein for the relief of declaration and for recovery of possession. In the plaint, the plaintiffs/respondents would contend that the husband of the first plaintiff/first respondent namely Murugesan has purchased the suit property from the husband of the first defendant in the suit namely Devambal by a registered sale deed dated 11.05.1989. After purchase, the first defendant Devambal requested the husband of the plaintiffs/respondents to permit her to occupy a portion of the land on the Northern side for a nominal rent and accordingly, considering the fact that the husband of the first defendant Devambal who sold the property to the husband of the first plaintiff/first respondent herein died and she has no male member to support, she was permitted to occupy a small portion of the suit property. After occupying the property, the first defendant Devambal in collusion with the second defendant/revision petitioner herein, clandestinely filed a suit in O.S. No. 7190 of 1989 claiming a share in the property occupied by her in which

husband of the first plaintiff/first respondent herein impleaded himself as a party. Thus, the defendants have created a cloud over the title in the suit property and therefore, the suit was filed for declaration and recovery of possession.

2. In the suit, according to the plaintiffs/respondents, summons were served on the second defendant/revision petitioner. However, the second defendant/revision petitioner would contend that he came to know about the filing of the suit only on 09.08.1996 when the police came along with the decree holders to dispossess him from the suit property. According to the second defendant/revision petitioner, he has no knowledge about the ex-parte decree passed in the suit on 27.10.1995. Therefore, the petitioner has filed an application in I.A. No. 1409 of 1996 under Order IX Rule 13 of CPC praying to set aside the ex-parte decree dated 27.10.1995. According to the revision petitioner, he came to know about the ex-parte decree dated 27.10.1995 only on 09.08.1996 when he was sought to be dispossessed and therefore, the application was filed in time and there was no delay in filing the same. Such a contention urged by the revision petitioner was negated by both the courts below, hence, the present Civil Revision Petition has been filed.

3. The learned counsel for the revision petitioner would mainly contend that the ex-parte order dated 27.10.1995 was passed without serving any notice on the revision petitioner and therefore, the courts below ought to have considered the application filed by the revision petitioner in I.A. No. 14009 of 1996 thereby giving an opportunity for him to defend the suit.

4. Even though the Civil Revision Petition was filed in the year 2003, the notice sent to the respondents returned unserved. Therefore, taking note of the fact that the Civil Revision Petition is pending for the past 10 years, I heard the counsel for the revision petitioner and this Civil Revision Petition is disposed of on merits.

5. It is seen from the records that notice was served on the wife of the revision petitioner twice and finding that such service of notice was not sufficient, the trial court permitted the plaintiffs/respondents to take a paper publication and it was also effected. Therefore, the revision petitioner cannot be heard to say that he was not aware of the pendency of suit or he was not served with any notice. It is also seen from the records that in the suit, originally, for the hearing on 19.01.1995, a notice was served on 24.12.1994 and it was received by the wife of the revision petitioner and it was duly endorsed by the Court Ameen. Thereafter, for the hearing dated 30.03.1995, another notice was served on the wife of the petitioner on 15.02.1995 and it was also received. Thus, notice was served on the wife of the revision petitioner twice and the revision petitioner had knowledge about the filing of the suit. However, notwithstanding the service of notice on the wife of the petitioner twice, the court below directed the plaintiffs/respondents to effect paper publication in one issue of Tamil Daily Malai Malar and accordingly, a paper publication was also effected on 30.09.1995 as substituted service for the revision petitioner. Only thereafter, the ex-parte

decree dated 27.10.1995 was passed by the trial court. Even other wise, the petitioner has filed the petition in I.A. No. 14009 of 1996 without an application to condone the delay as though he came to know about the ex-parte order only on 09.08.1996 and there is no delay in filing the petition under Order IX Rule 13 of CPC. The above aspects have been taken note of by both the courts below and negated the claim of the revision petitioner.

6. The learned counsel for the revision petitioner mainly argued that the trial court ordered paper publication since the trial court did not satisfied itself with the manner in which notice was served on the revision petitioner. The courts below did not see that the provisions of Order V Rule 20 of CPC has not been followed in this case, while so, the courts below are not justified in dismissing the application filed by the revision petitioner for setting aside the ex-parte decree.

7. A perusal of the orders passed by both the courts below would indicate that earlier, P.G. Raman, husband of the first plaintiff/first respondent herein filed a suit in R.C.O.P. No. 2867 of 1991 against the first defendant in the suit namely Devambal for eviction and the same was ordered on 08.04.1993. Thereafter, the husband of the first plaintiff/first respondent herein also filed E.P. No. 492 of 1993 to execute the decree. Thereafter, since the husband of first plaintiff/first respondent died, the present suit in O.S. No. 9165 of 1994 was filed by the plaintiffs/respondents herein in which the order dated 08.04.1993 passed in RCOP No. 2867 of 1991 was marked as a document in the suit filed by the plaintiffs/respondents.

8. When we analyse the orders passed by both the courts below, it is seen that the suit was filed in the year 1994 in which summons were served on the wife of the second defendant/revision petitioner twice and it was also duly endorsed by the Court ameen. The signature of the wife of the second defendant/revision petitioner is not disputed. The second defendant/revision petitioner also did not dispute that the notices were served on his wife. Notwithstanding such service of notice, the trial court ordered for effecting paper publication in one issue of Malai Malar and accordingly, a paper publication was effected during September 1995 as a substituted service for the second defendant/revision petitioner. Thereafter, the trial court passed the ex-parte decree. It is further seen that the first defendant Devambal, who is the wife of the brother of the second defendant/revision petitioner, was also served. Therefore also, it could be seen that the second defendant/revision petitioner has knowledge about the filing of the suit. Now, let me examine as to whether the summons served on the wife of the second defendant/revision petitioner is in compliance with the requirements of Order V Rule 20 of CPC.

9. Order V Rule 20 CPC contemplates that where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, a notice shall be affixed in some conspicuous part of the house in which the defendant is known to have resided or carried on business or personally worked for gain. Order V Rule 20 Sub-Rule (1-A) contemplates that

whenever service of notice is made by effecting paper publication, the Court shall see that the newspaper in which such publication is made shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually resided. In this case, since the trial court finds that the summons have been served twice on the wife of the second defendant/revision petitioner, as an abundant caution, orders for substitution of service and thereafter passed the ex-parte decree on 27.10.1995. Thus, the procedure adopted by the trial court relating to service of summons cannot be said to be unreasonable or arbitrary.

10. Order V Rule 15 of CPC deals with service of summons on an adult member of the family of the defendant. Rule 15 specifically contemplates that where, in any suit, the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him. In the present case, admittedly, notice was served twice on the wife of the second defendant/revision petitioner and therefore, such service on the wife of the second defendant/revision petitioner is in sufficient compliance with the provisions contemplated under Order V Rule 15 of CPC. Therefore, the courts below are justified in holding that service on the second defendant/revision petitioner is complete and I do not find any reason to interfere with the same.

11. The learned counsel for the revision petitioner relied on the decision of this Court reported in P.R. Ramaswami Gounder, Memorial Trust and Others Vs. Kasturi Travels, Proprietor, Neena Sha and Others, wherein this Court held that before ordering for substituted service the Court should satisfy itself that the defendant is evading service of notice and that the summons could not be served in an ordinary manner other than substituted service on the defendant. In that case, notice was served by affixture besides that notice sent through post was returned with an endorsement "door locked intimation delivered". The decision rendered by this Court cannot be made applicable to this case for the simple reason that in compliance with Order V Rule 15 of CPC, notice was served twice on the wife of the second defendant/revision petitioner who is competent to receive the notice. Thereafter, paper publication was ordered by the trial court as a substituted service to serve notice on the second defendant/revision petitioner. In those circumstances, it cannot be said that the trial court has erroneously exercised its jurisdiction conferred under Order V Rule 20 of CPC.

12. The counsel for the revision petitioner also relied on the decision of this Court reported in Ram Kripal Vs. Veerbhadra and Others, to contend that Order V Rule 17 and 19 relating to service of summons has not been complied with in this case. In that case, notice was only served by way of affixture in the house. The Court also held that the person who served such notice by affixture was not examined nor any other person in the area was examined as a witness.

Therefore, the decision rendered by the Madhya Pradesh High Court cannot be equated with the facts of this case where admittedly, notice was served twice on the wife of the second defendant/revision petitioner.

13. Similarly, the counsel for the revision petitioner relied on the decision of the Honourable Supreme Court reported in C.N. Ramappa Gowda Vs. C.C. Chandregowda (Dead) by L.Rs. and Another, . In that case, the trial court passed an ex-parte decree for non-filing of written statement in a suit for partition. In the ex-parte decree no reason was adduced as to how the plaintiff is entitled for half share in the property. As against the ex-parte decree, an appeal was filed and the High Court remanded the matter to the trial court for re-trial. On further appeal, the Supreme Court upheld the order passed by the High Court by holding that in the ex-parte decree, the trial court has not concluded on merits as to how the plaintiff therein is entitled for half a share in the suit property. The Honourable Supreme Court also found that the ex-parte decree was passed only on the basis of an affidavit filed by the plaintiff and no documents were marked. Therefore, the Honourable Supreme Court held that even if there was no written statement filed, the Courts should be cautious before granting a decree especially when there is no documents marked to substantiate the suit claim and that the suit claim has to be proved in accordance with law. In the present case, when we see the decree and judgment passed by the trial court, it is evident that the plaintiffs/respondents have marked documents and they were exhibited as Exs. A1 to A9. Ex. A1 is the sale deed dated 11.05.1989 in favour of the husband of the first plaintiff, executed by the husband of the first defendant in the suit. Ex. A4 is the Order passed in RCOP No. 2867 of 1991 filed by the husband of the first respondent/first plaintiff against the first defendant in the suit. The respondents/plaintiffs also filed Ex. A5, Patta in respect of the suit property issued on 09.08.1989, Ex. A6, Electricity and Water Tax Documents and Ex. A7, being the property tax receipt. Therefore, on the basis of such documentary evidence made available, the trial court passed the ex-parte decree on 27.10.1995 holding that the plaintiffs/respondents have proved the suit claim. Therefore, I am of the view that the decision of the Honourable Supreme Court relied on by the counsel for the revision petitioner cannot be made applied to the facts of this case.

14. In this case, it has to be mentioned that the second defendant/revision petitioner did not prove in a manner known to law that he came to know about the ex-parte decree dated 27.10.1995 only on 09.08.1996 when the police came to dispossess him along with the decree holder. The revision petitioner did not examine any one to substantiate his claim about the knowledge of the decree. The revision petitioner also did not dispute the service of notice on his wife twice. While so, the revision petitioner ought to have filed an application u/s 5 of the Limitation Act to condone the delay in filing the application to set aside the ex-parte decree dated 27.10.1995 especially when the revision petitioner did not prove that he came to know about the ex-parte decree only on 09.08.1996. The revision petitioner suppressed the factum of service of notice twice on his wife

and filed the petition under Order IX Rule 13 of CPC and it can be ranked as a dilly-dally tactics adopted by the revision petitioner to prolong the litigation and he cannot be equated with a person who did not know about the filing of the suit and the ex-parte order passed against him. While so, I am of the view that in the facts and circumstance of the case, the courts below are right in dismissing the application filed by the revision petitioner and I do not see any reason to interfere with the same. The Civil Revision Petition is devoid of any merits and therefore it is liable to be dismissed. In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.