

(2000) 09 MAD CK 0051
In the Madras High Court
Case No : C.R.P. No. 1384 of 2000

N.R. Krishnamoorthy

APPELLANT

Vs

N.R. Thulasiram, N.R. Mohan, N.R. Sudarsan and K.R.
Sulochana

RESPONDENT

Date of Decision : 07-09-2000

Acts Referred:

Evidence Act, 1872 — Section 114
Limitation Act, 1963 — Section 5

Citation : (2000) 09 MAD CK 0051

Hon'ble Judges : A. Subbulakshmi, J

Bench : Single Bench

Advocate : V. Sitharanjan Das, for the Appellant; M.S. Suresh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

A. Subbulakshmi, J.—First defendant is the revision petitioner. The plaintiffs filed the suit for partition and separate possession and also for mesne profits. Preliminary decree was passed on 4.2.94. Ex parte final decree was passed on 28.4.95. The first defendant filed application to set aside the ex parte decree along with the application to condone the delay of 1337 days in filing the application to set aside the ex parte decree. Learned trial Judge dismissed the application to condone the delay.

2. Aggrieved against the order of the trial Judge, the Civil Revision Petition is filed to set aside the order of the trial Judge in I.A. No. 344 of 1999 in O.S.1 of 1992.

3. Learned trial Judge, while arriving at such conclusion in dismissing the application to condone the delay, found that summons on the first defendant was served by affixture in his house and there was every opportunity for the first defendant to see the summons when he came to his house after his work and the first defendant's brother was also served since he is also a resident of the

same house and the first defendant also admitted in his evidence the signature found in the notice dated 2.2.96 in the amendment application No. 528 of 1996 which amendment application was filed to amend the final decree and the Commissioner also noted that the defendants did not participate when the Commissioner effected division. Based on these aspects, the trial Judge found that there is no ground at all to condone the delay and accordingly dismissed the application.

4. Learned counsel for the petitioner submitted that there was no proper service of summons on the revision petitioner/first defendant and without service of summons, the final decree has been passed and the petitioner himself came to know about the passing of final decree only on 28.9.98 when the E.P. was filed and he had no knowledge about the passing of final decree and now on the safe side, he has filed petition to condone the delay and as there was no proper service of summons effected on the petitioner, the first defendant had no knowledge of the final decree and the delay has to be condoned and the revision petitioner must be given an opportunity to participate in the final decree proceedings.

5. Learned counsel for the respondents/plaintiffs submitted that the first defendant is a doctor and he used to return to his house everyday and the summons was served by affixture and so, he would have had every opportunity to see the summons which was affixed in his house and it cannot be stated that there was no proper service. He also pointed out that in the notice in amendment application No.528/96 dated 2.12.96 only the revision petitioner has signed and he also knows about the amendment application in December 1996 itself and the defendant did not take any steps immediately and the dismissal of the application by the trial Judge is perfectly in order.

6. Order 5, Rule 10, CPC prescribes the mode of service. It states that Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

Order 5, Rule 12, states that

Wherever it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

Order 5, Rule 15, states 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.

Order 5, Rule 20, deals with substituted service which reads thus

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, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

The court shall order summons to be served by affixture only when the court is satisfied that there is reason to believe that the defendant is keeping out of the way for avoiding service. No such circumstance has been shown in the instant case. It is evident from the order passed by the trial Judge that the first defendant revision petitioner is a practising doctor and daily he used to go to his clinic by 10.00 am returns by 2.00 pm and then again he goes to his clinic by 5.00 pm and returns to his house by 9.00 pm. So, the revision petitioner was in the habit of returning to his house daily. There was sufficient opportunity for serving the summons on the revision petitioner when he was available in his house or in his clinic. When the petitioner is available and there was possibility of serving the summons on the petitioner the question of service by affixture does not arise at all. It is nowhere stated that the revision petitioner was not available for service and service by affixture of summons is a must. Only if the court is fully satisfied that the defendant was keeping out of way for the purpose of avoiding service, then the service by affixture can be ordered. Nothing transpires from the records that such thing had happened and service by affixture is a must. Without taking proper steps for service on the defendant/revision petitioner, the service by affixture has been made and the revision petitioner has been set ex parte. So, for service of summons by affixture on the revision petitioner itself no proper ground is found. So, it can be safely concluded that there was no proper service of notice on the final decree proceedings on the revision petitioner.

7. It is borne out by records that there is enmity between the revision petitioner and his brother on whom the summons was served. So, it cannot be stated that the brother would have informed the revision petitioner with regard to the final decree proceedings. Further only in the evidence, the revision petitioner has stated that the signature in the notice dated 2.12.96 in Application No. 522/96 is of himself. It is not clear from the evidence that he was aware of the amendment application and he knows about the proceedings.

8. In the order, the trial Judge has stated that the Commissioner had stated in his report that the defendants did not take part while the Commissioner was effecting partition. It is not borne out by the order that the defendants were present when the Commissioner went and divided the property. By the mere statement of the Commissioner that the defendants did not participate it cannot be concluded that the defendants were present in the suit property while the

Commissioner effected partition. So, that also does not conclusively establish that the defendants were present at the time of effecting partition by the Commissioner and the defendants were aware of the proceedings. Without taking proper steps for effecting service of the summons on the revision petitioner, he has been set ex parte and ex parte final decree is passed.

9. Of course, in the final decree it is stated as if counsel had appeared for the defendants but in the body of the final decree, the trial Judge has specifically stated that the defendants did not appear and ex parte final decree was passed. A perusal of the records clearly shows that there was no proper service of summons on the defendant. Mere saying that the summons was served would not lead to the presumption of regularity of summons under S.114 Evidence Act. In *Raghunath v. Radhakanto* (AIR 1961 Orissa 73) the Orissa High Court has held that

But the fact of non service of summons and the absence of any proof of the alleged service of summons coupled with the fact that there was sufficient proof of alleged motive on the part of the landlord for obtaining an ex parte decree by fraudulent suppression of summons held was sufficient ground for setting aside the ex parte decree.

In *G.S. Mudaliar v. I.F. Corporation* (AIR 1977 Madras 358) this court has held that

Under the Code, affixture cannot be resorted to before exhausting all attempts at direct service on the persons named in the notice or summons. Where it was found that the judgment-debtors were not in their respective residences at the time the process-server called but the process-server did not make any attempt to serve the notices on any adult male members of the family in their residences and he straightway proceeded to affix the notices, stating that the judgment-debtors were out of town and that no case was made out for serving the judgment-debtors by affixture. Consequently the order of the executing court declaring the judgment-debtors ex parte was without jurisdiction.

The Delhi High Court has held in *The Punjab Oil Expellers Co., Ghaziabad Vs. Madan Lal Nanda and Sons and Others*, that

To ensure that every effort is made to effect personal service, court has a duty to pay attention to matters connected with issue and service of process.

In *Shanmuga Sadachara Servai v. Thirugnanam Servai & others* (1999-3-LW 649) this court has held that "It is settled law that the discretion vested in the Court in the matter of dealing with the application filed u/s 5 of the Limitation Act is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood. The words sufficient cause" ought to receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant."

The Apex Court in *Collector, Land Acquisition, Anantnag and Another Vs. Mst.*

Katiji and Others, has given the following guidelines by stressing importance to adopt liberal approach in entertaining the application for condoning the delay u/s 5 of the Limitation Act.

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day's delay must be explained does not mean that a pedantic approach should be made. Why not every hour's delay every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right if injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by restoring to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.
10. In the case on hand, there was no proper service of summons even though the petitioner was available and no efforts were taken to serve the petitioner in person and instead the summons was served by affixture. That cannot be construed as proper service of summons. The petitioner clearly says that only when the E.P. was filed, he came to know about the final decree proceedings and immediately he filed application to set aside the ex parte decree along with application to condone the delay. The suit is one for partition and separate possession. The defendants must be given opportunity to take part in the final decree proceedings to have effective partition and separate possession. The petitioner has come forward with this petition after a lapse of 1337 days. Hence, I find that the petition can be allowed on payment of cost to the respondents.

In the result, the Civil Revision Petition is allowed on payment of Rs. 3000/= by way of cost to the respondents within two weeks from today failing which the Civil Revision Petition will automatically be dismissed. On such compliance, I.A. 344/99 in O.S. 1/92 is allowed. Consequent to the disposal of the Civil Revision Petition, C.M.P. 6675 of 2000 is closed.