
(1973) 11 MAD CK 0023
In the Madras High Court

Palaniammal

APPELLANT

Vs

Valliammal and Others

RESPONDENT

Date of Decision : 22-11-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 17, Order 5 Rule 19

Citation : (1975) 88 LW 143 : (1975) 1 MLJ 65

Hon'ble Judges : P.R. Gokulakrishnan, J

Bench : Single Bench

Judgement

P.R. Gokulakrishnan, J.—This Civil Miscellaneous Second Appeal arises out of the concurrent judgments of the District Munsif, Dharapuram in E.A. No. 282 of 1968 in E.P. No. 150 of 1966 in O.S. No. 374 of 1963 and also C.M.A. No. 41 of 1970 on the file of the District Judge, Coimbatore. Mr. T. P. Gopalakrishnan, the learned Counsel for the appellant, submitted that proper notice was not served in the Execution Petition on the appellant herein, and as such, any sale that is effected is void. On the very same point, Mr. T. P. Gopalakrishnan, the learned Counsel for the appellant argued Palaniammal v. Valliammal and Ors. C.M.S.A. No. 101 of 1970 I remanded the said C.M.S.A. No. 101 of 1970 after allowing the same to the file of the District Judge, Coimbatore, for the purpose of disposing of the appeal on its merits bearing in mind the principles laid down in Parasuram Udayar v. Appadurai Chetty and Ors. 83 M.L.W. 137 : (1970) 2 M.L.J. 1 : L.R. 1970 Mad. 271 . After the remand, the learned District Judge, Coimbatore East at Erode held that the District Munsif in Execution Petition, found the service of notice sufficient on the appellant herein and as such, the order of sale in the Execution Petition cannot be questioned. He also referred to the evidence of the process-server R.W. 5, which was recorded in the Execution Application which is much later to the District Munsif satisfying himself regarding the sufficiency of service on the appellant herein. In my view, the learned District Judge has not properly appreciated the principles laid down in Parasurama Udayar v. Appadurai Chetty 83 Mad. L.W. 137 : (1970) 2 M.L.J. 1 : L.R. 1970 Mad. 271 referred to above. What is important is that the endorsement of the Court itself should

indicate that the presiding Officer has applied his mind and considered that the summons has been duly served. This has been made clear in the Full Bench decision in para 45 of its judgment. Order 5, Rule 19 of the Civil Procedure Code, which is applicable to the facts of the case for the service of summons clearly states that:

Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath or cause him to be so examined by another Court touching his proceedings, and may make further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

2. It is clear from this rule that the Court, both in cases where the process server has filed an affidavit and in cases where he has not filed the same, must satisfy itself regarding the sufficiency of a proper service of notice after applying its mind and declare that the service is proper. From the endorsement in Exhibit B-3 it can be taken that the serving office has verified the affixture by an affidavit. It is also clear from Exhibit B-3 that the appellant was not present at her residence and the process-server came to know from the neighbours that he had gone to Coimbatore. Nothing is mentioned as to whether she was temporarily absent from the place of her residence or whether she had once for all left for Coimbatore. Service must be proper service or otherwise, a party will be condemned without being heard. That is why Order 5, Rule 17 and Rule 19, Civil Procedure Code, are very particular as regards service of a notice. In order to expedite the working of the Court, discretion is given to the presiding Officer to get himself satisfied regarding the proper service of notice being effected by affixture. This satisfaction by the Court must be patent on record and the Court must apply its mind before it declares that the service is proper. I do not find anything on the record to show that the Court was satisfied with the service of summons on the appellant herein. Though the exact form of that declaration may be in any convenient form, such as " it is declared that the defendant has been duly-served ", or " it is declared that the service is sufficient", or simply " defendant duly served ", or "service sufficient", what is important is that the endorsement of the Court itself should indicate that the presiding officer has applied his mind and considered that the summons has been duly served. From the way in which the return was made by the serving officer and the endorsement subsequently made by the presiding Officer it is not made out that the presiding Officer applied his mind before he considered that the service was sufficient. On the facts and the circumstances of this case, and also taking into consideration both the return made by the serving officer and the endorsement of the presiding Officer on the service made, I am of the view that Order 5, Rule 19 has not been satisfied in respect of the serving of notice on the appellant herein.

3. In these circumstances, this Civil Miscellaneous Second Appeal is allowed with

the result that the sale has to be set aside. There will be no order as to costs. No leave.