
(1969) 06 MAD CK 0004
In the Madras High Court
Case No : A.A.A.O. No. 5 of 1962

Parasurama Odayar

APPELLANT

Vs

Appadurai Chetty and Others

RESPONDENT

Date of Decision : 20-06-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 66, Order 21 Rule 90, Order 48 Rule 2, Order 5 Rule 17, Order 5 Rule 19
Limitation Act, 1908 — Article 164, 166, 169, 181
Limitation Act, 1963 — Article 123, 127, 137

Citation : AIR 1970 Mad 271 : (1970) ILR (Mad) 393 : (1970) 83 LW 137

Hon'ble Judges : Venkataraman, J; Ramakrishnan, J; Kailasam, J

Bench : Full Bench

Advocate : K. Parasaran, for R. Shanmugham, for the Appellant; V.V. Raghavan, for the Respondent

Final Decision : Allowed

Judgement

Venkataraman, J.—This Full Bench has been constituted to resolve the conflict of observations in Bench decisions of this Court concerning

the effect of non-compliance with the provisions of Order 5, Rule 19, Civil P. C. relating to the service of summons.

2. The reference arises out of an application, E. A. 120 of 1960, filed by one Parasurama Odayar, the judgment-debtor in O. S. 10 of 1956 on

the file of the District Munsif, Ami, to have it declared that the execution sale of his property which took place on 22-7-1959, in execution of the

said decree was null and void. The property which was sold was about three acres in extent with a well and electric motor pump set. A sum of

about Rs. 500 was due on the security of the property to the Government in respect of a loan which had been taken. The property was sold for a

sum of Rs. 11 subject to the above encumbrance and the purchaser was one Seshadri Iyengar, the second respondent in E. A. 120 of 1960, The

notice of sale sent by registered post was returned as refused and the subsequent notice sent through the Court for the hearing on 19-1-1959 is

said to have been affixed to the outer door of the house of Parasurama Odayar on 26-12-1958 by the process server on account of the absence

of Parasurama Odayar from the village. On 19-1-1959 the notice in the execution petition was as follows-

Respondent absent, Court notice affixed. Respondent called, absent. Set ex parte.

The sale was fixed on 18-3-1959. It finally took place on 22-7-1959 and was confirmed on 28-8-1959.

3. Parasurama Odayar alleged that he came to know of the sale only on 20-1-60 and he filed the application E. A. No. 120 of 1960 on 22-1-60

to have the sale set aside. He averred that he had no notice whatever of the sale and that the sale conducted without notice to him was void. He

claimed that the property was worth Rs. 10,000 initially, the upset price was Rs. 9,000 subject to the encumbrance of Rs. 500 and urged that the

sale was conducted fraudulently and with a material irregularity and had resulted in substantial injury to him. The application was resisted by the

auction purchaser. The learned District Munsif, who enquired into the petition, rejected his contentions and dismissed the petition. The judgment-

debtor's appeal to the learned District Judge also failed. The Courts below found that he had notice of the sale, that there was sufficient

compliance with the provisions of Order 5, Rule 19, Civil P. C., that since he had notice of the sale, he had to set aside the sale within 30 days

under Article 166 of the Limitation Act, 1908, and that the sale could not be said to be void. The judgment-debtor preferred A. A. A. O. 5 of

1962 and it came on for hearing before Kailasam, J,

4. At the outset It was pressed upon the learned Judge that property worth Rs, 10,000 had been sold for Rs. 511. The learned Judge apparently

felt impressed by the contention, but held that even so, the application would have to be filed under Order 21, Rule 90, Civil P. C. within a period

of thirty days from the date of sale as required by Article 166 of the Limitation Act of 1908. To get over that bar, it was urged on behalf of the

judgment-debtor that the starting point of limitation mentioned as the date of

the sale in Article 166 should be construed as the date of the judgment-debtor's knowledge of the sale, which was 20-1-1960 according to him. This contention was sought to be sustained by a reference to the decisions of the Supreme Court in Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another, and State of Punjab Vs. Mst. Qaisar Jehan Begum and Another, . Those were cases relating to the period within which the party dissatisfied with the award of compensation by the Collector under the Land Acquisition Act could ask the Collector to make a reference to the Civil Court. Where a party is not present at the time of making of the award and notice is not given to him of the award u/s 12(2) of the Act, the Act gives him six months from the date to move the Collector. It was held that the literal and mechanical construction would not be appropriate, and that knowledge of the party affected by the award, actual or constructive being an essential requirement of fair-play and natural justice, the expression must be construed as meaning six months from the date of knowledge of the Collector's award."" With reference to this contention, Kailasam, J. pointed out that, on the facts there was the finding of the Courts below that the judgment-debtor came to know of the sale at least on 20-11-1959. What happened was that the decree-holder, after the impugned sale, filed the next execution petition, E. P. 301 of 1959, to realise the balance of the decretal amount. Notice thereof was served on the judgment-debtor on 20-11-1959 and he paid the balance amount. The learned Judge accepted the finding of fact that he had knowledge of the date of the sale at least on 20-11-1959, and, since the petition was filed more than thirty days thereafter, it would be time-barred if Article 166 applied.

5. It was then contended on behalf of the judgment-debtor that the sale was void ab initio, because there was no service of notice under Order 21, Rule 66, that it did not require to be set aside at all and that consequently Article 166 of the Limitation Act would not apply and the residuary Article 181 would apply, providing for a period, of three years from the time when the right to apply accrued. If this contention was correct, there could be no doubt that the application was in time. In support of this contention what was urged on behalf of the judgment-debtor was that there was no compliance with the provisions of Order 5, Rule 19, Civil P. C. in the

Court's endorsement of 19-1-1959, already quoted. In order to explain this contention, it is necessary to quote Order 5, Rules 17 and 19:--

17. Where the defendant or his agent or such other person as aforesaid refused to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant and there is no agent empowered to accept service of summons on his behalf nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

19. 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 such 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.

6. What was contended before Kailasam, J., on behalf of the judgment debtor was that in two particulars there was no compliance with the provisions of Order 5, Rule 19: firstly, there was no affidavit of the serving officer (process server) before the Nazir and consequently the Court was bound to examine the process server on oath but that was not done; secondly, the Court did not declare that the summons had been duly served. The facts bearing on these contentions are these. After the alleged refusal of the postal notice, the execution petition was adjourned to 19-1-1959 and two notices were issued. The first was the notice under Order XXI, Rule 66(2) (which says that the terms of the proclamation of sale shall be settled after notice to the decree-holder and the judgment-debtor), and the other was the notice of an application by the decree-holder to reduce the upset price. The summonses are Exs. B-6 and B.9. Both of them were

affixed on 26-12-1958 to the outer door of the house of the judgment-debtor. The endorsements are similar. It is sufficient to note the endorsement in Ex. B-6. There is first the endorsement dated 26-12-1958 of the Karnam to the following effect:--

On enquiry made about the defendant mentioned in the notice, he is not to be found. It is learnt from the neighbours and the women of the house that he has gone to Odukathur or Vellore taluk and the date of his return is not known. Hence the summons is affixed to the outer door of his residential house." Below there is a "return" dated 5-1-1959 of the process server, Kuppuswami, stating-

I made enquiries on 26-12-1958 about the defendant herein in Nadukuppam village in Ami taluk. It was learnt from the neighbours that he had gone to Odukathur of Vellore taluk and that his date of return was not known. Hence copy of the summons was affixed to the outer door of his residential house with the karnam as a witness." There is an endorsement of the Nazir to the following effect-

P.S.A. Defendant absent, affixed." It is stated before us that "P.S.A." means "Process server affirmed". Before Kailasam J., what was stated was that the words meant "party solemnly affirmed", but that makes no difference. The point made on behalf of the appellant and accepted by Kailasam

J. was that these words would only mean that the process server solemnly affirmed the facts stated in the return before the Nazir, but under Order

V, Rule 19 besides that, an affidavit of the serving officer was necessary, but no such affidavit was taken by the Nazir and therefore it was

incumbent on the court, under the first part of Order V, Rule 19, to examine the serving officer on oath. That, however, was not done. The learned

Judge accepted this contention observing:--

There is no verification by the serving officer and the words written and initialled by the Nazir will not have the effect of the serving officer verifying

the return by affidavit." Secondly, it was urged before Kailasam J., that there was no declaration by the executing Court that the summons had

been duly served as required by the second part of Order V, Rule 19. We have already quoted the endorsement dated 19-1-1959, on the

execution petition, namely "respondent absent. Court notice affixed. Respondent called, absent. Set ex parte". It is here necessary to explain that

the words ""respondent absent. Court notice affixed"" refer to what happened in the village on 26-12-1958 and the further words ""respondent called

absent, set ex parte"" refer to what happened in the Court on 19-1-1959. The point which was made on behalf of the judgment-debtor was that

there was no declaration by the executing Court, as required by Order V, Rule 19 ""that the summons had been duly served.

7. Kailasam J. dealing with the first aspect, expressed himself thus:--

The rule (Order V, Rule 19) requires that the Court shall examine the serving officer on oath, if the return has not been verified by the affidavit of

the serving officer. It also requires that the Court must either declare that summons has been duly served or order such service as it thinks fit. No

decision has been cited before me as to the consequence of failure of the Court to examine the serving officer, when the return is not verified by

affidavit. As the word "shall" is used, unless contrary intention appears, it must be taken that the rule is mandatory and failure to observe the rule

will render the service void.

8. On the second aspect, the learned Judge expressed himself thus:--

Regarding the failure by the Court to declare summons duly served or not, there is conflict of authorities.

The learned Judge went on to point out the conflict of authorities.

8-A. Thus in two Bench decisions In Azhagappa Chetti, by mother and guardian Oonnamalai Ammal Vs. S.A. Ramanathan Chettiar, and

Ramanandhan Chettiar Vs. Veerappa Chettiar and Others, , It was held that, where there was no declaration by the Court under Order V, Rule

19, in the previous execution petition, the judgment-debtor would not be precluded by the doctrine of constructive res judicata in the later

execution petition, from putting forward his objections to the execution. These decisions were followed by single Judges in three decisions, namely,

A. Ramaswami Chettiar Vs. Chinnappa Chetty, , Viswanatha Pillai Vs. A.M.V. Mutugappan Chettiar and Others, and A.V.P. Palaniappa Chettiar

Vs. Thaivanai Achi and Others, . As against these, there are two Bench decisions in Raja Inuganti Venkata Rayanim Varu Vs. Alluri China

Bapanna, represented by his natural father Alluri Sooranna, under a general power-of-attorney and Others, and Govinda Krishna Aiyar Vs.

Sankaralinga Naicker, through his next friend and guardian ad litem, Subbia

Naicker, , where it was held that, though the provisions of Order V, Rule 19 are mandatory, the Court could spell out an implied declaration that the summons had been duly served and that the absence of such an express declaration does not involve as a necessary consequence a finding that summons had not been duly served. Kailasam J., felt that it was difficult to reconcile these views and observed:--

In view of this conflict, it is desirable that there should be an authoritative decision on the point. The question whether non-compliance of the requirements under Order V, Rule 19 would make the service of summons ineffective or not has to be considered. The matter will be placed before my Lord the Chief Justice as to posting it before a Bench or a Full Bench". That is how the matter has come before us.

9. It will be noted that the appeal itself has not been referred to us and has therefore to go back to Kailasam J. for decision after the expression of the opinion by the Full Bench on the question referred. The question referred is whether the non-compliance of the requirements of Order V, Rule 19 would make the service of summons ineffective or not, and this question has to be considered with reference to the application filed by the judgment-debtor to avoid the sale (to use a colourless expression).

10. At the outset we have to dispose of a preliminary point made by Sri V. V. Raghavan, the learned counsel for the second respondent-auction purchaser, that in respect of such an application in execution proceedings. Order V, Rule 19 would not in terms apply, that therefore the Court was not bound to see whether the provisions had been strictly complied with, and that it was enough if it was satisfied that the provisions had been substantially complied with. In support of this contention the learned counsel relies on two decisions, one of the Privy Council in Thakur Prasad v.

Sheikh Fakir Ullah, 17 All 106 and Dokku Bhushayya Vs. Katragadda Ramakrishnayya, . These decisions have interpreted Section 141 C.P.C.,

1908 and the corresponding Section 647, C.P.C. of 1882. Section 141 says that the procedure provided in this Code in regard to suits shall be

followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction. What is pointed out in these decisions is that, in

respect of execution proceedings, there is Order XXI which provides a detailed procedure, and consequently the general procedure prescribed

elsewhere in the Code cannot be made applicable to execution proceedings. But this contention of the learned counsel overlooks the provisions of

Order XLVIII, Rule 2 which says that "all orders, notices and other documents required by this Code to be given to or served on any person shall

be served in the manner provided for the service of summons". There is no provision in Order XXI as to the manner of service of the notice under

Order XXI, Rule 66 and hence Order XLVIII Rule 2 will apply, which means that the provisions of Order V relating to the manner of service will

apply even to the notice Issued under Order XXI, Rule 66. Hence, the provisions of Order V, Rule 19 will apply.

11. In answering the reference about the effect of the non-compliance with the provisions of Order V, Rule 19, we must remember that we are not

answering the question in the abstract, but in relation to an application to have the execution sale declared void. We will have to remember further

that the question has been raised by the appellant in order to contend that Article 166 of the Limitation Act of 1908, prescribing a shorter period of

limitation of thirty days from the date of the sale did not apply to him and that consequently the residuary Article 181 applied. This being the

context in which the effect of the non-compliance with the provisions of Order V, Rule 19 has to be considered, it will be necessary to have an

idea as to how the appellant can contend that Article 166 would not apply, if Order V, Rule 19 was not strictly complied with. When Article 166

of the Limitation Act of 1908 or the corresponding Article 127 of the new Limitation Act of 1963 prescribes a period of thirty days from the date

of the sale for making the application to set aside the execution sale, it assumes that the judgment-debtor knew of the date of the sale, either

actually or constructively and would therefore be in a position to make the application within thirty days of the date of the sale. If he was personally

served with the notice under Order XXI, Rule 66, there could be no difficulty in fixing him with knowledge of the date of the sale; even if he

chooses to be absent from the Court in response to the notice under Order XXI, Rule 66, the law will say that it was his duty to be present and

that he had constructive notice of the date of the sale. But it may not be possible always to effect personal service of the notice of the sale (meaning

thereby the notice under Order XXI, Rule 66). Indeed, if personal service were to be insisted on the judgment-debtor, he might evade personal

service and a premium could be put on such evasion. That is why the law has prescribed under Order V, Rule 19 that even if the notice is served

by affixture, the Court could declare that he has been duly served or alternatively the Court could order substituted service under Order V, Rule

20. In either case, the Court is enabled to proceed further* despite the absence of personal service and despite the possible absence of the judg-

ment-debtor. In such a case, the law will say that the judgment-debtor had constructive notice and would expect the judgment-debtor to file the

application within thirty days from the date of the sale. But, since it is possible that, In spite of the declaration of due service of the Court under

Order V, Rule 19 or of substituted service under Order V., Rule 20, the judgment-debtor may not have actually known of the date of the sale, it

should be open to him to satisfy the Court that actually he did not have notice of the sale and did not even otherwise know of the sale and that the

application of Article 166 would take away his valuable right. At this stage it is pertinent to recall the observations of their Lordships of the

Supreme Court in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya,

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that

men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and

property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions

and where they are clearly denned they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should

be construed, wherever that is reasonably possible, in the light of that principle."" But apart from the above right of the judgment-debtor himself, it

should be clear that in order that the executing Court may initially have jurisdiction to proceed with the execution, despite the absence of personal

service, the executing Court should strictly comply with the provisions of Order V, Rule 19 (if it wants to hold under that provision that there has

been due service). The imperative nature of the provisions of Order V, Rule 19 should therefore be obvious, This is also borne out by the use of

the word ""shall"" in the two parts of Order V, Rule 19, as contrasted with the use of the word ""may"" in the rule. Where the Legislature has used the

words "shall" and "may" in the same provision, that itself is an indication, that the word "shall" has been used in a mandatory sense. That has been

pointed out by their Lordships of the Supreme Court in *Jamatraj Kewalji Govani Vs. The State of Maharashtra*, construing Section 540, CrI. P.

Code. That runs-

Any Court may, at any stage of any enquiry, trial or other proceeding under this Code, summon any person or a witness, or examine any person

already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the

just decision of the case.

Their Lordships pointed out-

The section is in two parts. The first part gives a discretionary power, but the latter part is mandatory. The use of the word "may" in the first part

and of the word "shall" in the second firmly establishes this difference.

12. Now let us consider the rule more closely. The first part says that, where a summons has been 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 such further enquiry in the matter as it thinks fit.

Thus it says that, where the return under Rule 17 has not been verified by the affidavit of the serving officer, the Court shall examine him on oath

and it is mandatory. If there is an affidavit, it means that the serving officer has stated something on oath and, if the statement turns out to be false he

could be prosecuted. That itself would put him on guard and make him adhere to the truth as far as possible and would minimise the chances of a

false return of service. It is with the same object that the Court is required to examine him on oath where he has not verified the return by an

affidavit before the prescribed officer (Nazir). We know of numerous instances where defendants and judgment-debtors come to the Court and

state that the process server has not come to their place at all and that the alleged affixture is a myth; and there are several cases where "such a

contention of the defendant or judgment-debtor has been accepted by the Courts. Such a danger would be minimised if the Court adheres to the

provisions of Order V, Rule 19. If it makes it a point to question the serving

officer as to what he did when he went to the village and what attempts he made to get at the defendant, there is no doubt that the service would be more real and effective than it would be otherwise. We cannot really over-emphasise the importance of this provision. Very often there is room for thinking that the Court does not even look into the return, but simply Bays ""Service sufficient, defendant absent; set ex parte"". That defeats the salutary purpose for which the detailed provisions have been enacted with anxiety by the Legislature.

13. Sri V. V. Raghavan, the learned counsel for the auction-purchaser was alive to the importance of the affidavit, but sought to contend that since the process server was affirmed by the Nazir, according to the letters ""P.S.A.", it must be taken that what was affirmed was an affidavit. We ruled that such an argument was not open to him before the Full Bench, because the referring Judge has himself held that there was no affidavit in this case, and that point has not been referred to us for decision again. The only question referred is what the effect of the want of affidavit is and we have already indicated our opinion that it is essential,

14. For the reasons already Indicated, it is clear that the Legislature intends that there should be an express declaration by the Court that the summons has been duly served, 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 considers that the summons has been duly served. It is also desirable that before making such a declaration the Court indicates why it makes such a declaration. For instance, it may be that three different process servers had gone on different occasions and on every one of those occasions the judgment-debtor was absent and the Court feels that the judgment-debtor must really have come to know of the matter. Apart from the fact that the use of the word ""shall"" by the legislature in the concluding part of the rule in contrast with the use of the word ""may"" in the earlier part of the rule itself indicates that the legislature meant the concluding part of the rule, ""shall either declare that the summons has been duly served"", to be mandatory, we must emphasise what we

have already stated, namely, that since after such declaration of due service the decree-holder wants to contend that the judgment-debtor has had

constructive notice of the date of the sale and should therefore have filed the application to set aside the sale within thirty days under Article 166, It

is obvious that strict compliance with the provisions of Order V, Rule 19 is necessary before the decree-holder can limit the judgment-debtor to

the shorter period of limitation,

15. At this stage, however, I must point out that the contention initially urged before Kailasam J., on behalf of the judgment-debtor that the starting

point under Article 166 of the Limitation Act of 1908 would be the judgment-debtor's knowledge of the sale would have a material bearing on the

question we are now considering, whether strict compliance with Order V, Rule 19 is necessary. It may be noted that the initial contention that the

judgment-debtor's subsequent knowledge of the date of sale would be the starting point was put forth as a matter of construction of Article 166

itself, irrespective of the question whether there was due service of notice under Order XXI, Rule 66 within the meaning of Order V, Rule 19 that

is to say, the argument proceeded on the footing that even if there had been due service, and Article 166 applied, the starting point of limitation

would be the judgment-debtor's subsequent knowledge of the date of sale. If that contention were correct, it could be urged (on behalf of the

decree-holder or the auction purchaser) that the Court need not at all bother whether there had been strict compliance with the provisions of Order

V, Rule 19, because, whether there was strict compliance or not, the starting point of limitation would be the judgment-debtor's subsequent

knowledge of the date of the sale.

16. In my opinion, however, Article 166 of the Limitation Act of 1908 cannot be construed as initially contended for before Kailasara J., on behalf

of the judgment-debtor. The only words used in Column 3 were "the date of the sale" and there were no words making the judgment-debtor's

subsequent knowledge of the date of the sale as a relevant criterion for the starting point. It is well to remember that the Limitation Act of 1908

(and this is also true of the Act of 1963) contains several Articles (e.g., 32, 48, 90, 164, 169) which mention knowledge as a material factor for

the starting point of limitation, but others like Article 166 do not mention it.

Obviously the legislature intended that in the latter provisions subsequent knowledge would not be a material factor in fixing the starting point of limitation. In particular we may contrast Article 166 with Arts.

164 and 169 of the Act of 1908.

Description of application Period of limitation Time from which period begins to run

1 2 3

104. By a defendant, for an order Thirty days The date of the decree or, where the

to set aside a decreepassed summons was not duly served, when
ex parte. the applicant has knowledge of the
decree.

109. For the re-hearing of Thirty days The date of the decree in appeal Or
anappeal heard ex parte. where notice of the appeal was not
duly served, when the applicant has
knowledge of the decree.

Thus in Arts. 164 and 169 knowledge be-comes a material factor only when the summons or notice was not duly served. But there are no such

words in Article 166 even in a case where the notice was not duly served. This is a clear indication that even in a case where the notice was not

duly served and the judgment-debtor came to know of the date of the sale only subsequently, the limitation was not thirty days from the date of the

subsequent knowledge. At the same time it should be clear that in such a case where the notice was not duly served, it would be unreasonable to

apply Article 166 and oblige him to apply within thirty days of the date of sale. The solution for this difficulty is simple, namely, that in such a case

Art 166 was not meant to apply at all and the residuary Article 181 would apply. Similarly under the Act of 1963 Article 127 (corresponding to

Article 166 of the Act of 1908) would not apply and the residuary Article 137 (corresponding to Article 181) would apply. Where the Legis-

lature simply mentioned ""the date of the sale"" as the starting point in Article 166 of the Act of 1908, (or Article 127 of the new Act), it would not

be open to the Court to add words substituting the date of the judgment-debtor's subsequent knowledge as the starting point but preserving the

period of thirty days. To add such words make the words "the date of the sale" thoroughly useless, because in every case the judgment-debtor

would by-pass the provision and file the application within thirty days of his subsequent knowledge. If that was the intention of the Legislature, it

could simply have enacted the third column of Article 166 as "'the date of the judgment-debtor's knowledge of the sale.

17. The decisions of the Supreme Court in *Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another*, and *State of*

Punjab Vs. Mst. Qaisar Jehan Begum and Another, cannot, therefore, be extended to the fixation of the starting point under Article 166 of the

Limitation Act of 1908 or the corresponding Article 127 of the Limitation Act of 1963. Those decisions will have to be understood with reference

to the fact that under the Land Acquisition Act, very often the Collector makes the award without fixing the date before hand, and consequently the

party may not be present when the award is made. That is why Section 12 of the Land Acquisition Act itself requires that in such a case the

Collector shall give immediate notice of the award to the party interested. If such notice is issued, he is given six weeks from the receipt of the

notice for making the application for reference to the civil court; but where no notice is issued u/s 12(2), he is given six months from the date of the

Collector's award, and in such a case it stands to reason that the period of limitation should count from the date when the party gets notice of the

award, actually or constructively. The situation before the executing court is, however, entirely different, because here notice is given even before

the holding of the sale under Order XXI Rule 66 and the date of sale is fixed after such notice. Once that notice is served, actually or

constructively, the law presumes that the Judgment-debtor knows of the sale and sees no injustice in his being required to file the application to set

aside the sale within thirty days of the date of the sale. If, however, he proves that in spite of the presumption of law actual or constructive, he did

not factually have notice, the law will come to his rescue by saying that Article 166 would not apply to him at all and that the residuary Article 181

would apply. Instances where" the judgment-debtor may satisfy the Court that he had actually no notice of the sale are *Gyanammal Vs. Abdul*

Hussain Sahib, for instance that the summons was not really served upon him, but on somebody else -- one such instance is *Gopal Chettiar v.*

Mariasusai Pilial, 1937 Mad WN 184: AIR 1937 Mad 219 or that what was served was not the summons in the suit, etc. Similarly several cases

are collected in the AIR Commentaries on the CPC 1963 Edn. under Order IX. Rule 13, Note 18, where in an application to set aside the ex

parte decree on the ground that the summons was not duly served, the Court actually examined all the materials and circumstances of the case to

see whether in fact the defendant had been duly served.

18. I may sum up this portion of the case by observing that, since it is not possible to construe Article 166 of the Limitation Act of 1908 as giving

thirty days to the judgment-debtor from the date of the subsequent knowledge of the sale and the law will oblige him to file the application within

thirty days of the date of the sale where he has notice, actual or constructive, it is necessary that there should be strict compliance with the

provisions of Order V, Rule 19, before the decree-holder or the auction-purchaser can invite the Court to hold that in law there was constructive

notice under Order XXI, Rule 66 to the judgment-debtor.

19. The above conclusion of ours about the imperative nature of the provisions of Order V, Rule 19 in a later application by the judgment-debtor

to have the execution sale declared void is supported by several decisions cited by Sri K. Para-saran. though they are not direct decisions in the

sense of the question having been considered in an application to have the execution sale declared void. We shall consider the decisions

chronologically, as far as possible.

20. Taking first the Madras decisions, Venkobachar v. Raghavendrchar (1904) 18 MLJ 96 was a decision rendered, in 1908, with reference to

Section 82, C. P. Code, 1882 (corresponding to Order V, Rule 19 of the C.P.C. of 1908) and Article 169 of the Limitation Act. 1877. It was an

application for rehearing of an appeal heard ex parte. Art, 169, as it then was, prescribed a period of thirty days from the date of the decree in

appeal. The application was filed more than thirty days later and was dismissed by the District Judge on that ground. In the appeal the judgment of

the Bench was this:--

The District Judge has dismissed the application as barred by limitation. The appellant's case is that he never had any notice of the appeal. The

return on the notice is that it was tendered to the younger brother of the

appellant. u/s 82 C. P. Code it was the duty of the Court before proceeding with the appeal to declare that the notice had been duly served. This the Court, as the record shows, did not do, and without such declaration there is no sufficient service. If, in fact, the appellant had notice of the appeal. Article 169 of Schedule II of the Limitation Act can have no application. We, therefore, set aside the order of the District Judge and remand the case for disposal on merits.

The reasoning of the above decision will apply with equal force to an application, as we have in the present case, to avoid the sale on the ground that the judgment-debtor did not have notice at all under Order XXI, Rule 66. Order XXI. Rule 66, so far as material, enacts that, where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be drawn up in the language of such Court, and that the terms of such proclamation shall be settled in court after notice to the decree-holder and the judgment-debtor, except in cases where notices have already been issued under Order XXI, Rule 64, and such proclamation shall state the time and place of sale etc. In the corresponding Section 287 of the Code of 1882, the words ""after notice to the decree-holder and the judgment-debtor"" were not there. The addition of these words only emphasises the necessity of the notice to the judgment-debtor which should even otherwise be obvious, because before proceeding to sell a man's property the court must give notice to him that it is going to sell his property on such and such a date. If the man does not have such notice, how can he be expected to file the application under Article 166 within thirty days of the sale?

20-A. The above decision settles two points: (1) that want of declaration of due service u/s 82 C.P.C. of 1882 meant that there was no sufficient service in the eye of law; and (2) that, if the respondent in the original appeal had no notice of the appeal and it was heard ex parte, Article 169 of Schedule II of the Limitation Act of 1877 could have no application. This reasoning would apply by analogy to both the aspects of the application before us to have the sale declared void on the ground that the judgment-debtor had no notice under Order XXI, Rule 66. Firstly, since there was no declaration under Order V, Rule 19, that there was due service, there was not sufficient service in the eye of law, so far as Order V, Rule 19 is

concerned. Secondly, if the judgment-debtor had factually no notice. Article 166 of the Limitation Act of 1908 would not apply to him at all. It

may be noted that the wording of column 3 of Article 169 of the Limitation Act of 1877 was exactly similar to the wording of Article 166 of the

Limitation Act of 1908, in that the starting point of limitation was mentioned in Article 169 as the date of the decree in appeal. It was only in Act of

1908 that column 3 of Article 169 was amended so as to read thus:--

The date of the decree In appeal or, where notice of the appeal was not duly served, when the applicant has knowledge oi the decree"".

This wording of the Act of 1908 has been kept up in the new Act of 1963, where Articles 164 and 169 of the Act of 1908. have been clubbed

together as Article 123. In other words, subsequent knowledge of the date of the decree was not a material factor hi fixing the starting point of

limitation In Article 169 of the Limitation Act of 1877, and that was why it was held that, where the respondent in the original appeal had no notice

of the appeal, Article 169 of the Limitation Act of 1877 did not apply at all. On the same reasoning, we have to hold that Article 166 of the Act of

1908, which is similarly worded, would not apply to a case where the judgment-debtor has factually no prior notice of the date of the sale.

21. The next case referred to is Vellayappa Chetti v. Veerappa Chetti, 1 Mad LW 1 : 1914 Mad WN 79 AIR 1914 Mad 159 (1)). It was an

application under Order IX, Rule 13 to set aside an ex parte decree. The entry of the court in the suit was, ""defendants 1, 2, 5 and 6 absent; ex

parte"". The learned Judges were prepared to hold that there had been a declaration under Order V, Rule 19, that the summons had been duly

served, but held that the learned Subordinate Judge was not justified in making the declaration and should have ordered fresh notice; this is clear

from the reference to the previous decisions and the arguments. We do not think that the decision is of any help on the question before us.

22. C. Ganapathi Mudaliar Vs. N. Krishnamachari and Others, was a decision of Ramesam J., in which the learned Judge in an application u/s 25

of the Provincial Small Cause Courts Act, set aside in revision the ex parte decree on the ground that no order had been passed under Order V,

Rule 19 declaring that the summons had been duly served. This consideration will apply equally to the application to have the execution sale

declared void on the ground that no declaration of due service had been made under Order V, Rule 19.

23. In Sundararajulu Naidu Vs. Narayanaswami Naidu, , decided by Srinivasa Aiyangar J., the facts were these;

In the previous execution petition of 1924, an order for the arrest of the second defendant was passed, but no batta was paid and the order was

not carried out. In the later execution petition he sought to contend that the prior execution petition was barred by limitation. The decree-holder set

up the plea of constructive res judicata, The judgment-debtor demurred by urging that there was no declaration of due service under Order V,

Rule 19 in the previous execution petition. His contention prevailed with the executing Court. The revision petition filed by the decree-holder was

dismissed by Srinivasa Aiyangar J. The relevant entry in the execution petition of 1924 may be stated in two parts:

Defendants affixed 7th November 1924 as defendant 1 gone out, driving out, his wife said"".

Absent arrest defendant 2, 25th November 1924"".

The first part was in the handwriting of the clerk. The second part was in the handwriting of the presiding officer. Srinivasa Aiyangar J. held that

there was no declaration by the Court of the sufficiency of the service of the notice within the meaning of Order V, Rule 19 and that consequently

the plea of constructive res judicata would not apply. It was urged on behalf of the decree-holder that the very fact that the Court, after referring to

the absence of the judgment-debtors had proceeded to order execution must be regarded as impliedly including a declaration that the service was

sufficient and proper. Srinivasa Aiyangar J. repelled that submission and observed-

I am not sorry for my being unable to accede to the contention especially having regard to the unfortunate practice that has grown up at any rate in

this Presidency of not paying sufficient attention to the service of processes. When the law requires that the court should declare the proper service

of a notice or process, the mere omission to make such a declaration is not in my opinion a mere irregularity. Whatever it may be in the ordinary

cases, I am satisfied that when the rule that is sought to be invoked is the rule of constructive res judicata the rules relating to proper service of

notice cannot be too strictly adhered to." Lower down:--

For my part It seems to me that when the law requires the court to make a formal declaration about the propriety of the service, it requires the

court to pronounce upon such propriety in a judicial manner and it is obvious that the sufficiency or otherwise of the service required to be decided

on by the court should not be left merely to the office. I hold therefore that such a formal declaration of the propriety of service is really necessary,

at any rate, in all cases in which on the basis of such proper service the rule of constructive res judicata is sought to be availed of.

The above decision has been approved and followed by Walsh and Bardswell JJ. in Azhagappa Chetti, by mother and guardian Oonnamalai

Ammal Vs. S.A. Ramanathan Chettiar, . The judgment-debtors pleaded that the decree was not executable. It was urged that they were precluded

from raising such a contention on the principle of constructive res judicata by an order in a prior execution petition. But in the prior execution

petition there was no declaration by the Court that the summons had been duly served as required by Order V, Rule 19. It was held that

consequently the omission was fatal and that the principle of constructive res judicata could not be invoked against the defendants. The decision of

Srinivasa Aiyangar J. and that of the Bench were followed by Walsh J., on the same point of constructive res Judicata in A. Ramaswami Chettiar

Vs. Chinnappa Chetty, . The judgment-debtor was permitted to raise the plea of limitation despite the order in the previous execution petition

directing his arrest, the reason being that in the previous execution petition there was no declaration of due service under Order V, Rule 19.

24. Before noticing the other decisions, I may pause here and mention straightway that the principle of these decisions on the question of

constructive res judicata will apply equally to an application to have the execution sale declared void. The analogy consists in this: the doctrine of

constructive res judicata, if applied, would preclude the judgment-debtor from raising the pleas otherwise open to him and, therefore, it was

necessary to prove that he had notice of the prior proceedings in which he failed to take the plea and it was in that connection it was held that strict

compliance with the provisions of Order V, Rule 19 was necessary. Similarly here the judgment-debtor is told that he must apply within thirty days

of the date of the sale under Article 166, and, in order that he may be pinned down to the shorter period, it is necessary that he should have had

notice; in other words, there should be due compliance with the provisions of Order V, Rule 19,

25. The next decision chronologically in point of time cited by Sri Parasaran is that of Pandrang Row J. in Viswanatha Pillai Vs. A.M.V.

Mutugappan Chettiar and Others, . It was an application to set aside a sale on the ground that there was no due service of the notice under Order

XXI, Rule 66, because there was no declaration under Order V, Rule 19 that the service by affixture was sufficient. The learned Judge allowed the

appeal and set aside the sale on the ground that there was no due service of the notice under Order XXI Rule 66, because there was no

declaration under Order V, Rule 19 that the service by affixture was sufficient or due service. The learned Judge observed:--

The provisions of Order V, Rule 19 C.P.C. are imperative and when there is no declaration that the service is due service, the service cannot be

held to have been effected at all, and the case is one in which there has been no service at all of the sale proclamation and the judgment-debtors

had no opportunity to represent what they had to say to the Court, before the Court drew up the sale proclamation.

It must be added, however, that no question of the non-applicability of Article 166 was discussed probably the application was filed within thirty

days from the date of the sale.

26. The Bench decision in Azhagappa Chetti, by mother and guardian Oonnamalai Ammal Vs. S.A. Ramanathan Chettiar, was followed by

Pandrang Row and Menon JJ. in Ramanandhan Chettiar Vs. Veerappa Chettiar and Others, . The facts are rather complicated, but it is enough to

state the question was whether a particular order dated 8th October, 1928, in E.P. 104 of 1918 in execution of a decree in O.S. 330 of 1911

directing attachment would constitute res judicata so as to preclude the contention of the judgment-debtor later on that another earlier execution

petition was not maintainable and was time-barred. There was no declaration by the Court under Order V, Rule 19 that there was sufficient

service in E.P. 104 of 1928. On that ground it was held that the principle of constructive res judicata could not be applied in execution

proceedings. The Court observed:--

No doubt that order was passed on an application to execute the decree and if notice had been served in person on the judgment-debtor and he

had failed to appear to object to the execution being allowed on the ground that the execution is barred by limitation, his failure to do so coupled

with the order for attachment would constitute a bar in any later proceeding. In this particular case, however, there was no personal service nor

was there any declaration by the Court that there was sufficient service. This question was considered by a Bench of this Court in Azhagappa

Chetti, by mother and guardian Oonnamalai Ammal Vs. S.A. Ramanathan Chettiar, , and it was held therein that unless there is declaration by the

Court that the service made under Order V, Rule 17 is sufficient as required by Order V, Rule 19 C.P.C. any order passed by the Court in the

absence of the judgment-debtor will not constitute res judicata." In that particular case notice was affixed on the ground that it had been refused,

but it was held that, whether the affixture was by reason of the absence or by reason of refusal, the declaration under Order V, Rule 19 was

necessary.

27. Next there is a decision of Pandrang Row J. in A.V.P. Palaniappa Chettiar Vs. Thaivanai Achi and Others, . A decree of the Sub-Court,

Sivaganga was ordered to be transmitted to the Sub-Court, Devakottai. Before the Sub-Court, Devakottai, the judgment-debtor raised pleas of

limitation and discharge. The decree-holder pleaded that the order of transmission would operate as res judicata. The contention was repelled

thus-

The order of transmission would no doubt operate as res judicata if really it was passed after due service of notice of the petition on the judgment-

debtor. There was no personal service; the service was by affixture, the reason for affixture being refusal by the judgment-debtor to acknowledge

receipt of the notice. In such a case, as required by Order V, Rule 19 C.P.C., the Court shall either declare that the summons has been duly

served or order such service as it thinks fit. In this particular case there was no such declaration. It was held in Azhagappa Chetti, by mother and

guardian Oonnamalai Ammal Vs. S.A. Ramanathan Chettiar, by a Bench of this Court that the omission of the Court to make a declaration of the

kind mentioned in Order V, Rule 19 C.P.C. is fatal when it is sought to apply the constructive principle of res judicata against the judgment-debtor

..... The pleas of limitation and discharge have never been actually decided and the judgment-debtor is entitled to have a decision upon them.

Express decision there has been none, and no decision can be implied in the absence of a proper declaration as required by law of the service of notice.

28. I shall stop here for the present and turn to the line of authorities on the opposite side, where it was held that a declaration under Order V, Rule

19, though mandatory, could be implied. In re Shree Krishna Das. 19 MLJ 31 : 3 Ind Cas 474 (Miller and Pinhey, JJ.) was a case where the

learned Judges dismissed an appeal against the order of the City Civil Judge imposing a heavy fine. The fine was imposed u/s 174 C.P.C., 1882

(corresponding to Order XVI, Rules 10 to 13 and 17 of the Code of 1908). The judgment was as follows:--

The appellant refused service of the summons and a copy was duly affixed to his door. We do not think that the omission of the Judge to record

u/s 82, C.P.C. an express declaration that the process was duly served, can invalidate his order u/s 174 C.P.C. The order on the summons, in our

opinion, is sufficient "declaration in the circumstances. The City Civil Judge has given sufficient reasons for imposing a heavy fine.

28-A. The provisions of Section 174 C.P.C. of 1882 were as follows:--

If any person on whom a summons to give evidence or produce a document has been served fails to comply with the summons, or if any person

so summoned and attending departs in contravention of Section 173, the Court may order him to be arrested and brought before the Court

Provided that no such order shall be made when the Court has reason to believe that the person so failing had a lawful excuse for such failure.

When any person so brought before the Court fails to satisfy it that he had a lawful excuse for not complying with the summons, the Court may

sentence him to fine not exceeding five hundred rupees"".

29. It may be doubted whether in punishing a man for disobedience of a summons it is not essential that the summons should be declared to have

been duly served in strict compliance with the rule. However, without going too far, it is enough to distinguish the case by noting the following

features. Firstly, there were no words, "has been duly served" in Section 174. Further there was a proviso which enabled the party to satisfy the

Court that he did not really have notice. Presumably for these reasons It was held that express declaration was not necessary and that it was

enough if the Court was satisfied that the defendant had refused service. Further, for the reasons already discussed in full, the decision is not

directly applicable to the question before us.

30. The next decision in point of time is that of Sadasiva Iyer and Spencer JJ. in Mahomed Mera Rowther v. Kadir Mera Rowther, 1914 Mad

WN 63 : AIR 1914 Mad 153. It arose out of an application by the judgment-debtor to set aside the Court auction sale on the ground that notice

had not been duly served u/s 248 C.P.C. 1882 (corresponding to Order XXI, Rule 22 of the Code of 1908). The peon had returned the notice

with the note that it was affixed to the outer door of the judgment-debtor owing to his evading service. The executing Court (District Munsiff)

passed orders for attachment. The learned Judges observed:--

This act of the Court indicates in our opinion a sufficient declaration that the service has been duly effected.

For the reasons already stated, this view requires reconsideration and it has to be held that an express declaration is necessary, though the exact

form is immaterial.

31. The next decision is that of Burn and Stodart JJ. in Raja Inuganti Venkata Rayanim Varu Vs. Alluri China Bapanna, represented by his natural

father Alluri Sooranna, under a general power-of-attorney and Others, which arose out of an application under Order IX, Rule 13 to set aside an

ex parte decree. The judgment ran thus:--

It is of course desirable that all courts should observe the mandatory provision in Order V, Rule 19 C.P.C. and "either declare that the summons

has been duly served or order such further service as it thinks fit". But we do not think that the absence of such an express declaration will involve

as a necessary consequence a finding that a summons has not been duly served. In the present case, no less than four summonses were taken out

to the appellant and they were all returned with reports that the copies had been affixed because the appellant was absent in some place or other.

After the fourth return of the kind, the Court said on 24th March 1933,

"defendant 7 affixed on 15th March 1933, said to have gone to Tirupattur by the inmates of the house. Called absent. Defendant 7 ex parte." In the circumstances of this case we see no difficulty in saying that there is here an implied, though not an express, declaration of sufficiency of service on the seventh defendant. The decisions in Azhagappa Chetti, by mother and guardian Oonnamalai Ammal Vs. S.A. Ramanathan Chettiar, are not in point. Moreover we must agree with the learned Sub-Judge that the appellant really knew all about the suit as it was going on. The mortgagor-defendants were his son-in-law and his grandsons and it is not possible to believe his statements that he knew nothing about the suit until after it had been decreed.

32. In Madras the following proviso was introduced to Order IX, Rule 13:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim.

The decision could be supported under the above proviso, but the proviso will not in terms apply to an application to have an execution sale declared void.

33. The next decision is that of Krishnaswami Aiyangar and Kunhi Ra-man, JJ. in Govinda Krishna Aiyar Vs. Sankaralinga Naicker, through his

next friend and guardian ad litem, Subbia Naicker, . The learned Subordinate Judge set aside an execution sale on two grounds, the first of which

was that the guardian ad litem of defendants 4 and 5 had not been duly served with notice of the execution petition. The return on the notice was

not available, but what was stated to the High Court was that the return on the notice was affixed because the guardian was not to be found and

was evading service. Without a specific declaration under Order V, Rule 19 the Court declared these defendants ex parte. In appeal against the

order setting aside the sale, the learned Judges, following Raja Inuganti Venkata Rayanim Varu Vs. Alluri China Bapanna, represented by his

natural father Alluri Sooranna, under a general power-of-attorney and Others, , were prepared to imply a declaration. With great respect, this

decision cannot be considered as a safe precedent. Apart from the reasons already given for the necessity of an express declaration, it may be

noted that in that particular case even the terms of the return of the process server were not before the Court, and it does not appear whether that

was the only service attempted and how the executing Court was satisfied that the guardian had been evading service, particularly when in the case

of a minor the Court should normally be more considerate than in the case of an adult.

34. The next decision is that of Horwill, J. in *Adhilakshmi Ammal Vs. Srinivasa Goundan alias Krishna Goundan*, where the judgment-debtor

sought to raise the plea of limitation in a later execution petition, but it was urged that, because he had failed to raise the plea in the earlier execution

petition of 1937, the principle of constructive res judicata would bar him from raising the plea of limitation later. The judgment-debtor sought to

urge in reply that there had been no declaration of due service under Order 5, Rule 19 in the earlier execution petition and, therefore, on the

principle of the prior Bench decision, the doctrine of constructive res judicata would not apply. Horwill, J. reviewed the case law up till then, and

concluded-

An examination of the various decisions indicates that one has to consider the facts of each case and decide on those facts whether the failure to

declare a judgment-debtor ex parte was a mere omission and the subsequent procedure made it clear that the Judge did consider the service

sufficient, or whether the facts of the case left in some doubt the question whether there was proper service or not. In the present case, the second

defendant refused service on the frivolous ground that his father's name was not correct, despite the fact that his father was served at the same

time and was a party to the same proceedings. Under such circumstances, the executing Court would undoubtedly have considered the service

sufficient. When one considers the nature of the excuse offered and the fact that the executing Court immediately ordered "proclamation and sell", it

becomes clear that the executing Court did consider the service sufficient. If the service was sufficient, then the second defendant was bound by all

orders passed which impliedly decided any question that he might have raised with regard to the executability of the decree.

35. In my opinion, however, for the reasons already stated in full, there must be an express declaration by the executing Court of due service,

though, the declaration need not be in any set form.

36. Sri V. V. Raghavan referred to the decision of Yahya Ali, J. in Ammani Ammal Vs. K.P. Sabapathi Pillai, but there is no discussion and the decision is not of any help.

37. The next decision is that of Krishnaswami Nayudu, J. in Adisesha Ayyar Vs. Pappammal, , holding that the doctrine of constructive res

judicata could not be applied to shut out the pleas of the judgment-debtor, where in the earlier execution petition there had not been an express

declaration of due service. The learned Judge followed the Bench decision in Azhagappa Chetti, by mother and guardian Oonnamalai Ammal Vs.

S.A. Ramanathan Chettiar, and the other decisions to that effect and distinguished the decision of Horwill, J., and the decisions followed by him.

38. In Venkataramayya v. Venkatamutharao, AIR 1962 Andh Pra 156 Krishna Rao, J.. followed the decision of Horwill, J., and refused to set

aside the sale on the ground that there had been a declaration of due service of the notice under Order 21, Rule 22. The two defendants-

judgment-debtors were brothers and they were served by affixture. The second judgment-debtor put in his appearance, but his brother stayed

away. The learned Judge observed-

In these circumstances, there is prima facie no reason to think that the service by affixture was reduced to a formal ritual and was not sufficient for

the first judgment-debtor's obtaining knowledge of the execution proceedings."" The decision must be confined to the facts of that case and cannot

be taken as a general authority.

39. Other High Courts have also taken the same view as ours. In Champat Singh Vs. Mahabir Prasad and Others, , an application under Order 9

Rule 13 to set aside an ex parte decree was allowed, because in the suit there had been no express declaration of due service Under Order 5,

Rule 19 and the necessity thereof was emphasised.

40. In Farangu v. Harikishan, AIR 1929 Lah 334, the judgment-debtor sought to raise the plea of limitation in execution, but was met by the plea

of constructive res judicata. Bhide, J. pointed out that in the earlier execution petition of 1924, there was no due service and consequently the

principle of constructive res judicata would not apply. The report of the process server showed that a copy of the notice was offered to the

appellant and that he refused to receive it and the Court considered the service sufficient. Bhide, J. re-examined the facts and held that there was

no due service. He observed-

No copy of the notice was affixed on the outer door of the house of the appellant. Nor was any affidavit of the process server taken with respect

to the service. The mere fact that the Court considered the service to be sufficient cannot conclude the matter.

As against these, there are the following cases. In Harcharan v. Md, Azizullah AIR 1932 Oudh 326, there was an application u/s 25 of the

Provincial Small Cause Courts Act against the order of the trial Court refusing to set aside the ex parte decree. One of the grounds of the

application was that there was no declaration of due service under Order 5, Rule 19. The Bench held:

We are of opinion that there is no substance in this argument. We think that the declaration required by Rule 19 is implicit in the circumstances

attending the service of the summons on its return to the Court which had issued it. Further, the Court seized of the case clearly recorded in its first

day's proceedings of the trial of the case, "defendant sufficiently served."

The last mentioned circumstance would distinguish the case.

41. In Tahal Singh v. Chainchal Singh, AIR 1934 Lah 985 (2), the return of the process server showed that Tahal Singh, the guardian of the

minors judgment-debtors, refused to accept the notice sent to him under Order 21, Rule 66 and a copy thereof was affixed to the outer door of his

house. The report was supported by an affidavit, but there was no formal order under Order 5, Rule 19, that Tahal Singh had been duly served. It

was observed-

The failure to pass a formal order under Order 5, Rule 19 is not a material irregularity in this case and does not vitiate the sale.

The decision does not purport to be an authority for all cases.

42. M.R. Ved and Co. Vs. S.B. Hayeem, was an extraordinary case where the defendant, having received the copy of the summons, ran away

with It and therefore, the process server had no other copy to affix to the house of the defendant. It was in these circumstances it was held that he

had been duly served.

43. Sampatlal v. Baliprasad, 54 Cal WN 92 : AIR 1950 Assam 6 was a curious case where the suit which had been dismissed for default was

restored and one of the defendants filed a revision petition against it on the ground that in respect of some other defendants there had been no

express declaration of due service under Order 5, Rule 19, and, therefore, the order of the Court below was wholly without jurisdiction. The

learned Judges repelled this contention pointing out that the other defendants had no grievance and that that point could not be urged by the

revision petitioner. There were only incidental observations about the scope of Order 5, Rule 19 that it is not mandatory.

44. Some other decisions were referred to, like Manicka Goundan Vs. Krishna Goundan, , Anaithalayan Vs. Marudamuthu, ; Ellappa Naicker Vs.

Arumuga Servai and Another, ; Goculdas v. Dilaukhram, AIR 1943 Sind 188; Tripura Modern Bank Ltd. Vs. Bansen and Co., ; Chaturbhuj

Sohanlal Vs. Clive Mills Co. Ltd., , overruling Ganeshmal Bhawarlal Vs. Kesoram Cotton Mills Ltd., . But we need not discuss them in detail.

45. In the result, I would answer the reference thus: Where the judgment-debtor files an application to have the execution sale declared void and

the application is filed beyond thirty days from the date of the sale, if the decree-holder or the auction purchaser wants to defeat the application by

urging that the application should have been filed within thirty days of the date of the sale under Article 166 of the Limitation Act of 1908 (or the

corresponding Article 127 of the Act of 1963), for the reason that the summons had been duly served by affixture on the judgment-debtor as

required by Order 5, Rule 19 it is necessary that there should have been strict compliance with the provisions of Order 5, Rule 19 by the executing

Court when it proceeded to hold the sale in the absence of the judgment-debtor. In particular, where the return of the process server under Rule

17 has not already been verified by the affidavit of the serving officer the Court shall examine the serving officer on oath or cause him to be so

examined by another Court touching his proceedings. It should also declare expressly that the summons has been duly served, 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 considers that the summons has been duly served.

46. RAMAKRISHNAN, J.:-- I had the advantage of perusing the judgment of my learned brother, Venkataraman, J., who has set out the facts as

well as the several decisions cited at the Bar at length. It is not necessary for me to recapitulate them.

47. As mentioned by my learned brother, we did not allow arguments to reopen the finding of Kailasam, J., that in the present case the process

server has not supplied an affidavit to verify the return. As a result there is non-compliance with the provisions of the first part of Order 5, Rule 19,

Civil P. C. That itself would render the service invalid. No authority has been cited before us to show that the failure of the serving officer to verify

the return by an affidavit can be condoned.

48. The learned Judge (Kailasam, J.) could have himself set aside the execution sale on the finding of fact about the non-compliance with the first

part of Order 5, Rule 19, Civil P. C., but the learned Judge apparently was of the opinion that, for the sake of giving a complete decision, It would

be appropriate if he gave a finding also in regard to the compliance with the second part of Order 5, Rule 19, Civil P. C., namely, the making of a

declaration by the Court that the summons had been duly served. Since in the view of the learned Judge there is a conflict of authority on this point,

he has sought to obtain the opinion of a Full Bench. That is how the matter has come up before this Full Bench.

49. The notice by registered post sent to the judgment-debtor was returned as refused. When the Court notice was thereafter taken for service by

the process server the judgment-debtor was reported to be absent in his house, and the process server then served the notice by affixture under

Order 5, Rule 17, Civil P. C. He made a return as required under Order 5, Rule 18, Civil P. C. on the docket of the summons, mentioning the

above facts. On 19-1-1959, when the execution petition came for hearing, the Court noted as follows!

Respondent absent. Court notice affixed. Respondent called, absent Set ex parte.

The sale was thereafter fixed for 18-3-1959 and adjourned to a further date. The properties were sold and the sale was confirmed on 28-8-1959.

The point to note is that only one attempt appears to have been made to serve

the judgment debtor through Court. On that date the judgment debtor was reported to have been absent from the village. The prior attempt was by service by registered post. As is well known the postal peon cannot serve the notice by affixture. He can only return the registered notice as "unserved." Therefore, the registered postal notice will be valid notice, only if it is actually served by delivery. In these circumstances, the Court has to ensure personal service by Court. If it is not possible to effect personal service either due to the refusal by the judgment debtor, or his absence from his house for an unreasonably long time, which would entail long and vexatious proceedings prolonging the execution, steps should be taken to effect service by affixture under Order 5, Rule 17, Civil P.

C. It is to ensure that this method of service is not abused and that proceedings seriously affecting a party are not concluded behind his back, that Order 5, Rule 19, Civil P. C. lays down the formality of a declaration being made by the Court about due service of the notice by the affixture procedure. In the present case, there is the fact that the Court service had been taken only once. There is next the doubt which the learned Judge, Kailasam, J., felt about the existence of an affidavit by the serving officer. These circumstances clearly gave an occasion for the executing Court to apply its mind and make a declaration of due service. In the above context, one is entitled to look for an explicit declaration by the Court, which would show in unmistakable terms that the Court had applied its mind to the propriety of the service by affixture and was satisfied about the propriety. But the endorsement of the Court on the execution petition made on 19-1-1959 extracted above, might be equally consistent with a mechanical recording of the factum of service by affixture and then setting the defendant ex parte, without a conscious effort being made by the Court to consider and approve the circumstances under which the service by affixture was effected. The consequence has been very grave to the judgment-debtor in this case. Valuable property, more than three acres in extent subject only to a Government loan of about Rs. 500 had been sold for Rs. 11. Further the thirty days bar of limitation under Article 164 of the Limitation Act automatically runs from the date of the sale.

Therefore, when the affected judgment debtor comes to Court after the lapse of thirty days for setting aside the sale, the auction purchaser can

non-suit him by urging the bar of limitation. These circumstances clearly call for a strict application of the rule requiring the Court to make a

declaration in explicit terms about the adequacy of service as required under Order 5, Rule 19, Civil P. C. Such explicit declaration is absent in this

case. It is at this stage that the question arises for consideration whether the direction about making a declaration of due service found in the

second part of Order 5, Rule 19, Civil P. C. requires an express declaration or it can be implied from the surrounding circumstances. Since my

learned brother has dealt with this question at length, I will content myself by giving the matter a briefer treatment

50. I will take up first, for consideration, the ratio which can be spelt out from the decisions which appear to support the view that a declaration

could be implied from the circumstances of the case and that an express declaration need not be looked for. (1909) 19 MLJ 31. is a Bench

decision where the learned Judges have not referred to any earlier authority. The judgment is a brief one dealing with a prosecution u/s 174 of the

old Civil P. C. of a party who had not appeared in Court in response to summons. Section 174 of the old Civil P. C., under which the summonee

was prosecuted, gave an opportunity to the summonee to show in his defence that he had no knowledge of the summons, and he could escape

conviction in that manner. (1909) 19 MLJ 31 is clearly distinguishable on this ground.

51. *Mohomed Mera Rowther v. Kadir Mera Rowther*, 1914 Mad WN 63 = AIR 1914 Mad 153 was a case where notice had not been served

on the defendant in compliance with Order 21, Rule 22, Civil P. C. Following in (1909) 19 MLJ 31, the learned Judges held that a declaration

after due service could be implied, or on and after a return of the process by the serving officer the Court passes orders on the basis that service

has been duly made. The learned Judges of the Bench also observed that in the circumstances of the case, the judgment debtor had full notice. In

our opinion this decision requires reconsideration in the light of the subsequent Bench decisions in *Azhagappa Chetti, by mother and guardian*

Oonnamalai Ammal Vs. S.A. Ramanathan Chettiar, and Ramanandhan Chettiar Vs. Veerappa Chettiar and Others, , expressing a different view.

52. *Raja Inuganti Venkata Rayanim Varu Vs. Alluri China Bapanna*, represented by his natural father Alluri Sooranna, under a general power-of-

attorney and Others, a judgment of Burn, J. and Stodart, J., was a case where the learned Judges held that in the circumstances of that case, the

declaration of the sufficiency of service could be implied though it was not expressly made. A reading of the judgment shows that it was a case of

setting aside of an ex parte decree presumably under Order 9, Rule 13, Civil P. C. though the judgment does not specifically refer to Order 9.

Rule 13, Civil P. C. The learned Judges took into account the circumstances that the appellant really "knew all about the suit as it was going on.

They went on so far as to say that the circumstances against him were so strong that they had "no compunction" to deal with the matter in the way

they did. They felt not called upon to differ from Azhagappa Chetti, by mother and guardian Oonnamalai Ammal Vs. S.A. Ramanathan Chettiar, as

they said that that decision was not in point. Therefore, the above decision was a special case where the learned Judges had no doubt at all in their

minds that if an explicit declaration was necessary about the adequacy of the service, there could be only one answer, and that would be against

the appellant Govinda Krishna Aiyar Vs. Sankaralinga Naicker, through his next friend and guardian ad litem, Subbia Naicker, a Bench decision of

Krishnaswami Aiyangar and Kunhira-man, JJ., dealt with an execution sale as in the present case. The affected parties were minors and their

guardians were served by affixture on the report that they were not to be found and were evading service. When the return was brought to the

notice of the Court, the Court declared the minor defendants ex parte. The specific terms of the order of the Court were not before the Court. The

Court itself has noted that circumstance. The Court was only supplied with Information about the terms of the order. Nevertheless, the learned

Judges followed the decision in Raja Inuganti Venkata Rayanim Varu Vs. Alluri China Bapanna, represented by his natural father Alluri Sooranna,

under a general power-of-attorney and Others, and refused to follow the judgment of Pandrang Row, J. in A.V.P. Palaniappa Chettiar Vs.

Thaivanai Achi and Others, which followed the Bench decision in Azhagappa Chetti, by mother and guardian Oonnamalai Ammal Vs. S.A.

Ramanathan Chettiar, . The learned Judges unfortunately did not refer to the special circumstances which were relied upon for the view taken in

Raja Inuganti Venkata Rayanim Varu Vs. Alluri China Bapanna, represented by his natural father Alluri Sooranna, under a general power-of-

attorney and Others, . They did not also refer to any special circumstances in the case before them. On the other hand, with respect the

circumstances as stated in the judgment in Govinda Krishna Aiyar Vs. Sankaralinga Naicker, through his next friend and guardian ad litem, Subbia

Naicker, would have equally justified the taking of a strict view of the matter, namely, the necessity for an express declaration, taking into account

firstly the fact that minors were involved, and, secondly, the actual terms of the executing Court's order were not before the Bench. The learned

Judges, while refusing to follow A.V.P. Palaniappa Chettiar Vs. Thaivanai Achi and Others, did not discuss the effect of the earlier Bench

decisions of this Court for a contrary view, viz., the decision in Azhagappa Chetti, by mother and guardian Oonnamalai Ammal Vs. S.A.

Ramanathan Chettiar, which was relied on in A.V.P. Palaniappa Chettiar Vs. Thaivanai Achi and Others, . We are of the opinion that Raja

Inuganti Venkata Rayanim Varu Vs. Alluri China Bapanna, represented by his natural father Alluri Sooranna, under a general power-of-attorney

and Others, and Govinda Krishna Aiyar Vs. Sankaralinga Naicker, through his next friend and guardian ad litem, Subbia Naicker, cannot form

safe authority for dealing with the question now before us.

53. Next there is the decision of Horwill, J. in Adhilakshmi Ammal Vs. Srinivasa Goundan alias Krishna Goundan, . The learned Judge has

carefully considered the effect of the aforesaid decisions and expressed his view that one has to consider the facts of each case and decide on

those facts whether the failure to declare a judgment-debtor ex parte was a mere omission and the subsequent procedure made it clear that the

Judge did not consider the service of notice sufficient, or whether the facts of the case left in some doubt the question whether there was a proper

service or not. After making the above observations, the learned Judge found that in that particular case the affected party had notice of the

proceedings and that there were ample reasons to hold that the failure to make a declaration was a mere omission and that the executing Court

would undoubtedly have considered the service sufficient In the circumstances of the case. 54. My learned brother, Venkataraman, J., has set out

in detail several decisions in favour of making an express declaration including the Bench decisions in Ramanandhan Chettiar Vs. Veerappa

Chettiar and Others, and of Pandrang Row, J. in A. Ramaswami Chettiar Vs. Chinnappa Chetty, . In the first of the above cases, the learned

Judges referred to and distinguished 1914 Mad WN 63. They observed that in the case before them there was nothing to show that the Court

even looked at one of the returns before ordering the petition. They also observed that in the circumstances of the case, if the Court had

proceeded to pass an order under Order 5.

Rule 19, Civil P. C., it was very doubtful whether it would have accepted these returns even on their face value as correct. They, therefore, held

that the service was not valid as the Court had not declared the service to be sufficient, as it is imperatively required to do under Order 5, Rule 19,

Civil P. C. and in a case where it is sought to apply the constructive principle of res judicata against the defendant Ramanandhan Chettiar Vs.

Veerappa Chettiar and Others, was a similar case of the application of the principle of constructive res judicata. A. Ramaswami Chettiar Vs.

Chinnappa Chetty, was the decision of a single Judge, Pakenham Walsh, J. That was also a case involving the principle of constructive res

judicata, and the Court held, following several earlier decisions, including Azhagappa Chetti, by mother and guardian Oonnamalai Ammal Vs. S.A.

Ramanathan Chettiar, that a declaration was Imperative.

55. There are some more decisions of this Court which have been adequately referred to in the judgment of my learned brother and where it is

held that if the principle of constructive res judicata u/s 11, Civil P. C. is sought to be applied against a party, it is necessary that the provisions

contained in Order 5, Rule 19, Civil P. C. about making a declaration should be expressly complied with. Horwill, J. in the decision which I have

referred to in the preceding paragraph, has dispensed with the requirement of an express declaration in the circumstances of the particular case

before him. In that case the facts showed that in every probability the executing Court, if it had considered the circumstances, would have

unhesitatingly made a declaration of due service. Horwill, J. was careful to distinguish cases where the facts left in some doubt the question whether

there was a proper service or not But the principle of inferring an implied declaration of due service obviously cannot be extended to a case where

it is not possible to predicate an inadvertent omission on the part of the

concerned Court and where the circumstances clearly lead to a doubt as to whether the affected party had notice of the proceedings. In such circumstances, a decision about the adequacy of the service should and ought to have been arrived at by the executing Court and a declaration should have been explicitly made. In such cases, the mere fact that the Court had set the defendant ex parte and proceeded to the next stage in the proceedings, like ordering a sale in execution proceedings, (or passing an ex parte decree in a suit) would not ipso facto lead to the inference that the Court had made the necessary declaration by implication. The failure to make the declaration could be equally consistent with the Court having adopted a mechanical approach to the matter--an approach which is not infrequently noticed, on the part of the subordinate Courts. Srinivasa Aiyangar. J. has referred to its prevalence and strongly deprecated it in Sundararajulu Naidu Vs. Narayanaswami Naidu, . There is also no scope in such cases to draw a presumption about the due performance of official acts under illustration (e) to Section 114 of the Evidence Act, because the very performance of the act itself is left in a state of doubt.

56. To conclude, the point raised by Kailasam, J. for the answer of the Bench is whether the non-compliance of the requirements of Order 5, Rule 19, Civil P. C. would make the service of the summons ineffective. Our answer to this question is this: Where there is no affidavit of the serving Officer, and where the serving officer is not subsequently examined by the Court, as found by the learned Judge in this case, there is non-compliance with the first part of Order 5, Rule 19, Civil P. C. and the service is ineffective. Next, the safe rule is to look for an explicit declaration of due service as enjoined by the second part of Order 5, Rule 19, Civil P. C. In its absence, particularly in cases where valuable rights of parties are sought to be placed in jeopardy for example by the application of the principle of the law of limitation or of the rule of constructive res judicata, and where it is doubtful if the affected party had notice of the proceedings proposed to be taken against him, grave prejudice can be caused. The case dealt with by Horwill, J. covered an exceptional situation where the circumstances left no doubt whatever that the executing Court would have made the necessary declaration about the sufficiency of service, and therefore, the failure to make an explicit declaration was treated as a

mere omission which can be overlooked. In our view, this decision must be confined to the facts of that particular case, and cannot be taken as

laying down any general rule. On the other hand, it may very well happen that the circumstances"" are by no means conclusive, and there can be

serious doubt about the sufficiency of the service for giving notice to the affected party. Therefore, I am inclined to the view that an explicit

declaration should be insisted on. As stated by Venkataraman J., no precise form for such declaration need be laid down; any declaration or

statement by the concerned Court, in the record, which would clearly show that it had applied its mind to the sufficiency of service will very well do

for the purpose.

Kailasam, J.

57. I agree with the reasons and the answer given to the reference in the concluding paragraph of the judgment of Venkataraman J. In the view that

the endorsement of the Court Itself should indicate that the presiding officer has applied his mind and considered that the summons had been duly

served, the decision in Adhilakshmi Ammal Vs. Srinivasa Goundan alias Krishna Goundan, , has to be found as not good Jaw.

(After the expression of the opinion of the Full Bench aforesaid, this appeal coming on for hearing before Kailasam J. on 29-8-1969 the Court

delivered the following Judgment:--)

In view of my finding sitting singly that the process server had not verified the return by an affidavit, there Ss non-compliance of the requirements of

the first part of Order V, Rule 19 C.P.C. and on this ground alone the sale has to be set aside. In view of the decision of the Full Bench there is no

compliance of the second part also. In the result the appeal against appellate order is allowed with costs. Leave refused.