

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH**

WEDNESDAY, THE 27TH DAY OF MAY 2015/6TH JYAISHTA, 1937

FAO.No. 333 of 2009 ()

**AGAINST THE ORDER IN I.A.971/2006 IN AS 36/2003 OF SUB COURT,ATTINGAL
DATED 12.11.2009**

APPELLANT/PETITIONER/DEFENDANT:

**PRASANNA PEREIRA,
AGED 47 YEARS, W/O.ROCKY PEREIRA, KOIKKARI HOUSE
PADINJATTUMUKKU, CHITTATTUMUKKU P.O.
KADINAMKULAM VILLAGE, THIRUVANANTHAPURAM.**

**BY ADVS.SMT.MAJIDA.S
SRI.K.RAJESH KANNAN**

RESPONDENTS/COUNTER PETITIONERS/PLAINTIFFS:

- 1. MARY CHANDRIKA,
D/O.ROCKY PEREIRA, AGED 58 YEARS, CHANDRIKA COTTAGE
PADINJATTUMUKKU PUTHENTHOPE, CHITTATTUMUKKU P.O.
KADINAMKULAM VILLAGE.**
- 2. CELIN PEREIRA, D/O.ROCKY PEREIRA,
AGED 55 YEARS, CHANDRIKA COTTAGE
PADINJATTUMUKKU PUTHENTHOPE, CHITTATTUMUKKU P.O.
KADINAMKULAM VILLAGE.**
- 3. MARY AYVIN, D/O.ROCKY PEREIRA,
AGED 47 YEARS, CHANDRIKA COTTAGE
PADINJATTUMUKKU PUTHENTHOPE, CHITTATTUMUKKU P.O.
KADINAMKULAM VILLAGE.**
- 4. HERMOIN PEREIRA, D/O.ROCKY PEREIRA,
AGED 38 YEARS, CHANDRIKA COTTAGE
PADINJATTUMUKKU PUTHENTHOPE, CHITTATTUMUKKU P.O.
KADINAMKULAM VILLAGE.**

BY ADV. SRI.D.SOMASUNDARAM

**THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
27-05-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

SHG/

T.R. RAMACHANDRAN NAIR & K.P. JYOTHINDRANATH, JJ.

F.A.O.No.333 of 2009

Dated this the 27th day of May, 2015

J U D G M E N T

Ramachandran Nair, J.

This appeal is from the order in I.A.No.971/2006 in A.S.No.36/2003. In short the said application was for rehearing of the appeal and to set aside the decree passed as exparte. In the appeal, the appellant was the sole respondent.

2. The suit O.S.No.312/1999 was filed by the respondents herein against the appellant and the suit was dismissed. It was a suit mainly filed seeking a decree for permanent prohibitory injunction. When the appeal was filed notice was ordered to the appellant. At the time of hearing as she had not appeared she was set exparte and after hearing the learned counsel for the respondents, the appeal was allowed and the decree was set aside.

3. We heard the learned counsel on both sides.

4. Learned counsel for the appellant Smt. S. Majida

submitted that clearly it is a case where the notice in the appeal was not properly served on the appellant and therefore the view taken by the appellate court is not correct. Our attention is invited to Rules 80(2) and 80(4) of the Civil Rules of Practice in that context. It is submitted that this court may allow rehearing of the appeal at least on terms, namely, on payment of costs.

5. Learned counsel for the respondents submitted that actually it is a case where the process server was examined and the court was satisfied that notice was served in the appeal and there is no scope for interference.

6. The I.A. was filed by invoking Order XLI Rule 21 of the Code of Civil Procedure, 1908. The said Rule enables a party to apply to the appellate court to re-hear the appeal and, if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him. By invoking

the first limb that notice was not duly served the I.A. was filed.

7. It is clear that the appellate court has taken evidence in the matter. The appellate court heavily relied upon the evidence of PW2 the process server. The court also verified the signature of the appellant in Ext.C1. It was found identical as that of the signature in the petition and in her deposition. The court was of the view that the plea now raised by the appellant has no legs to stand. It was also found that even though there is no proper compliance of Rule 80(2) of the Civil Rules of Practice it cannot be considered as sufficient to conclude that there was actually no notice to the petitioner regarding the appeal.

8. It is true that Rule 80(2) of the Civil Rules of Practice provides for identification of the person by the village officer or some other respectable person who knows him. Going by the records in this case at the first time when the process server was sent he could not find the appellant in her residence and the notice was served on the next day

and the endorsement also has been personally verified by us. He has deposed before the court that he had identified the residence of the appellant with the help of the postman. Even though a challenge was made in the cross-examination the veracity of the said statement could not be shaken at all. As far as sub-rule (4) is concerned it refers to the discrepancy if any, when the signature of the person served differs from the name given in the process, the discrepancy must be explained in the verification of the process server.

9. Even though it is vehemently argued by the learned counsel for the appellant that Rule 80(2) should have been complied with mandatorily, we find that in the light of the evidence of the process server, that he had met the appellant personally, which was correctly appreciated by the appellate court there is nothing to find that the notice was not duly served on the appellant. Actually she had set up such a case, according to us without any justification. The signature of the appellant shows that she

signs in Malayalam and the initial is given in English. It was found to be identical both in the notice served by the process server and in the affidavit signed before the court. Since the learned Judge had occasion to view the demeanour of the witnesses also, we find no reason to interfere with the order impugned.

10. The request made by the learned counsel to grant a further opportunity on payment of costs, is strongly opposed by the learned counsel Sri. Sreekumar appearing for the respondents. It is clear that the notice was served in the year 2003 and the appeal was disposed of in the year 2005. For all these reasons, we find no reason to grant a further opportunity. Accordingly, the appeal is dismissed, without any order as to costs.

Sd/-

T.R. RAMACHANDRAN NAIR
JUDGE

Sd/-

K.P. JYOTHINDRANATH
JUDGE

shg/