

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC

&

THE HONOURABLE SMT. JUSTICE P.V.ASHA

TUESDAY, THE 9TH DAY OF DECEMBER 2015/18TH AGRAHAYANA, 1937

FAO.No. 176 of 2015 ()

APPELLANT/PETITIONER-DEFENDANT:

ANANDAKUMAR, AGED 49 YEARS
S/O.ACHUTHAN NAIR, MADATHIPARAMBIL, EROOR DESAM
NADAMA VILLAGE, KANAYANNOOR TALUK.

BY ADV. SRI.K.V.SADANANDA PRABHU

RESPONDENT/RESPONDENT/PLAINTIFF:

K RAGHAVAN, S/O.KUTTAPPAN
P.R. BHAVANIL, THURAVOOR, CHERTHALA TALUK.

R1 BY ADV. SRI.SHAJI THANKAPPAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD
ON 26-11-2015, THE COURT ON 09-12-2015 DELIVERED THE
FOLLOWING:

ANTONY DOMINIC & P.V ASHA, JJ.

F.A.O No.176 of 2015

Dated this the 9th day of December, 2015

JUDGMENT

Asha, J.

The defendant in a suit for money is the appellant. This appeal is filed against the order dated 06.08.2015 in I.A Nos.1134 and 1135 of 2013 in O.S.No.109 of 2007 on the file of the Sub Court, Cherthala, dismissing the applications for condoning delay and setting aside the exparte decree. I.A No.1134 of 2013 was filed under Order 9 Rule 13 C.P.C to set aside the exparte decree and I.A No.1135 of 2013 application was filed under Section 5 of the Limitation Act to condone the delay of 2017 days in filing the petition for setting aside the exparte decree passed against him.

2. The suit was decreed exparte on 10.03.2008. The case of the appellant was that, summons was not served on him and he came to know about the suit when he received notice in the execution petition - E.P.373 of 2012 on 31.10.2012, from the Sub court, Ernakulam, summoning him to appear on 26.11.2012.

Therefore the appellant contended that the limitation started to run only with effect from the date of knowledge as to the decree passed against him. The respondent filed a counter affidavit before the court below opposing the petitions. The appellant got himself examined as PW1. His daughter was examined as PW2. The respondent did not adduce any evidence.

3. The court below, on analysis of evidence on record, found that the process server had served notice on the daughter of the appellant on 4.2.2008 and it was only on being convinced of the service of summons on the appellant that he was set ex-parte on 10.03.2008. The case of the appellant was that, his daughter was not residing along with him at the relevant time, as she was married away and was residing at Kannur with her husband. PW2, the appellant's daughter above mentioned, when examined, deposed that she got married on 21.01.2008 and thereafter she was residing in her husband's house at Kannur. She denied receipt of any summons on behalf of her father and disowned the signature on the summons. At the same time, she deposed that there was another Sreelekshmi residing near their house and there are certain other houses with the name

`Madathilparambil'. Her testimony, remained consistent without being discredited in the cross-examination by the respondents. The depositions of PW1 and PW2 were to the effect that PW2 was not residing along with PW1 at the relevant time and that PW2 did not accept any summons or notice on behalf of her father.

4. From the endorsement on the summons, it is seen that, one Smt.Vineetha K.V, Process Server returned the summons on 12.10.2007, after her attempts to serve it on the defendant on 10.10.2007 and 11.10.2007, failed. Her endorsement is that, on inquiries made with the post office as well as with the residents in the locality, as per the address given, she was informed that no such addressee was residing in the address.

5. The report of Smt. Girija Sukumar, another process server, on the copy of summons issued on 26.12.2007 and sworn to before the Central Nazir on 4.2.2008 is that, Sreelekshmi, the daughter of the addressee, received and signed the summons on behalf of the addressee at the residence. The date of appearance

stated in that summons was 15.2.2008.

6. We heard the learned counsel appearing for the appellant as well as the respondent.

7. The learned counsel appearing for the appellant submitted that appellant's daughter, who was not residing in the said address, cannot be treated as an adult member of his family as she was residing separately; appellant's daughter, who was residing at Kannur, after her marriage in January 2008, can in no way be the person who received the summons. Therefore, the decree passed against him without serving notice on him is liable to be set aside. It is pointed out that the process server has not observed any procedure while tendering summons on a person other than the defendant.

8. The learned counsel for the respondent submitted that there is no bona fides in the appeal . Even assuming that there was any irregularity in the service of summons, the petition for setting aside the exparte decree was filed only after one year of the receipt of notice in the execution petition.

9. We find that the court below has dismissed the

petitions on the ground that the Process Server served the summons on appellant's daughter. The court below accused the appellant for not examining the Sreelekshmi, in their neighbourhood and in not examining the process server. When the petitioner as well as his daughter entered the witness box and deposed that the daughter Sreelekshmi was residing at Kannur in her husband's house at the relevant time, and the summons was not tendered or accepted by her and the respondent could not discredit their testimony, the court below ought to have found that the burden to prove service of summons is shifted to the respondent. Even the signature of the daughter was found to be different from the one in the summons. Even then the respondent did not adduce any evidence to disprove the case of appellant. The respondent did not take steps to examine the process server also.

10. On an examination of the records, we find that the process server has not explained the circumstances under which he/she happened to serve the notice to the alleged Sreelekshmi. The court below did not verify whether the procedure prescribed

in the rules were followed, before serving summons on a person other than the defendant. On verification of the records, we find that there is no endorsement or a report of the process server explaining the circumstances in which and manner in which she served the summons on the said Sreelekshmi. The only endorsement made on the summons is that 'summons was served on the daughter on behalf of the addressee at the residence'. She has not stated any reason for not serving the summons on the appellant personally. This Court has already held in **Abbas v. Moideen Kunhi & another** [2014(3) KLT 872] that, as per Rule 15 of Order V of the Civil Procedure Code, 1908, when the defendant is not available in the address, the process server has to ensure that it is not reasonably practical to meet him. The process server should also ensure that the person, on whom he is serving the summons on behalf of the defendant, has undertaken to inform the matter to the defendant. It is only when it is reasonably not practical to meet the defendant that, summons can be served on an adult.

11. In the present case, we find that the process server

has not explained the circumstances under which she has served the summons. In the absence of such a report, the court below was not right in finding fault with the appellant, for not examining either the process server or Sreelekshmi of the neighbourhood. When the appellant as well as his daughter had deposed that the summons was not served on them and their testimony was not discredited by the respondent, it was incumbent on the respondent to adduce evidence to substantiate their contention.

12. The circumstances under which the summons can be served on a person other than the defendant and the procedure to be followed in such cases are given in Order V of Rule 15 of the Civil Procedure Code and Sub rule 5 Rule 80 of the Civil Rules of Practice. Sub rule 5 of Rule 80 of the Civil Rules of Practice reads as follows:

“When another person accepts summons on behalf of the person to be served, it should be noted whether the person served is living with or undivided from the person on whose behalf he accepts service and in the case of an agent whether he is duly authorised to accept service.”

13. Order 5 of Rule 15, which provides that the summons can be served on an adult member of the family of the defendant,

as well as Order 5 Rules 16 and 18 of Order 5, which are relevant in these circumstances, read as follows:

“15. Where service may be on an adult member of defendant’s family.—Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him.

16. Person served to sign acknowledgement.—Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.

18. Endorsement of time and manner of service.—The serving officer shall, in all cases in which the summons has been served under Rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.”

14. In the present case, one process server reported that, there is no such person in the address of the appellant. The 2nd process server gets a signature from one Sreelekshmi and says she is the daughter. But there is no endorsement seen on or along with the copy of the summons, indicating the efforts she made to serve the summons on him. At any rate, there is no

report to the effect that there was no likelihood of the defendant being found at the residence, within a reasonable time. It is also not reported that the person on whom the summons was served was an adult member residing in the family of the defendant. It is also not reported that the person, on whom service was effected, had assured to inform the defendant about the summons served.

15. In such circumstances, the court below was not right in dismissing the applications.

16. In this case, we find that the summons said to have been served on the appellant's daughter on behalf of the father, without following the procedure prescribed for such service, cannot be treated as sufficient.

17. In these circumstances, we find that the court below was not right in dismissing the applications. In the absence of proper service of notice, it cannot be said that the defendant had notice on the suit. We therefore set aside the orders impugned and the *exparte* decree passed by the Sub Court, Cherthala, dismissing the applications for condoning delay and setting aside the *exparte* decree. The suit will stand restored to the file of the

Sub Court, Cherthala, and the court below will dispose of the matter on merits as expeditiously as possible.

The parties shall appear before the Sub Court, Cherthala on 05.01.2016.

The appeal is allowed accordingly.

Sd/-
ANTONY DOMINIC
Judge

Sd/-
P.VASHA
Judge

rtr/

/true copy/

P.S to Judge