

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE A.HARIPRASAD**

FRIDAY, THE 22ND DAY OF AUGUST 2014/31ST SRAVANA, 1936

RFA.No. 595 of 2014 () IN CMCP.34/2014

AGAINST THE ORDER/JUDGMENT IN OS 77/2011 of SUB COURT, HOSDRUG.

APPELLANT/DEFENDANT :

**T. LALITHA, W/O NARAYANA,
THEEKUZH HOUSE,
NELLIYADUKKAM, PANAYAL P.O.**

BY ADV. SRI.SUBHASH CYRIAC.

RESPONDENT(S):

**K. KUNHIRAMAN, RETIRED POST MASTER,
PADMALAUYAM, NELLIKKAT,
BALLA VILLAGE, P.O, BALLA,
HOSDURG TALUK.**

BY ADV. SRI.JAWAHAR JOSE.

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
22-08-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

amk

P.N.RAVINDRAN & ANIL K.NARENDRA, JJ.

R.F.A.No.595 of 2014

Dated this the 16th day of January, 2015

JUDGMENT

P.N.Ravindran, J.

The appellant is the defendant in O.S.No.77 of 2011 on the file of the Court of the Subordinate Judge of Hosdurg. The sole respondent is the plaintiff therein. The respondent instituted the suit on 29-6-2011 for realisation of the sum of ₹20,00,000/- stated to have been paid by him as advance on the date of execution of Ext.A1 agreement dated 30-4-2011 to sell two items of immovable properties belonging to the appellant. Since the appellant did not enter appearance, she was set exparte and the suit was decreed as prayed for, directing the appellant to return the entire advance consideration of ₹20,00,000/-with interest at the rate of 12% per annum from the date of suit till the date of decree and at 6% per annum thereafter. The defendant has aggrieved thereby, filed this appeal.

2. The main ground raised in the appeal is that there was no proper service of notice on the appellant and therefore the decree

and judgment passed by the trial court are liable to be set aside.

3. We heard Sri.Subhash Cyriac, learned counsel appearing for the appellant and Sri.Jawahar Jose, learned counsel appearing for the respondent. We have also perused the copy of the 'B' diary/proceedings paper which were called for through the Registry.

4. The 'B' diary/proceedings paper disclose that the suit was filed on 29-6-2011. The date fixed for appearance, in the summons issued to the defendant was 28-7-2011. The summons issued from the court below to the defendant was not returned after service and when the suit was called on 28-7-2011 the court below directed summons to be repeated by substitute service. The suit was accordingly adjourned to 5-9-2011. On 5-9-2011, the plaintiff filed I.A.No.977 of 2011 for the service of notice on the defendant by paper publication. That application was allowed and the suit was adjourned to 18-10-2011. On 18-10-2011 as there was no sitting, the suit was adjourned to 5-1-2012. On 5-1-2012 the paper publication was produced and as the defendant was absent when her name was called, she was set exparte. The suit was thereafter adjourned to 31-1-2012 for payment of the balance court fee and for

exparte evidence. On that day there was no sitting and the suit was adjourned to 14-3-2012. On 14-3-2012 an affidavit sworn to by the plaintiff in lieu of chief examination was filed and Exts.A1 to A3 were marked and the suit was adjourned for judgment to 23-3-2012. On that day, though the plaintiff was absent and there was no representation, the suit was decreed as prayed for.

5. The 'B' diary/proceedings paper disclose that there was no personal service of summons on the appellant/defendant. The summons issued to the defendant was not served on her. Instead of serving the summons afresh, the court below directed substituted service by paper publication. That application was allowed by order passed on 5-9-2011 and the summons was published in 'Latest', an evening daily published from Kanhangad. Order V Rule 20 of Code of Civil Procedure stipulates that where the court acting under sub rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided. The appellant's residence is at Nelliyadukkam in Panayal Village of Hosdurg Taluk. The newspaper in which the summons was

published is an evening daily published from Kanhangad. The distance between Kanhangad and the place of residence of appellant is admittedly 30 kms. By no stretch of imagination can it be said that the evening daily on which the summons was published has wide circulation in the locality where the defendant is residing. That apart, steps were not taken to serve notice by affixture at the last known address of the appellant. In such circumstances, we are satisfied that there was no proper service of notice on the appellant. As the appellant was not aware of the suit and it was decreed exparte, it has necessarily to be held that serious prejudice is caused to her.

We accordingly allow the appeal, set aside the decree and judgment in O.S.No.77 of 2011 on the file of the Court of the Subordinate Judge of Hosdurg and remand the suit to the trial court for fresh disposal. The parties shall appear through counsel in the court below on **09th February, 2015**. The court below shall on that day fix a date for the written statement of the appellant and try and dispose the suit within a period of six months from 9-2-2015. The sale held pursuant to the impugned decree shall stand set aside and

the sale certificate if any issued shall stand revoked. The auction purchaser will be entitled to apply for and obtain refund of the stamp duty paid on the sale certificate. The court fee paid on the memorandum of appeal shall be re-funded to the appellant in full. The parties shall bear their respective costs.

P.N.RAVINDRAN, JUDGE

skj

ANIL K.NARENDRA, JUDGE

True copy

P.A to Judge