

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

APPEAL SUIT No.437 of 2007

Between:

G.Hari Babu & another.

.. Defendants\Appellants

AND

K.Javaram Reddy & 2 others.

.. Plaintiffs/Respondents

Date of Judgment Pronounced: 18.12.2017

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE A.V. SESA SAI

1. Whether Reporters of Local newspapers may be allowed to see the Judgments?
2. Whether the copies of judgment may be marked to Law Reports/Journals?
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?

*** HON'BLE SRI JUSTICE A.V. SESA SAI****+APPEAL SUIT No.437 OF 2007**

% Dated 18.12.2017

- # 1. G.Hari Babu, W/o late G.Raghavaiah,
Aged 47 years, Occ: Business.
2. Smt.G.Venkata Lakshmi, W/o G.Hari Babu,
Aged 41 years, Occ: Housewife.
Both are residents of Plot No.35/B, Road No.6,
Filmnagar, Jubilee Hills, Hyderabad.

.. Defendants/Appellants

AND

\$ K.Javaram Reddy, S/o K.Balreddy,
Aged 49 years, Occ: Business & 2 others.
All are residents of Plot No.40, Jalavayu Vihar,
K.P.H.B.Colony, Kukatpally,
Hyderabad.

.. Plaintiffs\Respondents

! Counsel for Appellants : Sri B.Venkata Ramarao.

^Counsel for respondents : Sri V.N.R.Prashanth

<GIST:

> HEAD NOTE:

? Cases referred

1. (1999) 8 SCC 396
2. AIR 1974 AP Pg.1 (FB)
3. AIR 1957 AP Pg.1 (FB)



THE HON'BLE SRI JUSTICE A.V.SESHA SAI**APPEAL SUIT No.437 of 2007****JUDGMENT:**

The defendants, in O.S.No.125 of 2003 on the file of the II Additional District Judge, Ranga Reddy District at L.B.Nagar, Hyderabad, are the appellants in the present Appeal Suit, preferred under Section 96 of the Code of Civil Procedure (for brevity, 'CPC').

Heard Sri B.Venkat Rama Rao, learned counsel for the appellants, and Sri V.N.R.Prashanth, learned counsel for the respondents, apart from perusing the material available before this Court.

This Appeal Suit challenges the judgment and decree, dated 22.11.2004, passed by the learned II Additional District Judge, Ranga Reddy District at L.B.Nagar, Hyderabad in O.S.No.125 of 2003, instituted by the respondents herein, praying for cancellation of two sale deeds, in respect of the suit schedule property, bearing document Nos.9208/02 and 9209/02, dated 26.10.2002, and for a direction to the defendants to execute the deed of cancellation before the Sub-Registrar, Medchel.

During the course of trial, on behalf of the plaintiffs, the first plaintiff was examined as P.W.1 and Exs.A1 to A3 were marked. The defendants-appellants herein remained *ex parte*.

The learned II Additional District Judge decreed the suit *ex parte* on 22.11.2004. The present Appeal Suit, filed under Section 96 CPC by the defendants in the suit, challenges the

validity and the legal sustainability of the said judgment and decree.

It is contended by the learned counsel for the defendants-appellants herein that the judgment rendered by the learned II Additional District Judge is erroneous, contrary to law, weight of evidence and probabilities of the case and also not in conformity with the provisions of Order XX Rule 4 CPC; that the learned Judge grossly erred in decreeing the suit *ex parte* contrary to the provisions of Order V CPC. In order to bolster his submissions and contentions, the learned counsel placed reliance on the following judgments:

1. (1999) 8 SCC 396
2. AIR 1974 AP Pg.1 (FB)
3. AIR 1957 AP Pg.1 (FB)

On the contrary, it is vehemently contended by the learned counsel for the plaintiffs-respondents herein that the learned II Additional District Judge rendered the judgment strictly in accordance with law, as such, the same does not warrant any interference of this Court under Section 96 CPC. It is the further submission of the learned counsel that, only after effecting service of notice on the defendants, by way of publication in a daily newspaper, under the provisions of Order V Rule 20 CPC, the learned Judge decreed the suit. It is further submitted by the learned counsel that since the defendants-appellants herein did not contest the matter before the Court below, they cannot maintain the present Appeal Suit under Section 96 CPC.

In the above background, now the points that arise for consideration of this Court, in the present Appeal Suit, are as under:

1. Whether the judgment rendered by the Court below is in accordance with the provisions of Order XX Rule 4 CPC?
2. Whether the Court below adhered to the other provisions of Order V CPC before ordering substitute service under the provisions of Order V Rule 20 CPC?
3. Whether the judgment and decree rendered by the learned Additional District Judge are sustainable and tenable?

Point No.1:

In order to examine the issue as to whether the judgment rendered by the learned II Additional District Judge is in conformity with the provisions of Order XX Rule 4 CPC, it would be appropriate and apposite to refer to the said provision of law.

Order XX CPC deals with the judgment and decree. Sub-Rule (1) of Rule 4 of Order XX CPC deals with the judgment of the Small Causes Courts and sub-rule (2) of the said rule deals with the judgments of other Courts. Sub-rule (2) of Rule 4 of Order XX CPC reads as under:

“judgments other than in Small Cause Suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision”.

In the instant case, the complaint of the defendants-appellants is that the judgment rendered by the learned II Additional District Judge is not in consonance with the above referred provisions of law. In this context, it may be appropriate to

extract the judgment rendered by the Court below which reads as under:

“Heard the counsel for the petitioners. Perused the contents of sworn affidavit of P.W.1 and the documents which are marked as Exs.A1 to A3 on behalf of the plaintiffs. Suit filed by the plaintiff is hereby decreed as prayed for with costs and the sale deed bearing No.9208/02 and 9209/02 dated 26.10.2002 which are marked as Exs.A1 and A2 respectively are hereby cancelled.

Written and pronounced by me in open Court on this the 22nd day of Nov.2004”.

In this context, it may be apt to refer to the judgment cited by the learned counsel for the defendants-appellants in **BALARAJ TANEJA & ANOTHER v. SUNIL MADAN & ANOTHER**¹, wherein the Honourable Apex Court, while dealing with the provisions of Section 2 (9) and Order XX Rule 4 (2) CPC, held, at paragraph Nos.42 and 45, as under:

42. “Judgment” as defined in Section 2(9) of the Code of Civil Procedure means the statement given by the Judge of the grounds for a decree or order. What a judgment should contain is indicated in Order 20, Rule 4 (2) which says that a judgment:

"shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."

45. Learned counsel for respondent No. 1 contended that the provisions of Order 20, Rule 1 (2) would apply only to contested cases as it is only in those cases that "the points for determination" as mentioned in this Rule will have to be indicated, and not in a case in which the written statement has not been filed by the defendants and the facts set out in the plaint are deemed to have been admitted. We do not agree. Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds *ex-parte* and is ultimately decided as an *ex-parte* case, or is a case in which the written statement is not filed and the

¹ (1999) 8 SCC 396

case is decided under Order 8 Rule 10, the Court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved”.

In **AZIZ AHMED KHAN v. I.A.PATEL**², a Full Bench of this Court, while dealing with an identical situation, at paragraph Nos.8 & 9, held as under:

8. “The irregularities committed by the trial court do not stop at that. The judgment that it has given does not conform to the provisions of Rule 4 (2) of Order XX CPC at all. Whereas a judgment shall contain a concise statement of the case, the points for determination, and the decision thereon, we search in vain for any of these essentials in the impugned judgment. It is no judgment at all. The provisions of Rule 4 (2) have a set purpose. The form is designed to ensure that while pronouncing the orders or judgments. They should apply their minds to the facts of the case and the points at issue and give a reasoned judgment thereon so that not only their own conscience may be satisfied but also the litigants should have satisfaction that all their evidence has been evaluated and their contentions and arguments duly considered. This is of vital importance inasmuch as the whole edifice of confidence of the litigants in Courts is built upon the quality of judgments. The Courts, therefore, have to necessarily take care that their judgments conform to the provisions of law and are products of sound reasoning. In the instant case the judgment of the trial Court which we have extracted above is no judgment at all. The appeal must be allowed on that basis also”.

9. “Then again the so-called judgment of the Court suffers from a further defect. It is based upon material which is inadmissible in evidence. In fact that is the main grievance of the defendants and the case has before this Full Bench for a pronouncement thereon as well. It is no doubt true that the proceedings against the defendant were set *ex parte* under Order IX, Rule 6 CPC after issues were framed in the case. But that does not mean that the defendant should suffer decree by mere reason of his absence. The fact that Rule 6 of Order IX CPC permits the proceedings to be set *ex parte* does not dispense with the proof of the case. The meaning of “*ex parte*” being “in the absence of” ,

² AIR 1974 AP Pg.1 (FB)

all that follows from the order setting proceedings *ex parte* is that the proceedings which had to continue otherwise in the presence of the party may now be continued in his absence.

The absence of the defendants thus does not dispense with the responsibility of the plaintiff to prove his case to the satisfaction of the Court. He has to discharge his onus in the same way as he should have done in the presence of the defendant. He has to prove his case with the help of the material which is legal evidence. His burden is in no way lightened by the absence of the defendant. In fact the responsibility of the Court also has increased as it has to reach its conclusions without the assistance of the defendant who, if present, would have raised all questions with regard to admissibility of evidence and cross-examined the witnesses and advanced arguments in his favour. The Court cannot pass a judgment in favour of the plaintiff unless the suit is maintainable, the claim as set up is established by the material on record and the reliefs claimed can be lawfully granted”.

In the case on hand, the learned II Additional District Judge, in the impugned judgment, except saying that he perused the contents of the sworn affidavit of P.W.1 and also the documents marked, did not make any endeavour to render the judgment in accordance with the provisions of Order XX Rule 4 CPC. The mode and manner adopted by the learned Judge, for decreeing the suit, is obviously not in conformity with the said provision of law but it is also contrary to the law laid down by the Honourable Apex Court and this Court in the above referred judgments. Therefore, the impugned judgment and decree are liable to be set aside on the said ground. Accordingly, point No.1 is answered in favour of the defendants-appellants herein and against the plaintiffs.

Point No.2:

It is the submission of the learned counsel for the defendants-appellants herein that the learned Additional District Judge passed

the impugned judgment without being preceded by proper compliance of the provisions of Order V Rules 19 & 20 CPC.

In elaboration, it is further maintained by the learned counsel for the defendants-appellants herein that, without making any endeavour for due adherence to the provisions of Rules 19 & 20 CPC, the learned Judge decreed the suit *ex parte*. In the direction of fortifying the said contention, the learned counsel has placed on record the docket proceedings in O.S.No.125 of 2003. The suit was admittedly presented on 01.09.2003. From 03.11.2003, awaiting service of summons on the defendants, the Court adjourned the suit till 17.06.2004 and on 01.07.2004 the Court recorded that the defendants 1 and 2 were called absent and posted the case for steps on 02.07.2004. It is further evident from the said docket proceedings that on 02.07.2004 the Court allowed the substitute service petition by permitting the plaintiffs to publish the notice in 'Prajasakthi' daily newspaper of Hyderabad edition on 06.08.2004. Thereafter, on 06.08.2004, plaintiffs filed the publication before the Court and the matter was adjourned to 13.08.2004 and on 13.08.2004 the defendants 1 and 2 were set *ex parte*. Thereafter, the Court adjourned the matter from 25.08.2004 to 31.08.2004 and from 31.08.2004 to 26.10.2004 and from 28.10.2004 to 17.11.2004 and, eventually, on 22.11.2004 the Court heard the learned counsel for the plaintiffs and rendered the impugned judgment and decree.

Rule 17 of Order V CPC deals with the procedure when the defendant refuses to accept service or cannot be found. According to the said rule, where the defendant or his agent or such other

person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant [who is absent from his residence at the time when service 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 there is no agent empowered to accept service of the summons on his behalf, or 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.

Rule 19 of Order V CPC deals with examination of the serving officer which stipulates that where summons is returned under Rule 17 CPC, 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.

Rule 20 of Order V CPC, which is crucial for adjudication of the issue in the present Appeal Suit, in clear and vivid terms,

stipulates that where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit. Rule 20 (1A) of Order V CPC also mandates that such publication shall be made in a daily which has circulation in the relevant place.

In the instant case, as correctly pointed out by the learned counsel for the appellants and as evident from the docket proceedings, the Court below did not make any exercise or endeavour to adhere to the above mandatory requirements of law. In this context, it may be appropriate to refer to the judgment of a Full Bench of this Court in **G.SHANMUKHI v. UTAKUR VENKATA-SRAMI REDDY AND ANOTHER**³, wherein this Court, at paragraph No.8, held as under:

“Order 5 deals with the issue of summons to the defendant in order to apprise him of the institution of the suit against him so that he might appear and answer the claim. Rule 9 of that order prescribes direct service on the defendant or upon an agent empowered to accept service on his behalf. Sub-rule (3) thereof provides alternatively for service by registered post prepaid for acknowledgment. Rule 12 directs that wherever it is practicable, service shall be made on the defendant in person,

³ AIR 1957 AP 1

unless he has an agent empowered to accept service, in which case service on such agent would be sufficient.

Rules 13 and 14 enact that summons may be served on a manager or agent of the Defendant who carries on any business or work for him, if the suit relates to such business or work, or an agent of the Defendant in charge of any immovable property, if the suit seeks a relief respecting it. In a case where, the Defendant is absent and has no agent empowered to accept service, service may also be made on any adult male member of the family of the Defendant who is residing with him, as provided by Rule 15.

The summons is either to be delivered or tendered to the Defendant, his agent or an adult member of his family. Where they refuse to sign an acknowledgment of service, the procedure to be followed is prescribed by Rule 17, while Rule 18 describes the procedure to be adopted when the summons has been actually served on any one of them. Then follows Rule 20 which provides for substituted service in these terms:

(1). Where the Court is satisfied that there is reason to believe that the Defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house (if any) in which the Defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(2). Service substituted by order of the Court shall be as effectual as if it had been made on the Defendant personally.

It is manifest that these several modes of service attempt to reconcile the need for bringing home to the Defendant knowledge of the suit with the practical necessity of proceeding as early as possible with its trial. Where these rules of service are observed, there would generally be good reason for supposing that the Defendant became aware of the institution of the suit, though it does not necessarily follow that he actually did.

It is possible that even in a case of personal service or service upon an agent, etc., there may be mistaken identity, and the person served may not be the Defendant or his agent. The Defendant when he comes to know of the suit or the decree passed therein may in such a case approach the Court for relief under Order 9, Rule 13, Code of Civil Procedure (CPC), and point out that he has not been 'duly served.'

It is seen that in the case of substituted service, there are two conditions prescribed before it can be resorted to, viz., that the Court must be satisfied either (1) that there is reason to believe that the Defendant is keeping out of the way for the purpose of avoiding service, or (2) that for any other reason the summons cannot be served in the ordinary way. The satisfaction of the Court in each of these cases is brought about by representations of the Plaintiff usually made by an affidavit. If, of course, the Defendant has been deliberately keeping out of the way and substituted service is ordered in such a case, it certainly would be 'due' service.

A party cannot close his eyes and complain that he is unable to see. But, if on the other hand the Defendant is not really keeping out of the way at all and the Court is only induced to believe that he is, by the one-sided representation of the Plaintiff, it is clear that the service that is then

substituted cannot be regarded as "due" service. Therefore when the question arises as to whether in a particular case, substituted service obtained from the Court is or is not "due" service, it will have to be determined by ascertaining whether the representations made to the Court by the Plaintiff were not true, that is to say, whether the Defendant could be presumed in the circumstances, to have or had actual knowledge.

Of course, substituted service will not be directed unless the Court is satisfied as to the existence of one or the other conditions specified in the rule. But a mere note upon the record to that effect is not conclusive against the Defendant though in the absence of any other practicable alternative the Court must proceed upon the footing, for the time being, that the service is as effectual as personal service.

This effectuality is only for the purpose of enabling the Court to go on with the suit. But, its-effectuality against the Defendant depends solely on whether he really avoided service or whether as a matter of fact he came to know of the suit otherwise. These facts will have to be determined by the Court to which application is made to set aside an ex parte decree".

The material available on record, in clear and vivid terms, reveals that the Court below did not adhere to the mandatory provisions of Order V CPC. On this ground also the impugned judgment is liable to be set aside. Accordingly, point No.2 is also answered in favour of the defendants-appellants herein.

Point No.3:

In the result, the Appeal Suit is allowed, setting aside the judgment and decree, dated 22.11.2004, in O.S.No.125 of 2003,

passed by the learned II Additional District Judge, Ranga Reddy District at L.B.Nagar, Hyderabad and the said suit-O.S.No.125 of 2003 is remanded to the Court below for fresh enquiry and for rendering judgment, in accordance with law, after giving opportunity to all the stakeholders.

As a sequel thereto, miscellaneous Petitions pending, if any, in this Appeal Suit, shall stand closed. There shall be no order as to costs.

A.V.SESHA SAI,J

18th December, 2017

Note:

L.R.Copy to be marked.

B/o

Tsy

