

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.11.2020

PRONOUNCED ON : 30.11.2020

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

C.R.P(PD).No.4076 of 2015

and

M.P.No.1 of 2015

1.Bharathi,
D/o. Sarawathi.

2.Maheswari,
D/o. Sarawathi.

3.Nachimuthukumar,
S/o. Sarawathi.

... Petitioners

Vs.

C.Sundarasamy,
S/o. Gurusamy

सत्यमेव जयते... Respondent

Prayer: Civil Revision Petition is filed under Article 227 of Constitution of India, to set aside the fair and final order of the IV Additional District Court, Coimbatore in C.M.A.No.29 of 2013 against I.A.No.541 of 2009 in O.S.No.1036 of 1992 dated 21.07.2015.

For Petitioners : M/s.Mukunth

for M/s. Sarvabhauman Associates

For Respondent : Mr.Hema Sampath,
Senior Counsel
and M/s.K.Myilsamy

ORDER

This Civil Revision Petition has been filed by the respondent/plaintiff against the order passed in C.M.A.No.29 of 2013 on the file of the IV Additional District & Sessions Judge, Coimbatore dated 21.07.2015.

2. The petitioners herein had filed a suit in O.S.No.1036 of 1992 on the file of the I Additional Subordinate Court, Coimbatore for the relief of partition and separte possession. In the said suit, an ex-parte preliminary decree was passed on 11.11.1993. The respondent herein had filed an application in I.A.No.541 of 2009 under Order 9 Rule 13 of CPC to set aside the said preliminary decree. The learned I Additional Subordinate Judge, Coimbatore by the order dated 30.04.2013 had dismissed the said application without costs. Feeling aggrieved, the respondent herein had filed an appeal in C.M.A.No.29 of 2013 on the file of the IV Additional District and Sessions Judge, Coimbatore. The learned IV Additional District and Sessions Judge, Coimbatore by the

order dated 21.07.2015 has allowed the said appeal without costs and thereby the ex-parte preliminary decree passed in O.S.No.1036 of 1992 has been set aside. Feeling agrieved, the respondents/plaintiffs have filed the present Civil Revision Petition.

3. Heard Mr.Muhunth for M/s. Sarvabhauman Associates, the learned counsel for the petitioners and M/s.Hema Sampath, the learned Senior counsel assisted by Mr.K.Myilsamy for the respondent/ 3rd defendant.

4. The learned counsel for the petitioners has submitted that the Appellate Court erred in reversing the well considered order passed by the trial Court. He further submitted that the Appellate Court failed to consider that the trial Court had passed an order relying on the endorsement made by the Court staff in the suit notes paper. Since, when the process server went to the respondent's house to serve the summons, he was not found in his residence, he served the said summons by affixing a copy of the summons on the outer door of the respondent's house. He further submitted that the Appellate Court failed to consider

that the notice in the final decree proceeding was served on the respondent to the same address which was given in the plaint and that shows, he would have seen the copy of the summons which was affixed on the outer door of his house. He further submitted that the Appellate Court failed to consider that keeping quiet for 17 years, the respondent had filed an application to set aside the ex-parte preliminary decree without filing any application to condone the delay. He further submitted that the Appellate Court failed to consider that the respondent while examining himself as P.W.1 has categorically admitted the Ex.R1/acknowledgement card but he failed to give any explanation as to under what circumstances the said acknowledgement card was signed by him. He further submitted that the Appellate Court failed to consider that before filing final decree application, the petitioners herein had sent a notice to the respondent by registered post requesting him to come forward for dividing the suit property in pursuance of the preliminary decree passed in the said suit and the respondent had received the said notice by signing Ex.R1/ acknowledgement card but he contended that the said notice was received by him relating to some other case, but he has not produced any material to show that Ex.R1/acknowledgement

card is relating to some other case and under the said circumstances, the Appellate Court should have drawn adverse inference against the respondent. He further submitted that even after receipt of notice by signing Ex.R1/acknowledgement card, the respondent had not filed any application immediately to set aside the ex-parte decree. After keeping quite for a long period, he filed an application in the year 2009 stating that as if he got acknowledge about the exparte decree only after receipt of the notice in the final decree proceedings. Therefore he prayed to allow this Civil Revision Petition and set aside the order passed by the Appellate Court in C.M.A.No.29 of 2013 and restore the order passed by the trial Court in I.A.No.541 of 2009 dated 30.04.2013.

5. The learned counsel for the petitioners, in support of the aforesaid contentions, relied upon the decision in ***Sunil Poddar and Ors.***

Vs. Union Bank of India, MANU/SC/0322/2008 : AIR 2008 SC 1006

6.Per contra, the learned Senior Counsel appearing for the **respondent/3rd defendant** has submitted that on 11.06.1992, one Ramanagounder, his son Muthusamy for himself and for his three minor

children had sold the suit property to the respondent herein for valuable consideration. She further submitted that within two months i.e., on 11.08.1992, the Minor children had filed the suit in O.S.No.1036 of 1992 on the file of the I Additional Subordinate Court, Coimbatore for partition in which the respondent herein had been arrayed as 3rd defendant. She further submitted that in the said suit summons was not served on the respondent/3rd defendant and an ex-parte preliminary decree was passed on 11.11.1993. She further submitted that the respondent came to know about the said ex-parte preliminary decree only on 11.03.2008 when he received a notice from the petitioner's counsel in final decree application and hence immediately, the respondent had filed an application in IA.No.541 of 2009 to set aside the ex-parte preliminary decree.

7. The learned senior counsel for the respondent has further submitted that in the affidavit filed in support of the said application, the respondent had categorically stated that he had knowledge about the said ex-parte preliminary decree only after receipt of the notice in final decree proceedings. In the counter, the petitioners herein have not specifically

denied the said fact. She further submitted that the trial Court had set the respondent herein ex-parte in the suit merely based on the endorsement made by the court staff in the suit notes paper as copy of the summons was served on the respondent by affixture on the outer door of the residence of the respondent. She further submitted that as per Order 5 Rule 17 of CPC, 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, then only he can affix a copy of the summons on the outer door of the defendant's residence but in this case there is no proof that the process server used all due and reasonable diligence to find out the respondent/ 3rd defendant. She further submitted that Order 5 Rule 18 of CPC insists that the Serving Officer shall make an endorsement in the original summons with regard to the name and address of the person who identified the said house and also witness to the said delivery, but in this case, there is no evidence that any such endorsement has made by the process server. She further submitted that Order 5 Rule 19 insists that where the summons is returned under Rule

17, the Court shall verify whether the Serving Officer has filed affidavit to the effect as to how summons was served and also examine the said officer on oath, but in this case the trial Court has stated in its order that since the records were destroyed , due to lapse of more than 12 years the Court had no opportunity to verify the said fact and in such case the benefit of doubt should be given to the respondent/3rd respondent.

8. The learned senior counsel for the respondent has further submitted that the suit notes paper dated 10.06.1993 shows that the 4th defendant died, a fresh summons was ordered to all the defendants including the 4th defendant who reported dead. She further submitted that the suit notes paper also shows that on 18.08.1993 an endorsement has been made by the Court staff as D3 to D5 were absent and affixed. If really the process server had gone to the residence of 4th defendant, he would have found that the 4th defendant had expired and in such a case he would not have returned the original summons stating that the copy of the summons were served to the said defendant by affixing the same on the outer door. She further submitted that based on the aforesaid endorsement made in the suit notes paper, the trial Court without

following the procedures contemplated under order 5 Rule 18, 19 and examining the process server, had declared as service sufficient and set the defendants 3 & 5 ex-parte and passed an ex-parte preliminary decree on 11.11.1993 including against dead person.

9.The learned senior counsel for the respondent/3rd defendant has further submitted that since in the partition suit, all the defendants are necessary parties and decree has passed against a dead person, the said decree is nullity against all other defendants also. She further submitted that in the counter, the petitioners have not stated that before filing final decree application, they had sent a notice requesting the respondent/3rd defendant to divide the suit property in pursuance of preliminary decree. She further submitted that without any such pleadings, surprisingly they have shown the Ex.R1 postal acknowledgement to the respondent and hence the said postal acknowledgement cannot be considered. She further submitted that without producing a copy of the said notice which was said to be sent by the petitioners herein, they sought not have marked the postal acknowledgement alone. She further submitted that since the petitioners relying upon Ex.R1 they have to establish the fact

for what purpose the said Ex.R1 was actually sent but they have not adduced any evidence with regard to the said fact. She further submitted that the trial Court without considering the said facts had dismissed the application filed by the respondent to set aside ex-parte preliminary decree and hence the Appellate Court had rightly interfered with the said order and allowed the appeal and set aside the order passed by the trial Court and in the said order, this Court need not interfere and therefore she prayed to dismissed the Civil Revision Petition.

10.It is seen from the order passed by the trial Court that the suit notes paper shows that in O.S.No.1036 of 1992, the Court Staff made an endorsement as " 4th defendant expired and summons to the 5th defendant returned for want of correct address and bata for defendants 1 to 3 not paid". Based on the said endorsement, the trial Court had ordred fresh summons to defendants 1 to 5 including 4th defendant who was reported dead. On 18.08.1993, the Court staff made an endorsement in the suit notes paper as "the defendants 3 to 5 absent affixed". Again 27.09.1993 the Court staff made an endorsement in the suit notes paper as the "defendants 3 to 5 absent affixed." Based on the same, the trial Court

had passed an order that defendants 3 to 5 called absent and set ex-parte.

11. At this juncture it would be relevant to refer to Order 5 Rule 17 and 19 of CPC which read thus:

"17.Procedure when defendant refuses to accept service, or cannot be found,-- Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable deligence, 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, 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. Examination of serving officer.-- 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."

12. A bare reading of the aforesaid provisions of law would show that where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence that 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, the serving officer shall affix a copy of the summons on the outer door in which the defendant ordinarily resides and return the original summons to the Court with a report stating that he has so affixed the copy, circumstances in which he did so, and the name and address of the person who identified the house of the defendant and in whose presence the copy was affixed. It is also clear that where the 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.

13. In this case it appears that the trial Court did not pass any order declaring that the summons has been duly served. It has simply passed an order setting the defendant ex-parte, based on the endorsement made by the Court staff.

14. It is also seen from the trial court's order that in the suit notes paper the Court staff made an endorsement as 4th defendant reported dead but for him also fresh summons was ordered and Subsequently he was also set ex-parte. As rightly held by the Appellate Court that if really the process server went to the residence of the defendants 3 to 5, he would have verified whether actually 4th defendant was alive or not. Further, the trial Court also without verifying the previous endorsement it had mechanically ordered fresh summons to the dead person and passed ex-parte decree against him also. It is well settled that the decree passed against the dead person is nullity.

15. When the respondent herein was examined as D.W.1 in I.A.No.541 of 2009, during cross examination, a postal acknowledgment

was shown to him and he admitted that the signature found in the said acknowledgment card belongs to him and hence, the said acknowledgment card was marked as Ex.R1. According to the petitioners, after passing preliminary decree, they had sent a notice through their Advocate and the respondent had received the said notice by signing in the said acknowledgment card (Ex.R1). But in the counter statement filed in I.A.No.541 of 2009, the petitioners herein not at all whispered anything about the said notice and also acknowledgment card. It is well settled that without pleadings no amount of evidence can be adduced and even if it is adduced and that cannot be looked into. In this case the petitioners have not even produced a copy of the said notice. Under the said circumstances, the Court cannot come to the conclusion that the said acknowledgement is relating to the notice state to have been issued by the petitioners after passing of the preliminary decree.

16.In Sunil Poddar and Ors. Vs., Union Bank of India (cited supra) the Hon'ble Supreme Court in para 18 held as follows:

"18.It is, therefore, clear that the legal position under the amended Code is not whether the defendant

was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim, of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the defendant has otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code. Since the said provision applies to Debt Recovery Tribunals and Appellate Tribunals under the Act in view of Section 22(2) (g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not

even contended by the appellants that though they had knowledge of the proceedings before the DRT, they had no sufficient time to appear and answer the claim of the plaintiff-bank and on that ground, ex parte order deserves to be set aside."

17. From the aforesaid decision it is clear that the legal position under the amended code is not whether the defendant was actually served with the summons in accordance with the procedure laid down. If the Court is convinced that the defendant had otherwise knowledge of the proceedings and could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code. In this case, as already pointed out that the trial Court before setting the respondent ex-parte, it has not declared that service of summons is sufficient. Further, there is no finding as to whether the serving officer had affixed the copy of the summons by following the procedure prescribed under Order 5 Rule 17 of Civil Procedure code. Further, there is no material before the Court that the respondent had

knowledge about the proceedings initiated against him by the petitioners herein. Taking into consideration the aforesaid facts the Appellate Court had rightly held that the aforesaid decision will not help the petitioners.

18. For the aforesaid reasons this Court is of the view that the order passed by the Appellate is not suffering from any irregularity or illegality. Therefore, this Civil Revision Petition is liable to be dismissed.

19. In the result, this Civil Revision Petition is dismissed. Confirming the order passed by the Appellate in C.M.A.No.29 of 2013 dated 21.07.2015. No costs. Consequently connected miscellaneous petition is closed.

30.11.2020

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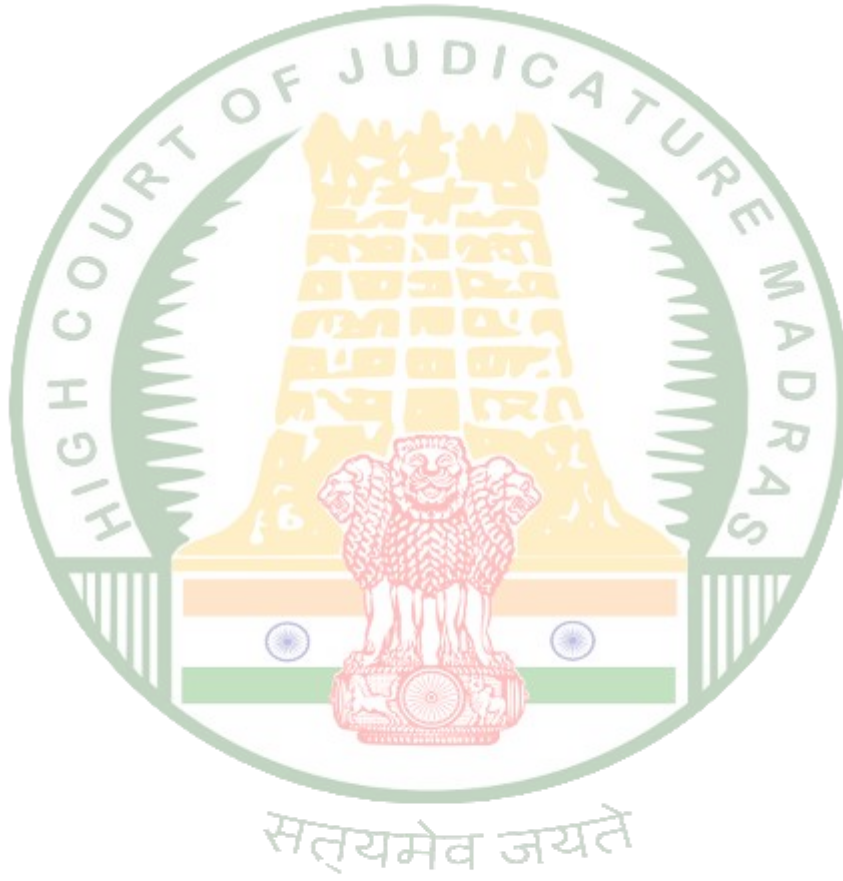
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To

1. The IV Additional District and Sessions Judge, Coimbatore.

2.The I Additional Subordinate Court, Coimbatore.



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**CRP (PD).No.4076 of 2015 and
MP.No.1 of 2015**

P.RAJAMANICKAM.J.,

vsn



**Pre-Delivery Order made in
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and
M.P.No.1 of 2015**

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