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High Court Of Kerala

Case No: C. R. P. No. 1082 of 1963

Gopalan APPELLANT

Vs

Sekharan RESPONDENT

Date of Decision: Sept. 10, 1964

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 20A, Order 5 Rule 9(3), 122

Citation: (1964) KLJ 1238

Hon'ble Judges: C. A. Vaidialingam, J

Bench: Single Bench

Advocate: L. Gopalakrishnan Potti, for the Appellant; T. R. Achutha Warrier and S. Krishna Warrier, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Vaidialingam J

1. In this revision petition Mr. L. Gopalakrishnan Potti, learned counsel for the defendant petitioner, challenges the orders of both the subordinate courts, declining to set aside the ex parte decree passed in the suit as against his client on 22.03.1961. The suit was for redemption on the basis of an Otti dated 24.12.1113 and also for certain other consequential reliefs.

2. It will be seen that in this case, the summons to the defendant petitioner was sent even in the first instance by registered post; and that must have been under the provisions of O. V., R.9(3), C. P.C. It must be mentioned at this stage that sub-rule (3) of Rule 9 of Order V, was incorporated in our State only on 09.06.1959, and that sub-rule no doubt gives jurisdiction to the court even in the first instance to issue summons by registered post. As to what exactly is the scope of that sub-rule will have to be considered, when I

revert to the scheme of Order V.

3. The summons sent to the defendant by registered post, in the manner indicated above, was returned refused by the Postal department. On the same date, when the suit was posted for return of summons, namely 22.03.1961, the defendant was set ex parte and a decree was passed in favour of the plaintiff. The defendant, claiming to have obtained knowledge of the decree on 05.04.1961, filed an application, C. M. P. No. 6408/61, on 13.04.1961, the order in which is under attack in this revision petition, for setting aside the ex parte decree against him on 22.03.1961.

4. It will be seen that the petitioner no doubt appears to have given evidence in chief examination and ultimately dropped out of the witness box; and representation was made by his learned counsel in the trial court on 10.08.1962, that further examination of his client, namely the defendant, may be dispensed with as it is not necessary. But the question as to what is the effect of a return of a postal cover as refused in respect of a summons issued even in the first instance by registered post under O. V, R. 9(3) C. P.C. has not been considered by both the lower courts. And as to whether the question was raised and argued, is not also clear from the orders both the courts below. Both the lower courts are of the view that inasmuch as there is an endorsement of refusal on the postal cover containing the summons sent to the defendant by registered post, under O.V, R.9(3), the burden of proving that the said endorsement is false or that there has been no attempt at proper service on him, is on the petitioner. Inasmuch as he has not established those circumstances, especially after having given evidence in part, the view of both the subordinate courts is, that it must be held that the summons has been properly served and there is no ground for setting aside the ex parte decree passed as against the petitioner on 22--3--1961. In this view both the learned Munsif, as well as the learned District Judge have declined to set aside the ex parte decree.

5. Mr. L. Gopalakrishnan Potti, learned counsel for the defendant-petitioner, challenges both the orders of the subordinate courts declining to set aside the ex parte decree in the case. The learned counsel urged that the fact that his client attempted in the first instance to establish that the record of refusal made in the postal registered cover returned to the court is false and did not ultimately pursue that aspect by tendering himself for further cross-examination, is of no consequence whatsoever. According to the learned counsel, it is that circumstance unfortunately that appears to have weighed with both the subordinate courts in rejecting the application filed by his client for setting aside the decree. The learned counsel also urged that there are two specific provisions contained in Order V of the Code of Civil Procedure, dealing with sending of summons by registered post; the provision for sending summons by registered post even in the first instance is contained in sub-rule (3) of rule 9, which sub-rule was incorporated in this State only as late as 9-6-1959. Even earlier, the Central Legislature had incorporated, by Central Act, 66 of 1956 rule 20A of Order V which deals with the issue of summons by registered post, only under the conditions mentioned therein. The learned counsel also pointed out in particular to the provisions made in sub-rule (2) of Rule 20A to the effect that an

acknowledgment purporting to be signed by the defendant or the agent, or an endorsement by a postal employee that the defendant or the agent refused to take a delivery, may be deemed by the court issuing the summons to be prima facie proof of service. And, in as much as sub-rule (3) of rule 9 of Order V, with which we are now concerned, does not make any provision whatsoever regarding the effect of a registered postal cover containing the summons to the defendant being refused by the party, and giving jurisdiction to the court to treat it as proper service, the learned counsel urged that in this case it must be held that the summons has not been duly served, and that inasmuch as his client has come to court with an application under O. IX, R. 13 within 30 days of the ex parte decree, the question of knowledge does not assume any importance in which case the learned counsel pointed out that his client will have to let in some evidence regarding the date of knowledge of the decree. Therefore the learned counsel urged that when once his client is able to satisfy-- and in this case according to the learned counsel his client must be considered to have so satisfied--the court that in law the summons has not been duly served on his client, he was entitled to have the ex parte decree set aside. In this connection the learned counsel drew my attention to a Division Bench judgment of the Madras High Court, consisting of Ramachandra Iyer, C. J. and Anantanarayanan J., reported in Pichai Ammal Vs. Vellayya Thevar alias Ochu Thevar, . Pausing here for a minute, it may be stated that sub-rule (3) of rule 9 of Order V, which was no doubt incorporated in our State only on 9--6--1959, was already in the CPC obtaining in Madras from as early as 1951, by virtue of the rules framed by the Madras High Court u/s 122 of the Code. The Central rule viz., R. 20A of Order V, as I mentioned earlier, was incorporated in Order V by the Central Legislature, only in 1956, by Act 66 of 1956. Excepting for this difference, there is no difference in the wording of sub-rule (3) of rule 9 of Order V, in the State of Madras or in this State not regarding the matters provided for in rule 20A of Order V. The learned Judges in the Madras decision referred to above had to consider the question as to whether, when a summons is sent even in the first instance by registered post under sub-rule "(3) of rule 9 of O.V, and it is returned with an endorsement of refusal by the party, the court has got jurisdiction to treat it as due service of summons. The learned Judges have considered the scope and the field of operation of sub-rule (3) of rule 9 of Order V as well as rule 20A of Order V, in that decision, and have ultimately held that under those circumstances, the court has no jurisdiction to treat it as due service of summons so as to enable the court to pass an ex parte decree. On this Madras decision, quite naturally Mr. Gopalakrishnan Potti, learned counsel for the petitioner, has placed considerable reliance.

6. Mr. T. R. Achutha Warrier, learned counsel for the 1st plaintiff 1st respondent, has urged that the provisions of R. 20A of O.V, control the provisions of sub-rule (3) of R.9 of O.V. also. The learned counsel further urged that so long as a court has been given jurisdiction, as to whether the summons is sent by registered post in the first instance under sub-rule (3) of R.9, or at a later stage as indicated in rule 20A, the consequence is the same. That is, according to the learned counsel, the consequence mentioned, particularly in sub-rule (2) of R. 20A, will have full force even in matters arising for

consideration under sub-rule (3) of R. 9, of O. V. The learned counsel pursued this line of argument by urging that if the consequence is not as indicated in sub-rule (2) of R. 20A, then there is no purpose in conferring jurisdiction on the court to send summons even in the first instance by registered post under sub-rule (3) of R.9. To a pointed question as to why sub-rule (3) of R.9 of O.V, when it provides that an acknowledgment purporting to be signed by the defendant shall be deemed to be sufficient proof of service of such summons, does not make any provision regarding the effect of refusal of a registered cover containing the summons to the defendant concerned, the learned counsel pointed out that it was unnecessary to make any such provision in sub-rule (3) of R. 9, because such a provision regarding the effect of a refusal of summons by registered post is already existing in R. 20A. Therefore, the substantial contention of the learned counsel for the respondent is that R. 20A of O.V. controls the issue of summons in all respects summons issued under sub-rule (3) of R.9 of O.V. also.

7. The question for consideration is whether the contention of Mr. Achutha Warrier, learned counsel for the plaintiff respondent can be accepted.

8. It is now necessary to consider the scheme of O.V. of the Code of Civil Procedure. Order V deals generally with issue and service of summons and it contains as many as 31 rules. In particular, it will be seen that "service of summons" is taken in and dealt with by rules 9 to 31. It is also necessary to note that R.16 makes provision for the serving officer to deliver or tender a copy of the summons to the defendant personally, or to an agent or other person on his behalf, and also requiring the signature of the person to whom the copy is so delivered or tendered. R.17 provides for the procedure when the defendant refuses to accept service or cannot be found. R.16 will have to be read with R.18 regarding the various matters which have to be complied with by the serving officer when he delivers or tenders the summons to the defendant personally or to an agent or other person on his behalf. In fact R. 17 will have to be read along with R.19, because if the return under R. 17 has not been verified by the affidavit of the serving officer, then jurisdiction is given under R. 19 to the court to examine the serving officer on oath and ultimately to either declare that the summons has been duly served or order such service as it thinks fit. Pausing here, it will have to be noted that R.17 gives authority to the serving officer, under the circumstances mentioned therein, to affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides, subject to the various conditions mentioned therein. R. 20 gives a further right in certain cases to the court, under the circumstances mentioned therein, to order the summons to be served by substituted service. Broadly this is the scheme of Order V and it will be seen that the object is for meticulously providing for the manner of service of summons, as to make a very serious and honest attempt as far as possible, to bring directly to the notice of the defendant or his agent specially authorised in that behalf about the institution of the suit and about the necessity of his having to defend the action.

9. It is in this context that the provisions contained in sub-rule (3) of R.9 of O.V, and R. 20A of O.V, will have to be considered. R.9 deals with delivery or transmission of summons for service; and the particular sub-rule with which we are now concerned is sub-rule (3), which is as follows:

Where the defendant resides in India, whether within the jurisdiction of the Court in which the suit is instituted or not, the court may direct the proper officer to cause a summons under this Order to be addressed to the defendant at the place where he ordinarily resides or carries on business or works for gain and sent to him by registered post prepared for acknowledgement. An acknowledgement purporting to be signed by the defendant shall be deemed to be sufficient proof of service of such summons.

This will be a convenient stage to refer also to the provisions contained in R. 20A of O. V, which again is as follows:

20. A. Service of summons by post. (1) Where, for any reason whatsoever, the summons is returned unserved, the Court may, either in lieu of, or in addition to, the manner provided for service of summons in the foregoing rules, direct the summons to be served by registered post addressed to the defendant or his agent empowered to accept service at the place where the defendant or his agent ordinarily resides or carries on business or personally works for gain.

(2) An acknowledgement purporting to be signed by the defendant or the agent or an endorsement by a postal employee that the defendant or the agent refused to take delivery may be deemed by the court issuing the summons to be prima facie proof of service.

It will be seen that under sub-rule (3) of R.9 four matters appear to be provided, viz., (a) jurisdiction is given to the court to issue summons by registered post even in the first instance, (b) summons by registered post is to be sent only to the defendant and not to any other person, (c) when an acknowledgment purporting to be signed by the defendant is received, the court shall deem it to be sufficient proof of service of summons, and (d) the sub-rule does not, significantly, make any provision whatsoever as to what exactly will be the effect of a registered cover containing the summons returned by the postal department with the endorsement of refusal by the party concerned. These are the four aspects, so far as I could see, that are dealt with in sub-rule (3) of R. 9. of O. V. In contrast to these provisions contained in sub-rule (3) of R. 9, it will be seen by reference to R. 20A extracted earlier, that before the court can issue a summons by registered post, a summons in the ordinary manner must have already been issued to the defendant and that summons must have been returned unserved, for whatever reason the non-service may be. It is only under these circumstances that jurisdiction is given to the court to send by registered post the summons to the defendant, either in lieu of, or in addition to, issue of fresh summons, and also directing issue by registered post. Such provisions are not to be seen in sub-rule (3) of R. 9. Sub-rule (2) of R. 20 A provides for the effect of an

acknowledgment purporting to be signed by the defendant or the agent, and also the effect of an endorsement by a postal employee that the defendant or the agent refused to take delivery. Another aspect to be noted is that provision is made in sub-rule (1) of R. 20A for issue of summons by registered post, addressed either to the defendant personally or to his agent empowered to accept service at the place where the defendant or his agent ordinarily resides or carries on business or personally works for gain. Acceptance by the agent or the defendant of summons by registered post, or refusal of the same by the agent, are both put on the same par as acceptance or refusal by the defendant himself of the summons by registered post; and specific provision is made to the effect that under those circumstances the Court issuing summons may deem it to be prima facie proof of service.

10. I am not inclined to accept the contention of the learned counsel for the respondent that the provisions of rule 20A of O.V. can be considered in any manner to control the provisions of Sub-rule (3) of rule 9 of O.V. I am no doubt aware of the contention of the learned counsel for the respondent that it was unnecessary for the framers of the rule to make any particular provision regarding the effect of a return of a summons sent by registered post with an endorsement of refusal, when action is taken under sub-rule (3) of rule 9, because according to the learned counsel it is provided for in sub-rule (2) of rule 20A. But the point to be noted is that notwithstanding the fact that a specific provision is made in sub-rule (2) of rule 20A regarding the effect of an acknowledgment purporting to be signed by the defendant or his agent, a similar or identical provision is also made in sub-rule 3 of rule 9 also. But, whereas there is specific provision regarding the effect of an endorsement by a postal employee of refusal by the defendant or his agent to take delivery, under sub-rule (2) of rule 20A when summons is sent by post under the conditions mentioned in sub-rule (1) of rule 20A, there is no such provision made in sub-rule (3) of rule 9. That, in my view, clearly shows that no jurisdiction was contemplated to be given to the court, when a summons is sent by registered post even in the first instance under sub-rule (3) of rule 9, to treat an endorsement of refusal as amounting to a proper or due service of summons. The rule only gave jurisdiction to the court, in a case where the party to whom summons under the circumstances mentioned therein is sent and he readily accepts the summons, to treat it as sufficient proof of service and to proceed with the further conduct of the suit. Therefore, if sub-rule (3) of rule 9 really intended to give the same jurisdiction to the court as is conferred by sub-rule (2) of rule 20A, namely to treat the endorsement of refusal of the defendant to accept summons sent by registered post as prima facie proof of service, such a provision would certainly have found a place in that sub-rule also. Therefore the absence of such a provision clearly shows that the court, acting under sub-rule (3) of rule 9 has no jurisdiction to treat a refusal to receive summons sent by registered post, as amounting to proper or due service of summons so as to disentitle the party to ask for the exparte decree being set aside under O.IX, R.13.

11. The provisions of rule 9(3) and rule 20A of O.V. operate on different fields, as I have already pointed out earlier. No doubt, to have a speedy disposal of cases, probably sub-rule (3) of rule 9 has been enacted conferring jurisdiction on courts to issue summons by registered post even in the first instance. But that does not mean, that the courts have also been clothed with jurisdiction, when the registered cover is returned as refused, to treat it as a proper or due service of summons. So far as I could see, that sub-rule does not go to that extent. If a party receives the registered postal cover containing the summons, that means that the elaborate procedure otherwise provided for for service of summons need not be gone into again. Therefore, in my view, it cannot certainly be held that the provisions of rule 20A of O.V. in any manner control the provisions of sub-rule (3) of rule 9 of O. V.

12. The view that I have expressed above, is substantially in accordance, if I may say so with respect, with the views expressed by the learned Chief Justice of Madras delivering the judgment, sitting with Justice Anantanarayanan, in the decision reported in Pichai Ammal Vs. Vellayya Thevar alias Ochu Thevar, already referred to by me earlier in this order.

13. Mr. Achutha Warrier, learned counsel for the plaintiff-respondent, no doubt referred me to the decision of Kumara Pillai J., reported in St. Mariammal Roman Catholic Church v. Lakshmanan Nadar (1958 K. L. J. 1192), and urged that when once a registered cover has been returned with an endorsement by the postal department of refusal by the defendant to accept the same, the burden of disproving the presumption under rule 20A (2) of O. V, is on the defendant. A reading of the judgment of the learned Judge referred to above, clearly shows that the learned Judge was dealing with a case arising under rule 20 A of O. V. The learned Judge had no occasion in that case to consider the provisions of sub-rule (3) of rule 9 of O. V. In fact, it will be seen that on the date when the learned Judge delivered the judgment the provisions of Sub-rule (3) of rule 9 had not been incorporated in the Code. I have already pointed out that the said rule was incorporated in our State only on 9--6--1959. If the matter arises under rule 20A of Order V, I am in respectful agreement with the learned Judge''s view expressed in the decision referred to above, namely that in view of the express provision in the new rule 20A(2) of Order V, that the endorsement by the postal employee that the defendant refused to take delivery may be deemed by the court issuing the summons to be prima facie proof of service, the burden is now cast upon the defendant to prove that there has been no proper service of summons on him and that the endorsement by the postal peon is false. If that was the case, certainly the original attempt of the defendant by going into the witness box and attempting to satisfy the court that there has been no refusal by him to accept summons and withdrawing from the witness box without offering himself for cross-examination at a later stage, would be a matter for serious consideration under sub-rule (2) of rule 20A of Order V.

14. As I have already pointed out, there is no controversy in this case that the summons to the defendant-petitioner was issued by registered post even in the first instance.

Therefore the correct provisions that are applicable, are not those contained in R. 20A of O. V. but really those contained in sub-rule (3) of rule 9 of O. V. If that is so, in my view, it cannot certainly be said that the summons has been duly served though no doubt the postal department returned the postal cover containing the summons as having been refused by him.

15. The question of date of knowledge of the ex parte decree does not in this case assume any importance, because, as I have already pointed out, the ex parte decree was passed on 22--3--1961 and the defendant filed the application for setting aside the ex parte decree on 13--4--1961, within 30 days, claiming to have knowledge of the decree only on 5--4--1961. If the application had been filed beyond the period of 30 days of date of decree then the question of date of knowledge may become material and the defendant will have to adduce evidence regarding that aspect. Therefore, inasmuch as that question does not arise for consideration, the fact that the defendant went into the witness box and then stepped out of it, is of no consequence whatsoever. In fact, I am prepared to proceed on the basis that the defendant never offered to go in to the witness box and give any evidence in the case excepting to state that under sub-rule (3) of rule 9 of O. V. on the admitted facts, the court has no jurisdiction to hold that there has been a due service of summons on him. Therefore the view of the two subordinate courts that there has been due service of summons on the defendant revision petitioner cannot certainly be sustained. In the result the revision petition is allowed. But parties will bear their own costs of the revision petition.