
(1976) 04 MP CK 0005

Madhya Pradesh High Court

Case No: Miscellaneous A No. 78 of 1969

Shantibai

APPELLANT

Vs

Manikchand and others

RESPONDENT

Date of Decision: April 24, 1976

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47, 96

Citation: (1977) JLJ 274

Hon'ble Judges: C.M. Lodha, J

Bench: Single Bench

Advocate: H.G Mishra, for the Appellant; B.D. Gupta, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

C.M. Lodha, J.

This appeal by one of the judgment-debtors Shantabai arises out of execution proceedings initiated by the decree holder in respect of which a preliminary decree on the basis of a mortgage deed was passed on 19-11-59 and final decree on 27-3-62. It is not disputed that the sale was made absolute on 11-8-65 and a sale certificate was granted in favour of the auction-purchasers Madhav, Shriram, Jugal Kishore and Suryakant (who will hereinafter be referred to as auction-purchasers) on 14-8-65. The objection made by Shantabai under S. 47 C.P.C out of which the present appeal arises was filed on 25-11-69 on the ground that the sale is a nullity inasmuch as no notice was served upon her either under O. 21. R. 22 or under O. 21. R. 66 C.P.C. The executing Court did not issue notice of this application either to the decree-holder or to the auction-purchasers, but dismissed it summarily by its order dated 5-12-69 on the ground that notice-under O. 22. R. 66 had been duly served upon the appellant. Aggrieved by the order of the learned Additional District Judge, Gwalior. Shanta Bai has filed this miscellaneous appeal under S. 96 read with S. 47

C.P.C.

2. Learned counsel for the appellant has strenuously urged that the lower Court was not justified in rejecting the objection summarily without notice to the opposite party and without recording evidence on the points raised in the objection. It is argued that no notice under O. 22, R. 66 C.P.C. was served upon the appellant and, therefore, the sale is a nullity. In this connection it has also been urged that the substituted service effected on the appellant by publication of notice in the newspaper "Navprabhat" was illegal, inasmuch as there is nothing on the record to show that it was not possible to serve the notice on the appellant personally at Ratlam where she was residing with her son.

3. On the other hand, Mr. B.D. Gupta, learned counsel for the auction purchasers has contended that the objection filed by the appellant in the lower Court was barred by limitation and the Court was perfectly justified in dismissing it summarily. He has also argued that the sale cannot be set aside for want of notice to the appellant under O. 21, R. 66 C.P.C. as she was adequately represented by the co-judgment-debtors and thus the doctrine of effective representation applied to the case. Lastly, he has argued that when personal service of the notice under O. 21, R. 66 was found to be not possible, substituted service was effected on the appellant and the same cannot be considered to be invalid.

4. Before embarking upon the consideration of the contentions raised on behalf of either party, I may observe that the appellant's case rests purely on want of notice under O. 21, R. 66 C.P.C. on the appellant. Consequently, before addressing myself to other objections advanced on behalf of the auction-purchasers, I would deal with this point first.

5. It is worthy of note that the suit was instituted against Smt Sunderbai widow of Dinkarrao, her daughter-in-law Smt. Kamlabai widow of Gopalrao, Smt. Shakuntlabai, another daughter-in-law of Smt. Sunderbai & Shantabai & Sakhubai daughters of Smt. Sundrabai as far back as 29-8-1956. Smt. Shantabai was here self party to the suit and it is not a case of legal representatives of a party coming with an objection in the course of execution. It also needs to be noticed that Smt. Sakhubai, the other daughter of Sundrabai and sister of the present appellant Shantabai filed an objection under O. 21 R. 90 C.P.C. on 12-8-64. This was dismissed on 30-11-64 and the appeal filed by Smt. Sundra Bai was dismissed by the High Court on 14-9-65. Her prayer for Letters Patent Appeal as well as for grant of leave to appeal to the Supreme Court were also rejected. It may also be mentioned here that the appellant was a party to the appeal though a proforma respondent-before the High Court and it would not be unreasonable to presume that she had knowledge of this appeal and must have been served with a notice of the appeal.

6. Now coming to the facts contained in the application moved by the appellant under S. 47 it is no doubt true that no notice was issued under O. 21 R. 22 C.P.C., as

the execution application had been filed within a year of the passing of the final decree. It is also not denied that notice under O. 21, R. 66 for the date 7-9-62 was issued to the appellant at her Gwalior address but the same was returned unnerved with an endorsement that Shantabai (Appellant) had gone to Ratlam where she was residing With her son. Notice issued to Salkhubai was also returned with the endorsement that she was at Indore. Thereupon, the Court ordered on 7-9-62 that fresh notice may be issued to Shantabai on furnishing of fresh address. Accordingly, fresh notice was again issued at Gwalior address. This notice too was returned unnerved with an endorsement that Shantabai was residing with her son at Ratlam. On 18-10-62 the decree-holder made an application supported by an affidavit, for affecting substituted service on Shantabai. It was stated therein that it was not possible to serve Shantabai personally as her correct address could not be found in spite of best efforts. The Court allowed the application and directed that the notice to Shantabai may be published in daily newspaper "Nav Prabhat". In compliance of this order, notice was published in the issue of "Nav Prabhat" dated 3-11-62. Notices on other judgment-debtors, namely-Sakhubai and Shakuntlabai were also published in the same issue of the "Nav Prabhat". Shantabai did not put in appearance in response to the notice, but Sakhubai appeared on 6-11-62 through her counsel and took part in the proceedings and, as already noted above, she also filed objection under O. 21, R. 91 C.P.C. This has been held to be sufficient notice under O. 21, R. 66 C.P.C. by the learned Additional District Judge.

7. The contention of the learned counsel for the appellant, however is, that it was the duty of the decree holder to have ascertained the latest correct address of Shantabai at Ratlam and to have made an effort to get her served personally and since this was not done, the publication of notice in the "Nav Prabhat" is no notice in the eye of law. In support of his contention he has relied upon *Kamlabai v. Bhula* 1959 J.L.J. 253: AIR 1959 MP 133 and *Chandrakalabai v. Radreshyam* 1964 J.L.J. SN 103.

8. In *Kamlabai v. Dhula* (supra) the question was whether limitation for setting aside the ex parte decree should be counted from the date of the ex parte decree or from the date of publication of the notice for the purpose of limitation under Art, 164 Limitation Act and the learned Judge held that merely because the Court had ordered substituted service, it cannot be taken that by virtue of sub-rule 2 of R. 20 of O. 5 C.P.C. the defendant was duly served for purposes of Art. 164 of the Limitation Act. The Court found that a copy of the summons was not affixed upon some conspicuous part of the house where the defendant resided and further taking into consideration the fact that the defendant was an illiterate laborer who could not have read the paper regularly so that he could have come to know of the claim against, him from the notice published in the paper and in this view of the matter, the application filed by him for setting aside the ex parte decree within 2 or 3 days of the date of knowledge of the decree was held to be within time. In this connection, it may be observed that it was not disputed that the application was within 30 days of the date of the defendant's knowledge of the decree

9. In *Chandrakalabai v. Radheshyam* (supra), the question was whether there was sufficient ground for setting aside the *ex parte* decree and it was observed that before issuing substituted service the Court must be satisfied that the summons could not be served in the ordinary way and that the publication should be made in a paper having circulation in the place where the defendant resides. It was held that "Nai Dunia" in which the notice was published had no circulation in Jodhpur where the defendant resided.

10. In AIR 1948 177 (Nagpur) it was held that where an application is made to set aside the sale on account of omission to give notice Under O. 21. R. 66, the application lies u/s 47 inasmuch as the issue of notice Under O. 21. R. 66 touches the jurisdiction of the Court which effects the same. It was further held that notice under O. 21. R. 66 is mandatory and the omission to give notice cannot be treated as a curable irregularity. The learned Judge also observed that all that the rule requires is that judgment "debtor should have notice in one way or another and it is enough that a date of which he had either constructive or actual notice be fixed for the drawing up and issue of the proclamation. I may usefully reproduce here the observations of Bose, J.

22. I have no doubt that notice through the processes of the Court is not essential. All that the rule requires is that the judgment debtor should have notice in one way or another. I held in A.I.R 4939 Nag. 17 at p. 18 that notice of attachment under O 21, R. 53, is essential but indicated that the notice need not necessarily be through the processes of the Court. I also considered a case of this kind in Miscellaneous Appeal No. 178 of 1937 and held there that a second notice need not be served under O. 21. R. 66 (2). If the judgment debtor is noticed under O. 21, R. 22, or appears at a previous stage, then it is not necessary to notice him again under O. 21 R. 66. It is enough that a date of which he has either constructive or actual notice be fixed for the drawing up and issue of the proclamation.

11. Now in the present case it would have been no doubt better if the Court had insisted that before substituted service was affected the appellant's address of Ratlam may be furnished. But it appears that the Court issued the notice twice at the same address as was mentioned in the suit and furnished by the decree-holder, namely Lashkar, Gwalior" and thereafter passed the order for substituted service on the application and affidavit filed by the decree holder.

12. A close scrutiny of the application filed by the appellant u/s 47 reveals that she has nowhere stated as to when and how she came to know about the impugned sale. All that has been stated in para 11 of the application is that having come to know of the proceedings, she got the file inspected by a counsel and since loss of thousands of rupees had been caused she has made the application. The circumstances of the case are such as undoubtedly raise the presumption that she could not have remained unaware and completely in the dark about the proceedings in the execution case. It is pertinent to note that she is the real sister of Sakhubai who filed

the objection under O. 21 R. 90 C.P.C. on 12-8-64. Not only that, after Sakhubai's objection had been dismissed by the executing Court, she filed an appeal and impleaded the appellant as proforma respondent. It has not been suggested to me, much less argued that service of notice of appeal on the appellant was dispensed with and, therefore, it would not be unreasonable to suppose that at any rate when Sakhubai filed appeal before the High Court she must have come to know of the proceedings about sale. But she conveniently remained silent for more than 4 years after the sale having been made absolute and has then come forward with an objection that notice under O. 21, R. 66 C.P.C. was not duly served upon her. She has nowhere stated in the application that the paper Nav Prabhat" has no circulation in Ratlam and that she had no contact with the co-judgment debtors, who are her close relations for all this period. It is not a case of complete absence of notice under O. 21, R. 66 C.P.C. In the facts and circumstances of the case, the executing Court was therefore satisfied that substituted service may be affected on her. It cannot, therefore, be said that the satisfaction recorded by the executing Court was perverse in the circumstances of the case. It appears to me that the appellant was lying low for all this period just to spring up a surprise on the decree holder and the auction purchasers after all the proceedings for sale of the property were over so as to set at naught the fruits of the decree. Harnarain v. Ramchandra (supra) relied upon by the learned counsel is a Case of complete absence of notice under O. 21. R. 66 C.P.C. while the present is not a case of that nature. The circumstances as I have detailed above clearly give indication that the appellant was aware of the sale proceedings at or about the time they took place. It is also a serious question whether it is open to the judgment debtor to make an application for treating the sale as nullity on a ground like the one taken in the present case. At any rate granting for a moment that apart from the provisions of O. 21, Rr. 90 & 91, the application may be u/s 47 for want of notice under O. 21, R. 66 C.P.C. it would still be governed by residuary Article in the Limitation Act for filing applications. It would not be conducive to justice to give a blank charter to the judgment debtor to make such an application at any time he or she thinks proper. Art. 137 of the Limitation Act, 1963 prescribes 3 years period for an application not otherwise provided from the date the cause of action accrues. As already pointed out above, the date of accrual of cause of action is conspicuous by its absence in the application. The application is, therefore, liable to be dismissed on the ground of laches also. Be that as it may, I am of opinion that there is no absence of notice under O. 21, R. 66 C.P.C. in the present case and the appellant had knowledge of the sale proceedings at or about the time they took place. In this view of the matter, it is not necessary for me to examine the question of effective representation as argued by the learned counsel for the respondent.

13. In the result, I dismiss the appeal, but make no order as to costs.