

Riyazul Raheem Vs. Raheem

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Court : Madhya Pradesh

Decided On : Nov-07-2001

Reported in : 2002(1)MPHT43

Judge : P.C. Agrawal, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 9, Rule 13; [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 107 and 117

Appeal No. : Misc. Appeal No. 557/2001

Appellant : Riyazul Raheem

Respondent : Raheem

Advocate for Def. : M. Hafizullah, Adv. General

Advocate for Pet/Ap. : A.K. Jain, Adv.

Disposition : Misc. appeal allowed

Judgement :

P.C. Agrawal, J.

1. 11th Addl. District Judge, Jabalpur in M.J.C. No. 44/2000, Riyazul Raheem v. Raheem, on 8-3-2001 dismissed the application of the appellant under Order 9 Rule 13 of the Code of Civil Procedure (to be called as 'Code' only) for setting

aside ex parte judgment and decree dated 19-3-99 in Civil Suit No. 41-A/98, Raheem Khan v. Riyazul Raheem and 4 Ors.

2. Appellant Riyazul Raheem had purchased house No. 641 (old No. being 561) situate upon Nazul block No. 99 plot 107 area 315 sq. feet, in Galgala Toriya, Bhartipur Tilak Ward, Jabalpur (to be called as suit house) from Wazir Khan (1), Mehmood Khan (2), Sultan Khan (3) and Jahagir Khan (4) by registered sale deed dated 8-1-98. Rahim Khan (respondent) had filed a Civil Suit No. 40-A/98 challenging the sale deed on the ground that he was in open peaceful adverse possession of the same since 1960 and thus had perfected his title by adverse possession. The civil suit was decreed by ex parte judgment dated 19-3-99. The appellant had tried to get the same ex parte decree set aside.

3. The appellant in his application had claimed himself to be the owner in possession of the suit house since the date of purchase i.e., 27-1-98. Raheem Khan (respondent) is claimed to be a tenant of previous owners/sellers to the appellant. Appellant had been insisting for vacating the house, hence a false suit was filed by the respondent. Summons or notices were not served on the appellant. False reports of refusal of service by the wife of the appellant were procured by the respondent. The process server had never visited the house of the appellant. The appellant filed a civil suit for eviction in the Court of Civil Judge wherein the respondent filed a copy of the impugned decree on 20-11-99 whereupon the appellant could come to know about the impugned ex parte decree and after seeking advice of his advocate filed the application on 6-11-99.

4. The respondent took objection that Wazir Khan (1), Mehmood (2), Sultan Khan (3) and Jahagir (4) were not impleaded as parties to the application. According to him he is residing in the suit house as an owner since 1960. False reports were not procured from the process service. The appellant knowing the date of hearing did not appear and contest the civil suit. His plea that he came to know about the impugned decree on 20-11-99 was denied. According to him the application was barred by limitation and the appellant was not able to make out any case for setting aside the impugned decree.

5. The appellant had examined himself as (A.W. 1), Sultan Khan (A.W. 2) and Mehmood Khan (A.W. 3) were also examined they were unanimous that no summons or notices were served on them. No summons or notices were tendered to their wives. Their wives did not inform them about the visit of the process server or taking of any summons or notices by them. They claimed to have been in complete dark. They claimed to be illiterate persons. It is note worthy that ordinarily they should have been believed by the learned Trial Judge. A Civil Suit No. 26-A/97 against the appellant, Mehmood Khan, and Jabalpur Corporation was already pending. Besides that a criminal proceedings No. 639/98 under Sections 107/117 of the Code of Criminal Procedure was also pending. The appellant had recently got executed a sale deed of the house on 8-1-1998 from Wazir Khan and his three brothers. In these circumstances it is not natural or probable that the appellant would not appear and contest the civil suit if he had actually come to know about the same. It is note worthy that the process server who claimed to have affixed the summons/notices on the outer door of the house of the appellant was not examined. It is true that such process server had submitted his affidavit sworn before the Nazir in the Trial Court. It is also true that the process server is a public servant and ordinary presumption of regularity of his proceedings is there. Even then it is not credible that the appellant who was contesting the earlier civil suit and the criminal proceedings would have intentionally kept him away from the Court. In my considered opinion, the learned Trial Judge should have believed the evidence of the appellant that the summons and notices were not properly served on the appellant. Non-examination of Smt. Sageerur Nisha wife of the appellant is not determinative or conclusive in this respect. Thus, I hold that appellant was not properly served.

6. The other finding of the learned Trial Court had not also been sound. Riyazul Raheem had claimed in part 2 that he had filed a civil suit for eviction. On being asked by the Judge why the respondent was not paying the rent, he had filed a judgment and decree in the Court whereupon he had come to know that the impugned judgment and decree was passed against him. After two or three days of such notice, he had applied for setting aside the impugned judgment and decree. The appellant should not have been disbelieved merely because he being illiterate could not tell the exact date of filing the copy of the impugned judgment

and decree in the Civil Court.

7. It is true that Raheem Khan (N.A. 1) had claimed that he had approached the Municipal Corporation for mutation of his name on the basis of the impugned judgment and decree. There upon notices were issued to the appellant, Wazir and others. However, no documentary evidence is filed in support of such a claim. Riyazul Raheem (A.W. 1) in para 5 has admitted that he had come to know in Municipal Corporation that his sale deed was declared void by the Court. However, date of such knowledge of the case in corporation has not been disclosed by the either party. Obviously Ex. N.A. 1 notice dated 11-9-2000 did not disclose any knowledge of the impugned judgment and decree. Similarly in Ex. NA 2 there is no reference of either to Civil Suit No. 41-A/98, Raheem Khan v. Riyazul Raheem and 4 Ors. or the impugned judgment and decree dated 19-3-99. Notice merely refers to C.S. No. 26-A/97 before 11th Addl. District Judge, Jabalpur in which stay was granted against the Jabalpur Corporation. Definitely that is a different civil suit. Thus, clearly second proviso to Order 9 Rule 13 of the Code is not applicable as it is no established that the appellant had notice of the Civil Suit No. 41-A/98 or date of hearing therein or had sufficient time to appear and answer the claim of the respondent.

8. In my considered opinion, the learned Trial Judge has erred in finding that the application filed by the appellant was barred by limitation. Thus, I am satisfied that the appellant was able to prove that summons/notices were not duly served on him. The application should have been allowed. Hence this appeal is allowed and the ex parte judgment and decree dated 19-8-1998 in Civil Suit No. 41-A/98 of the Court of 11th Addl. District Judge, Jabalpur is hereby set aside.

9. Misc. Appeal allowed.