

Om Prakash and ors. Vs. Sriram and ors.

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Court : Rajasthan

Decided On : Sep-28-2001

Reported in : 2003(1)WLN543

Judge : Arun Madan, J.

Acts : Code of Civil Procedure (CPC) - Order 9, Rule 13

Appeal No. : S.B. Civil Revision Petition No. 924 of 1997

Appellant : Om Prakash and ors.

Respondent : Sriram and ors.

Advocate for Def. : Ajay Gupta, Adv.

Advocate for Pet/Ap. : M.M. Ranjan, Adv.

Disposition : Revision petition dismissed

Judgement :

Madan, J.

1. Though this revision petition came up for orders on the respondents' application for vacation of ex parte stay order dt. 8.7.97 but, this revision petition having been pending since 1997 at the joint request of both the parties the matter was heard as to the maintainability of the revision petition itself.

2. By this revision petition having been filed by the defendants the order dt. 9.8-88 of the learned Munsif Srimadhapur in Civil Misc. Case No. 25/77, dismissing application under Order 9 Rule 13 CPC filed by Om Prakash, Suja Devi and Geeta Devi (defendants) which stood confirmed by the appellate court (ADJ Neemkathana) in CMA No. 36/88, has been challenged.

3. The facts in brief are that plaintiff (respondent) instituted a suit for permanent injunction on 19.9.1972 against the petitioners so also other defendants' (proforma respondents Nos. 2 to 5 herein. Admittedly, all the defendants are brothers, sister and mother having been living together at Srimadhapur. The injunction was sought for against the defendants to close windows and remove the projection constructed by them and for restraining them not to open by construction in the wall over the plaintiff's plot. The dispute arose when the defendants had opened the windows (i) of 3 x 3 ft and (ii) of 1x1 ft and also two ventilators (i) of one & half ft x 1 ft and 00 of 1 x 1 ft in sizes, besides one projection on the window.

4. After the notices having been issued by the trial Court in the suit, Om prakash-petitioner No. 1 was served on 7.10.1972 and other defendants after the services of the notice upon them, had entered into a compromise and accordingly the suit was decreed on 17.2.1975 where after, Om Prakash and his sisters (present petitioners) moved an application before the trial Court under Order 9 Rule 13 CPC which was dismissed by the learned Munsif by the impugned order against which appeal was also dismissed by the appellate court. Hence, this revision petition.

5. Mr. M.M. Ranjan, learned counsel for the petitioner contended that neither names of witnesses nor their descriptions were disclosed on the summons and even then affixation was not correct but the learned courts below erroneously held them correct by ignoring the well canons of law cited before it as to the service being defective on the summons, inasmuch as both the courts below erroneously disbelieved petitioner's certificate on the ground that it stood not proved whereas it being a public document was required no proof. Next contention urged by Mr. M.M. Ranjan is that the courts below erroneously held that as the petitioner No.2 did not appear in the witness box so her averments could not have been believed

while there was ample evidence to show that Smt. Geeta Devi was not at village Srimadhopur on her being married and gone to her in-laws house whereas, her service on summons was got fraudulently effected by affixation.

6. Per contra Shri Ajay Gupta learned counsel for the respondents contended that the petitioners had already been served in suit on 7.10.1972 as is evident from a crystal report of the process server so also the witnesses with regard to the refusal of the notice being not taken by Om Prakash so also his sister Smt. Geeta Devi and that apart even according to the proviso to Order 9 Rule 13 CPC in case there is any irregularity in the services of the summons and the defendants being well known about the pendency of the suit the decree having been passed ex parte can't be reviewed and otherwise also this is a revision petition against the concurrent findings by the two courts below deciding the application on the evidence therefore it is not maintainable warranting no interference in exercise of revisional jurisdiction.

7. I have heard the learned counsel for the parties and perused the impugned orders of two courts below which have concurrently concluded that the application under Order 9 Rule 13 CPC is not maintainable so as to review/set aside the ex parte decree as the applicants have failed to satisfy that they had been prevented by any sufficient cause from appearing when the suit was called for hearing or that the summons were not duly served,

8. The courts below after having carefully perused and considered the process server's report dt. 7.10.1972 concurrently found that Omprakash had refused to accept the summons and thereby those summons were got affixed at his house which bore endorsement and signatures of witnesses at Exh. NA1. Similar was the report as to the service of summons on the other defendants Smt. Suja Devi and Smt. Geeta Devi. Merely because the process server report did not contain or disclose description, name or addresses of the witnesses in whose presence the summons was affixed, it cannot be said that ex parte decree ought to have been set aside by invoking provisions of Order 9 Rule 13 CPC whereas, by its proviso it has clearly been provided that no court shall set aside a decree passed ex parte merely on the ground of any irregularity in the service of summons if it is satisfied

that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. It is not the case either in the application for setting aside the decree against the defendant moved under Order 9 Rule 13 CPC or before this Court that the summons were not duly served on the petitioners and only the case put forward by the defendants petitioners is that there has been irregularity in the service of summons by not describing name and addresses of the witnesses in whose presence the affixation was made at the house of the petitioners. But, in my considered opinion, by virtue of proviso to Rule 13 of Order 9 CPC both the courts below have concurrently and rightly so held that merely on the basis of irregularity in the service of summons, ex parte decree cannot be set aside by invoking jurisdiction under Order 9 Rule 13 CPC hence, I find that the courts below have not acted in exercise of their jurisdiction illegally or with material irregularity. Further, the petitioners have not challenged the compromise arrived at by their co-defendants who were admittedly their brothers & mother nor their brothers & mother have disputed the factum of compromise nor it is their case that they had no knowledge of the suit proceedings nor it can be inferred that they had no knowledge either of the suit proceedings being pending or culminating into decree under the compromise with their brothers and mother over the trivial dispute. It is really shocking that the compromise decree has not culminated into its true execution benefiting with its fruits to the parties even after a decree having been passed long back on 17.2.1975 perhaps owing to such vexatious application. To deprecate such proceedings, I deem it proper to award costs against the petitioners. Thus, I find no merit in this revision petition to call for any interference by involving revisional jurisdiction as both the impugned orders are perfectly legal and correct.

9. Resultantly, this revision petition being devoid of any merit and substance is hereby dismissed with costs Quantifying at Rs. 2000/-.