

Anaithalayan Vs. Marudamuthu

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Court : Chennai

Decided On : Nov-07-1952

Reported in : AIR1953Mad528; (1953)IMLJ302

Judge : Venkatarama Aiyar, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 5, Rule 17 - Order 9, Rule 13

Appeal No. : Civil Revn. Petn. No. 1427 of 1949

Appellant : Anaithalayan

Respondent : Marudamuthu

Advocate for Def. : R. Desikan, Adv.

Advocate for Pet/Ap. : C.A. Seshagiri Sastry, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

Venkatarama Aiyar, J.

1. The respondent instituted O. S. No, 302 of 1946 in the Court of the District Munsif, Namakkal, for recovery of possession of certain properties and for mesne profits, and the same was decreed 'ex parte' on 16th September 1946.

2. The defendant then applied in I. A. No. 835 of 1946 to set aside the decree passed 'ex parte' on the ground that the summons was not duly served on him. The facts as found by the Courts below are that the summons was tendered to the defendant on 14-9-1946, and that he refused to sign the acknowledgment. The contention of the petitioner is that the process-server must either take an acknowledgment from the defendant or affix the summons to the outer door of the house and that as neither was done, there was no due service of summons as required by Order 5, Rule 17 and that, therefore, the Court was bound to set aside the 'ex parte' decree under Order 9, Rule 13. The Courts below met this contention by reference to the proviso to Order 9, Rule 13 enacted in Madras. The proviso runs thus:

'Provided further that no Court shall set aside a decree passed 'ex parte' merely on the ground that there has been an irregularity in the service of summons if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim.'

The Courts below have held that the defendant had notice of the hearing in sufficient time and that the failure to affix the summons on the outer door was only an irregularity. They accordingly dismissed the application to set aside the 'ex parte' decree.

3. Mr. Seshagiri Sastri, the learned advocate for the petitioner contends that the proviso to Order 9, Rule 13 applies only when there is merely an irregularity in the service of summons but that the failure to take an acknowledgment or to affix the summons is much more than an irregularity; and that it is an illegality vitiating the entire service and that the proviso has accordingly no application. In support of the position that the failure to affix the summons amounted to an illegality, he relied upon the decision in - 'Ganeshmal v. Kesoram Cotton Mills Ltd.', : AIR1952 Cal10 (A). That case arose under the Arbitration Act. An award having been filed into Court, notice thereof was directed to be given to the party. The summons was tendered to the party but he refused to receive it. No acknowledgment by him was taken nor was summons affixed on the outer door. An 'ex parte' order was passed and an application was filed for setting aside the 'ex parte' order on the ground that

the provisions of Order 5, Rule 17 had not been complied with. This petition was opposed on the ground that non-affixing of a copy was only an irregularity and that it was not a ground for setting aside the order. It was held, on a review of the authorities, that the failure to affix a copy amounted to much more than an irregularity; and that the procedure laid down in Order 5, Rule 17 must be strictly followed and if it is not followed, the decree must be set aside under Order 9, Rule 13. The judgment refers to the contrary view taken in some of the Courts but holds that the provisions of Order 5, Rule 17 are mandatory and must be strictly complied with.

4. The question is whether this decision can be applied to the present case which is governed by the proviso to Order 5, Rule 13 enacted in Madras. Though it is true that in : AIR1952 Cal10 (A) the failure to observe the procedure is described as something more than an irregularity, I am of opinion that the matter really falls under the proviso to Order 9, Rule 13. It is difficult to see to what cases the proviso can be applicable if it is not to apply to cases like this, where the provisions as to service of summons are not complied with strictly. In my opinion, the proviso applies to all cases in which there has been a failure to observe the provisions as to service of summons under Order 5. In all such cases if it be proved that the defendant had notice of the date of hearing in sufficient time to appear and answer the plain-tiff's claim, it will be an irregularity, such as will be cured by the proviso.

5. In view of the finding that the petitioner had knowledge of the date of hearing, the application for setting aside the 'ex parte' decree under Order 9, Rule 13 was rightly dismissed by the Courts below.

6. This revision fails and is dismissed with costs.

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