

**V. Kumar, Vs. Sri Abdul Bashith S/O. Late Abdul Jabbar,**

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**Court :** Karnataka

**Decided On :** Mar-15-2010

**Judge :** B.V. Nagarathna, J.

**Acts :** Code of Civil Procedure (CPC) - Section 151 - Order 9, Rule 13

**Appeal No. :** M.F.A. No. 1620/2006

**Appellant :** V. Kumar, ; V. Bhaskar And; V. Srinivas S/O. Late A. Varadarajachari

**Respondent :** Sri Abdul Bashith S/O. Late Abdul Jabbar,; Smt. M.S. Pushpavathi  
W/O. K.V. Manunath And; Sri K.V. Ma

**Advocate for Pet/Ap. :** L.K. Ramaiah Gowda, Adv.

**Judgement :**

**B.V. Nagarathna, J.**

1. This appeal is filed challenging the order dated 9.11,2005 passed in Miscellaneous Petition No. 614/1999 by the VIII Additional City Civil Judge, Bangalore.

2. The relevant facts for the disposal of this appeal are that the appellants' father had entered into an agreement with the 2nd respondent herein on 28.3.1983, Subsequently, the 2nd respondent entered into an agreement with the 1st respondent to sell the suit schedule property on 19.1.1990. Since the appellants

and their father were in possession of the same, a suit for possession was filed by the 1st respondent against the appellants herein and the said suit was decreed exparte. Being aggrieved by the said judgment and decree, the appellants filed Miscellaneous Petition Fo.614/1999 under Order IX Rule 13 of CPC R/w Section 151 of CPC requesting to set aside the said judgment and decree passed in O.S. No. 3691/1997 dated 10.11.1998 and to restore the suit on the file of the Court. The said miscellaneous petition has been dismissed. Being aggrieved by the said order of dismissal, this appeal has been preferred.

3. I have heard the learned Counsel for the is unrepresented and notice to the 2nd respondent has been dispensed with by order dated 15.12.2009.

4. It is contended on behalf of the appellants that when the agreement was entered into between the 2nd respondent and the father of the appellants the appellants were residing at Palace Guttahalli. The 1st respondent while arraying the appellants as defendants had given the said address. After order for issuance of notice and summons in O.S. No. 3691/1997, which was filed by the 1st respondent herein, summons were taken to the Place Guttahalli address of the appellants. But, it was returned with a Shara that the said appellants did not reside there. Subsequently, an order for substituted service was made by the trial Court by way of affixture and the 1st respondent took steps for affixture with regard to the very same address at Palace Chittahalli. It is further contended that, the trial Court has failed to notice the fact that, though it has come in the evidence at the relevant point of time that the appellants were residing at Geddalahalli, the substituted service could have been taken at the said address but taking the substituted service where the appellants did not reside was not correct. The trial Court could not have held that the defendants/appellants were served and placed them exparte. In the circumstances, the application filed under Order 9 Rule 13 of CPC ought to have been allowed by taking the material on record particularly, Exs.P14, 15 and Ex.R5 and restore the suit Therefore, he submits that en the basis of the material on record, this is a fit case where the order of the trial Court has to be set aside by allowing the Miscellaneous petition filed under Order IX Rule 13 of CPC and to restore O.S. No. 3691/97 by giving an opportunity to the appellants to contest the said suit.

5. Having heard the learned Counsel for the appellants and on perusal of the material on record, it is evident that the 1st respondent herein had filed O.S. No. 3691/97 dated 10.11.98 seeking possession. In the said suit, the address of the defendants i.e., appellants herein is shown as No. 75, Muniveerappa Block, Venkatorangapuram, Palace Guttahalli, Bangalore. It is on the said address that suit summons and notices were ordered by the trial Court. However, on perusal of Exs.P14 and P15 particularly, from the share, it is evident that, the said notices could not be served to the appellants in the said suit for the simple reason, that they were not residing in the address mentioned and it has also come on record that the appellants were residing at Geddalahalli, Kasaba Hoblic, Bangalore South Taluk. Therefore, 1st respondent ought to have taken affixture i.e., by way of substituted service to the correct address and not at the address where the appellants were not all residing. In the absence of the correct address being given by the 1st respondent herein the steps taken with regard to the affixture by way of substituted service was not at all in accordance with law and also it did not result in the service of notice on the appellants. This aspect of the matter has not been considered by the trial Court particularly, when. Ex.R5 clearly reveals that the affixture was at the Palace Guttahalli residence and not at Geddalahalli where the appellants resided. Therefore, in my view there was no effective service of notice on the appellants by way of substituted service and they were placed *ex parte* in O.S. No. 3691/97 without ascertaining as to whether the appellants had been served.

6. If the aforesaid facts and material were taken into consideration by the trial Court, then it would have held that there was no service of notice and miscellaneous petition would have been allowed. But, in the absence of taking into consideration the said facts and material, the trial Court has erroneously held that the appellants have failed to prove that they were erroneously placed *ex parte*. The said findings of by trial Court in the miscellaneous petition would have to be reversed setting aside the order dated 9.11.05 in Misc. Petition No. 614/1999. The *ex parte* judgment and decree in O.S. No. 3691/97 is also set aside. Consequently O.S. No. 3691/97 has to be restored to file of the trial Court.

7. the trial Court is directed to issue fresh notices to the respondents herein.

8. the appellants are directed to appear before the trial Court on 3.4.2010 and the trial Court is directed to proceed with the disposal of the suit on merits after service of notice on the respondents herein.

Appeal is allowed in the aforesaid terms.

Office is directed to send the records to the trial Court forthwith.

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