

N.Baskaran Vs. D.Geetha

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Court : Chennai

Decided On : Jan-17-2013

Judge : The Hon'Ble Mrs.Justice R.Banumathi

Appellant : N.Baskaran

Respondent : D.Geetha

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

17. 01.2013 CORAM : THE HONOURABLE Mrs.JUSTICE R.BANUMATHI and THE HONOURABLE Mr.JUSTICE K.K.SASIDHARAN Original Side Appeal No.132 o

1. N.Baskaran 2.N.Samala 3.N.Kasthuri ... Appellants Vs. D.Geetha ... Respondent Original Side Appeal is filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent against the order dated 14.02.2012 made in D.No.40597 of 2011 in C.S.No.340 of 2010 on the file of this Court. For Appellants : Mr.K.Narendran For Respondent : Mr.A.D.Jagadish Chandra JUDGMENT R.BANUMATHI,J This intra Court appeal is preferred against the order of learned single Judge in D.No.40597 of 2011 in C.S.No.340 of 2010 (14.2.2012) directing the Appellants-Defendants 1 to 3 to file appropriate application to condone the delay in filing the application to set aside the exparte decree dated 28.09.2011. Appellants are Defendants 1 to 3 in the suit.

2. Brief facts:- Suit property six grounds in T.S.No.7085/1 and 7085/2 of Thiagaraya Nagar, Chennai originally belonged to C.P.Natesa Mudaliar, who died intestate on 04.01.1974 leaving behind his wife and children as under:-
C.P.Natesa Mudaliar (died on 04.01.1974) | | |
----- | | | | | N.Saras-
N.Samala N.Kasthuri V.Vimala N.T.Arasu N.Baskaran wathy (daughter) (daughter)
(unmarried (son) (son) (wife) (D2) (D3) daughter (died on (D1) (died on died on
1.11.09) 14.10.93) 30.05.96) Case of Respondent-Plaintiff is that all the legal heirs
of C.P.Natesa Mudaliar agreed to sell the suit property to the Respondent and
received advance amount through N.T.Arasu, elder son of the family. It is the case
of Respondent that she purchased one-fourth undivided share of the suit property
from N.T.Arasu under sale deed dated 27.01.2005 (Document No.175 of 2005 on
the file of S.R.O. T.Nagar). Respondent approached Appellants for division of her
one-fourth share and even though Appellants initially agreed, they delayed the
division saying one reason or other. Therefore, Respondent filed the suit
C.S.No.340 of 2010 for partition and separate possession of her one-fourth share.
In the suit Appellants were shown to be represented by Power of Attorney
M.Srinivasan. Suit summons were served upon the Appellants through their Power
of Attorney M.Srinivasan. In the suit Appellants did not appear and they were set
exparte and exparte decree was passed on 28.09.2011.

3. Stating that there was dispute between them and their Power of Attorney and
that the Power of Attorney without intimating the Appellants engaged the counsel
and they had knowledge of exparte decree only on 09.11.2011 when the
Appellants were summoned by the Assistant Commissioner of Police, T.Nagar
Range, Appellants have filed application (D.No.40597 of 2011) on 08.12.2011 to
set aside the exparte decree passed against them. Registry returned the papers
interalia directing the Appellants to file appropriate application to condone the
delay in filing the application to set aside the exparte decree. The same was
represented by the Appellants stating that the application (D.no.40597 of 2011) is
well within the time from the date of knowledge and therefore, there is no delay in
filing the set aside application. Office again returned the papers on 19.01.2012 and
the matter was posted before the Court.

4. The learned single Judge held that the allegations made against the power agent are good enough for condoning the delay and to set aside the exparte decree. However, that cannot be accepted as a valid reason to come to the conclusion that Appellants had knowledge only on 09.11.2011 and directed the Appellants to file an appropriate application. Being aggrieved by the said order (14.02.2012), Appellants have preferred this appeal.

5. In this appeal, Respondent was served through her husband Somashekar Reddy and her name was also printed in the cause list. Since there was no representation for the Respondent, on our direction dated 12.12.2012, learned counsel for Appellants served notice upon Mr.A.D.Jagadish Chandra, learned counsel appeared for the Respondent before the single Judge.

6. We have heard the arguments of the learned counsel for Appellants and the learned counsel for Respondent.

7. Mr.R.Narendran, learned counsel for Appellants submitted that Respondent served summons only to the power agent M.Srinivasan and without intimating the Appellants, the power agent engaged the counsel and the Appellants were set exparte and that Appellants had knowledge of the same only on 09.11.2011 when the Appellants were summoned by the Assistant Commissioner of Police, T.Nagar Range and on verification of the Court records, Appellants came to know about the fraud played on them by the Respondent and the alleged power agent M.Srinivasan. Learned counsel for Appellants further submitted that there is dispute between the Appellants and the Power of Attorney and while so, service of suit summons upon the Power of Attorney cannot be said to be due service upon the Appellants.

8. As noted earlier, exparte decree was passed on 28.09.2011 and application (D.No.40597 of 2011) to set aside the exparte decree was filed on 08.12.2011. According to Appellants, they had knowledge of the exparte decree only on 09.11.2011 and therefore, the application (D.No.40597 of 2011) filed on 08.12.2011 is well within the period of limitation.

9. Application under Order IX, Rule 13 C.P.C. to set aside the ex parte decree has to be filed within the period of thirty days from the date of decree or when the summons were not duly served, when the Appellants had knowledge of the decree. Knowledge is something more than mere knowledge that a decree has been passed against the Defendants. In the suit (C.S.No.340 of 2010) summons was served on the Power of Attorney of the Appellants viz., M.Srinivasan.

10. Under Order V, Rule 19 C.P.C., it is important that Court should record a declaration of due service before it can proceed ex parte. Due service is effective in bringing the claim to the knowledge of the Defendants. Service on the Power of Attorney of Appellants cannot be said to be due service. In the plaint documents, Respondent has filed the xerox copy of Power of Attorney (13.11.2009) executed by the Appellants infavour of M.Srinivasan. Even though Respondent has filed the xerox copy of Power of Attorney, service of summons on the Power of Attorney cannot be said to be due service. More so, when the Appellants claim that they have already cancelled the Power of Attorney (13.11.2009). In the said facts and circumstances of the case, we do not find any reason to doubt the statement of Appellants that they had knowledge of ex parte decree only on 09.11.2011, when they were summoned by the Assistant Commissioner of Police, T.Nagar Range. After consent from the lawyer engaged by the Power of Attorney, Appellants have filed application (D.No.40597 of 2011) to set aside the ex parte decree on 08.12.2011 which is well within the period of thirty days from the date of knowledge. Therefore, the order of learned single Judge cannot be sustained and liable to be set aside.

11. In the result, the order of single Judge in D.No.40597 of 2011 in C.S.No.340 of 2010 (14.2.2012) is set aside and the appeal is allowed. Registry is directed to number the application D.No.40597 of 2011 in O.S.No.340 of 2010 and post the same before the single Judge on 28.01.2013. No costs. bbr Copy to The Sub-Assistant Registrar, Original Side, High Court, Madras

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