

attachment of his rights and as such he was entitled to apply under section 311 and to appeal against the order passed under that section.

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CHETTI.

Turning now to the merits the only irregularity that was pressed before us as vitiating the sale was that lot No. 1 of the property was sold in five sub-lots. Having regard to the facts stated by the Judge in his order and to the other circumstances of the case, we do not think that this was an irregularity at all, but was a prudent step in the interest of all concerned.

The result is that we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

SUBRAMANIA PILLAI (DEFENDANT No. 1), PETITIONER,

1897.
December 10.

v.

SUBRAMANIA AYYAR (PLAINTIFF), RESPONDENT.*

*Civil Procedure Code—Act XIV of 1882, ss. 78, 80, 82—Substituted service—
Duty of process-server.*

Mere temporary absence of a person to be served does not justify the process-server in affixing the summons to a door. It is the duty of the process-server to take pains to find out the person to be served in order that, if possible, personal service may be effected.

PETITION under Provincial Small Cause Courts Act IX of 1887, section 25, praying the High Court to revise the proceedings of S. Gopala Chariar, Subordinate Judge of Tinnevely, in Small Cause Suit No. 1427 of 1896.

A decree had been passed in favour of the plaintiff, the defendants having been declared *ex parte*. The defendants then made an application under Civil Procedure Code, section 108, and Provincial Small Cause Courts Act, 1887, section 17, praying that the decree be set aside and that the suit be tried on the ground that they had not been served with the summons.

The allegations contained in the plaint were as follows:—

“It is learnt that a decree has been passed in the said suit, declaring the defendants *ex parte*.”

* Civil Revision Petition No. 302 of 1897.

SUBRAMANIA PILLAI v. SUBRAMANIA AYYAR. "The defendants have not to pay the plaintiff in the said suit any amount in any matter.

"It is learnt that the summonses have been returned falsely, stating that the defendants Nos. 1, 2 and 3 were not present at their residence and that they (summonses) were affixed in their houses.

"No summonses were served on the defendants in the said suit; neither were they affixed. The defendants are unaware of the subject-matter of the said plaint.

"Of the said defendants, defendants Nos. 1 and 3 have been permanently residing in Pottanur and second defendant in Puthaneri.

"I therefore pray that the Court may be pleased to cancel the decree passed in the said suit declaring the defendants *ex parte*, hear the contentions of these defendants and pass a fresh decree."

The return of the serving officer was as follows:—

"On making inquiries about the guardian herein mentioned on 24th instant, the females of the said person's house and the neighbours said that he left for Tinnevely two days ago and that there were no heirs (male members), and, therefore, at the place the copies of the notice issued for the minors Nos. 1, 2 and 3 have been affixed to the front door of the said guardian's house. I solemnly declare that, in respect of the said particulars, I have obtained *athatchi* (statements) from the big landholders of the said village."

The Subordinate Judge refused to set aside the decree. He referred to *Nobodeep Chunder Shaha v. Sonaram Dass*(1) and said:—

"In the circumstances I must find that first defendant had not proved the truth of his case and that he had or must have had knowledge of the suit.

"As regards the second defendant, defendants' witnesses Nos. 1 to 3 seek to make out that he permanently resides in Puthaneri 6 miles off. But he is an undivided son of first defendant, and I find, on evidence of plaintiff's witness No. 2, that he used to reside in both places and that there was constant communication between second defendant and the other members of his family. Section 78 provides that, in the absence of a defendant, his summons may be served on any adult male member of the family

(1) I.L.R., 4 Cal., 592.

“residing with him, and such a person first defendant undoubtedly
 “was. If first defendant is to be deemed to have been duly served,
 “then such service is enough to bind second defendant also.”

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Defendant No. 1 preferred this petition.

Ramasubba Ayyar for petitioner.

Seshagiri Ayyar for respondent.

JUDGMENT.—We do not think that the service in this case was proper. Mere temporary absence of the person to be served does not justify the process-server affixing the summons to the door (*Bhomschetti v. Umabai*(1)). It is the duty of the peon to take some pains to find out the person to be served, so that, if possible, personal service may be effected.

We must set aside the decree and direct that the Subordinate Judge do restore the suit to his file and dispose of it according to law. Costs will abide and follow the result.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
 Mr. Justice Benson.*

RAMAKISSOOR DOSSJI (DEFENDANT No. 3), APPELLANT,

1898.
 January 17.

v.

SIRIRANGA CHARLU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 2, 588—Religious Endowments Act—Act XX of 1863, s. 18—Order for payment of plaintiffs' costs out of the funds of the institution—Appeal on behalf of the institution.

A suit having been instituted under Religious Endowments Act, 1863, section 14, *bonâ fide* in the interests of a Hindu temple, the plaintiffs desired to withdraw the suit with liberty to sue again and an order was made permitting them to do so and directing that the costs be paid from the funds of the institution :

Held, that no appeal lay against the order as to costs.

APPEAL against the order of E. J. Sewell, District Judge of North Arcot, on Miscellaneous Petition No. 349 of 1896.

The order appealed against was an order permitting the withdrawal of Original Suit No. 3 of 1892 and gave liberty to the

(1) I.L.R., 21 Bom., 223.

* Appeal against Order No. 158 of 1897.