

APPELLATE CIVIL.

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

1897.
December 16.

SANKARALINGA MUDALI (PETITIONER-DEFENDANT No. 2),
APPELLANT,

v.

RATNASABHAPATI MUDALI AND OTHERS (COUNTER-
PETITIONER-PLAINTIFF AND HIS REPRESENTATIVES), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 80, 101, 108—*Ex-parte* decree—
Substituted service of summons.

A decree was passed *ex parte* against defendants on whom the summons was served by affixing it to their house. The defendants who had applied unsuccessfully under Civil Procedure Code, section 101, to be heard in answer to the suit, now preferred a petition under section 108 that the decree be set aside. This application was dismissed. On an appeal by one of the defendants :

Held, as it appeared from the serving officer's return that, according to the information given to him, there was no prospect of his being able to serve the defendant personally within a reasonable time, that he was justified in affixing the summons to the door of the house.

Per curiam :—The fact that an order under section 101 has been made against a defendant and has not been appealed against is no objection to an application being made by him under section 108.

APPEAL against the order of E. J. Sewell, District Judge of North Arcot, in Original Suit No. 42 of 1892 on Miscellaneous Petition No. 120 of 1895.

The petitioners were the defendants against whom a decree was passed *ex parte* on the 30th of March 1895. On this application they alleged they had not been duly served the summons, and were not informed of the suit until after the settlement of the issues and the petition proceeded as follows :—“ Subsequently these defendants “ have put in petitions with affidavits under section 101 of the “ Code of Civil Procedure to set aside the *ex-parte* order and accept “ their written statements filed by them in Court and proceed with “ the suit on merits. Their applications were then rejected. Now “ as a decree is passed *ex parte* against these defendants, they most “ humbly pray that it may be set aside, and the suit proceeded “ with for a decision upon merits.” The application was dismissed

* Appeal against Order No. 6 of 1897.

by the District Judge who was not satisfied under Civil Procedure Code, section 108, that the summons was not duly served, or that the applicants were prevented by any sufficient cause from appearing when the suit is called on for hearing. As to the service of the summons he said :—“The summons to the defendants were “affixed to first defendant’s house on the 25th February, and the “District Munsif who had the summons served after such enquiry “as he thought fit declared the summons duly served under section “82 of the Civil Procedure Code. That his decision was right inas- “much as the house is first defendant’s residence appears from the “fact admitted by first defendant in his affidavit that he returned “on the 20th March to this house from Bangalore The “second defendant is first defendant’s brother The “return on the summons which is certified by the Village Munsif “states that second defendant lived in the first defendant’s house “and had only left it three days before the notice was affixed.”

Defendant No. 2 preferred this appeal.

Mr. J. Satya Nadar and V. Krishnasami Ayyar for appellants.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) and Gopaldasami Ayyangar for respondents.

JUDGMENT.—The Advocate-General raises a preliminary objection to the effect that inasmuch as an order was passed against the second defendant (appellant) under section 101, Civil Procedure Code, and as no appeal was made against the *ex-parte* decree so as to enable the appellant to impeach that order, the appellant was not entitled to make an application under section 108 raising the same question as had been already decided against him under section 101, nor should he be now allowed to appeal against the order made against him under section 108.

This contention at first sight may seem to be reasonable, but having regard to the very wide words “in any case” used in section 108 we are unable to hold that the defendant was not entitled to make an application under section 108. That being so he was, under section 588, entitled to prefer the present appeal.

Nor can we agree with the Advocate-General’s contention that even if an appeal lies and the *ex-parte* decree is set aside, the proceedings will be futile inasmuch as the order passed under section 101 could not be interfered with in an appeal like the present. We think, if under section 108 an *ex-parte* decree is set aside this necessarily carries with it a reversal of any order previously made

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under section 101 refusing to allow the party to appear and defend the suit. To hold otherwise would lead to an absurdity.

Turning now to the merits the question whether the serving officer "cannot find" the defendant within the meaning of section 80 is one which must be determined with reference to the circumstances of each case. If the information given to the serving officer leads him to think that the defendant is only to be absent for a short time, it may well be that the serving officer should, if possible, wait and endeavour to effect personal service (*Bhoushetti v. Umabai*(1)). Otherwise, and if there is no person who can be served in the absence of the defendant, we see nothing improper in the serving officer affixing the summons to the outer door of the defendants' ordinary residence. In the present case the serving officer's return shows that according to the information given to him there was no prospect of his being able to serve the appellant personally within a reasonable time. He was, therefore, justified in affixing the summons to the door of the house, and the District Judge was justified in accepting it as a sufficient service.

We must, therefore, dismiss the appeal with costs.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard, Mr. Justice Subramania Ayyar, Mr. Justice Benson, and Mr. Justice Davies.

1897. RAMACHANDRA RAYAGURU (PLAINTIFF), APPELLANT,

March 4, 15,
September
13,
1898.
April 1,
May 4,
July 15.

v.

[MODHU PADHI (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, arts. 132, 147—Mortgage—Suit for sale.

On 2nd July 1879 the defendant mortgaged to the plaintiff certain property to secure payment of a debt with interest. The instrument purported to be a mortgage with possession, and it contained a covenant to repay the mortgage amount on the 8th March 1882. The plaintiff never obtained possession and he brought a suit on the 29th June 1894 to recover the principal and interest by the sale of the land:

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

* Second Appeal No. 1699 of 1895.