APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mosely.

1939

Feb. 9.

K.K.N.K.A.R. CHETTYAR FIRM

v.

AGA M. SHEERAZEE.*

Limitation—Application to set aside ex parte *decree—Summons by substituted service—"Effectual" service of summons—Due service of summons—Defendant's knowledge of the decree against him—Purposeful evasion of knowledge—"Prevented by any sufficient cause from appearing"—Civil Procedure Code, O. 5, r. 20 (2); O. 9, r. 13—Limitation Act, Sch. I, art. 164.*

Summons by substituted service effected in proper form is not necessarily due service for the purpose of Art. 164 of the Limitation Act.

The word "effectual" in O. 5, r. 20 (2) of the Civil Procedure Code does not mean due service; it means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. In art. 164 of the Limitation Act and in O. 9, r. 13 of the Civil Procedure Code "due service of summons" means not only that the summons was served in proper form according to the directions laid down in the Code but also that the summons was served under circumstances which enabled the Court to be satisfied that the defendant had knowledge of the decree against him, except in the case where the defendant had purposely put it out of his power to have such knowledge.

In O. 9, r. 13 of the Civil Procedure Code the words "prevented by any sufficient cause from appearing" mean causes other than lack of knowledge of the proceedings, so that this rule is in the same terms as art. 164 of the Limitation Act.

Gyanammal v. *Abdul Hussein Sahib*, I.L.R. 55 Mad. 223; *Ram Bharose* v. *Ganga Singh*, I.L.R. 54 All. 154 (F.B.); *Vitta Venkatachalam* v. *Sivapuram*, 54 M.L.J. 448, referred to.

Kalyanwala for the appellant.

Aiyangar for the respondent.

MOSELY, J.—The appellant K.K.N.K.A.R. Chettyar Firm of Hlawga by its agent Kanappa Chettyar applied under Order 9 rule 13 of the Code of Civil Procedure for setting aside an *ex parte* decree passed against it in Civil Regular Suit No. 29 of 1931 of the District

* Civil Misc. Appeal No. 46 of 1938 from the order of the District Court o Insein in Civil Misc. No. 8 of 1938.

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Court of Insein. The learned District Judge dismissed the application holding that the applicants had been duly served once by a summons which was refused by their clerk and posted on their place of business and secondly by substituted service. In appeal it is now contended that these findings were wrong, and that the appellants were never properly served, and it is also argued that in any case they were unaware of the summonses and the proceedings in the suit. Their case in the trial Court was that the summonses and subsequent notices in the case were kept from their knowledge by fraud or, if not, by irregularities or carelessness in the service of them.

The suit in question was one instituted by the present respondent Aga M. Sheerazee for an equitable mortgage decree. The property in that suit was very large and the property now in question is some 130 acres. There were nine defendants in that suit. The facts there were briefly that the lands in question originally belonged to one Ko Po Mya and his wife who mortgaged them in 1921 to the appellants, the K.K.N.K.A.R. Firm. In 1922 Po Mya sold the lands to C.A.P.C.T. Shanmugam Chettyar. In 1923 Shanmugam Chettyar mortgaged them by an equitable mortgage to Sheerazee. In 1924 the K.K.N.K.A.R. Firm obtained a mortgage decree against Po Mya and Shanmugam Chettyar and the Firm bought the lands in execution. Then in 1931 Sheerazee brought this mortgage suit against Shanmugam Chettyar and eight other defendants, one of whom was the appellant firm and another was the so-called K.K.N.K.A.P. Veerappa Chettyar. Veerappa Chettyar died in 1935 and the suit was continued against his son of the same name Veerappa *alias* Somasundaram Chettyar.

A decree was passed against all nine defendants, *ex parte* against Veerappa Chettyar and the appellant

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firm. There is evidence in the present case which has not been rebutted or even denied that there never was such a firm as the K.K.N.K.A.P., and Veerappa appears to have been impleaded by mistake merely because he was a previous agent of the appellant K.K.N.K.A.R. Firm.

The appellant firm was sued in that suit as subsequent transferees of the property. It is said now, and it is not denied, that they never were such subsequent transferees of the property but merely prior encumbrancers. On referring to the case I find that there was no issue on the point whether they were subsequent transferees. That perhaps is natural as the case was decided *ex parte* against them; but there was no evidence on the subject and no reference to it, much less any finding on the point in the judgment. All that there is in the case is a pleading in the plaint that they were subsequent transferees, and the decree was one against them as well as the other defendants. No attempt was evidently made to execute it as against them.

It is perhaps doubtful whether any thing is *res judicata* against the present appellants. Even had they been proved to have been subsequent transferees there would have been no merger of their interest in the property as prior mortgagees (section 101 of the Transfer of Property Act as altered in 1929). But they have chosen to file the present suit if only by way of greater caution, and the matter must now be decided.

The appellants also filed another application under Order 21 rule 90 to have the sale of certain land set aside on the ground that they had no notice of the terms of the proclamation and that the proclamation itself did not disclose the previous encumbrance, which was a registered mortgage, of which Sheerazee must have had constructive notice. But this application which was

rejected by the trial Court in another part of its order which is also appealed against need not now be considered in view of the orders which I propose to pass on the application to set aside the *ex parte* decree in that suit. The defendant-respondent sought to prove certain notices issued to the appellants in execution to rebut the allegation that they did not know of the sale ; but these notices, it is now argued, are relevant here to show the appellants' knowledge of the proceedings.

[His Lordship discussed the evidence as to the service of the summonses and found that in the original suit a non-existent firm of K.K.N.K.A.P. was sued and the K.K.N.K.A.R. was sued by its agent who had left long ago and the summonses and notices were issued throughout on a non-existent Koorandan Chettyar as agent. These circumstances, ignored by the trial Court, were extremely important to decide the question whether the appellant firm was ever properly served or ever had any knowledge of the proceedings.

A decree was also passed against the appellant firm as subsequent transferees of the property when they were merely prior encumbrancers who had bought in the property prior to the suit. So there was a decree against and summonses were issued to non-existent persons on pleas unfounded on any facts. Substituted service of summons was allowed not on the ground that the firm was evading service of summons, but on the ground that the clerks (non-existent) had refused service. His Lordship continued :]

The present application to set aside the *ex parte* decree was made on the 21st January 1938, and the appellant says that he had notice of the proceedings against him only on the 8th of January 1938, when he found that his tenants were being asked by the respondent Sheerazee to pay the rent to him. Under

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Article 164 of the Limitation Act the limitation for an application by the defendant for an order to set aside a decree passed *ex-parte* is thirty days from the date of the decree or, where the summons was not duly served, when the applicant has knowledge of the decree. The meaning of this article was discussed in *Ram Bharose* v. *Ganga Singh* (1) by a Full Bench and in *Gyanammal* v. *Abdul Hussein Sahib* (2) by a Bench of Judges. The question before those Courts was whether summons by substituted service effected in proper form was necessarily due service for the purpose of Article 164 of the Limitation Act.

Order 5 rule 20, sub-sections (1) and (2), reads as follows :

" (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally."

Order 9 rule 13 says :

" In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside ; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree . . . "

The words " prevented by any sufficient cause from appearing " here clearly mean causes other than lack of

(1) (1931) I.L.R. 54 All. 154. (2) (1931) I.L.R. 55 Mad. 223.

knowledge of the proceedings, so that this rule is in the same terms as Article 164.

I would respectfully agree with the conclusions arrived at in those two rulings. The object of issuing a summons is to inform the party against whom a suit is being instituted of the fact that there is a suit against him and if he so chooses he may contest it. The order for substituted service is made *ex parte*, and obviously it should be open to the defendant when he appears to show that the method employed was not calculated to effect the purpose which the Court had in view, namely, informing the defendant of the institution of the suit. The rule that substituted service is to be taken as effectual as personal service only means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. Where the summons has issued against the defendant personally and it has been reported that personal service has been effected the defendant may always come forward to show that that has not been the case. Summons by way of substituted service is obviously the least satisfactory of all methods of service only to be used by the Court as a last resort when other means are unavailable, and the defendant should be given an opportunity of contesting that the summons has been served in a way which did not in effect bring the proceedings to his notice. The basis of the order on which the Court ordered substituted service to issue is either that the defendant is either deliberately keeping out of the way to avoid process or that it cannot be served in the ordinary way, perhaps through no fault of his own. In the latter case the defendant may always show that the proceedings could not have come to his knowledge. In the former case the order of the Court is only relevant to the question whether the defendant was in a position to have knowledge of the proceedings,

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for obviously if a defendant keeps out of the way to avoid service of process on him either on account of the suit in question or of other suits that have been or may be filed against him he cannot afterwards be heard to argue that he had no knowledge of the proceedings, as he has deliberately put himself in a position where he can have no such knowledge. In *Gyanammal* v. *Abdul Hussein Sahib* (1) at page 231 Reilly J. draws attention to the judgment of Srinivasa Ayyangar J. in *Vitta Venkatachalam* v. *Sivapuram Subbayya* (2). In the words of Reilly J.

" there Srinivasa Ayyangar J. suggested with great force, I think, that the provision that, when the summons is not duly served, the period runs from the date when the applicant had knowledge of the decree implies that due service within the meaning of that article is service which brings the claim to the knowledge of the defendant."

What Srinivasa Ayyangar J. said was this :

" I do not for my part believe that the legislature really intended in enacting the third column of Article 164 to confine the scope of the section only to cases where the actual service directed by the Court is shown not to have been effected at all in that manner. We may also have regard to what is obviously the object of the legislature in providing that in cases where the summons is not duly served the time begins to run from the date on which the applicant has knowledge of the decree. The implication seems to be clear that in cases where the summons is duly served the presumption may well be that he has knowledge of the decree, or at any rate if he does not get knowledge of the decree, it was ascribable only to some fault on his part or on the part of those near about him who ought to have known better."

I would respectfully agree that the word " effectual " in Order 5 rule 20, sub-section (2), does not mean due service, and that it has the meaning given to it by the learned Judges in these rulings. I would also agree

(1) (1931) I.L.R. 55 Mad. 223. (2) 54 Mad. L.J. 448.

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that in Article 164 of the Limitation Act and Order. 9 rule 13 " due service of summons " means not only that the summons was served in proper form according to the directions laid down in the Code but also that the summons was served under circumstances which enabled the Court to be satisfied that the defendant had knowledge of the decree against him, except of course in the case where the defendant had purposely put it out of his power to have such knowledge.

On the evidence in this case however I do not think it could possibly be held that either of these summonses were served in due form, that is to say, that one was refused by the appellant firm's clerk and then posted, or that the other was posted on the appellant firm's house.

It remains to consider whether it can be satisfactorily inferred from the other summonses and notices proved in this application that the defendant had knowledge of the decree, and that therefore the present application is time-barred.

[His Lordship held that none of the notices or summonses were tendered to or refused by the appellant firm or posted on their house or place of business.]

For the reasons that I have given the decree of the trial Court will be reversed with costs throughout, the appellants to obtain two-thirds of what would otherwise have been awarded them as their advocates' fees in this Court (for their failure to translate two documents and failure to put any copies of the defence evidence on the Bench copy, which caused the Court considerable inconvenience), advocate's fee six gold mohurs, and it will be directed that the *ex parte* decree against the appellants in Civil Regular Suit No. 29 of 1931 of the District Court of Insein be set aside.

MYA BU, J.—I agree.