

Misc(J) 13/13

21.05.13 :

Order arises out of petitions 404/13 filed under order IX Rule 13 read with section 151 of CPC.

Petitioner/Defendant's case is that she is an old ailing lady aged about 65 years. It is stated that she was lying bedridden somewhat from the month May, 2009 and had recovered in the month of January, 13. That during that period brother of the petitioner namely Sri Bubul Dutta in collusion with other brother namely Sri Sarbeswar Dutta had filed a Title Suit being T.S 67/09 before this court against many other persons as well as against the petitioner and her sister namely Putoli Dutta, for illegally and maliciously grabbing the ancestral property of the petitioner. That the petitioner had no knowledge of the said Title suit and had only come to know when the official staff of Jorhat East Circle visited the house of the petitioner on 11.2.13. Thereafter on 13-2-13, when enquiry was through advocate she came to know, about the said suit. It is further stated that in the said Title Suit address of the petitioner and his sister was wrongly stated. And such the decree is liable to be set aside.

Opposite party filed written objection denying the claims of the petitioner and further stated that they had taken proper steps in T.S. 67/09 for several times. It is further stated that they have not only taken steps through Process Servers but also published the summon in newspaper, namely Dainik Janambhumi dated 7-5-10, after obtaining due permission from court. It is also stated that petitioner had full knowledge about the institution of the Title Suit, but did not come forward to contest the suit and such prayer has been made to dismiss the petition.

Perused the available materials on records which reveals that suit was filed by the plaintiff against the present petitioner amongst 21 others. And the suit proceeded *ex parte* against all the defendants. Perusal of records further reveals that summon to present petitioner was first sent through ordinary way but the same was returned unserved with a report that addressee i.e. Phuleswari Dutta does not reside in that locality. The said fact was certified by the Gaonburah of that village, just above the report of the Process Server. Perusal of the copy of newspaper reveals that summon to said Phuleswari Dutta was published in the newspaper in the same address. From the report of the process Server as well as Gaonbura it is *prima facie* clear that the address of the petitioner Phuleswari Duta was not proper. In spite of that fact summon was published in the newspaper at the same address.

Moreover perusal of record further reveals that during the period of institution of the suit petitioner was under medical treatment and she was advised bed rest by medical practitioner.

Certificate of vice president Saraibahi Gaon Panchayat reveals that the petitioner is a resident of Kamalabari Gaon, P.O- Borbheta under Jorhat district since last 10 years.

Petitioner has relied upon a decision Reported in AIR 2003 Jammu and Kashmir 77, Sumi Aga Vs J and K Bank, wherein it was held that, failure of the plaintiff to furnish full address of the defendants can't be reason for court to infer that summon can't be served in ordinary way-Resort to substituted service by court by ordering publication of notice in newspaper without exhausting ordinary modes is not valid and effective service.

In view of the aforesaid fact situation and also in the light of the aforesaid decision, I am of the considered opinion that resort to substituted service was taken without exhausting ordinary modes of service, and as such it is held that that summon was not duly served upon the

petitioner, therefore I am of the considered opinion that the decree passed against the petitioner is liable to be set aside.

Perusal of record of T.S 67/09 reveals that suit was filed by the plaintiff for declaration of the share of the plaintiff out of entire ancestral joint property of predecessor in interest of the plaintiff as well of defendant no 1 and profoma defendant no 2 and 3. Profoma defendant no 4 to 21 are imp leded as they are alleged to be co-pattadars.

In view of the aforesaid situation I am of the opinion that decree can't be set aside as against the petitioner only and as such for effective adjudication of the matter in dispute, exparte decree passed against defendant no 1 and profoma defendant no 2 and 3 is set aside.

Misc (j) case is accordingly disposed off.

Mrs Achma Rahman.

Munsiff No 1, Jorhat.