

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 25.11.2013

+ **FAO(OS) 492/2013 & CM No. 17344/2013**

SATYA KHURANA

... Appellant

Versus

SUMINDER SINGH REEN

... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Vinay K. Garg
For the Respondents : Ms Kamlesh Mahajan

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This appeal is directed against the order dated 23.09.2013 passed by a learned single Judge of this court in IA no. 914/2013 which was an application under Order IX Rule 13 CPC and section 5 of the Limitation Act read with section 151 CPC for setting aside the ex parte decree dated 26.09.2012. The suit (CS(OS) No. 79/2012) had been filed by the defendant seeking specific performance of the sale deed dated 30.11.2011 in respect of the ground floor of the premises bearing no. 80/65A, Malviya Nagar, New Delhi, (hereinafter referred to as 'the suit property'). The main point urged by the appellant before the learned single Judge while arguing the said application for setting aside the ex parte decree was that as per the

memo of party filed with the plaint, the appellant was stated to be residing at 80/55A, second floor, Malviya Nagar, New Delhi, whereas all the documents including the sale deed etc. filed on record showed that the appellant/defendant was a resident of 80/65A, Malviya Nagar, New Delhi. The allegation was that the respondent/plaintiff did not serve the defendant and surreptitiously obtained an ex parte decree.

2. It is an admitted position that the suit was filed in January 2012 and on the first date of hearing i.e 10.01.2012, the learned single Judge had issued summons in the suit and notice in IA no. 555/2012 which had been filed under Order 39 Rule 1&2 Code of Civil Procedure (CPC). The returnable date was 08.05.2012 before the Joint Registrar. Inasmuch as, the learned single Judge had restrained the appellant/defendant and had directed the appellant/defendant to maintain the status quo with regard to the title and possession of the suit property, compliance under order 39 Rule 3 CPC was to be done by the respondent/plaintiff. The respondent/plaintiff sent copies of the plaint, the application under Order 39 Rule 1&2 CPC and the order passed by the court to the appellant/defendant at the address 80/55A, second floor, Malviya Nagar, New Delhi. An affidavit of compliance had been filed by the respondent/plaintiff under Order 39 Rule 3 CPC stating that the respondent/plaintiff had sent the entire plaint along with the documents through registered post and courier, however, the same were refused by the appellant/defendant on three dates i.e. 13th, 14th and 16th of January 2012.

3. It is also clear from the record that the summons that were issued in the suit were sent by registered post as well as through process server.

Insofar as, the summons through registered post was concerned, the same was stated to have been refused by the appellant/defendant on 08.02.2012. The endorsement indicated that the appellant/defendant refused to take the articles which obviously included the plaint and the other documents along with it. As regards the service of summons through process server is concerned there is a similar endorsement that on 04.02.2012 when the process server went to the address of the appellant/defendant at 80/55A, Malviya Nagar, New Delhi, the appellant/defendant refused to accepted the same. There is another report of the process server also that, when the process server went to serve the summons on 13.02.2012, the appellant/defendant refused to accept the same. Consequently, when the matter was listed before the Joint Registrar on 08.05.2012, he recorded that on account of the refusal on the part of the appellant/defendant to accept the service under registered post, the summons stood served. Thereafter, the appellant/defendant was proceeded ex parte by virtue of the order of the learned single Judge dated 29.05.2012 and the ex parte decree was passed on 26.09.2012.

4. According to the learned counsel for the appellant/defendant the summons not having been duly served, the ex parte decree ought to have been set aside. In order to establish this claim, the learned counsel for the appellant submitted that the summons ought to have been served in the manner as indicated in the Order V Rule 17 CPC. The said provision prescribed the procedure when a defendant refuses to accept the service or cannot be found. Order V Rule 17 CPC reads as under:-

“17. Procedure when defendant refuses to accept service, or cannot be found.— Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.”

5. It is apparent from the reading of the above provision that when the defendant refuses to sign the acknowledgement, the serving officer is required to affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain. And, is required to return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

6. The learned counsel for the appellant/respondent submitted that, admittedly, no such affixation was carried out by the process server and therefore the procedure prescribed under Order 5 Rule 17 CPC had not been followed. Consequently, he submitted, since the procedure had not been followed, it cannot be considered as a valid service of summons on the appellant/respondent. The learned counsel for the appellant placed reliance on the decision of the privy council in the case of **Nazir Ahmed v. King Emperor:** AIR 1936 PC 253 (2) and stated that there was a well recognised rule that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Similarly, he placed reliance on **Sharma Transport v. State of Maharashtra & Ors:** 2011 (8) SCC 647. (at page 656) wherein the principle enunciated in **Nazir Ahmed** (*supra*) has been followed. The learned counsel for the appellant also placed reliance on the decision of the Supreme Court in the **Sushil Kumar Sabharwal v Gurpreet Singh & Ors:** (2002) 5 SCC 377, wherein the procedure when a defendant refuses to accept service prescribed under Order 5 Rule 17 CPC was considered, the Supreme Court had observed as under:-

“8. We find several infirmities and lapses on the part of the process server. Firstly, on the alleged refusal by the defendant either he did not affix a copy of the summons and the plaint on the wall of the shop or if he claims to have done so, then the endorsement made by him on the back of the summons does not support him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy of the plaint on the wall should have been witnessed by persons who identified the defendant and his shop and witnessed such procedure. The endorsement shows that there

were no witnesses available on the spot. The correctness of such endorsement is difficult to believe even prima facie. The tenant runs a shoe shop in the suit premises. Apparently, the shop will be situated in a locality where there are other shops and houses. One can understand refusal by unwilling persons requested by the process server to witness the proceedings and be a party to the procedure of the service of summons but to say that there were no witnesses available on the spot is a statement which can be accepted only with a pinch of salt. Incidentally, we may state that though the date of appearance was 23-2-1993 the summons is said to have been tendered on 22-2-1993 i.e. just a day before the date of hearing.”

7. The learned counsel for the respondent/ plaintiff, however, submitted straightway that the latter decision in **Sushil Kumar Sabharwal** (*supra*) would not apply, inasmuch as, Order 5 Rule 9 was amended with effect from July 2002 and the decision of the Supreme Court was rendered on 23.04.2002. Therefore, the said decision would have no applicability in the facts and circumstances of the case where the delivery of the summons was also through registered post with acknowledgement due. The learned counsel for the respondent/plaintiff also submitted that service of summons through process server was one of the accepted modes of service. The other modes of delivering of summons were prescribed under Order 5 Rule 9(3) CPC which included service through registered post acknowledgement due or by speed post or by such courier services as are approved by the High Court or by the court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or by electronic mail service) provided by the rules made by the High Court. Therefore, it was submitted by the learned counsel for the respondent/plaintiff that service of summons through the process server was only one of the modes of service.

Insofar as, service of summons through registered post acknowledgement due is concerned there is a specific provision in Order 5 Rule 9(5) CPC which clearly indicates that if there is a refusal by the defendant to take delivery of the postal articles containing summons, the court issuing summons shall declare that the summons had been duly served on the defendant.

8. Order V Rule 9 CPC after the amendment of 2002 reads as under:-

“Delivery of summons by court- (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and where he is such an officer, the summons may be sent to him in such manner as the Court may direct.

(3) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court:

Provided that the service of summons under this sub-rule

shall be made at the expenses of the plaintiff.

(4) Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgment due), the provisions of Rule 21 shall not apply

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, - the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of courier agencies for the purposes of sub-rule (1).

9. After considering the arguments advanced by the learned counsel for the parties, even if we put aside the arguments raised by the appellant with regard to the manner and mode of service of process server in view of the provisions of Order V Rule 17 CPC, it cannot be denied that the service through registered post acknowledgement due has been effected in terms of Order V Rule 9(5) CPC. It is an admitted position that an endorsement has been made by a postal employee to the fact that the defendant has refused to take delivery of postal articles. In such eventuality it was enjoined upon the court to declare that the summons had been duly served on the defendant.

10. We may also observe that although this is not a case of irregularly served summons, the second proviso to Order IX Rule 13 CPC specifically provides that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity of service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

11. In these circumstances we entirely agree with the learned single Judge that this is not a case in which the application under Order IX Rule 13 CPC ought to be allowed. The fact being that the summons had been duly served on the appellant/defendant. No other ground was raised by the learned counsel for the appellant/defendant while seeking the setting aside of the ex parte decree.

12. The appeal is dismissed. There shall be no orders as to costs.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

NOVEMBER 25, 2013
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