

Neutral Citation No. - 2024:AHC-LKO:22804

AFR
Reserved

Court No. 8

Case :- MATTERS UNDER ARTICLE 227 No. - 96 of 2024

Petitioner :- Narmal Prasad Mishra And Another

Respondent :- Mukut Bihari And 5 Others

Counsel for Petitioner :- Rajeu Kumar Tripathi

Counsel for Respondent :- Sushil Kumar Pathak,Pawan Kumar
Mishra,Piyush Asthana

Along with

Case :- MATTERS UNDER ARTICLE 227 No. - 91 of 2024

Petitioner :- Narmal Prasad Mishra And Another

Respondent :- Mukut Bihari And 5 Others

Counsel for Petitioner :- Rajeu Kumar Tripathi

Counsel for Respondent :- Sushil Kumar Pathak,Pawan Kumar
Mishra,Piyush Asthana

Along with

Case :- MATTERS UNDER ARTICLE 227 No. - 342 of 2024

Petitioner :- Narmal Prasad Mishra And Another

Respondent :- Mukul Bihari And 5 Others

Counsel for Petitioner :- Rajeu Kumar Tripathi

Counsel for Respondent :- Sushil Kumar Pathak,Pawan Kumar
Mishra,Piyush Asthana

Along with

Case :- MATTERS UNDER ARTICLE 227 No. - 347 of 2024

Petitioner :- Narmal Prasad Mishra And Another

Respondent :- Mukut Bihari And 5 Others

Counsel for Petitioner :- Rajeu Kumar Tripathi

Counsel for Respondent :- Sushil Kumar Pathak,Pawan Kumar
Mishra,Piyush As,Piyush Asthana

Hon'ble Jaspreet Singh,J.

1. This is a batch of four petitions preferred under Article 227 of the

Constitution of India assailing the order dated 20.12.2023 passed by the District Judge, Bahraich and order dated 07.11.2023 passed by the Additional Civil Judge (Junior Division)/F.T.C. Bahraich whereby the application preferred by the private respondents under Order 9 Rule 13 C.P.C. has been allowed and also holding that the said application was within time and was not barred by limitation.

2. Since the issue involved in all the four petitions are common and the matter is in between the same parties, consequently, all the four petitions are being decided by this common judgment.

3. The Court has heard Sri Rajeiu Kumar Tripathi, learned counsel appearing for the petitioner. Sri S.C. Sitapuri, learned counsel who has filed his vakalatnama on behalf of the private respondent nos. 2 and 4 in the petition bearing No. 96 (A-227) of 2024 which is taken on record. Sri Piyush Asthana, learned counsel appearing for respondent no. 1 and 3, Sri Pawan Kumar Mishra, learned counsel for the respondent nos. 5 and 6.

4. The learned counsel for the private respondents submitted that they do not wish to file any counter affidavit as only a question of law is involved, hence, with the consent of learned counsel for the parties, the Court has heard the matter and it is being decided at the admission stage itself.

5. For the sake of convenience, the Court has lifted the facts from the Petition No. 96 (A-227) of 2024 and shall refer to the parties as impleaded in the instant petitions.

6. In order to appreciate the controversy involved in the instant four

petitions, it will be appropriate to delineate the facts giving rise to the instant petitions.

7. That the petitioners before this Court, were the plaintiffs in Regular Suit No. 1146 of 2018 while the private respondents were the defendants. The petitioners filed a suit as aforesaid, seeking a decree of cancellation of sale deed dated 16.09.1982 and injunction. The sale deed was executed by Ram Pyare in favour of the private respondents and it was impugned on the ground that Ram Pyare was the grand-father (maternal) of the petitioners who bequeathed the property to the petitioners by means of his will dated 10.09.1982.

8. It is only at a later stage that when the defendants of the suit attempted to get their names mutated in the revenue records on the basis of the alleged sale deed dated 06.09.1982 that the petitioners became aware of the sale deed and thus filed the said suit. The suit proceeded ex-parte against the defendants and it was finally decided ex-parte on 13.09.1982.

9. The ex-parte judgment and decree dated 13.09.1982 was assailed by the defendants of the suit by filing application under Order 9 Rule 13 C.P.C. in two sets; (i) one set of the defendants namely Mukut Bihar, Arvind Kumar Tripathi, Anand Prakash Tripathi and Akhilesh Tripathi filed an application under Order 9 Rule 13 C.P.C. along with an application under Section 5 of the Limitation Act. This was registered as miscellaneous Case no. 289 of 2023. The other set of defendants namely Asha Devi and Anita Devi filed a separate application under Order 9 Rule 13 C.P.C. along with an application under Section 5 of the Limitation Act which was registered as Misc. Case No. 305 of 2023.

10. In both the aforesaid two cases, notices were issued to the plaintiffs (the petitioners herein). Both the Misc. Cases namely Case No. 289 of 2023 and 305 of 2023 were heard together and the Trial court by means of order dated 26.10.2023 found that the application filed by the defendants in two sets were within time in terms of Article 123 of the Schedule appended with the Limitation Act of 1963 and consequently it rejected the application under Section 5 of the Limitation Act for the aforesaid reasons.

11. The petitioners herein moved an application in both the misc. cases as aforesaid and sought the dismissal of the application under Order 9 Rule 13 C.P.C. on the ground that as Section 5 of the Limitation Act, 1963 applications have been rejected so also the petitions under Order 9 Rule 13 C.P.C. ought to have been rejected consequently.

12. These two applications were rejected by the Trial Court on 31.10.2023 and the Trial Court thereafter fixed 07.11.2023 for orders on the application under Order 9 Rule 13 and accordingly on 07.11.2023, the applications under Order 9 Rule 13 C.P.C. were allowed holding that the defendants of the suit did not have adequate notice and they were prevented by sufficient cause from contesting the proceedings and since the nature of the ex-parte decree dated 13.09.2022 was joint and several, hence, setting aside of the decree in respect of one set of defendants would entail the setting aside of the decree as a whole enuring to the benefit of the other set of defendants, too.

13. The petitioners being aggrieved preferred four Civil Revisions before the District Judge, Bahraich assailing the order dated 31.10.2023 and the order dated 07.11.2023. Both orders were challenged in both the sets of

cases and as such this resulted in four civil revisions bearing No. 66 of 2023, 67 of 2023 which arose from Misc. Case No. 289 of 2023 whereas the Civil Revision No. 68 of 2023 and 69 of 2023 are the cases arising out of Misc. Case No. 305 of 2023.

14. The Revisional Court did not find favour with the submissions advanced by the revisionist and consequently all four revisions as aforesaid were dismissed upholding the order passed by the Trial Court. As a consequence, the petitioners have preferred these four petitions under Article 227 of the Constitution of India and the order dated 31.10.2023 and 07.11.2023 arising out of Civil Revision Nos.66 of 2023 and 67 of 2023 have given rise to the two petitions bearing Nos. 96 (A-227) of 2024 and 347 (A-227) of 2024. Similarly, the order dated 31.10.2023 and 07.11.2023 passed in Civil Revision No. 68 of 2023 and 69 of 2023 relating to Misc. Case no. 305 of 2023 has given rise to a petition under Article 227 of the Constitution of India bearing No. 91 (A-227) of 2024 and 342 (A-227) of 2024.

15. It is in the aforesaid backdrop that all the four petitions were connected and heard together. In the aforesaid four petitions, the order dated 31.10.2023 and 07.11.2023 has been challenged on common grounds.

16. Sri Rajeiu Tripathi, learned counsel for the petitioners while assailing the orders in all the petitions has primarily raised two questions for consideration of this Court:-

(I) It is urged that once an application under Section 5 of the Limitation Act of 1963 was rejected by the Trial Court on 26.10.2023, it was only obvious

that the petition under Order 9 Rule 13 C.P.C. ought to have been rejected consequently.

17. It is urged that the petitioners have moved an application on 31.10.2023 requiring the Trial Court to consider this aspect and since the application under Section 5 of the Limitation Act already stood rejected, the petitions under Order 9 Rule 13 C.P.C. ought to have been dismissed but the Trial Court without affording any opportunity of hearing on the same date itself i.e. 31.10.2023 rejected the said applications moved by the petitioners and thereafter the order dated 07.11.2023 allowing the petitions under Order 9 Rule 13 was passed and the petitioners were not even aware of the order dated 31.10.2023 which came to the notice of the petitioners only when the order dated 07.11.2023 was passed.

18. In the aforesaid circumstances, the petitioners have been prevented from agitating their cause appropriately before the Trial Court and this aspect of the matter has also not been appropriately dealt with by the Revisional Court resulting in sheer miscarriage of justice;

(II) The other limb of submission of learned counsel for the petitioners is that the two courts have not considered the provisions of law applicable to the instant case in the correct perspective.

19. The contention is that in terms of Section 27 C.P.C. summons have to be issued to the defendants in a suit and in the instant case, the service report indicated that despite the summons having been sent to the correct address of the defendant, they evaded the service. In the aforesaid backdrop, the Trial Court had also sent summons by registered post which

also did not return, as a result, a presumption in terms of Order 5 Rule 19-A C.P.C. was available to the court. The Trial Court being cautious also permitted the petitioners (the plaintiffs before the Trial Court) to get the defendants served through substituted service in terms of Order 5 Rule 20 C.P.C.

20. It is submitted that Order 5 Rule 20 C.P.C. was amended by the amending Act No. 104 of 1976 which came into effect from 01.02.1977. It is further submitted that sub Rule 2 of Order 5 Rule 20 C.P.C. clearly provides that substituted service shall be as effectual as if it had been made on the defendant personally and in this view of the matter the service upon the defendants would be effectual as personal service, consequently, while moving an application under Order 9 Rule 13 C.P.C., it was incumbent upon the defendants to have moved the application under Section 5 of the Limitation Act (which was actually done by the defendants) but the Trial Court as well as the Revisional Court failed to appreciate the provisions of Article 123 appended to the Limitation Act, 1963 and by wrongly applying the principle as provided in the Explanation appended to Article 123 in the schedule appended to the Limitation Act, the Trial Court and the Revisional Court treated the application under Order 9 Rule 13 C.P.C. to be within time from the date of knowledge.

21. Taking his submissions forward, Sri Tripathi urged that Article 123 clearly provides a period of limitation of 30 days for moving an application under Order 9 Rule 13 C.P.C. and it has been emphasized that the time from which the period begins to run is to be reckoned from the date of the decree as in the instant case the summons were duly served on the

defendants.

22. It is urged that only when the summons are not duly served then the period of limitation of 30 days is to be reckoned from the date when the person moving the application under Order 9 Rule 13 C.P.C. gets knowledge of the decree.

23. It is further urged that there is an apparent discrepancy in Order 5 Rule 20 (2) C.P.C. and the explanation appended to Article 123 in the scheduled appended with the Limitation Act, 1963.

24. Sri Tripathi has urged that the explanation appended to Article 123 states that substituted service in terms of Order 5 Rule 20 C.P.C. shall not be deemed to be due service. It is stated that the Trial Court and the Revisional Court has granted the benefit of this explanation to the defendants and has treated the application under Order 9 Rule 13 C.P.C. to be within the period of 30 days granting the benefits to the defendants of the time for commencement of limitation from the date of knowledge of the decree.

25. It is urged that once it is provided in Order 5 Rule 20 (2) C.P.C. that the service through substituted mode shall be as effectual as having been made personally then the summons served through publication would amount to sufficient personal service and in the aforesaid circumstances, the time period will have to be reckoned from the date of the decree and not from the date of the knowledge and in the aforesaid circumstances where admittedly the application under Order 9 Rule 13 C.P.C. was filed in the month of July, 2023 whereas the ex-parte decree was dated 13.09.2022,

hence, the two courts ought to have considered the ground shown in the said application and Section 5 of the Limitation Act, 1963 whether it constituted sufficient cause but the two courts have grossly erred in holding that the application under Order 9 Rule 13 C.P.C. was within time and for the said reason, the application under Section 5 of the Limitation Act, 1963 filed by the private respondents in two separate miscellaneous cases were incorrectly decided vide order dated 26.10.2023 which was patently erroneous.

26. It is urged that for the very same reason, the application dated 31.10.2023 by which the petitioners prayed that the application under 9 Rule 13 C.P.C. be rejected was erroneously dismissed and as a consequence the order dated 07.11.2023 by which the Trial Court allowed the application under Order 9 Rule 13 C.P.C. is also bad, thus, the petitions deserve to be allowed.

27. The learned counsel for the petitioners in support of his submissions has relied upon the decision of the Apex Court in ***S. Sundaram Pillai and Others Vs. V.R. Pattabariman and Others; 1985 (1) SCC 591*** to explain that what is the ambit of an explanation or a proviso which is appended to a statutory provision.

28. Relying upon the aforesaid decision, it is urged that the proviso is meant to be an exception to something within the main enactment or it is to qualify something enacted therein, however, as far as an explanation is concerned, it is intended to explain the meaning of the provision and when there is obscurity or vagueness in the provision, the explanation is meant to clarify the same to make it consistent with the dominant object which it

seems to subserve and it is meant to provide additional support to the dominant object of the provision.

29. It is further urged that the explanation is to be interpreted in a manner that it should support the main provision but nevertheless it cannot have a purpose of taking away a statutory right with which any person under the Statute has been provided with some benefit nor it can set to naught the working of the provision by becoming a hindrance.

30. It is further submitted by Sri Tripathi that the manner in which the Trial Court and the Revisional Court have passed the order dated 26.10.2023 rejecting the application under Section 5 of the Limitation Act, 1963 holding that the application under Order 9 Rule 13 was within time from the date of knowledge of the decree, it has incorrectly applied the explanation to Article 123 and by doing so it has rendered the provisions of Order 5 Rule-20 (2) C.P.C. redundant which could not have been done. Accordingly, the petition deserves to be allowed after setting aside the impugned orders.

31. On behalf of the private respondents, Sri Piyush Asthana and Sri Pawan Mishra, learned counsel have responded to the submissions of the learned counsel for the petitioners and it has been pointed out that the instant petitions are bad, inasmuch as, the petitioners have not assailed the order dated 26.10.2023 by which the application under Section 5 of the Limitation Act, 1963, though rejected, but in effect the Trial Court had held that the application under Order 9 Rule 13 C.P.C. was within time and therefore there was no requirement to move the application under Section 5 of the Limitation Act, 1963. It is urged that without assailing the order

dated 26.10.2023, the arguments of the petitioners pales into insignificance as the primary order has not been assailed.

32. It is further urged by the learned counsel for the private respondents that admittedly in so far as Smt. Asha Devi and Anita Devi are concerned, there was a clear averment that they were not residing at the given address since the daughter of Asha Devi was residing in Surkhet, Nepal and Asha Devi was also residing with her daughter, hence, neither the summons sent through registered post were served nor the publication made in the Hindi Daily Jan Morcha could be treated as due service as it had no circulation worth its name in Surkhet, Nepal.

33. It is further urged that once there was ample material available on record of the Trial Court especially the endorsement on the registered cover that Asha Devi was residing in Surkhet, Nepal, it was incumbent upon the plaintiffs (the petitioners herein) to have got the summons served to the petitioners at their address in Surkhet, Nepal. In the aforesaid circumstances, without doing so, the application for getting the defendants served through publication was also improper but nevertheless even the newspaper summons could not be treated to be duly served as the newspaper namely Jan Morcha was not having adequate circulation and this was contrary to Order 5 Rule 20-A C.P.C.

34. It is submitted that in the aforesaid circumstances, where the petitioners have not assailed the order dated 26.10.2023 and the Trial Court by the said order had categorically held that for the purposes of the disposal of the application under Section 5 of the Limitation Act, there was no due service on the defendants of the second set namely Asha Devi and Anita

Devi, hence, the application under Order 9 Rule 13 C.P.C. was within time as it has been moved within 30 days from the date of knowledge of the decree.

35. It is submitted that the reasoning given by the Trial Court is based on sound principles of law and requires no interference. The petitioners have erred in moving the application which came to be rejected on 31.10.2023 as once it was held by the Trial Court that the application under Order 9 Rule 13 C.P.C. was within time. However, merely because the Trial Court held in its order that the application under Section 5 of the Limitation Act is rejected, it did not mean that the application under Order 9 Rule 13 C.P.C. would be rejected automatically as the reason was that the application under Section 5 of the Limitation Act, 1963 was actually not required since the Application under Order 9 Rule 13 C.P.C. was within time.

36. It would have been a different scenario altogether if the application under Section 5 of the Limitation Act moved by the defendants would have been rejected on the merits holding that the defendants were unable to justify the delay and could not establish a sufficient cause then perhaps the contention of the learned counsel for the petitioner could be appreciated that as a consequence the application under Order 9 Rule 13 C.P.C. be dismissed.

37. It is urged that in the instant case, the Trial Court found that since the application under Order 9 Rule 13 C.P.C. was within time from the date of knowledge, hence, there was no requirement to move an application under Section 5 of the Limitation Act, hence, it was rejected. The necessary consequence was that the application under Order 9 Rule 13 C.P.C. was to

be heard and decided substantively and this was done by the Trial Court and it allowed the application under Order 9 Rule 13 C.P.C. holding that the defendants were prevented by sufficient cause from contesting the suit and thus the order dated 07.11.2023 does not suffer from any error which may require any interference by this Court.

38. It is further urged that the Revisional Court also noticed the aforesaid aspect and consequently the revision filed by the petitioners were dismissed, hence, the instant petition is bad and does not deserve admission rather is to be dismissed outright especially when the matter is yet to be decided on merits and once the courts have exercised their discretion in a positive manner, it would not be expedient for the Revisional Court or this Court to interfere in such kind of orders especially when the parties have been given an opportunity to contest the proceedings on merits and the Constitutional Courts also lean in favour of such orders by which the parties are granted the benefit of hearing rather the shutting out hearing on the ground of technicalities such as raised by the petitioners in the instant case. For the aforesaid reasons, the petitions deserve to be dismissed.

39. Sri S.C. Sitapuri, learned counsel has also adopted the aforesaid submissions advanced by Sri Piyush Asthana and Sri Pawan Mishra, learned counsel for the private respondents.

40. The Court has heard the learned counsel for the parties and also perused the material on record.

41. In so far as the facts involved in the instant petitions are concerned, there is not much dispute between the parties. It is also not disputed by the

learned counsel for the petitioners that they have not assailed the order dated 26.10.2023 in the instant batch of four petitions.

42. The record would further indicate that even though the issue regarding no challenge to the order dated 26.10.2023 was raised by the private respondents on the first date itself but no effort was made by the petitioner to raise any challenge to the said order by moving an application or to amend the relief clause.

43. It is in the aforesaid backdrop that the courts has considered the submissions made by the parties.

44. At the outset, it will be relevant to notice the relevant provisions of law which have an interplay and impact on the instant petitions and for better appreciation, this Court reproduces Section 27 C.P.C. Order 5 Rule-17, Rule, Rule 20 C.P.C. and Article 123 of the schedule appended to the Limitation Act, 1963.

“27. Summons to defendants.—Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed[on such day not beyond thirty days from the date of the institution of the suit].

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Order 5 Rule 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.

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20. Substituted service.—(1) Where the Court is satisfied that there is reason

to believe that the defendant is keeping out of the way for the 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.

[(1A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper,

the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.]

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

(3) Where service substituted, time for appearance to be fixed.—Where service is substituted by

order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.”

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Article 123 Limitation Act, 1963

123. To set aside a decree passed ex parte or to rehear an appeal decreed or heard ex parte. *Thirty days summons or notice was not duly served, when the applicant had knowledge of the decree.*

Explanation.—For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not be deemed to be due service.

45. From the perusal of the aforesaid provisions of law, it would be clear that whenever a suit is filed in a court of law which is governed by the Code of Civil Procedure, 1908, summons have to be issued to the defendants. The summons are served through the process server and as far as possible the summons are to be served on to parties to the suit, in case if the person upon whom the service is to be affected is not available then there is an option of affixation of the summons as provided under Order 5 Rule 17 C.P.C. Similarly, where the court finds expedient, it can also get the summons served on the defendants through registered post.

46. In terms of Section 27 of the General Clauses Act, if a registered cover is sent to the person at his correct address and the requisite time having elapsed and the registered cover does not return back to the court or returns to the court with the endorsement such as refusal then in such circumstances, the service shall be deemed to have been affected. In this regard, the decision of the Apex Court in ***Ajeet Seeds Limited Vs. K. Gopala Krishnaiah***; (2014) 12 SCC 685 is relevant and the relevant portion of the said report is being reproduced hereinafter:-

“9. This Court then explained the nature of presumptions under Section 114 of the Evidence Act and under Section 27 of the GC Act and pointed out how these two presumptions are to be employed while considering the question of service of notice under Section 138 of the NI Act. The relevant paragraphs read as under: (C.C. Alavi Haji case [C.C. Alavi Haji v. Palapetty Muhammed, (2007) 6 SCC 555 : (2007) 3 SCC (Cri) 236] , SCC pp. 563-64, paras 13-14)

“13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the court that the common course of business renders it probable that a thing would happen, the court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the GC Act is a far stronger presumption. Further, while Section 114 of the Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of the GC Act is extracted below:

‘27. Meaning of service by post.—Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression “serve” or either of the expression “give” or “send” or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.’

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is

deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', due service has to be presumed. (Vide Jagdish Singh v. Natthu Singh [(1992) 1 SCC 647] , State of M.P. v. Hiralal [(1996) 7 SCC 523] and V. Raja Kumari v. P. Subbarama Naidu [(2004) 8 SCC 774 : 2005 SCC (Cri) 393] .) It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved."

10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.

Similarly, the Apex Court in ***Vishwabandhu Vs. Sri Krishna And Another; (2021) SCC 549*** in paragraph 15 has observed as under:-

"15. The summons issued by registered post were received back with postal endorsement of refusal, as would be clear from the order dated 19-2-1997. Sub-rule (5) of Order 5 Rule 9 of the Code states inter alia that if the defendant or his agent had refused to take delivery of the postal article containing the summons, the court issuing the summons shall declare that the summons had been duly served on the defendant. The order dated 19-2-1997 was thus completely in conformity with the legal requirements. In a slightly different context, while considering the effect of Section 27 of the General Clauses Act, 1897, a Bench of three Judges of this Court in C.C. Alavi Haji v. Palapetty Muhammed [C.C. Alavi Haji v. Palapetty Muhammed, (2007) 6 SCC 555 : (2007) 3 SCC (Cri) 236] made the following observations : (SCC p. 564, para 14)

"14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. (Vide Jagdish Singh v. Natthu Singh [Jagdish Singh v. Natthu Singh, (1992) 1 SCC 647] ; State of M.P. v. Hiralal [State of M.P. v. Hiralal, (1996) 7 SCC 523] and V. Raja Kumari v. P. Subbarama Naidu [V. Raja Kumari v. P. Subbarama Naidu, (2004) 8 SCC 774 : 2005 SCC (Cri) 393] .)"

47. There may be cases where for certain reasons, the defendant cannot

be served and in such circumstances the court may take recourse to get the defendants served by substituted service i.e. through publication for which the court has to take recourse to Order 5 Rule 20 C.P.C.

48. In order to permit the service through substituted mode, the court is required to form a subjective satisfaction and it has reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that the summons cannot be served in the ordinary course then the court can order the summons to be affixed in some conspicuous place in the court house or upon some conspicuous place where the defendant is known to have last resided or carried on business or personally worked for gains.

49. Rule 1-A was inserted in Order 5 Rule -20 C.P.C. by the amending Act which came into effect from 01.02.1977 which permitted the courts to get the summoned served through an advertisement in a newspaper provided the newspaper must be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided or carried on business or personally worked for gains.

50. It is in the aforesaid circumstance that a publication can be made and Sub Rule 2 of Order 5 Rule 20 C.P.C. saves such service and it would be treated as effectual as if the defendant was personally served.

51. At this stage, it will be relevant to notice the observations of the Apex Court in *Sunil Poddar Vs. Union Bank of India; (2008) 2 SCC 326* wherein it has been held that once a summon is published in the newspaper having wide circulation in the locality, it is immaterial whether the defendants were subscriber to the said newspapers or whether they read it.

The relevant paragraphs of the said report read as under:-

“23. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order 5 of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non-service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order 9 of the Code. Since the said provision applies to the Debts Recovery Tribunals and the Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before DRT, they had no sufficient time to appear and answer the claim of the plaintiff Bank and on that ground, ex parte order deserves to be set aside.”

52. Proceeding further, if Article 123 of the Schedule appended with the Limitation Act is seen, it clearly provides that the limitation for moving an application under Order 9 Rule 13 C.P.C. is 30 days, however, it further states that this period of 30 days is to be reckoned from the date of the decree in case if the summons are duly served. In case if the summons are not duly served then the period of 30 days is reckoned from the date of knowledge of the decree. The said Article also contains an explanation that the service made by publication shall not be deemed to be due service.

53. In the aforesaid backdrop, if the submissions of learned counsel for the petitioners is examined, it would be clear that the explanation which has been appended in Article 123 is only applicable to the said provision alone.

54. It is not quite correct to state that Sub Rule 2 of Order 5 Rule 20 C.P.C. was incorporated by the amendment in 1977. Rather, the correct position is that by the amending Act of 1977 Rule-1 was inserted, it only permitted the court to get the summons served through advertisement in a newspaper and in order to do it, the requirement is that the newspaper must

be a daily newspaper having wide circulation in the area where the defendant sought to be served through publication was last known to have resided or worked for gains. In this regard, the observations of the Apex Court in ***Basant Singh and Another Vs. Roman Roman Catholic Mission; (2002) 7 SCC 531*** and the relevant paras thereof read as under:-

“6. Regarding the contention of the counsel for the appellants that the summons were not duly served, as the substituted service has been published in the local daily Aacharan instead of Dainik Bhaskar, we may point out that it is in the evidence on record that both Aacharan and Dainik Bhaskar are local dailies and are widely circulated in the area. In ordinary circumstances, if both the local dailies are widely circulated in the area the change of the name of the local daily from Dainik Bhaskar to Aacharan would not materially affect the service of notice by way of substituted service, deemed to have been served, and would not invalidate the effect of substituted service just because the notice for substituted service has been published in the local daily which is not ordered by the court. It is the specific contention of the plaintiff-respondent that the notice has been published in the local daily Aacharan on 9-8-1986 and the said local daily is widely circulated in the area and the substituted service would construe as sufficient notice upon the defendants. We are also of the view that it is inherently probable that publication in the local daily Aacharan which is widely circulated in the area would have constituted a sufficient notice to the defendants.

7. Before the trial court the stand taken by the plaintiff was that the defendants had knowledge about the suit filed by the plaintiff and they had sufficient time to appear and answer the plaintiff's claim but they did not appear and the application had been filed with the intention to cause delay. Be that as it may, we are of the view that the publication of the substituted service in the local daily Aacharan instead of Dainik Bhaskar is a mere irregularity in service of summons.

8. Second proviso to Order 9 Rule 13 casts an embargo on the court that a decree passed ex parte shall not be set aside merely on the ground that there has been an irregularity in the service of summons.”

9. Order 5, proviso to sub-rule (2) of Rule 19-A CPC provides that where the summons are properly addressed, prepaid and duly sent by registered post with acknowledgement due, notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the court within thirty days from the date of the issue of the summons, the court shall presume that notice is duly served. Further, Section 27 of the General Clauses Act, 1897 (in short “the Act”) provides similar provision. The presumptions are rebuttable. It is always open to the defendants to rebut the presumption by leading convincing and cogent evidence.”

55. The impact of the substituted service through publication was noticed by the Apex Court in a subsequent decision in ***Parimal vs. Veena Alias Bharti; (2011) 3 SCC 545*** and the relevant paragraphs thereof read as under:-

“12. It is evident from the above that an ex parte decree against a defendant has to be set aside if the party satisfies the court that summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court. The legislature in its wisdom, made the second proviso mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.

13. “Sufficient cause” is an expression which has been used in a large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, inasmuch as may be necessary to answer the purpose intended. Therefore, word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, “sufficient cause” means that the party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive”. However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide Ramlal v. Rewa Coalfields Ltd. [AIR 1962 SC 361] , Lonand Grampanchayat v. Ramgiri Gosavi [AIR 1968 SC 222] , Surinder Singh Sibia v. Vijay Kumar Sood [(1992) 1 SCC 70 : AIR 1992 SC 1540] and Oriental Aroma Chemical Industries Ltd. v. Gujarat Industrial Development Corpn. [(2010) 5 SCC 459 : (2010) 2 SCC (L&S) 50 : (2010) 2 SCC (Cri) 1291 : (2010) 2 SCC (Civ) 448])

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...15. While deciding whether there is sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide State of Bihar v. Kameshwar Prasad Singh [(2000) 9 SCC 94 : 2000 SCC (L&S) 845 : AIR 2000 SC 2306] , Madanlal v. Shyamlal [(2002) 1 SCC 535 : AIR 2002 SC 100] , Davinder Pal Sehgal v. Partap Steel Rolling Mills (P) Ltd. [(2002) 3 SCC 156 : AIR 2002 SC 451] , Ram Nath Sao v. Gobardhan Sao [(2002) 3 SCC 195 : AIR 2002 SC 1201] , Kaushalya Devi v. Prem Chand [(2005) 10 SCC 127] , Srei International Finance Ltd. v. Fairgrowth Financial Services Ltd. [(2005) 13 SCC 95] and Reena Sadh v. Anjana Enterprises [(2008) 12 SCC 589 : AIR 2008 SC 2054] .)

16. In order to determine the application under Order 9 Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straitjacket formula of universal application.

Presumption of service by registered post and burden of proof

17. This Court after considering a large number of its earlier judgments in Greater Mohali Area Development Authority v. Manju Jain [(2010) 9 SCC 157 : (2010) 3 SCC (Civ) 639 : AIR 2010 SC 3817] held that in view of the provisions of Section 114 Illustration (f) of the Evidence Act, 1872 and

Section 27 of the General Clauses Act, 1897 there is a presumption that the addressee has received the letter sent by registered post. However, the presumption is rebuttable on a consideration of evidence of impeccable character. A similar view has been reiterated by this Court in Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra [(2010) 13 SCC 657 : JT (2010) 12 SC 287].

18. In Gujarat Electricity Board v. Atmaram Sungomal Poshani [(1989) 2 SCC 602 : 1989 SCC (L&S) 393 : (1989) 10 ATC 396 : AIR 1989 SC 1433] this Court held as under : (SCC pp. 611-12, para 8)

“8. There is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. The burden to rebut the presumption lies on the party, challenging the factum of service.”
(emphasis added)

19. The provisions of Section 101 of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgment in his favour. Section 103 provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the facts in issue.”

56. Having noticed the relevant provisions and the pronouncement of the Apex Court, it would be clear as to how the service through publication is to be made and how it impacts the service on the parties.

57. At this stage, it will also be relevant to notice that apparently, there is no inconsistency between Order 5 Rule 20 (2) C.P.C. and the explanation appended to Article 123 in the schedule appended to the Limitation Act, 1963. Both the provisions operate in different spheres. As far as the provisions of Order 5 Rule 20 C.P.C. is concerned, it permits the court to take recourse through substituted service (through publication) in a newspaper and sub rule 2 states that the service through publication will be as effectual as due service made on the defendant personally and the purpose and intent of Sub rule -2 is to enable the court dealing with the

matter to proceed further. Meaning thereby that upon filing of a suit before a court of law, the court is required to issue notice to the defendants. Before proceeding, the court has to record its subjective satisfaction that the defendants of the suit are properly served and once it arrives at the said satisfaction and yet the defendants do not appear in the suit then it would enable the court to proceed further and pass appropriate orders including setting the defendants ex-parte so that the matter can be tried and decided. If this provision is not invoked then perhaps in certain cases where the defendant is not served and even after publication where the service is not treated effectual service then the suit will not proceed and it cannot be left in limbo indefinitely. In order to avoid this uncertainty sub rule (2) of Order V Rule 20 is to be interpreted and it is in this context it is held that the provisions of Order V Rule 20 (2) is for the Court to enable it to prove further.

58. On the other hand, the explanation in Article 123 of the Limitation Act, 1963 is for the purpose of that article alone. Where the defendant moves an application under 9 Rule 13 C.P.C. for setting aside the ex-parte judgment and in such a case, the limitation as provided in the said Article 123 can be seen which is in two parts; (I) there can be a situation where the defendant may have put in appearance in the suit and later for some reason may not participate and the decree is passed ex-parte, in such situation, the limitation would be reckoned from the date of the decree. (II) There may be a situation that the defendants for some reason could never be served either personally or through affixation or through substituted service and later if an application for setting aside the ex-parte decree is moved then it can be

filed within 30 days from the date of knowledge.

59. It is for only such defendants against whom the suit has proceeded ex-parte and the service was through publication that the limitation would be from 30 days of the knowledge and to protect such litigants the explanation has been appended, however, it is not correct to say that the explanation would run counter to Order 5 Rule 20 (2) C.P.C. Primarily, Order 5 rule 20 (2) C.P.C. is for the benefit of the court to enable it to proceed further whereas the explanation appended in Article 123 is for the benefit of such defendants against whom an ex-parte decree has been passed and what will be the period of limitation to move an application under Order 9 Rule 13 C.P.C. has been mentioned and what will be the starting point of limitation has been explained. Thus, it cannot be said there is any contradiction or inconsistency in the provisions of Order 5 Rule 20 (2) C.P.C. and Article 123 of the Limitation Act, 1963.as projected by the learned counsel for the petitioners.

60. It is now well settled that the courts endeavour to construe the provisions of law harmoniously so that each provision is given its complete extant within which they operate and any inconsistency may be avoided. In case if the argument of the learned counsel for the petitioner is accepted, it may give rise to anomalous situation and the endeavour of the court is always to avoid inconsistency and to harmonies the provisions, hence, the contention of the learned counsel for the petitioners is fallacious and misconceived.

61. The court is fortified in its view and draws strength from a Full Bench decision of this Court in *Ram Bharose v. Ganga Singh* 1931 SCC

Online All. 133 and the relevant portion reads as under:-

“I am unable to accept this argument. The object of issuing a summons is to inform the party, against whom a suit has been instituted, of the fact that there is a suit against him, and if he so chooses, he may come and defend it. If that be the object of a summons, and if, for no fault of his own, a defendant was never put in a position to know that a suit had been instituted against him, whatever steps may have been taken for serving the summons on him, these steps can never be accepted as amounting to “due service”. When an order for substituted service is made by a court, on the representation of a plaintiff, only one side is present before the court and it acts on the representation of one party. 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. If this is so, the court has to consider, in view of all the circumstances of the case, for example, the place where the defendant was when the summons was issued to him, where and how the summons was served, and so on, in order to see whether there was due service. For example, if a man has gone to Burma to earn a living and he has relations at home with whom he is in constant touch, and the summons is served on the defendant by affixation of a copy of it on the outer door of his house, it may be open to the court to infer that the service was good, it being expected that the defendant's close relations, living jointly with him in the same house, would inform him of the case. Again, where it is found that the defendant knew that a suit was likely to come and, in order that a summons may not be served on him, he leaves the place, it may be open to the court to hold that there was due service by substitution. On the other hand, if the defendant went, say, to Burma to earn a living and left no one at home, which remained vacant, and at the instance of the plaintiff a substituted service was ordered by publication of the fact of the institution of the suit in a paper published, say, at Aligarh, where the suit was instituted, the court would be in a position to hold that there was no due service.

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.

The result is that, in my opinion, whether there has been ‘due service’ or not is to be considered by the court to which an application has been made for setting aside an ex parte decree, having regard to all the circumstances of the case as described above. If the conclusion is that there was due service, then, if the application has not come within thirty days of the decree, he is barred by time. If the conclusion is that there was no due service, the limitation would be computed from the date of the applicant's knowledge of the decree. The mere fact that a substituted service had been ordered is immaterial, by itself.”

62. Applying the principles as noticed hereinabove to the facts of the instant case, it would be seen that Smt. Asha could not be served through registered cover as the registered cover had returned with an endorsement that she was not residing at the given address but was in Surkhet, Nepal. Even though, the Trial Court went ahead in getting the summons served

through publication but it could not be disputed that Jan Morcha, the daily newspaper wherein the summons were published had any circulation in Surkhet, Nepal.

63. Even though, it has been urged that the said newspaper was even circulated in Nepalganj but there is nothing to state that the said newspaper had circulation in Surkhet, Nepal. Needless to say that Surkhet is a different district whereas Nepalganj is in a different district in a foreign country i.e. Nepal. The Trial Court as well as the Revisional Court has taken note of the aforesaid and has recorded findings regarding the fact that the defendant Smt. Asha Devi was not personally served nor the registered cover was served, hence, treating the publication as not due service for the purposes of computing the limitation for moving the application under Order 9 Rule 13 C.P.C, it held that the applications were within 30 days for the date of knowledge, hence, within time and thereafter the Trial Court went on to consider the application under Order 9 Rule 13 C.P.C. and found that there was sufficient cause for the defendants, by which they were prevented to contest the proceedings and since the decree was joint and several and indivisible, hence, if it is was set aside for one defendant, it would have to be set aside for all. There is no error in the findings recorded by the Trial Court and the Revisional Court.

64. Moreover, there is another flaw in the arguments of the learned counsel and that is the application under Section 5 of the Limitation Act, 1963 was rejected by the Trial Court by holding that the application under Order 9 Rule 13 C.P.C. were within 30 days of the knowledge of the decree, hence within time, this order was known to the plaintiffs but they

never assailed the same before the Revisional Court nor before this Court.

65. Merely to state that since in the order itself it was written that the application under Section 5 of the Limitation Act is rejected and consequently the application under Order 9 rule 13 C.P.C. would have to be rejected, is apparently an erroneous submission, in the facts of the instant case. May be the language used by the Trial Court while disposing of the application under Section 5 of the Limitation Act, 1963 may not have been very happily worded but the fact remains that in the entire text of the said order dated 26.10.2023, it has been clearly explained by the Trial Court that the application under Order 9 Rule 13 C.P.C. is to be treated within time and for the said reason, the application under Section 5 of the Limitation Act, 1963 was rejected, however, it did not mean nor it is evident from the perusal of the order dated 26.10.2023 that the application under Section 5 of the Limitation Act, 1963 was rejected on merit i.e. to say that the defendants were unable to explain the delay or they could not establish the sufficient cause as required, hence, the submission to the contrary made by learned counsel for the petitioners does not impress this Court.

66. For all the aforesaid reasons, this Court is satisfied that there is no error in the orders impugned which may persuade this Court to entertain the aforesaid petitions which are devoid of merits and all the petitions deserve to be dismissed.

67. Since the matter of R.S. No. 1146 of 2018 is to be contested on merits, accordingly, this Court provides that the Trial Court seized with the Regular Suit No. 1146 of 2018 shall after affording full opportunity of hearing to the parties but without granting any unnecessary adjournments

shall expedite the proceedings to decide the suit on its own merits as expeditiously as possible.

68. The writ petitions bearing *W.P. No. 96 (A-227) of 2024, W.P. No. 91 (A-227) of 2024, W.P. No. 342 (A-227) of 2024 and W.P. No. 347 (A-227) of 2024* are *dismissed*. Costs are made easy.

Order Date :- 15th March, 2024

Asheesh

(Jaspreet Singh, J.)