



2024:DHC:7036



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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Date of decision: 09.09.2024*

+ **CS(COMM) 19/2017**

M/S GATI INFRASTRUCTURE PVT LIMITED .....Plaintiff

Through: Mr.Basa Mithun Shashank,  
Mr.Subrahmanya Bhanu and  
Mr.M.V. Mukunda, Advs.

versus

ASHWANI SAINI & OTHERS .....Defendants

Through: Mr.Gagan Gupta, Sr. Adv. with  
Mr.Tanvir Nayar, Mr.Yagyesh  
Kumar & Mr.Saurabh Gupta,  
Advs. for D-1 & D-  
2/Applicants.

**CORAM:**

**HON'BLE MR. JUSTICE NAVIN CHAWLA**

**NAVIN CHAWLA, J. (ORAL)**

**I.A. 16321/2019 & 16326/2019**

1. These applications have been filed by defendant nos.1 and 2 under Order IX Rule 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'), praying for the setting aside of the *ex parte* Judgment and Decree dated 13.12.2017, passed in the present Suit. It is contended that the summons issued by this Court *vide* its Order dated 09.01.2017, were never received by the defendant nos.1 and 2.

2. In support of the said submission, the learned senior counsel for the defendant nos.1 and 2 contends that, to the knowledge of the



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plaintiff, defendant no.1 had shifted his residence to 28, Civil Lines, Baldev Singh Marg, Roorkee, Uttarakhand-247667, as is evident from the letter dated 05.04.2017 addressed by the plaintiff to the defendant no.2 through defendant no.1. In spite of such knowledge, the plaintiff attempted to serve defendant nos.1 and 2 at the old address, that is, S-14, Avas Vikas, Roorkee, Uttarakhand-247667.

3. He submits that, even otherwise, the report of the Process Server, as far as defendant nos.1 and 2 are concerned, are contradictory. For defendant no.1, the Process Server states that he went to the address given in the notice, which was the address given in the memo of parties, and though he did not find defendant no.1 there, he met defendant no.1's wife, that is, Smt. Sujatha, who informed him that her husband had gone out for some work and would be available only after one or two months. He further records in his report that Mrs.Sujatha refused to receive the notice after speaking to defendant no.1 on the phone. The Process Server then states that he affixed the notice on the wall of the house. In contradiction to this report, for defendant no.2, notice of which was again addressed through defendant no.1 and at the same address, the same Process Server states that when he went to the same address, he was informed that the company has since been closed. He was also told that defendant no.1 does not stay at the given premises. He states that he was then told that defendant no.1 stays in a house in front of the house of an Ex MP, Mr. Harpal Singh Sathi of Ram Nagar, where he went and met Smt.Sujatha, wife of defendant no.1. The learned counsel for the applicants submits that, therefore, the two reports of the Process



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Server are contradicting each other, whereas in one it states that Mrs.Sujatha was found at the address given in the memo of parties, while in the other it is mentioned that she was not found at that address and in fact the Process Server went to another address where he found her; both cannot co-exist.

4. The learned senior counsel for the applicants further submits that the Process Server, in both summons, states that he had to affix the summons as Mrs.Sujatha refused to accept them. As a witness to the affixation, only two signatures appear on both the reports, but the names and addresses of these witnesses are not mentioned. Placing reliance on Order V Rule 17 of the CPC and Chapter XXI Rule 9 of the Delhi High Court (Original Side) Rules, 2018 (hereinafter referred to as the 'Delhi High Court Rules'), he submits that it is essential that where the notice is served by way of affixation, the name and addresses of the witnesses shall be mentioned in the report by the Process Server. This is to ensure that there is authenticity of process of affixation.

5. He submits that, in fact, Rule 1(b) and 1(c) of Chapter XXI of the Delhi High Court Rules would show that, ordinarily, where a defendant is not residing in Delhi, summons should be directed to be served by way of registered post with acknowledgement due. It is only in addition to this, the other means of service can be adopted. In the present case, since the applicants were not residing in Delhi, service was sought to be effected only by ordinary post and, therefore, even otherwise, there is a defect in service.

6. In support of his submissions, he places reliance on the



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judgments of Supreme Court in *Naresh Chandra Agarwal v. Bank of Baroda & Ors.*, (2001) 3 SCC 163; *Sushil Kumar Sabharwal v. Gurpreet Singh & Ors.*, (2002) 5 SCC 377; *Neeraj Realtors Pvt. Ltd. v. Janglu (dead) through Legal Representative*, (2018) 2 SCC 649; *G.N.R Babu v. Dr B.C. Muthappa & Ors.*, 2022 SCC Online SC 1158; *Sudhir Ranjan Patra (dead) through Legal Representative & Anr. v. Haimnsu Shekhar Srichandan & Ors.*, (2022) 12 SCC 809; and of this Court in *The Punjab Oil Expellers Company v. Madan Lala Nanda & Sons & Ors.*, 1966 SCC OnLine Del 15; and, *Neena Soni v. Rakesh Soni*, 2004 SCC Online Del 842.

7. The learned counsel for the plaintiff, on the other hand, submits that a mere irregularity in the service of summons will not be sufficient to set aside a Decree of the Court. He submits that, therefore, non-mentioning of the names and addresses of the witnesses to the affixation of the summons, will not be a sufficient reason to set aside a Decree passed by this Court.

8. He further submits that in terms of Section 119 of the Bharatiya Sakshya Adhiniyam, 2023 (hereinafter referred to as the 'BSA'), there is a presumption that the judicial act has been regularly performed. The report of the Process Server, therefore, cannot be interfered with to the contrary.

9. He submits that in terms of Section 104 of the BSA, the burden of proving that the summons were not duly served on the defendants, is on the defendants. The defendants have not led any evidence to show that they were not residing at the given address or had not been duly served with the summons by the Process Server.



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10. The learned counsel for the plaintiff further submits that there is a considerable delay in the defendant nos.1 and 2/applicants approaching this Court by way of the present applications. He submits that the Decree was passed *ex parte* on 13.12.2017. The present applications have been filed by the defendant nos.1 and 2/applicants only on 08.11.2019, that is, with a delay of almost two years. He submits that no explanation for this delay, much less a sufficient explanation, has been rendered by the defendants for the same.

11. He further submits that mere denial of Mrs.Sujata Saini of any attempt being made to serve the summons on her, cannot be a ground to set aside the *ex parte* Decree that has been passed in favour of the plaintiff.

12. In rejoinder, the learned senior counsel for the defendant nos.1 and 2/applicants submits that apart from the fact that the procedure as prescribed by the law was not followed for ensuring service of summons of the Suit on the defendants, even otherwise, the defendants came to know of the passing of the impugned Decree only in October 2019. Thereafter, an inspection of the file was made on 22.10.2019 and on getting the information on the facts of the case, the present applications were filed. He submits that the applications have, therefore, been filed within 30 days of knowledge in terms of the Article 123 of the Schedule to the Limitation Act, 1963.

13. I have considered the submissions made by the learned counsels for the parties.

14. In the present case, summons in the suit were issued to the defendants on 09.01.2017.



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15. In the Order dated 13.04.2017 passed by the learned Joint Registrar (Judicial), it was recorded that the summons have been refused to be accepted by the wife of the defendant no.1-Smt.Sujata Rishi on 03.04.2017 and were thereafter served by way of affixation. As far as the defendant no.2 is concerned, it was stated that Smt.Sujata Rishi is also a Director of the defendant no.2/Company and, therefore, due to refusal to accept the summons, even the defendant no.2 is deemed to have been served with the summons in the suit.

16. Order V Rule 17 of the CPC prescribes the procedure that has to be followed where the defendant refuses to accept service or cannot be found at the given address. The same is reproduced hereinbelow:

***“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***



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affixed.”

(Emphasis supplied)

17. Rule 1 of Chapter XXI of the Delhi High Court Rules, as were applicable on the date of issue and alleged delivery of summons on the defendants, also provided that service of any notice upon a person who resides outside the jurisdiction of this Court may ordinarily be effected by pasting a copy of the document required to be served in a prepaid envelope registered for acknowledgement addressed to the party or his agent empowered to accept the service, at the place where the party or his agent resides or carries on business or personally works for gain. Sub-Rule (c) of Rule 1 of Chapter XXI of the Rules, however, further provided that notwithstanding the above, the Registrar may direct, in a particular case or class of cases, that the service shall be effected in the manner provided in the CPC for service of summons. Therefore, ordinarily and in regular course, for a defendant, who is resident of outside Delhi, the proper mode of effecting service of summons would be by way of registered post with an acknowledgement due. The other modes are to be followed as an exception.

18. Rule 9 of Chapter XXI of the Delhi High Court Rules further stated that the Process Server shall, wherever possible, obtain on the original process the endorsement by signature or thumb impression of a respectable person of the locality identifying such person or place of residence or the house or property on which the process is served.

19. Rule 10 of Chapter XXI of the Delhi High Court Rules further stated that where the defendant or his agent refuses to sign the



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acknowledgment of service, the Process Server 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 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*’. The Process Server shall also obtain the signature of the person, who identified the person or in whose presence the copy was affixed on the said house, in case the summons are refused to be accepted.

20. Therefore, apart from obtaining the signatures of the person before whom the affixation is carried out on the refusal of the defendant or his agent to accept the summons, the name and the address of such witness is also to be mentioned by the Process Server on the summons while returning the same to the Court.

21. Rule 1, Rule 9, and Rule 10 of Chapter XXI of the Delhi High Court Rules, as were then applicable, are reproduced hereinbelow:

*“1. Service of notice—(a) Except where otherwise provided by these Rules, or ordered by the Court, all summons, notices other documents required to be given to or served on a party or person, who resides within the jurisdiction of this Court, shall be served on such party or person either personally or on his advocate.*

*(b) Service of any notice, order or other document upon a person, who resides outside the jurisdiction of this Court, but within the territory of India, may ordinarily be effected*



*by posting a copy of the document required to be served in a prepaid envelope registered for acknowledgement addressed to the party or his agent empowered to accept service, at the place where the party or his agent resides or carries on business or personally works for gain.*

*(c) Notwithstanding anything hereinabove contained in rule 1(b) the Registrar may direct in a particular case or class of cases, that the service shall be effected in the manner provided by the Code for service of summons.*

*(d) Unless the contrary is proved, a document served by post shall be deemed to be served at the time at which it would be delivered in the ordinary course of post.*

**9. Endorsement of identifier on the original process—** *If the serving officer is not personally acquainted with the person to be served, he shall, whenever possible obtain on the original process the endorsement by signature or thumb-impression of a respectable person of the locality identifying such person or place of residence or the house or property on which the process is served.*

**10. Procedure where defendant refuses to accept service or cannot be found—** *Where the person to be served, or his agent, refuses to sign the acknowledgment of where the serving Officer, after using all due and reasonable diligence, cannot find that person and there is no agent empowered to accept service of the summons on his behalf, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which that person 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 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*



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*house was identified and in whose presence the copy was affixed. He shall also obtain the signature of the person on the return, who identified the person or in whose presence the copy was affixed on the said house.”*

22. In the present case, admittedly, the summons which have been received back merely bear purported signatures of the two witnesses. Their names and address are not mentioned in the summons which were received back.

23. Though mere irregularity in service of summons on the defendants may not be a ground for setting aside the Decree passed *ex parte* against such defendants, in the present case, the report of the Process Server which has been received back, does not inspire any confidence of this Court.

24. As far as the summons issued to the defendant no.1 is concerned, its service report reads as under:





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25. In the above, the Process Server states that he went to the house of the defendant no.1 and the address of the defendant no.2, where he did not find the defendant no.1, however, found his wife-Smt.Sujata. She, in turn, told him that the defendant no.1 had gone out of station for some work and normally returns in a month or two months. She also refused to accept service. She later called the defendant no.1 and stated that the defendant no.1 would be returning next month and she cannot accept notice on his behalf. The Process Server further states that, on such refusal, he affixed the copy of the notice in front of the two witnesses on the main door of the house. The said proceedings are said to have been taken place on 03.04.2017.

26. As far as the defendant no.2 is concerned, the process server for his report of the same day, that is, 03.04.2017, for the same address, states that when he reached there, he found that the defendant no.2 has closed its business and pertinently, the defendant no.1 does not stay there. He states that he was told that the defendant no.1 now stays in a house opposite the house of Ex. M.P. Mr.Harpal Singh Sathi. He went to the said house and there he found Smt.Sujata. Therefore, for the same day, in one report, he states that he found Smt.Sujata at the address given in the memo of parties by the plaintiff, while in the other, he states that he did not find the defendants at the said address. The two cannot co-exist. The report is reproduced herein under:



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सेवा चरपा

सेवा से

श्री साह जी आज दिनांक 03-04-2017 को दिने जेमे  
पते पर जाकर कैप्टनरी जेम्स प्रिवेट लिमिटेड ड.14  
आवास विभाग काली-री कडकी को तलाश किया।  
जाकी तलाश करने के बाद पता चला कि महु

(13) Cherry Games Pvt. Ltd. श्री अश्वनी-सै-री की श्री  
इस महु छन्द हो गई है। और अब इस इकाई पर  
अश्वनी सै-री जी नहीं रहते हैं। अब रायगढ़ में पुर्व  
सांसद हरपाल साह जी के अकान के सामने वाले बकिाने मरहे  
हैं। राफिल कुनिदा ने वहां पर जानकारी की तो वोके तकील  
पर Cherry Games Pvt. Ltd. के डायरेक्टर श्री अश्वनी सै-री की  
पारिवर्तनी गति सुजता जी मिली। इ-होने बताया कि अरेपारी  
बाहर रहते हैं वे कभी-कभी भी महु कडकी में आते हैं।  
और मुझे इस की कोई जानकारी नहीं है। इसी लिए मैं  
यह नोटिस नहीं दे सकती।  
महु कडकर इन्होंने बायबी के नाम का नोटिस लेने में साफ इच्छा  
काल दिया व किसी कारण पर अपने हस्ताक्षर करने से भी इच्छा  
न कर दिया।  
महुसाह जी तकील कुनिदा ने एक प्रति नोटिस महु-मकान के  
महुसाह जी तकील कुनिदा के गेट पर चरपा कर दिया।  
Cherry Games Pvt. Ltd. के गेट पर चरपा कर दिया।  
मौके पर दो लोग ने अपने अपने हस्ताक्षर करने से भी इच्छा  
अहोदम जी लौट सेवा में भाग ले रहे हैं।

प्रीत अलम  
विनी गोविंद  
अपराध, उद्योग

श्रीमती सुजता  
डा. दीक्षा कश्यप  
अजय कुमार  
सिद्धिनाथ जी  
कडकी

अहोदम जी आज दिनांक 03-04-2017 को तकील कुनिदा  
ने उपरोक्त रिपोर्ट का अपराध पुर्वक समान किया।

प्रीत अलम  
अपराध (5/4/24)  
अपराध, उद्योग

श्रीमती सुजता  
डा. दीक्षा कश्यप  
अजय कुमार  
सिद्धिनाथ जी  
कडकी

27. In the report of service for the defendant no.2, the process server further stated that the wife of the defendant no.1 refused to accept notice stating that she cannot accept the same. Smt.Sujata has now filed an affidavit stating that she never met the Process Server and never refused to accept summons of the suit.

28. In *Sushil Kumar Sabharwal* (supra), the Supreme Court emphasised that where the endorsement by the process server of the



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service of summons is difficult to believe even *prima facie*, the decree passed *ex parte* is liable to be withdrawn.

29. In view of the above, I find that the satisfaction recorded by the learned Joint Registrar (Judicial) of the refusal of the defendants to accept summons and of their service by way of affixation, *vide* Order dated 13.04.2017, was incorrect.

30. As far as the plea of the learned counsel for the plaintiff that there is a presumption attached that a judicial act must have been regularly performed is concerned, while there is no doubt on the proposition of law, the presumption is always rebuttable in nature. In the present case, from the record, as noted hereinabove, and on the basis of the affidavit filed by the wife of defendant no.1, the presumption as contained in Section 119 of the BSA stands rebutted by the defendants.

31. On the plea of limitation, it has been contended by the defendants that they came to know of the passing of the decree only in October, 2019. They have moved the present applications in November, 2019, that is, within the period of limitation as prescribed in Article 123 of the Limitation Act, 1963. Therefore, there is no merit in the said submission of the learned counsel for the plaintiff.

32. In addition to the above, what is most important is that the plaintiff knew that the defendant no.1 had shifted his residence, as is evident from the letter dated 05.04.2017 addressed by the plaintiff to the defendant no.2 through defendant no.1. In spite of such knowledge, the plaintiff attempted to take advantage of the report of the Process Server, which, in view of the analysis hereinabove, was



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totally unreliable.

33. In view of the above, I find that the defendants have shown sufficient cause for their non-appearance in the Suit. The applications are allowed. The *ex parte* Decree dated 13.12.2017 is accordingly set aside. The Suit be reinstated.

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34. The defendants shall file their written statement within the prescribed period. Along with the written statement, the defendants shall also file affidavit of admission/denial of documents filed by the plaintiff. The plaintiff shall, on receipt of the copy of the written statement from the defendants, be entitled to file replication along with affidavit of admission/denial of documents filed by the defendants, if any, within the prescribed period.

35. List before the learned Joint Registrar (Judicial) on 18<sup>th</sup> December, 2024.

**NAVIN CHAWLA, J**

**SEPTEMBER 9, 2024/rv/ns/VS**

*Click here to check corrigendum, if any*