

HIGH COURT OF CHHATTISGARH, BILASPUR

Order reserved on : 14.08.2018

Order delivered on : 08.10.2018

WP227 No. 2897 of 2010

1. Thurlu S/o Late Tedu Bhatra, aged about 50 years
2. Gadru S/o Late Tedu Bhatra, aged about 45 years (Garud as mentioned in the impugned order dated 02.02.2010)

Both R/o Village Badeamawal, Tahsil Jagdalpur, District Bastar (Chhattisgarh)

---- Petitioners

Versus

1. Arkhit Baghel, S/o Late Shobi Bhagel, Aged About 65 Years
2. Ameer Baghel Since Dead, Through Legal Representative Veeru Ram S/o Late Ameer Baghel

Both R/o vill Mohalai, Tahsil - Kondagaon, Distt Bastar- CG

3. State Of Chhattisgarh Through Collector, Jagdalpur, Distt.-Bastar, Jagdalpur, CG
4. Amal Sai Baghel, S/o Late Shobhi Bhatra, Aged About 62 Years R/o Vill. Mohlai, Tah. Kondagaon, District Bastar Chhattisgarh

---- Respondents

For petitioners	: Shri PN Bharat, Advocate
For respective respondents	: Shri RN Jha, Advocate and Ms M Asha, Panel Lawyer

Hon'ble Shri Justice Parth Prateem Sahu

CAV Order

1. The petitioners by this instant petition have challenged the impugned orders dated 22.11.2005 passed by learned Fourth Civil Judge, Class-II, Bastar at Jagdalpur and Order dated 02.02.2010 passed by learned First Additional District Judge, Jagdalpur respectively, whereby learned Court below have dismissed the Miscellaneous appeal filed by the petitioners challenging the rejection of their application under Order 9 Rule 13 of the CPC.

2. Brief facts for disposal of this petition are that respondents-1, 2 and 4 have filed suit for declaration of title and possession of the property in dispute. Learned trial Court after registering the Civil Suit, directed for issuance of notice to the petitioners/defendants therein. When the notice could not be served on them, then learned trial Court issued notice again. All the notices were directed to be issued by ordinary mode. Learned trial Court when found that notices have not been served on petitioners/defendants, then passed an order directing issuance of notice by Registered Post. The acknowledgement sent along with the Registered Post was returned back to the learned trial Court bearing signatures of the petitioners/defendants showing service of notice on them. On the date fixed and mentioned on notice sent by Registered Post, the defendants/petitioners did not appear and therefore, learned trial Court proceeded *ex-parte* and after completion of trial, decreed the suit in favour of respondents/plaintiffs on 30.04.2002.

3. The petitioners thereafter, have filed an application under Order 9 Rule 13 of the CPC for setting aside the *ex-parte* decree on the ground that notices were not served on them and it came to their knowledge only when they appeared before the Court of Naib Tehsildar, Mohlai, Jagdalpur. Learned trial Court while considering the application filed under Order 9, Rule 13 of the CPC, recorded evidence of the parties wherein the petitioners have examined two witnesses in their support. One is Gadru Ram Kashyap (AW-1) and another is Dinu Ram Kashyap (AW-2) village Postman. Learned trial Court looking to the evidence and other material available on record, ie the service report, have arrived at a

conclusion that the defendants therein were properly served and even after service, they did not appear before the Court. Learned trial Court while recording that no sufficient cause was shown for non-appearance of the petitioners/defendants on the date fixed for hearing on 19.03.2002 mentioned in the notice, dismissed the application under Order 9 Rule 13 of the CPC vide order dated 22.11.2005.

4. The petitioners aggrieved by the aforementioned order, have preferred miscellaneous appeal before learned First Additional District Judge, Bastar, Jagdalpur and learned appellate Court also considering that though there was proper service of notice on the petitioners/defendants, they did not appear and failed to show sufficient cause for their non-appearance, dismissed the appeal.

5. Learned counsel for the petitioners submitted that there was no service of notice on the petitioners and therefore, they could not appear before learned trial Court. He submitted that under Order 5 Rule 9 of the CPC, no mode or procedure was prescribed for service of notice by Registered Post prior to 01.07.2002, whereas the *ex-parte* decree itself has been passed on 30.04.2002. He further submitted that under the provisions of Order 5 Rule 9 of the CPC, the notices are to be served through Officer of the Court and no such notice was served through the Officer of the Court and lastly, submitted that the acknowledgement Ex.P/1 and P/2 bear the date as 09.01.2002 and 09.01.2004 respectively, whereas the date of hearing fixed on 19.03.2002, which also shows that there was no proper service of notice.

6. Per contra, learned counsel for respondents-1, 2 and 4 submits that learned trial Court first issued ordinary mode of notice thrice to be served on petitioners/defendants and when they were not served on all counts, then learned trial Court passed an order directing issuance of notice by Registered Post, which is within its jurisdiction and also provided under Order 5 Rule 9 of CPC. He further argues that the defendants deliberately not appeared on the date of hearing even after service of notice. He also submits that the Registered Post notice was served on defendants through the village Postman and he has been examined as a petitioners' witness before the Court and his evidence would show that the service of notice was effected on petitioners/defendants.

7. I have heard learned counsel for the parties. Perused the record. From perusal of the order sheets and the prescribed form/application for issuance of notice, it is evident that learned trial Court directed for issuance of notice on 06.10.2001 and thereafter, on 06.11.2001, second order of issuance of notice was passed for appearance on 22.11.2001. In both the notices issued to petitioner's service report was not received back to the Court as noted in order sheet.

8. Order 9 Rule 13 of CPC is reproduced here below:

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

into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided further that no court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the 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."

9. By reading the aforementioned provision, the court provides that *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 provided by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on some 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.

10. "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 view point of a reasonable standard of a cautious man. The only test that has to be applied is whether defendant honestly and sincerely intended to remain present when the suit was called for hearing and did his best to do so.

11. The notice issued to State along with petitioners was served on State which was recorded in order-sheet dated 22.11.2001. As the petitioners/defendants could not be served, then again it was directed for issuance of notice vide order dated 22.11.2001 which returned unserved with note that the date of appearance is lapsed during service process. Therefore, learned trial Court on 11.01.2002 passed an order for issuance of notice by Registered Post fixing a date for their appearance on 19.03.2002.

12. The acknowledgement sent through Registered Post was received back to the Court with signature of defendant- 1 and 2 which was marked as Ex.P/1 and P/2. The receipt of Registered Post was also available on record. Though Gadru Ram (AW-1) in his evidence denied the service of notice given through Registered Post, but the village Postman who was examined as witness by the petitioners themselves before learned trial Court as AW-2, in his statement before Court admitted that the seal endorsed on the postcard (Ex.P/1 and P/2) are not fabricated and forged. He further admits that as the notice was received by the petitioners/defendants, therefore, there was seal on the postcard/ acknowledgement. One of the petitioners/defendants did not enter into witness box to prove the ground mentioned in application u/o 9 Rule 13 of CPC.

13. Hon'ble Supreme Court in the matter of **Greater Mohali Area Development Authority and others Vs Manju Jain and others** reported in (2010) 9 SCC 157 has held as under:

"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 impeachable character."

14. Hon'ble Supreme Court in the matter of **Gujarat Electricity Board Vs Atmaram Sungomal Poshani** reported in (1989) 2 SCC 602 held as under:

"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.*"

15. In **CC Alavi Haji Vs Palapetty Muhammed** reported in (2007) 6 SCC 555, Hon'ble Supreme Court reiterated a similar view in para 14 as under:

"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..... 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."

16. Under Section 27 of General Clauses Act, notices sent on correct address will be presumed to be served on recipients unless contrary is proved. In the case in hand, acknowledgement was received back with signatures of the defendants with seal of post office. Village Postman was also examined before Court as AW-2. The burden of proof that petitioners were not served by Registered Post was on them which they attempted by pleading that there was non-service of summons but they failed to prove their pleading by placing satisfactory and cogent evidence on record. Mere pleading of any fact is not sufficient but it requires fact pleaded to be proved by cogent supporting evidence oral or documentary.

17. In the case in hand it is not a case where the acknowledgement attached with Registered Post did not return back and court below presumed that notice was served after certain fixed period of issuance of notice in fact, the village Postman (AW-2) during the proceedings u/o 9 Rule 13 of CPC entered into witness box as petitioners' witness and in his cross examination admitted that the seal and signature on the acknowledgement is there because petitioners were served with notice.

18. From the aforementioned facts, it is evident that the registered notices sent by the Court to the petitioners/defendants were served on them and it is also stated by village Postman (Government employee) and no efforts have been made to controvert the evidence of AW-2 and the signatures of the defendants on the acknowledgement of service of Registered Post.

19. From the aforementioned discussion it is also evident that it was not a case of the petitioners that there had been a fraud or collusion between the appellant and Postman. Not a single document had been summoned from the Post Office. In such a fact situation and considering the evidence of AW-2 (village Postman), the petitioners failed to prove that there was no service of summons on them.

20. So far as the grounds raised by learned counsel for the petitioners that prior to 01.07.2002 there was no procedure prescribed under CPC for issuance of notice through Registered Post is not acceptable. From bare perusal of provisions of Order 5 Rule 9 of the CPC, it is evident that the Courts have all the powers to serve notice on the defendants by other modes also other than service through proper Officer or his subordinates. Apart from it, Rule 19A of Order 5 of the CPC also provides that Court can simultaneously direct for issuance of service of notice by Registered Post. The learned trial Court first issued ordinary summons thrice and thereafter directed for service of summons by Registered Post.

21. The learned trial Court exercised its jurisdiction strictly in accordance with the provisions provided u/o 5 of CPC. The mentioning of the date on the acknowledgement as submitted by learned counsel for the petitioners to be not correlating with the date fixed for hearing also have no force, particularly when on the acknowledgement/postcard received back by the Court ie Ex.P/1 and P/2 specifically bears the date of appearance on 19.03.2002 and as per order which was recorded by learned trial Court, the said acknowledgement was received back after service and signature of defendants prior to 19.03.2002 and learned trial

Court proceeded *ex-parte* only at 4 pm. The proceeding of Court cannot run on the choice of litigant but the courts are required to proceed in accordance with law and procedure prescribed thereunder.

22. In view of the aforementioned discussions, I am of the view that petitioners/defendants were served by Registered Post and no sufficient cause for non-appearance of the defendants/petitioners before learned trial Court on the date fixed for their appearance has been shown. Learned Courts below rightly dismissed the application filed under Order 9 Rule 13 of the CPC filed by the petitioners. I do not find any illegality or infirmity in the orders passed by learned Courts below.

23. In the result, the Writ Petition being devoid of substance and merit, is liable to be and is hereby dismissed.

24. No order as to costs.

Sd/-
(Parth Prateem Sahu)
JUDGE