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

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Judgment delivered on: 15.03.2018

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FAO 95/2017

B S CHILLAR

..... Appellant

Through: Mr. Hem C. Vashisht, Advocate.

versus

USHA GUPTA & ANR.

..... Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

FAO 95/2017 & CM APPL. 7332/2017, CM APPL. 7333/2017

1. This appeal impugns an order dated 07.11.2016 passed by the learned ADJ in execution of decree in Suit no. 808/2009. In the appeal records, as per the report of the process server dated 23.05.2017, respondent no.1 has been served through her grand-son as well as through her previous counsel Mr. Vasu Singh. Additionally, an affidavit dated 30.03.2017 proving service through Speed Post on 27.03.2017 has been filed. Respondent no.1 stands served. Respondent no.2 was served but subsequently deleted from the array of parties.

2. It is the appellant's case that a suit for recovery of monies was instituted by respondent no.1 (plaintiff) against respondent no.2 (defendant no.1) and the appellant (defendant no.2). The appellant was never privy to any transaction of the suit property which is situated in Alwar, Rajasthan.

Notice in the suit was not served upon him and his address remains the same in Rajasthan. He was a property dealer and had only introduced the parties to each other. The transaction between them is unknown to the appellant. Notice was purportedly served upon the appellant via publication in the English Daily – The Statesman, a newspaper which is neither circulated nor available in Alwar, Rajasthan, therefore, he never had notice of the suit proceedings. The learned counsel for the appellant submits that a claim for recovery of monies would not lie against the appellant because the documents relied upon by the plaintiff do not even mention his presence at the time of their execution, let alone any money being given to the appellant; that in the absence of any privity of contract between the plaintiff and the appellant or anything having been received by the appellant or his having extended any assurance to the plaintiff, no liability could ever be fastened upon the appellant. Accordingly, he submits that the impugned order dated 07.11.2016, passed in the execution proceedings, concluding *inter alia* that the appellant's non-appearance was intentional and malafide, is erroneous and without basis. He contends that no legal notice, preceding the institution of the suit, was addressed to the appellant; although one notice was allegedly addressed only to respondent no.2. Even the Police Compliant (Ex. Pw1/8) filed on 20.11.2008 only alludes to the appellant but does not specify any criminality on his hands and does not record any monies having been paid to the appellant or any surety having been extended by the appellant to the respondent. He states that the *ex parte* decree is primarily against respondent no.2, who is stated to have received monies from the plaintiff/respondent no.1; he contends that the appellant has been roped in into the litigation without any justification and a liability has been fastened upon him without

any basis. There is no averment in the plaint that any monies were received by the appellant.

3. The facts of the case are that the respondent had filed a suit for recovery of Rs. 15 lacs with *pendente lite* interest at the rate of 24% per annum till realization of the decretal amount. The suit was filed against respondent no.2 and the appellant (arrayed as defendant nos. 1 and 2 respectively, in the suit). It was the plaintiff's case that on the basis of an agreement to sell, for the purchase of certain lands in Alwar, Rajasthan, against a total sale consideration of Rs. 60,60,600/-, an amount of Rs. 15 lakhs had been paid by the plaintiff to defendant no.1 i.e. Mr. Dharamveer, (respondent no.2 in this appeal). The address of the appellant was shown as Baba Bhagwan Das Properties, Office near Chaurahan, Alwar Road, Behror, Alwar (Rajasthan). Notice was sought to be served upon him but was not effected through ordinary process, hence notice was served via publication in The Statesman newspaper, which according to the learned counsel for the appellant, is neither circulated nor available in Rajasthan. Hence the said publication cannot constitute the substitute service.

4. The appellant was proceeded ex parte, so was defendant no.2 who had allegedly received Rs. 15 lakhs from the plaintiff. The ex parte decree was passed on the basis of evidence led by the plaintiff through his Special Power of Attorney (SPA) - Mr. Rajiv Gupta who had filed his evidence by way of affidavit and essentially relied upon three documents: (i) the original agreement to sell (Ex. PW1/2); (ii) copy of the legal notice (Ex. PW1/3) sent to defendant no.1; (iii) complaint (Ex. PW1/8) filed before Police Station Model Town, Delhi, in terms of what has been stated in the plaint.

5. It is the appellant's case that in the first instance the suit could not

have been adjudicated in Delhi since no cause of action arose in the NCT of Delhi, because the suit property is situated in Alwar; in any case no liability could be fastened upon the appellant because the aforesaid three documents relied upon by the plaintiff, did not even whisper any receipt by the appellant or of his presence during the execution of the said documents, let alone his being a party to the same; the appellant has neither received any money nor was it transacted in his presence; if indeed he was present or party to the alleged transaction, the document relied upon by the plaintiffs would have so specified. Furthermore a legal notice was not issued to the appellant, like it was so to defendant no.1. Therefore, if any liability were to be fastened, it could be only upon defendant no.1 and not against the appellant. He submits that the suit had been proceeded against the appellant who was not a necessary party to the suit proceedings. The learned counsel for the appellant has drawn the Court's attention to Exhibits PW1/2 and PW1/3 which do not show that any monies have been transacted in the appellant's presence or otherwise having been received by him or that he stood guarantee for repayment of the said monies.

6. The impugned judgment records that summons were issued to defendant no.1 through registered post, which was returned back with report 'refused', accordingly defendant no.1 was proceeded ex parte on 25.05.2009. Apropos the appellant the impugned judgment records that as per the report of the process server (of the Court of ACJM, Bahrod), the appellant had left the given address, hence publication was effected on him through substituted service under Order 5 Rule 20 CPC. The learned counsel submits that the report of the process server of the court of ACJM, Bahrod is erroneous because the appellant has all along continued his

business from the said premises and he never left that place. In any case the substituted service cannot be deemed to be a service upon him since the publication in English Daily Statesman is not circulated or otherwise available in Bahrod. He also argues that in the absence of any liability against the appellant for repayment of such monies or in the absence of notice of the suit having been served upon him, he cannot be held liable. He submits that therefore the impugned order dated 07.11.2016 is erroneous in so far as it concludes that the non-appearance of respondent no.2 i.e. the appellant herein was intentional or malafide.

7. From the preceding narration and arguments what emerges is that the process server's report recording that the appellant had left the given address was taken as sufficient information, for a substituted service by way of publication to have been resorted to. The said report went unrebutted. Indeed it could not have been rebutted in the absence of any notice to the appellant. The substituted service by publication in a Delhi based English newspaper – The Statesman, which is not available locally otherwise circulated in the town of Bahrod in Rajasthan where the appellant is based, cannot be deemed to be service of notice. His being proceeded ex-parte was erroneous. The impugned order suffers from denial of natural justice to the appellant, since he was not heard. The Court is of the view that if notice of motion on a party remains unserved, a decree fastening liability upon him, cannot be sustained. Furthermore, none of the documents relied upon by the plaintiff either mention the plaintiff in it or fasten any liability upon him. Neither was any legal notice served upon him. No claim is made against him. Therefore even on merits no case could be made out against the appellant for the relief of a money decree.

8. In view of the aforesaid, the impugned order apropos the appellant, is set aside. The appeal is allowed in the above terms.

NAJMI WAZIRI, J

MARCH 15, 2018/kk

