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

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Judgment delivered on: 17.08.2021

+ FAO 141/2021 & CM APPL.14923/2021

SMT. KAILASH KUMARI SHARMA Appellant

versus

SMT. KAMLA DEVI (DECEASED) THROUGH HER LEGAL
HEIRS & ORS. Respondents

Advocates who appeared in this case:

For the Petitioner: Mr. Narender Bhandari and Mr. Manjeet Singh,
Advocates.

For the Respondent: Mr. Nagendra Kumar, Advocate.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. The hearing was conducted through video conferencing.
2. Appellant impugns order dated 01.04.2021 whereby the application filed by the appellant under Order 9 Rule 13 Code of Civil Procedure (CPC for short) has been dismissed.
3. Subject suit was filed by the respondents for possession, permanent and mandatory injunction and for recovery of arrears of rent, mesne profits and damages.

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4. It is contended in the suit that appellant is a tenant under the respondent at a rate of Rs.4000/- per month and despite vacation notice has failed to vacate the premises.

5. Learned counsel for the appellant/defendant submits that appellant is not a tenant in the property but is an owner of the property and the property was purchased by the husband of the appellant. It is submitted that respondents have fabricated the documents after the property was purchased by the appellant.

6. Further it is contended by learned counsel for the appellant that appellant was neither served with the summons of the suit nor was aware of the pendency of the suit. He submits that no opportunity of leading evidence was granted to the appellant to show that appellant was never served with the summons of the suit.

7. Impugned order dated 01.04.2021 holds that the application under Order 9 Rule 13 on the face of it is devoid of merits. Trial Court has held that initially the appellant stood served through her daughter-in-law and even an affidavit to the said effect was filed by the respondent plaintiff.

8. The Trial court records that the Court by its order dated 27.03.2017 directed fresh service on the appellant. Trial Court further records that appellant had even refused to accept/claim the process/summons as reported by the postman who had gone to deliver

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the same at the address of the appellant.

9. The Trial Court in the impugned order has recorded that the order sheet of the day reveals that one Ms. Jyoti was found at the given address who claimed herself to be the daughter of the appellant and she refused to accept the service. Thereafter summons were affixed at the address of the appellant. Accordingly, the Trial Court has held that it was valid service in the eyes of law.

10. Further Trial Court has held that the order sheet revealed that appellant did not claim/receive the summons sent through registered post despite visits by the postman on two different dates.

11. In view of the above, the Trial Court has returned a finding that appellant clearly knew about the filing of the suit and intentionally avoided to receive the process as well as to appear in the Court to defend the suit.

12. The Trial Court has additionally held that as the address was correct and even legal notice was received by the appellant at the said address, the application under Order 9 Rule 13 was devoid of any merits and was dismissed.

13. Perusal of the record of the Trial Court shows that the suit was listed before the Court for the first time on 16.12.2016 when notice was directed to be issued, returnable for 22.12.2016.

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14. The endorsement of the court staff on the order sheet dated 16.12.2016 shows that *dasti* summons were collected by the counsel for the respondent on 20.12.2016.

15. Order sheet of 22.12.2016 records that the appellant is served through her daughter-in-law Smt. Meenakshi Sharma. The Trial Court directed the respondent to file an affidavit to the said effect and accordingly the proceedings were adjourned to 22.03.2017. On 22.12.2016 there was admittedly no service report on record.

16. There is an endorsement of the court staff on the order sheet dated 22.12.2016 for the next date that process is unserved and registered envelope is unclaimed.

17. Order sheet of 27.03.2017 records that affidavit of compliance was filed by Sh. Alok Chandra son of the respondent on 13.01.2017. The Trial Court has recorded that process issued did not show any report on the back of the process and the affidavit of compliance did not disclose that respondent was accompanied by any process server. The Trial Court thereafter holds that there is no service in the eyes of law. An application was also moved on the said date under Order 22 Rule 3 to bring on record legal heirs of the deceased respondent/plaintiff. Notice was directed to be issued on the said application under Order 22 Rule 3 as well as on the suit, returnable for 07.06.2017.

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18. Order sheet of 07.06.2017 records that on the returned registered envelope there is an endorsement that the house was found locked on 17.05.2017. The returned postal envelope records that Postal Information was delivered on 18.05.2017 and on 24.05.2017 the postman has reported that the envelope was unclaimed.

19. Perusal of the returned envelope shows that there is an endorsement 'ID'. There is no endorsement on the envelope as to whom the postman had given any intimation about the registered envelope.

20. Since there is no endorsement on the postal envelope as to who was informed about the registered envelope, said endorsement of 'ID' cannot be accepted as an intimation to the appellant. Further, the endorsement that the envelope remained unclaimed is also of no consequence as there is no clarity as to who was informed, if at all, by the postman.

21. Further perusal of order dated 07.06.2017 shows that it records that the process server had visited the premises on 24.04.2017 and the premises were found locked.

22. In the above circumstances, the Trial Court did not believe that any service had been affected on the appellant. Accordingly, the Trial Court directed fresh service on the appellant and directed that in case of refusal or premises being locked, the process server shall serve the

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summons through affixation.

23. On the subsequent date i.e. 02.08.2017 the Trial Court has recorded that summons were served by affixation upon the appellant in view of the refusal by a woman claiming herself to be Jyoti. Trial Court has further recorded that summons sent through registered post were received back unclaimed with the endorsement of visits on two dates by the postman and report of intimation delivered.

24. The Trial Court has also noticed that earlier reports were also to the same effect and therefore there is deemed service and since none appeared for the appellant, appellant was proceeded ex parte.

25. Perusal of the summons sent, returnable for 02.08.2017 through registered post once again show endorsement "ID" and "unclaimed". Once again the endorsement by the postman does not indicate as to who was given the intimation about the registered envelope. Since there is no clarity as to who was informed about the said envelope, it cannot be presumed that there was intimation to the appellant of the summons sent by the Court.

26. Further, report of the process server dated 15.07.2017 records that the process server had allegedly gone to the spot and met a lady who gave her name as Ms. Jyoti and claimed to be the daughter of the appellant and verbally informed the process server that she could not accept the summons as she had been asked not to. Thereafter the

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process server records that in view of the orders of the Court the summons were pasted. It further records that no witness was found at the spot so no evidence of pasting was produced.

27. The question as to whether the summons were tendered to the daughter of the appellant or even pasted at the spot are not substantiated by any evidence or witness found at the spot.

28. Trial Court has acted solely on the basis of an endorsement by the process server that he had met one lady who stated her name to be Jyoti and claimed to be the daughter of the appellant and she refused to accept the summons and thereafter the summons were pasted on the spot. This is not supported by any material or evidence on the spot. There is no photograph filed by the process server to substantiate that he had even visited the property, tendered the summons to Jyoti and she refused or that he pasted the same on the house of the appellant.

29. In any event this would have raised a disputed question of fact on which the Trial Court was obliged to give an opportunity to the appellant to lead evidence.

30. Further perusal of the order proceeding ex parte shows that what has played with the mind of the Court is not only the alleged refusal and pasting on 15.07.2017 but the earlier reports of the postman about intimation delivered.

31. As noticed hereinabove mere endorsement on an envelope 'ID'

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without indicating as to who has been informed would not even give rise to a presumption that appellant was made aware of the pendency of the present suit.

32. Further as noticed hereinabove, the reports of the postman were disbelieved by the Trial Court as sufficient service or raising any presumption of knowledge and that is why the Trial Court had directed fresh summons to be issued. Once the Trial Court has itself disbelieved the postal reports the same could not have formed the basis of holding that appellant was aware of the proceedings and proceeding ex parte against him.

33. Even if assuming a presumption is raised against the appellant, the Trial Court should have given an opportunity to the appellant to disprove the same. This was not done.

34. Reliance has been placed by learned counsel for the respondent on second proviso to Order 9 Rule 13 CPC to contend that mere irregularity of service would not be a ground to set aside the ex parte decree.

35. Second proviso to Order 9 Rule 13 CPC reads as under:-

“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

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claim.”

36. Reading of the said proviso clearly shows that the proviso would come into play only if there was service but it was irregular and the Trial Court is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

37. As noticed above there is no material on record to show that there was any service on the appellant or any family member of the appellant or any intimation to the appellant about the pendency of the present suit.

38. The Trial Court in the impugned order has relied on the endorsement “ID” of the postman. As noticed above the said endorsement does not in any manner give rise to the presumption that appellant had notice of the date of hearing.

39. Accordingly, it cannot be held that this was a mere irregularity in the service of summons. The contention of the appellant is that there was no service at all. It is only when the service had been affected that the issue of irregularity in the service of summons would be relevant.

40. Accordingly, second proviso to Order 9 Rule 13 CPC does not further the case of the respondent.

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41. Further reliance has been placed by learned counsel for the respondent on Order 5 Rule 15 CPC which provides for service on an adult member of a family and proviso to Order 5 Rule 9 sub Rule (5) CPC which empowers the Court to declare that a summons have been duly served on the defendant in case an acknowledgement or receipt purporting to be signed by the defendant or his agent is received back by the Court or postal article containing the summons is received back by the Court with an endorsement of the postal employee that the defendant or his agent has refused to take delivery of the postal article containing the summons.

42. Even if assuming that the Court could have, in the facts and circumstances of the case, raised a presumption that summons have been served on the appellant, it was obligatory on the part of the Trial Court to give an opportunity to the appellant to rebut the presumption, which has not been done.

43. Further reliance is placed by learned counsel for the appellant on the judgment of the Division Bench of this Court in *Sweety Gupta vs. Neety Gupta & Ors.*, 2016 SCC online Delhi 5668.

44. The judgment in the case of *Sweety Gupta (Supra)* also does not help the case of the respondent in as much as the judgment specifically refers to a decision of the Supreme Court in *Basant Singh and Anr vs. Roman Catholic Mission*, 2002 (7) SCC 531 which lays down that the onus of proof in a case of Order IX Rule 13 CPC would

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be discharged by the defendant being required to examine the postman who would have been a material witness and whose evidence would have a bearing for proper adjudication of the issue. In *Sweety Gupta* the Division Bench has specifically noticed that not only the summons in the suit but also the notices sent in compliance of Order XXXIX Rule 3 CPC were refused to be accepted by the defendant and there was an endorsement to the said effect.

45. In *Sweety Gupta (Supra)* it was only one of the defendants who had sought setting aside of the *ex parte* decree and the Division Bench has categorically held that said defendant acted in collusion with other defendants and had sought to delay the proceedings and avoid appearing in the suit.

46. In the said case, not only a copy of the plaint but also notices were sent by the Local Commissioner who had been appointed by the Court. It is in those facts and circumstances that the Court refused to set aside the order under Order 9 Rule 13 CPC. Said judgment is not applicable to the facts of the present case.

47. In the facts and circumstances of this case, as held hereinabove, an issue should have been framed by the Trial Court as to whether the appellant was served and/or had knowledge of the pendency of the suit and thereafter an opportunity should have been given to the appellant to lead evidence to rebut the same.

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48. Since the said procedure has not been followed, I am of the view that the Trial Court has erred in dismissing the application under Order 9 Rule 13 CPC.

49. Accordingly the impugned order dated 01.04.2021 is set aside. The application under Order 9 Rule 13 CPC filed by the appellant is restored to the file of the Trial Court.

50. Parties shall appear before the Trial Court for directions on 16.09.2021.

51. Trial Court shall thereafter proceed to frame an issue and give an opportunity to the appellant to lead evidence in support of the application under Order 9 Rule 13 CPC.

52. Trial Court shall thereafter proceed to expeditiously decide the application under Order 9 Rule 13 CPC in accordance with law.

53. Appeal is allowed in the above terms.

54. Copy of the Order be uploaded on the High Court website and be also forwarded to learned counsels through email.

SANJEEV SACHDEVA, J.

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