



\$~

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

Reserved on: 17.08.2023

Decided on: 31.08.2023

+ FAO 144/2023, CM APPL.31772/2023 & 35118/2023

SHAILESH RAI Appellant

Through: Mr. Sanjay Gupta, Adv.

versus

ANUJ TYAGI & ANR. Respondents

Through: Mr Rajesh Bhatia and Mr Naveen
Thakur, Advocates for R-1

Mr K.P Singh Chauhan, Adv. for R-2

CORAM:

HON'BLE MS. JUSTICE POONAM A. BAMBA

J U D G M E N T

POONAM A. BAMBA, J

1.0 Vide present appeal, the appellant is assailing order dated 12.05.2023 passed by the Ld. ADJ-04, North-West District, Rohini Courts, whereby the appellant's application under Order IX rule 13 of The Code of Civil Procedure, 1908 ('CPC') bearing no. Misc. DJ 301 of 2022 titled as "Anuj Tyagi vs. Kare India Development Services Pvt. Ltd. & Anr." for setting aside of ex parte judgment and decree dated 06.07.2020, was dismissed.

2.0 Ld. Counsel for the appellant submitted that the Ld. ADJ failed to appreciate that from 18.04.2018 to 08.05.2018, the appellant and his wife were in Mumbai; and had even placed on record air tickets in support. Further, at that time the appellant's daughter was studying in Haldwani, Uttarakhand, since 2017 and the appellant's seventeen years old minor son





was staying with his *Chacha* in Sector-11, Rohini, Delhi. Only their domestic help Sanjit Kumar was at home at that time. These facts clearly show that there was no attempt on the part of the appellant to evade service. Ld. Counsel also submitted that relying upon the report dated 26.04.2018 of the process-server, the Ld. Trial Court arrived at conclusion that the appellant failed to appear despite service, totally ignoring that the appellant and his wife were not in Delhi during that period.

2.1 Ld. Counsel for the appellant also argued that the Ld. Trial Court even erred in referring to the past conduct/process-server's report pertaining to the previous date of hearing while rejecting the appellant's plea. He submitted that in terms of Order IX rule 13 CPC, the appellant was required to explain his conduct of non-appearance only on the date of hearing, when he was proceeded ex-parte. His conduct pertaining to the previous date of hearing could not have been taken into consideration for rejecting the explanation offered. In support, reliance was placed upon the judgment of the Hon'ble Supreme Court in *Tea Auction Ltd. vs. Grace Hill Tea Industry and Anr.*, AIR 2007 SC 67.

3.0 *Per contra*, Ld. counsel for the respondents submitted that the appellant has failed to explain his non-appearance despite service for 01.03.2018 as well as for 05.05.2018. Ld. counsel also submitted that the appellant has simply stated that he as well as his wife were away to Mumbai on 18.04.2018 and returned on 08.05.2018, but no explanation has been provided for his non-appearance on 01.03.2018. Even the Ld. Trial Court has observed in its order dated 01.03.2018 that as per the service report, the



defendants/ appellant herein seem to be evading service of summons. In view of which, fresh summons were issued directing service even by way of affixation, returnable on 05.05.2018. The summons for 05.05.2018 were duly served by way of affixation as per report of process-server dated 26.04.2018. It was argued that in terms of Order V rule 17 CPC, the summon was duly affixed on the wall adjacent to the gate i.e. the conspicuous part of the house in which the appellant no. 1 ordinarily resided/ carried on business. Further, the process-server has duly attested/stated on oath the factum of affixation. Summon was also served by way of “refusal” as reported on the envelope whereby the summons were sent by Speed Post. Ld. counsel for the respondents also submitted that the appellant has not disputed the identification of the property and the address. It is also not disputed that the person found at the given address/servant Sanjit Kumar was made aware of the summons. The appellant has not even disputed report of refusal on the speed post. Nor has he disputed the affixation of summons at conspicuous place. Further, the fact that the moment, the summons were issued at the same/given address in execution proceedings, the appellant filed application under Order IX rule 13 CPC for setting aside the ex-parte judgment against him. These facts clearly show that the appellants’ non-appearance during pendency of the suit was deliberate.

3.1 Ld. counsel for the respondent further argued that the appellant has failed to place on record any document in support of his plea that at the relevant time, his daughter was studying in Uttarakhand and his son was residing with his uncle. Thus, there is no infirmity or illegality in the



impugned order.

3.2 Ld. Counsel for the respondent also argued that the appellant was very much aware of filing of the suit against him through the respondent and even through the complaint lodged against him in PS Burari. Ld. Counsel also submitted that a number of recovery cases as well as cases under Section 138 Negotiable Instruments Act have been filed against him by various persons and the appellant has therefore been avoiding the process of law. The appellant cannot be allowed to take advantage of his own wrong.

4.0 In rebuttal, Ld. counsel for the appellant submitted that Order V rule 20 CPC requires affixation of summons on some conspicuous place at court house and at the conspicuous part of the house, in which the defendant last resided/carried on business. Whereas in the instant case, there is no report regarding affixation of summons in the court house. Thus, the summons cannot be said to be duly served by way of affixation.

5.0 I have duly considered the submissions made by both the sides.

6.0 Perusal of the trial court record shows that vide order dated 02.11.2017, the Ld. ADJ directed issuance of summons to the defendants/the appellant herein on filing of PF/RC returnable on 01.03.2018. The summons sent to the appellants no. 1 and 2 through ordinary course were received back with the report of the process-server dated 23.02.2018 to the effect that at the given address one person was found, who identified himself as Sanjit Kumar, servant of the appellant and informed that the appellant was out of



station and he was not aware about the appellant's return. The summons sent through registered post was received back with the report – "*baar baar jaane par prapt karta nahi mila*", and the report shows that the postman visited the given address eight times from 14.02.20218 to 22.02.22018. Considering these reports, the Ld. ADJ observed that, "defendants are unserved as per report. As per report it seems that the defendants are evading service of summons", and directed issuance of fresh summons on PF and RC as well as by way of affixation, returnable on 05.05.2018.

7.0 The record further shows that the summons issued to the defendants/the appellant herein through ordinary course for 05.05.2018 bears the similar report of the process-server, which reads as under:

"Note-Chaspa

Shrimanji,

Aaj Ta. 26/4/18 ko mauka summon par gaye pate anusar aakar Sh. Shailesh Rai Director M/s. Kare India Development Services (P) Ltd. ki barai summon tamil prapt kiya to mauke par lohe ke gate par tala band mila. Aas pass poochne par kucch pata na chala baad maine court ke aadesh anusar summon v summon ki report kaafi tala band lohe ke gate ke saath divar par chaspa kar di mauke par koshish karne par tehrir gawahi na mili lihaza report pesh hai.

*Sd/
26/4/18*

Main Shapath lekar kehta hun ki uprokt report sahi hai.

*Sd/
26/4/18"*

7.1 The summons sent through speed post for 05.05.2018 bear the report dated 19.04.2018, "*lene se inkar kiya*".



8.0 On 05.05.2018, the Ld. Trial Court observing that the appellant/defendants did not appear despite due service, proceeded them ex-parte. Said order reads as under :

“05.05.2018

*Present : Sh. Vikesh Rathi, counsel for plaintiff.
None for defendants.*

As per report, both the defendants have been served for today but absent despite repeated calls. They are served by affixation. The report on the registered envelope is regarding refusal. I deem it to be due service upon the defendants.

Be awaited for 2:00 PM.

*(Manish Gupta)
ADJ-04(NW)/Rohini Courts
Delhi/05.05.2018*

05.05.2018

*Present : Sh. Vikesh Rathi, counsel for plaintiff.
None for defendants despite repeated calls and despite service.*

It is 2:08 PM now.

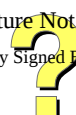
None has appeared on behalf of the defendants despite repeated call since morning. It seems that defendants are not interested to defend the present case. Hence, the defendants are hereby proceeded with ex-part.

Put up for ex-part evidence by way of affidavit on 03.08.2018.

*(Manish Gupta)
ADJ-04(NW)/Rohini Courts
Delhi/05.05.2018”*

8.1 Subsequently, the respondents’ suit for recovery was allowed vide judgment dated 06.07.2020.

9.0 Later, subsequent to filing of the execution petition by the respondents herein, the appellant filed an application under Order IX rule 13





CPC on 04.07.2022 for setting aside of the ex-parte judgment and decree, making similar submissions as made before this court. In support of his plea that the appellant (defendant no. 2) was away to Mumbai along with his wife during the period 18.04.2018 to 08.05.2018, the appellant placed on record flight booking details/e-ticket for himself as well as his wife Kusum Lata Rai from Delhi to Mumbai for 18.04.20218 and return flight on 08.05.2018 from Mumbai to New Delhi. Ld. Trial Court after considering the submissions made by both the sides, dismissed the appellant's application under Order IX rule 13 CPC vide impugned order dated 12.05.2023, relevant portion of which reads as under :

"12.05.2023

Present: None.

*..... The summons of the suit were issued and initially summons were received back unserved and considering the reports, Ld. Predecessor of this Court issued summons to be served through RC and affixation also vide order dated 01.03.2018. **On 05.05.2018, the defendant were found served with the summons by affixation and were deemed served considering the report of refusal on registered envelop.** The defendant were proceeded ex parte and suit was decreed against them after completion of evidence of plaintiff vide order dated 06.07.2020.*

By way of present application, the defendant no. 2 is seeking setting aside of the said order with the averments that

..... It is claimed that the applicant and his wife had gone to Mumbai on 18.04.2018 for attending family function and returned to Delhi on 08.05.2018. It is claimed that both the children were also not in the home on 19.04.2018 as well as 24.04.2018. It is averred that the postman has given the report of refusal on 19.04.2018 and as per report of process server, house was found locked on 26.04.2018 and summons were pasted on wall of the house. It is claimed that there was no one at home except the domestic help Sanjit Kumar who has left the service during pandemic and the postal envelop was never tendered to the applicant or any of his family members on 19.04.2018. It is claimed





that there is no photograph of affixation or any witness on the record and prescribed procedure was not followed. It is claimed that he was wrongly proceeded ex parte on 05.05.2018 and ex parte judgment dated 06.07.2020 needs to be set aside.

..... In the report given on envelop, the postal employee has not mentioned the name of the person by whom it was refused to be received. The process server has given the report about pasting of summons with the copy on the wall of the premises on oath. The statement of the process server cannot be discarded lightly merely on the bald assertions that the same is not supported with any photograph. The case law relied upon by the applicant reported at AIR 1967 Delhi 28 is not helpful to the applicant in the facts of the case as in the present case, the summons issued on earlier occasion were returned back with the report of process server who visited the premises on 23.02.2018 that one servant was found who stated that owner is out of station. Servant disclosed his name as Sanjit Kumar.

Considering the facts and circumstances of the case, I found no ground to disbelieve the report of process server given on oath about the pasting of summons at the wall of premises. The applicant fails to show any material that he was not duly served. As such, the application stands dismissed.”

10.0 Before appreciating the rival contentions, reference is made to Order IX rule 13 CPC, which reads as under :

“13. Setting aside decree ex parte against defendants.—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 an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he 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 that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

¹*[Provided further that no Court shall set aside a decree passed*





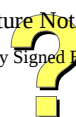
ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.]

²*[Explanation.—Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree.]”*

11.0 From the plain reading of Order IX rule 13 CPC, it is clear that an ex-parte decree may be set aside if the court is satisfied on any of the two counts i.e. either the summons were not duly served on the defendant or that the defendant was prevented by any sufficient cause from appearing. The appellant in the instant case has pleaded non-service of summons on him.

12.0 In the present case, the address of the appellant/identity of the property at which the summons were sent by registered post/ affixed, is not disputed. As noted above, the summons sent through registered/speed post for 05.05.2018, were returned as refused (*lene se inkaar kiya*). Refusal is due service. As directed, the summons were also duly affixed (on 26.04.2018) on a wall near the iron gate of the given address, which is not disputed. Thus, there is a legal presumption of due service on the appellant. While dealing with presumption of service by registered post at the correct address/refusal to receive the same, the Hon’ble Supreme Court in ***Parimal vs. Veena, (2011) 3 SCC 545***, observed :

“16. In order to determine the application under Order IX, Rule 13 CPC, the test 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.

.....

PRESUMPTION OF SERVICE BY REGISTERED POST & BURDEN OF PROOF :

17. This Court after considering large number of its earlier judgments in ***Greater Mohali Area Development Authority v. Manju Jain***, AIR 2000 SC 2306, held that in view of the provisions of Section 27 of the General Clauses Act, 1897, there is a presumption that the addressee has received the letter sent by registered post at correct address. ***However, the presumption is rebuttable on a consideration of evidence of impeccable character.*** Similar view came to be reiterated by the apex Court in ***Dr. Sunil Kumar Sambhudayal Gupta vs. Stae of Maharashtra***, (2010) 13 SCC 657.

18. In ***Gujarat Electricity Board v. Atmaram Sungomal Poshani***, AIR 1989 SC 1433, the Hon'ble Supreme Court held that :

“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)

13.0 Thus the burden was on the appellant to rebut the presumption of service by way of evidence of impeccable character. Though the appellant has pleaded that he and his wife were away to Mumbai from 18.04.2022 to 08.05.2022, only a copy of booking report/e- ticket has been placed on



record. No proof of actual travel was placed on record. Further, admittedly, there are other members i.e. son and daughter in the appellant's family. The appellant has pleaded that during that period, his daughter was studying in Haldwani, Uttarakhand, but failed to place on record any document whatsoever in support. Even with respect to his son, the appellant has simply stated that during the said period, he was residing with his paternal uncle/*Chacha* in Sector-11, Rohini, without placing any material on record in support. The appellant therefore did not place on record any convincing material much less the evidence of impeccable character in rebuttal. Thus, the appellant failed to discharge the burden placed upon him to rebut the legal presumption of due service of summons.

14.0 With respect to service by way of affixation, it was much argued by the Ld. Counsel for the appellant that the report of the process-server was not proper as no supporting affidavit in the form as prescribed under High Court Rules, was filed. He also argued that as per Order V rule 20 CPC summons was required to be affixed at a conspicuous place in the court also. But there is no report regarding affixation of summons in the court house. Thus, the summons cannot be said to be duly served by way of affixation.

14.1 It may be mentioned that the process-server's report (as reproduced in para 7.0 above) is on the lines as provided for under High Court Rules followed by his statement on oath that the report given by him is correct. After considering the said report, the Ld. Trial Court recorded its satisfaction about due service. Non-filing of affidavit strictly in the prescribed form may be a mere irregularity. It would be pertinent to mention here that second





proviso to Order IX rule 13 CPC 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 (*Basant Singh & Anr. Vs. Roman Catholic Mission, 2002 SCC OnLine SC 944*).

14.2 Further, it may be mentioned that in case titled *Commissioner of Income Tax, Punjab Vs. Daulat Ram Khanna, AIR 1967 SC 1552* in somewhat similar circumstances where though the notice by way of affixation was not pasted on the outer wall of the office of the Income Tax Office, the Income Tax Officer held it to be proper service. In appeal, the High Court held it to be invalid service. Same was challenged before the Hon'ble Supreme Court. While setting aside the High Court's order, the Hon'ble Apex Court held:

"...The following question was referred to the High Court –

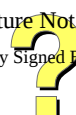
"Whether on the facts and the circumstances of the case the notice under Section 34 of the Income Tax Act was properly served on the assessee within the prescribed period"

...

7. The answer to the question depends on the true interpretation of Order 5 Rule 20(1) of the Civil Procedure Code which reads as follows:

"(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."

8. Mr Sen divides the above sub-rule into two parts. According to him, the first part deals with a copy of the summons being affixed in the





*court-house and another copy being affixed in some conspicuous part of the residential house or business premises. He says that it is not obligatory on the Court to adopt this method, **but the Court can**, in view of the circumstances, **order the service of the notice in any other manner as it thinks fit**. Mr Sen further says that it would be noticed that the word “also” **has not been repeated in the last ten words of the sub-rule**, underlined above. He says that **in a particular case it is in the discretion of the court to order service of the notice by registered post or by affixing a copy thereof and then satisfying itself that the copy has been affixed in a proper manner**.*

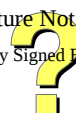
*9. In our view, there is great deal of force in what Mr Sen urges. It seems to us that the **last ten words in sub-rule (1) of Rule 20, do confer a discretion on the court to adopt any other manner of service**. The sub-rule prescribes one manner which the court may follow and this manner consists of two acts; (1) affixing a copy of the summons in the court-house, and (2) affixing it in some conspicuous part of the residential house or the business premises of the defendant. If the High Court were right we would expect that the word “also” would be repeated and inserted between the word “or” and “in” in the last ten words. The alternative manner which the court decides to adopt for serving must of course be such as gives notice to the person to be served.*

.....

*11. It seems to us that **the object of the legislature in giving a discretion to the Court is to enable the court to see that unnecessary steps are not taken and the service is effected in the most expeditious and best manner**. For example, if the person to be served had, to the knowledge of the court, temporarily gone outside India, the court might have sent, even before the insertion of Rule 20-A, the summons by registered post to his address abroad without affixing a copy thereof in the court-house. In *Narendra Kishore v. Banamali Sahu Dibakar Sahu Firm* the Division Bench of the Orissa High Court held that “the last mode of service, namely ‘or in such other manner as the Court thinks fit’, no doubt, gives the Court the jurisdiction to have the service of summons through registered post”*

12.In the result we accept the appeal, set aside the judgment of the High Court and answer the question in the affirmative and against the assessee.....”

14.3 In view of the above facts and settled position of law, the appellant was duly served.





15.0 Learned counsel for the appellant also vehemently argued that the Ld. Trial Court erred in referring to his past conduct/process-server's report pertaining to the previous date i.e. 01.03.2018. Suffice it to state that in *Basant Singh's case (supra)*, the Hon'ble Supreme Court noted that once it is proved that the summons by registered post were sent to the correct and given address, even the past conduct of the defendant becomes important. In view of the above facts and circumstances, it assumes significance that even the summons sent to the appellant for the previous date of hearing i.e. 01.03.2018, through registered post mentioned about eight visits by the postman when the appellant could not be found at the given address; and summons sent through ordinary course, show that the servant Sanjit Kumar was found at the given address, who informed about non-availability of the appellant at home. The appellant himself has stated that his servant Sanjit Kumar was at home at the given time. Be that as it may. Even otherwise, as noted above, the appellant was duly served but failed to appear on the date fixed.

16.0 In view of the above, this court finds no illegality in the impugned order. Appeal is accordingly dismissed.

POONAM A. BAMBA, J

AUGUST 31, 2023/manju

[Click here to check corrigendum, if any](#)

