



2025:DHC:11716-DB



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

% Judgment reserved on: 15.12.2025
Judgment delivered on: 22.12.2025

+ **FAO (COMM) 247/2024 & CM APPL. 75267/2024**

HARISH MITTALAppellant

versus

KISHAN GOPAL RATHIRespondent

Advocates who appeared in this case:

For the Appellant : Mr. Vikas Khatri and Mr. Manas Khatri, Advocates.

For the Respondent : Mr. Pankaj Garg and Mr. Basab Sengupta, Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

J U D G M E N T

TUSHAR RAO GEDELA, J.

1. Present appeal has been filed under Order 43 Rule 1 of CPC, 1908 against the order dated 22.11.2024 passed by the learned District Judge (Comm.), Karkardooma Courts, Delhi in Misc. DJ No.583/2024 titled *Harish Mittal vs. Kishan Gopal Rathi* whereby the application of the appellant/defendant under Order IX Rule 13, CPC read with Section 151, CPC, 1908 seeking setting aside of the *ex parte* decree and judgement dated 17.05.2023 passed in CS(COMM) 535/2021 titled *Shri Kishan Gopal Rathi vs. Shri Harish Mittal* was dismissed. The present appeal also assails the *ex parte* decree and judgement dated 17.05.2023 whereby the suit was decreed in favour of the respondent/plaintiff for an amount of Rs.7,72,526/- along with



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pendente lite and future interest @ 9% per annum till its realization; with costs and expenses.

2. In December, 2021, a suit bearing CS(COMM) 535/2021 for recovery of a sum of Rs. 7,72,526/- was filed by the respondent/plaintiff against the appellant/defendant before the learned District Judge, Karkardooma Courts, Delhi. Summons of the recovery suit were issued upon the appellant/defendant returnable on 01.02.2022. However, the appellant/defendant remained unserved and fresh summons were issued through ordinary as well as electronic mode subject to filing of affidavit of correctness as per Rule 12 of the Delhi Court Services of Process (Civil Proceeding) Rules, 2010 returnable on 14.03.2022. On 14.03.2022, the appellant/defendant was reported to be served through Whatsapp/E-mail. However, it was observed that as the Nazarat branch neither informed the appellant/defendant over phone, nor it was mentioned whether the said e-mail was duly received or bounced back, nor the screenshots of the e-mail and Whatsapp have been annexed, hence, fresh summons were issued.

3. On 11.05.2022, the summons again remained unserved and the respondent/plaintiff sought liberty to move an application under Order V Rules 20, CPC for substituted service. Thereafter, on 30.05.2022, the said application moved by the respondent/plaintiff for substituted service of the appellant/defendant was allowed by the learned Trial Court observing that the defendant cannot be served by ordinary process and it is avoiding the service. Accordingly, the respondent/plaintiff served the appellant/defendant by substituted mode, by way of publication in the national newspaper "The Statesman" dated 12.06.2022. On 01.12.2022, the learned Trial Court observed that the defendant was duly served with the summons of suit by



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substituted means yet not appeared and thus, was proceeded *ex parte*.

4. Thereafter, after hearing the arguments and examining the evidence led by the respondent/plaintiff, the learned Trial Court passed the *ex parte* decree and judgement dated 17.05.2023 whereby the suit was decreed in favour of the respondent/plaintiff for an amount of Rs.7,72,526/- along with *pendente lite* and future interest @ 9% per annum till its realization; with costs and expenses.

5. In April, 2024, an execution petition bearing EX (COMM) 73/2024 was filed by the respondent/plaintiff. It is the case of the appellant/defendant that it was when the Bailiff appointed by the Court came to the residence with warrants of attachment to execute the decree that the appellant, for the first time, came to know about the *ex parte* judgement and decree dated 17.05.2023 passed against him. On 12.06.2024, the appellant duly filed objections in the execution petition and thereafter, on 22.08.2024, the appellant filed an application under Order IX Rule 13 read with Section 151, CPC for setting aside the *ex parte* decree passed against him. The said application came to be rejected by the learned Trial Court *vide* impugned order dated 22.11.2024. Hence, the present appeal.

6. Mr. Vikas Khatri, learned counsel for the appellant stated that the *ex parte* judgment and decree was passed by the learned Trial Court on 17.05.2023. He submitted that it was only when the Bailiff appointed by the Executing Court came to the residence of the appellant/defendant with the warrants of attachment to execute the decree that the appellant for the first time gained knowledge about the *ex parte* judgment and decree dated 17.05.2023 passed against him. He submitted that at the first instance, the appellant/defendant filed his objections to the execution petition on



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12.06.2024. It was under the legal advice that the appellant preferred an application under Order IX Rule 13 read with Section 151, CPC seeking setting aside of the *ex parte* judgment and decree passed against him on the ground that the appellant/defendant was never served the summons of the suit alongwith the suit plaint. He stated that the present appeal has been preferred by the appellant against the impugned order dated 22.11.2024 passed by the learned Trial Court dismissing his application under Order IX Rule 13, CPC.

7. Learned counsel for the appellant invited attention of this Court to the application filed by the appellant under Order IX Rule 13, CPC, particularly to para 8 wherein it was categorically mentioned that the premises bearing no.9/6241, Nehru Gali, Subhash Mohalla, Gandhi Nagar, Delhi-110031 was sold to one Smt. Shivani Sharma in the month of February, 2018 and the business was shut down after handing over physical possession to the purchaser and therefore, the service could not be effected upon the appellant at the said address. He also contended that in para 9 of the said application, it was averred that the residential address of the appellant i.e. A-76, Gali No.8, Rajgarh Colony, Gandhi Nagar, Delhi-110031 was known to the respondent/plaintiff despite which, for some unknown or oblique reasons, the respondent/plaintiff chose not to mention it in the memo of parties accompanying the suit plaint. He submitted that the alternative address which was provided in the memo of parties was a fictitious address and does not belong to the appellant/defendant.

8. Inviting attention to the memo of parties of the suit plaint, learned counsel for the appellant categorically submitted that even the email address provided by the respondent/plaintiff purporting it to be belonging to the respondent/defendant, is a fictitious email address. In any case, he contended



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that no email containing the summons of the suit was ever received by the appellant/defendant.

9. In order to demonstrate the deliberate and willful attempt of the respondent/plaintiff to obtain an *ex parte* decree by concealing the correct and known address of the appellant/defendant being writ large, the learned counsel for the appellant drew our attention to the memo of parties accompanying the execution petition filed in respect of the *ex parte* judgment and decree dated 17.05.2023. He contended that apart from the address of the premises which were sold in the year 2018, and the fictitious address as reflected in the memo of parties accompanying the suit plaint, the respondent/plaintiff had also furnished the correct residential address as mentioned in para 9 of the application under Order IX Rule 13, CPC as well as the address of the new shop/premises from where the appellant/defendant has been carrying on business from and after February, 2018. According to him, this gathers great significance for the reason that the suit for recovery is predicated on the invoices raised by the respondent/plaintiff upon the appellant/defendant from and after July, 2018. He stoutly contended that this document itself would establish that the respondent/plaintiff was all the while aware of and in the know of the address at IX/622, Krishna Gali No.2, Subhash Road, Gandhi Nagar, Delhi-110031. If that be so, according to learned counsel, there was no reason to have concealed the correct address of the appellant/defendant in the memo of parties accompanying the suit plaint. He vehemently contended that all this was done only to ensure that the appellant/defendant does not get a fair opportunity to defend the suit on its merits.

10. That apart, learned counsel for the appellant invited attention to the



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order dated 14.03.2022 of the learned Trial Court wherein even after noticing, according to learned counsel erroneously, that the appellant/defendant was served through whatsapp and email, learned Trial Court, at the request of the respondent/plaintiff, directed issuance of fresh summons of the suit to be served upon the appellant/defendant by all permissible modes. He would contend that once the above observation was made by the learned Trial Court pursuant whereto, a direction for fresh service by all permissible modes upon the appellant/defendant was issued, the question of the learned Trial Court, in the impugned order, noting that the defendant was served by whatsapp is an error on record. That by itself, would entitle the appellant/defendant to setting aside of the *ex parte* judgment and decree dated 17.05.2023.

11. Learned counsel for the appellant also argued that ordinarily, once the service of summons has not been correctly effected upon the defendant in a particular case, unless the procedure under Order V Rule 17, CPC is exhausted, the right or entitlement of a plaintiff to seek service by way of substituted mode as envisaged under Order V Rule 20, CPC cannot be resorted to. In the present context, he contended that the learned Trial Court had committed an error in law by surpassing/bypassing the procedure prescribed under Order V Rule 17 of the CPC. This, according to him, was mandatory. In that regard, he relied upon the judgment of the Hon'ble Supreme Court in ***Neerja Realtors (P) Ltd. vs. Janglu (Through LR): (2018) 2 SCC 649***, particularly para nos.14 and 15. Thus, he contended that the deemed service under Order V Rule 20, CPC would not be an effective service disentitling the appellant/defendant from seeking setting aside of the *ex parte* judgment and decree dated 17.05.2023. On the basis of the aforesaid, he submitted that the impugned order dated 22.11.2024 rejecting the



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application of the appellant under Order IX Rule 13, CPC passed by the learned Trial Court be set aside and the appellant be permitted to participate in the suit proceedings.

12. *Per contra*, Mr. Sengupta, learned counsel appearing for the respondent/plaintiff vehemently refuted the submissions of the appellant/defendant.

13. At the outset, Mr. Sengupta invited attention to the application under Order IX Rule 13 CPC filed by the appellant/defendant, particularly to para 6 wherein the appellant admitted that the premises bearing No.9/6241, Subhash Mohalla, Gandhi Nagar, Delhi-110031 was let out to one Mr. Manish Mantri w.e.f. 01.04.2017 to 31.12.2019 and the said Manish Mantri, during the said period, was conducting business and handling the statement of accounts of M/s. Heena Overseas (proprietorship firm of the appellant). He also relied on para 7 of the said application to submit that the appellant also averred that Mr. Manish Mantri had informed him (appellant/defendant) that he had paid the entire payment of goods to the respondent/plaintiff. Learned counsel submitted that no document to prove the aforesaid submission was ever filed by the appellant/defendant.

14. He further submitted that the learned Trial Court in its orders has clearly noted that the appellant/defendant was served summons of the suit by whatsapp mode as also by e-mail. In particular, he referred to order dated 14.03.2022 wherein it was specifically noted that the appellant/defendant has been served through whatsapp and e-mail and it was reported on the process issued to the appellant on whatsapp that blue tick was visible. That apart, for abundant precaution, the respondent/plaintiff had also filed an application under Order V Rule 20, CPC praying for effecting service of summons of the



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suit upon the defendant by way of substituted mode, i.e., by way of newspaper publication. He contended that as a matter of record, the newspaper publication is on the Trial Court's record and has been taken note of by the learned Trial Court even in the impugned order dated 22.11.2024. He would contend that in view of such overwhelming orders and the appropriate procedure prescribed in CPC having been followed in its letter and spirit, the contention that the appellant/defendant was never served summons of suit is inconceivable.

15. That apart, learned counsel for the respondent also contended that the recovery suit filed by the respondent/plaintiff being a commercial suit, the mandatory pre-litigation mediation process was also availed of before Shahdara District Legal Services Authority (SDLSA) and the notices of the same were duly served upon the appellant. He contended that in the said mediation proceedings, the counsel for the appellant/defendant had appeared and filed his Vakalatnama before the said authority, which is reflected in the Non-Starter Report dated 30.09.2021. He also contended that the same counsel had also filed the application under Order IX Rule 13, CPC, which is the subject matter of the present appeal. In this context, he would contend that the knowledge of the appellant/defendant that a suit has been filed stands established, apart from the fact that the notice for appearing in the pre-litigation mediation proceedings was in fact served upon the appellant.

16. Additionally, learned counsel for the respondent emphasized that the service upon appellant/defendant through whatsapp mode has to be held to be proper service inasmuch as there is no denial that one of the mobile numbers provided by the respondent/defendant and mentioned on the memo of parties accompanying the plaint have been admitted to belong to the



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appellant/defendant. In fact, the application under Order IX Rule 13, CPC and the objections filed on behalf of the appellant/defendant to the execution petition also contain the very same mobile number. Thus, in view of the fact that the summons were served upon the appellant/defendant and recorded in the order of the learned Trial Court, there is no plausible explanation as to why such service would not be deemed to be an effective service in terms of Order V, CPC. He also submitted that so far as the mentioning of the correct residential address of the appellant/defendant in the execution proceeding is concerned, the said information was obtained subsequent to the disposal of the suit.

17. Drawing support from the reasons stated in the impugned order, learned counsel invited attention to the judgment of the Hon'ble Supreme Court in ***Parimal vs. Veena @ Bharti: (2011) 3 SCC 545*** referred to in para 14 of the impugned order dated 22.11.2024. He would contend that the Hon'ble Supreme Court has clearly held that the Court shall not set aside a decree on mere 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. He urged that applying the said ratio to the facts noted in the impugned order, leaves no manner of doubt that the appellant/defendant was indeed served with the summons of the recovery suit in accordance with the provisions of Order V of CPC, 1908. In view of the aforesaid, he prayed that the said appeal be dismissed.

18. We have heard learned counsel for the parties and perused the impugned order as also the records of the case.

19. At the outset, we observe from the order dated 01.02.2022 passed by the learned Trial Court that the addresses available on the memo of parties



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accompanying the plaint were found to be, (i) so far as the property bearing No.9/6241, Nehru Gali, Subhash Mohalla, Gandhi Nagar, Delhi-110031 is concerned, the process server's report noted that "*Dukan Khali Kar Gaye*" and; (ii) so far as the property bearing No. 10/1308, Gandhi Nagar, Delhi-110031 is concerned, the process server's report noted that "*Kutch Pata nahin chala*". On the said report of the process server, the learned Trial Court had directed issuance of summons of the suit by way of e-mail, fax, telegram, signal and whatsapp number and posted the matter to 14.03.2022.

20. On 14.03.2022, the learned Trial Court in its order noted that the appellant/defendant has been served through whatsapp and e-mail on the basis that on the process issued on whatsapp mode, blue tick was visible denoting effective delivery of the summons of the suit on the mobile phone of the appellant/defendant. However, at the same time, the learned Trial Court also noted that the Nazarat branch had not informed the appellant/defendant on phone regarding sending of summons through e-mail nor was it mentioned whether or not the said e-mail was duly received or had bounced back and further also noted that the screenshots of the e-mail and whatsapp have not been annexed to. In view of the fact situation obtaining, on the request of the counsel for the respondent/plaintiff, a direction for fresh service upon the defendant was issued to be effected through all modes and the matter was posted on 11.05.2022. This order indicates that the learned Trial court was not satisfied with the mode of service.

21. We observe from the order dated 11.05.2022 passed by the learned Trial Court that the addresses available on the memo of parties accompanying the plaint were found to be, (i) so far as the property No.9/6241, Nehru Gali, Subhash Mohalla, Gandhi Nagar, Delhi-110031 is concerned, the process



server's report noted that "*Harish Mittal naam ka koi vyakti va M/s. Heena Overseas naam ki koi bhi firm nahin hain*" and (ii) so far as the property bearing No.10/1308, Gandhi Nagar, Delhi-110031 is concerned, the process server's report noted that "*iss naam se koi vyakti va firm nahni hain*". This indicates that the appellant/defendant was not served on the addresses which were mentioned in the memo of parties accompanying the suit plaint. It is interesting to note that in the same order, counsel for the respondent/plaintiff mentioned that those were the last known addresses of the defendant and had sought time for moving appropriate application for substituted service of the defendant.

22. Subsequently, an application under Order V Rule 20, CPC appears to have been filed by the respondent and taken up for consideration on 30.05.2022. The learned Trial Court allowed the said application and directed publication of the summons in the newspaper "The Statesman". Simultaneously, the learned Trial Court had also directed issuance of summons on filing of PF, RC, AD, Speed Post and posted the matter to 22.08.2022.

23. Thereafter, *vide* order dated 01.12.2022, the learned Trial Court took note of the service upon the defendant by substituted mode by way of publication in the "Statesman" in its edition dated 12.06.2022. Upon noting that the appellant/defendant had not appeared even in the post lunch session despite service, he was proceeded *ex parte*. The matter was finally posted on 24.01.2023 for *ex parte* final arguments of the suit. Apparently, consequent to hearing the arguments and examining the plaintiff evidence, the judgment and decree was passed by the learned Trial Court on 17.05.2023.

24. The aforesaid narration of the facts, which are on record of the learned



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Trial Court, makes it apparent that the addresses which were made available by the respondent/plaintiff in the memo of parties accompanying the suit were not the correct addresses of the appellant/defendant. Merely upon the statement of the respondent/plaintiff that the said addresses are the last known addresses of the appellant/defendant, and on the filing of the application under Order V Rule 20, CPC, the learned Trial Court having allowed service by substituted mode, would not *ipso facto* deem to be an effective service in terms of Order V, CPC. The provisions of service through substituted means available under Order V Rule 20, CPC is resorted to only as the last resort when all the previous procedures are found to have failed. We find from the records that while in the memo of parties accompanying the suit plaint, incorrect addresses of the appellant/defendant were mentioned, however surprisingly, in the execution petition filed on 09.04.2024, two correct addresses which included the residential address of the appellant/defendant as also the new premises from where the appellant/defendant was conducting its business were mentioned. In fact, the Bailiff had served the warrants of attachment upon the appellant/defendant at the so mentioned residential address.

25. The fact that the new business address i.e., IX/622, Krishna Gali No.2, Subhash Road, Gandhi Nagar, Delhi-110031 was available with the respondent/plaintiff at the time of filing the execution petition, is intriguing for the reason that the suit for recovery of monies was predicated on the basis of invoices on and from the month of July, 2018. The version of the appellant/defendant that he had sold the premises bearing No.9/6241, Nehru Gali, Subhash Mohalla, Gandhi Nagar, Delhi-110031 in the month of February, 2018 and had shifted to the new business address noted above,



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immediately thereafter appears to be a plausible explanation as to why the respondent/plaintiff had the knowledge of the new business address. In fact, the appellant/defendant has asserted that the business relations post February, 2018, between the parties were continuing from the new business address which was in the knowledge of the respondent/plaintiff. This aspect appears to be a plausible explanation which also appears to be sufficient explanation as to why the appellant/defendant did not appear before the learned Trial Court and participate in the suit proceedings.

26. If we believe that the respondent/plaintiff had continued its business relations with the appellant/defendant post February, 2018, coupled with the fact that the recovery suit was predicated on the invoices from the month of July, 2018 onwards, having regard to the fact that the suit was filed in December, 2021, it is verily possible that the respondent/plaintiff had knowledge of the correct addresses of the appellant/defendant. If that is so, the mere service by substituted mode under Order V Rule 20, CPC would not be a sufficient or deemed to be an effective service of the summons of the suit upon the appellant/defendant. It is so for the reason that the substituted mode of service is to be availed of only as a last resort and unless the ordinary mode as prescribed in Order V, CPC till service through affixation under Order V Rule 17, CPC is exhausted, the defendant cannot be deemed to be served in accordance with law.

27. So far as the argument predicated on service through whatsapp mode is concerned, we find that the learned Trial Court itself in the order dated 14.03.2022 had doubted the veracity of the same and had in fact directed issuance of fresh service by all ordinary and permissible modes. Having regard thereto, the said contention is not only unpersuasive but unmerited and



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thus stands rejected.

28. Learned counsel for the respondent/plaintiff had also argued that the knowledge of the filing of the suit for recovery can also be gathered from the fact that a counsel had appeared on behalf of the appellant/defendant in the pre-litigation mediation proceedings. This argument also is unmerited for the reason that mere participation in the pre-litigation mediation is neither here nor there. In that, it is not necessary that consequent upon failure of such pre-litigation mediation proceedings, a plaintiff may necessarily institute a suit. It may be possible in certain situations that a party may choose not to pursue its legal remedies. Merely because a party has instituted pre-litigation mediation would not be a guarantee that it would be followed by the said party filing a suit for its claims. Moreover, the procedure for service of summons of a suit upon the defendant is prescribed by the procedure envisaged in Order V of CPC, 1908. Therefore, whether service of a summons has been effected upon a defendant in accordance with the provisions of Order V, CPC has to be necessarily gathered from the evidence that is brought on record through the process server or postal receipts and other modes validly prescribed under Order V, CPC. Thus, the said contention of the respondent holds no water and is rejected.

29. So far as the ratio laid down by the Hon'ble Supreme Court in *Neerja Realtors (supra)* is concerned, there is no quarrel on the proposition of law. In *Neerja Realtors (supra)*, it was held that before a Civil Court proceeds to press into service the provisions of Order V Rule 20, CPC, the mode of service by affixation as prescribed in Order V Rule 17, CPC ought to be exhausted. In the case before the Hon'ble Supreme Court, service by ordinary mode, for some reason or the other, was not effected upon the defendant



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therein. It was in such circumstances that the Hon'ble Supreme Court held that prior to resorting to the remedy of service by substituted mode, service by affixation under Order V Rule 17, CPC ought to be satisfied. It is pertinent to note that in *Neerja Realtors (supra)*, there was no misdescription or incorrectness in the address of the defendant therein. However, in the present case, the moot issue and undeniable fact is that the addresses of the appellant/defendant as mentioned in the memo of parties accompanying the suit plaint were incorrect and therefore, even if the mode of service prescribed under Order V Rule 17, CPC had been employed, the same would have been futile. Thus, though the ratio of *Neerja Realtors (supra)* holds the field however, may not applicable to the facts of the present case. With due respect, it need not be reiterated that judgements are not to be applied as Euclid's Theorem *de hors* the consideration as to whether the same would apply to a particular fact situation. In our humble opinion, the ratio in *Neerja Realtors (supra)* is inapplicable to the facts of the present case.

30. In view of the observations made herein above, the order dated 22.11.2024 is set aside and the matter is remanded back to the learned Trial Court for fresh adjudication on the application under Order IX Rule 13, CPC filed by the appellant. Further, we direct that that till a decision is taken on the application of the appellant by the learned Trial Court, the *ex parte* judgement and decree dated 17.05.2023 shall remain stayed.

31. It is also directed that the deposit so made by the appellant of the 50% decretal amount before this Court be transferred to the learned Trial Court, who may invest the said amount in interest bearing FDR, for a period as per its discretion.



32. In view of the above, the appeal stands disposed of with pending applications if any, without any order as to costs.

**TUSHAR RAO GEDELA
(JUDGE)**

**DEVENDRA KUMAR UPADHYAYA
(CHIEF JUSTICE)**

DECEMBER 22, 2025

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