

Rajesh Arora Vs. Mukesh Jain and ors.

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Court : Delhi

Decided On : Jul-31-2001

Reported in : 93(2001)DLT328

Judge : Mr. J.D. Kapoor, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 37, Rules 2(2), 3 and 3(2) and (6) - Order 5, Rules 9 to 19, 19A and 19A(2); General Clauses Act - Sections 27

Appeal No. : Suit No. 1151 of 2000

Appellant : Rajesh Arora

Respondent : Mukesh Jain and ors.

Advocate for Pet/Ap. : Mr. Rajesh Tyagi, Adv.

Judgement :

ORDER

J.D. Kapoor, J.

1. This is a suit for recovery of money under the provisions of Order xxxv II of the Code of Civil Procedure (hereinafter referred to as the Code).

2. The order provides for a summary procedure in respect of certain suits. As per this procedure the defendant is at first instance required to enter into appearance

within 10 days of the service of summons of the suit.

3. Having entered into such an appearance, defendant is again served with the summons for judgment. He is, within ten days of the service of such summons, required to seek leave to defend himself. The defendant is entitled to leave to defend only when it discloses such facts that give rise to triable issues or that will put onus upon the plaintiff to prove consideration. Thus, in like ordinary suits, defendant is not entitled to defend as of right. The underlying object of this procedure is to prevent obstruction by the defendant who has otherwise no defense.

4. The legal proposition arising in this suit is with regard to service of summons upon the defendant.

5. Pursuant to the summons in the suit the defendants 1, 2 and 4 entered into appearance within the prescribed period of ten days. However, defendant No. 4 successfully evaded the service upon him by any of two prescribed modes and even after report on the ordinary process that he as well as defendant No.1 have left the premises. Defendant No. 3 was reported to have died. His wife Veena Jain was imp leaded. She also stands served. After the service of summons of judgment only defendant No. 4 made a motion for leave to defend while defendants 1 and 2 chose not to respond in spite of having been served. Service report on the postal dispatch of summons upon defendants 1 and 2 is 'intimation delivered', that may tantamount to refusal.

6. Indisputably Order xxxv II CPC is a self-contained provision and a Code in itself. The procedure for service of the defendant in suit under this provision is different from the one for ordinary suit.

7. Sub-rule 2 of Rule 3 clearly postulates that all summons, notices and other judicial processes, required to be served upon the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

8. Sub-rule 6 of Rule 3 lays down that if the defendant has not applied for leave to defend after service of summons for judgment or if such an application is made and is refused, the plaintiff shall be entitled to judgment forthwith.

9. Admittedly the summons for judgment were dispatched at the same address where the summons of the suit were served and the defendants had entered appearance without intimating any change in the address. However, the registered envelope containing the summons for judgment were received back with the endorsement that the information has been duly delivered to the defendants Rajesh Jain and Mukesh Jain. The postman had visited the address on couple of occasions.

10. Now the question arises whether after having been served at the same address with the summons of the suit and having put in appearance within the prescribed period of ten days the subsequent summons for judgment if received with the report that the information about the summons was delivered whenever the summons were taken for service tantamount to valid service or not as the learned counsel for the plaintiff has sought for judgment on the ground that the defendants have failed to apply for leave to defend in spite of having been served with the summons for judgment.

11. It is contended by the learned counsel that for the service of summons in the suit steps as prescribed under Order 5 of the CPC are not strictly applicable as the mode of service by way of postal service is not included in the summary procedure under Order xxxv II of the CPC. There is a substance in this contention as in a suit filed under Order xxxv II there are two stages of service. First stage is with reference to summons of the suit. The moment the summons are served the defendant is required to enter appearance either in person or by a pleader and file in Court the address for service of notice upon him. No further obligation upon the defendant is cast as is required in ordinary suits that the defendant shall at the first hearing or within the said period present written statement of his defense at first instance.

12. In a suit under Order xxxv II the second stage is to serve the defendant with summons for judgment. On having been served with such summons he may at

any time within ten days of service by way of affidavit or otherwise disclose such facts as may entitle him to defend the suit. Though this is a cumbersome procedure but the saving provision is sub-rule 2 of Rule 3 which provides that unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

13. As against this there is a specific procedure and mode of service of summons or notice in ordinary suits. There is a specific mode of service when the defendant refuses to accept notice, or cannot be found. This is laid down under Order 5 rule 17. Again rule 19A of Order 5 makes it mandatory for the court to in addition to and simultaneously with, issue summons for service and direct the summons to be served by registered post, acknowledgement due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain. However, in spite of summons sent by registered post acknowledgement due sub-rule 2 of Rule 19A of Order 5 provides that when an acknowledgement purporting to be signed by the defendant or his agent is received by the court or the postal article containing the summons is received back by the court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the court issuing the summons shall declare that the summons had been duly served on the defendant. There is also procedure for substituted service 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 reasons the summons could not be served in any other way, such a service could be made either by affixing a copy of summons in some conspicuous place in the court-house and also upon some conspicuous part of the house in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner viz. by publication in the newspaper as the court may think fit.

14. All the aforesaid modes of service relating to the ordinary suits do not find place in the summary procedure governing the suits filed under Order xxxv II.

15. In the summons for judgment sent by way of registered post acknowledgement due the general principle of service shall apply including the provisions of Rule 19A of Order 5 which specifically relates to the service by way of registered post acknowledgement due and provides as under :-

'Rule 19A of Order V CPC

Simultaneous issue of summons for service by post in addition to personal service :- (1) The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in Rules 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgement due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain.'

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstance of the case, the Court considers it unnecessary.

(2) When acknowledgement purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the court issuing the summons shall declare that the summons had been duly served on the defendant.

Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for other reason, has not been received by the Court within thirty days from the date of the issue of the summons.'

16. As per sub-rule 2 of Rule 2 of Order xxxv II CPC if summons, notices or any judicial process left at the address there is presumption of service. On the same analogy, if the registered envelope containing the summons for judgment is returned with the endorsement of the postal employee as to the non-availability of the defendant in spite of repeated visits, it is a valid service if it is dispatched and posted at the correct address. Such presumption becomes stronger if the defendant at the time of putting in appearance does not file any address for service of notice upon him as it shall be presumed that the address is the same upon which the summons of the suit were served and the defendant had put in appearance pursuant thereto.

17. Another distinction between the mode of service relating to ordinary suit as provided under Order 5 Rule 9 and 10 is that the service of summons will be made by delivering or tendering a copy thereof signed by the Judge or such officer, as he appoints in this behalf and sealed with the seal of the Court. The expression used in Order xxxv II is that of mere 'service'. There is no obligation for service of summons or service of suit or that of judgment by registered post with acknowledgement due.

18. As per provisions of Section 27 of the General Clauses Act, the process for service is complete and stands substantiated if there is a proper and bona fide dispatch of summons at the correct address of the party. The legally recognised and well-established mode of dispatch is the postal dispatch. It is again settled proposition that if a registered envelope or even the ordinary summons sent through Court are received with the report that premises were found locked on repeated visits there is strong presumption of service. Sub-rule 2 of Rule 19A of Order 5 specifically recognises the service if the postal employee makes an endorsement that the defendant or his agent has refused to take delivery of postal articles containing the summons intended to be served upon him. If summons are received back with such a report or endorsement it is mandatory for the court to declare that the summons have been duly served upon the defendant. The condition is that the summons should be properly addressed, prepaid and duly sent by registered post acknowledgement due.

19. In this background of distinction between mode or procedure of service of summons, notices or judicial processes in ordinary suits as provided under Order 5 CPC and that of sub-rule 2 of Rule 3 of Order xxxv II CPC, I find substance in the contention of the learned counsel that the endorsement of the postal employee made on couple of occasions on the registered envelope containing the summons for judgment that the information has been delivered tantamount either to refusal or deliberate avoidance by the defendant to accept the summons of the judgment and, therefore, amounts to valid and legal service. Endorsement of the nature of the kind one in question also amounts to leaving the summons at the address of the defendant and as per sub-rule 2 of Rule 3 of Order xxxv II all summons and notices and all other judicial processes are deemed to have been duly served if they are left at the address given by such defendant.

20. Even otherwise if a defendant who has been duly served with the summons at the same address and has entered into appearance tries to evade the service of the summons for the judgment sent at the same very address as furnished by him in his motion for appearance suffers adverse inference as to the service of summons of judgment.

21. I find that in the given facts and circumstances of the case, there is no need for fresh service of summons upon the defendant s as the summons received with the endorsement of the postal employee that the information has been duly delivered to the defendant s amounts to valid service as contemplated under sub-rule 2 of Rule 3 of Order xxxv II CPC. And even if the sterner standards of service as provided under Rule 19A or Rule 10 of Order 5 are applied, still the kind of endorsement of the postal employee as in the instant case amounts to valid and legal service.

22. Thus from and aspect we may look at the matter, the inescapable conclusion is that the defendant has been duly served with the summons of the judgment and since he has failed to apply for leave to defend disclosing such, facts that may entitle him to contest, the plaintiff is entitled for judgment. As a consequence, the suit is hereby decreed so far as defendants 1, 2 and 3 are concerned. The defendant No.4 has applied for grant of leave to defend under Rule 3 of Order

xxxv II. His leave shall be considered on merits.

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