

Badamilal Vs. Harshvardhan

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Court : Rajasthan

Decided On : Jul-15-1993

Reported in : AIR1994Raj9

Judge : Rajesh Balia, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 5, Rule 19A - Order 9, Rules 6 and 13 - Order 22, Rules 4 and 6

Appeal No. : S.B. Civil Revision Petition No. 541/1991

Appellant : Badamilal

Respondent : Harshvardhan

Advocate for Def. : Dinesh Maheswar, Adv.

Advocate for Pet/Ap. : N.N. Mathur, Adv.

Disposition : Revision dismissed

Judgement :

Rajesh Balia, J.

1. Heard learned counsel for the parties.

2. This revision is directed against the order dt. 8-7-91 passed by District Judge, Udaipur rejecting the petitioner's application under Order 9, Rule 13, C.P.C. for setting aside ex parte decree against the petitioner.

3. In suit for pre-emption against the petitioner and his vendor Kurilal, in the first instance, summons were issued on 26-4-82 for 6-7-92. Summonses were not served on the petitioner as he was out of station when the process server went to his house. Thereafter the Court directed to issue summons afresh and in addition to that the Court also directed that summons be also sent through registered post in terms of Order 5, Rule 19A, C.P.C. The next date fixed was 6-9-82. The registry containing summons of Badamilal petitioner was returned with an endorsement of refusal and this was held to be sufficient in terms of Order 5, Rule 19A (2). Since the petitioner had not appeared on that date, and service on him has been held to be sufficient the Court ordered to proceed ex parte against him. The summonses were ordered to be issued against Kurilal co-defendant who was served before 13-5-83. Kurilal also did not appear in the suit, and he too was ordered to be proceeded ex parte. After recording of the evidence of plaintiff and hearing an ex parte decree was passed against the defendant-petitioner on 13-7-84.

4. In the aforesaid circumstances the petitioner moved an application under Order 9, Rule 13, C.P.C. for setting aside the ex parte decree. He alleged that the plaintiff has not complied with the order dt. 6-7-82. He also alleged that registry containing summons was not offered to him and he did not refuse to accept it. He also alleged that the registry was addressed to Dhuley Kangan Store with which the defendant is not related. Another plea was taken that Kurilal died on 12-10-84 before passing of the decree, no decree, according to defendant-petitioner, could have been passed without bringing on record the legal representatives of deceased Kurilal. A reply of the application has been also filed denying the allegation of applicant. So far as the claim of the petitioner for setting aside the decree on the ground that death of Kurilal is concerned, it was pointed out that Kurilal died after arguments were heard in the case and merely because decree was passed thereafter the death of defendant during intervening period does not affect the validity of the decree. Defendant also examined the postman who stated on oath that he knows the defendant Badamilal personally, he offered the registry

to defendant Badamilal and on his refusal it was returned with endorsement of refusal. The trial Court relying on the statement of postman held that summonses were duly offered to the defendant and he has refused to accept the same therefore declaration made under Order 5, Rule 19A (2) cannot be said to be incorrect and it cannot be said to be insufficient service in the present case. There is no dispute that the registered article was addressed to Badamilal and Dhutey Kangan Store was also mentioned as trade name but the place at which article was addressed was Dharmshala, Rishabh Dev Ji and the plaintiff place of business is Dharmshala, Rishavdev ji. On these findings the trial Court rejected the application filed by the petitioner.

5. Learned counsel for the petitioner has urged that notices under Rule 19A of Order 5 are issued in addition to issue of summons in ordinary manner and such service cannot be treated as substituted service and he further says that no presumption of service can be drawn from refusal of postal article.

6. Perusal of Rule 19A (1) leads one to conclude that there is no merit in the contention made on behalf of the petitioner. The requirement of rule is that it should be addressed to the defendant at the place where the defendant or his family ordinarily reside or carries on business or person works for gain. As has been noticed above the registered article was addressed to the defendant to be served at Dharmshala, Rishavdev Ji which is a place where admittedly defendant, carries on business. Merely because of the trade name under which he carries on his business is disputed does not make the service insufficient for want of non-compliance of requirement of Sub-rule (1) of Order 5, Rule 19A, particularly in the face of statement of postman who categorically stated that defendant is personally known to him, the registered article was offered to him but the defendant refused to accept the same. Therefore in the context, it cannot be said that there is non-compliance of the provision of Rule 19A.

7. Likewise such Rule 2 clearly envisages where the registered article is returned with an endorsement of refusal which was offered to him by postal employee, the Court has to declare the summons duly served on the respondent. The use of word 'shall' in Sub-rule (2) is a pointer that in such event service has to be

accepted as sufficient. No doubt this presumption under Sub-rule (2) is rebuttable and mere statement of defendant about the non-receipt may in the circumstances of a particular case rebut the presumption. But in the present case when the postman who offered the article and made the endorsement on the registered article has appeared in the witness box and his testimony on oath has been accepted by the trial Court as trustworthy, it cannot be said that there was any defect in service of the present case in any manner whatsoever.

8. So far as the contention of learned counsel that no decree could be passed in the absence of legal representatives of Kurilal on 14-10-84 is concerned, it also has no merit in view of clear provisions of the Order 22, Rule 4(4) and Rule 6 which read as under :--

Rule 4 (4) : 'The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file written statement or who, having filed it, has failed to appear and contest the suit at the hearing : and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant shall have the same force and effect as if it has been pronounced before death took place.'

Rule 6 :

'Notwithstanding anything contained in the foregoing rules, whether the 'cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

9. The above provisions clearly obviate the necessity of impleading legal representatives of a deceased defendant who has not contested the suit in spite of service by abstaining from filing written statement or even after filing written statement has failed to appear and contest the suit. In the present case the defendant Kurilal has not at all appeared after service and did not file any written statement. He was proceeded ex parte. In that view of the matter it was not

necessary to substitute his legal representatives on his death and pronouncement of judgment and decree against him has the same force as if the same were pronounced before his death.

10. As a result the above discussion I do not find any merit in this revision and the same is hereby dismissed.

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