

Hari Narayan and ors. Vs. Topkhana Desh Grah Nirman Samiti Ltd.

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Court : Rajasthan

Decided On : Jan-28-1997

Reported in : AIR1997Raj174; 1997(2)WLC407

Judge : Shiv Kumar Sharma, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 5, Rule 17 - Order 9, Rule 13

Appeal No. : Civil Misc. Appeal No. 864 of 1996

Appellant : Hari Narayan and ors.

Respondent : Topkhana Desh Grah Nirman Samiti Ltd.

Advocate for Def. : R.P. Garg, Adv.

Advocate for Pet/Ap. : R.K. Agrawal, Adv.

Disposition : Appeal allowed

Judgement :

Shiv Kumar Sharma, J.

1. Short question which arises for consideration in this appeal is as to whether the summons can be said to have duty served when process server going to the defendants house for the first time and on finding that he had gone to another town, affixed summons on outer door of his house?

2. This question has emerged in the following circumstances:

(i) Plaintiff respondent instituted a civil suit against the defendants appellants in the trial Court. Summons was issued against the defendants for appearing in the Court on April 20, 1992, but returned with the report of process server that he had gone to the house of the defendants on April 18, 1992 but defendants had gone out so he tried to serve the summons on the wives of the defendants who refused to, accept the summons therefore the summons was affixed by him on outer door of the house in the presence of two witnesses.

(ii) On the basis of the report of process server the trial Court proceeded ex parte against the defendants on April 20, 1992 and ex parte decree was passed on March 8, 1994. The defendants filed application for setting aside the ex parte decree under Order 9, Rule, 13, CPC along with affidavits of their wives Smt. Ram Pyari Murli Devi and Kamala Devi who affirmed on oath that none from the Court at any time went to their residence for service of Summons or notice and there was no occasion for them to refuse the service of summons. They never refused the service of summons as alleged. The defendants alleged in the application that they came to know about the decree at any time before July 15, 1995 when they were first apprised of the same by one Shri Sujee Lal.

(iii) The trial Court dismissed the application vide order dated August 3, 1996. Against the said order present action for filing the appeal has been resorted to.

3. Close scrutiny of the record reveals that the process server had gone to the house of the defendant on April 18, 1992 for the first time and on finding that the defendants had gone out he affixed summons on outer door of their house.

4. It is necessary to advert now towards the statutory provisions with regard to service of summons. Order 5, Rule 17, CPC reads as under :

'Where the defendant or his agent or such other person, as aforesaid, refuses to sign the acknowledgment or where the serving officer after using all due and reasonable diligence cannot find the defendant who is absent from his residence at the time when service is sought to be effected on him and his residence and

there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for a gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed:

5. In the instant case the process server did not care to use due and reasonable diligence in finding the defendants, without making efforts to find out as to when the defendants would be available next time and trying the summons on them the process server affixed the summons on outer door. There is one more infirmity in the report of process server that he did not mention that as to by whom the house of the defendants was identified. These infirmities can not be merely termed as irregularities. I am of the considered view that the provisions of Order 5, Rule 17, CPC have not been complied with by the process server in the instant case. Second proviso of Order 9 Rule 13 does not apply in the present case.

6. In State of U. P. v. Ram Prasad, 1996 AIHC 1485 the Division Bench of Allahabad High Court has observed thus :

'The second proviso to Order 9, Rule 13 does not apply where there is no service of summons at all, it covers only irregularity in service. A person claiming benefit of the proviso must prove that all necessary conditions have been fulfilled.'

7. In Smt. Ram Pad Devi v. Mst. Chan-drika Devi, AIR 1979 Patna 314 the Patna High Court (Hon'ble L. M. Sharma, J. as he then was) had held that second proviso appended to Order 9, Rule 13, CPC. applied only to those cases where irregularity in service of summons is found but when there is no service of the summons at all the provision is not applicable and the person who claimed the benefit of the provision must prove all necessary conditions.

8. In this case the learned counsel for the plaintiff though vehemently argued in support of the impugned order but I am unable to accept this contention that non-compliance of the provisions of Order 5, Rule 17, CPC strictly, may only be termed as irregularity and in view of provisions contained in second proviso to Order 9. Rule 13, CPC ex parte decree cannot be set aside.

9. Consequently, the appeal is allowed and the impugned order is quashed. The ex parte decree dated March 8, 1994 is set aside. While setting the clock back I direct the trial Court to provide opportunity to the defendants to file written statements and proceed to decide the suit on merits. The record of the case be sent back forthwith. Costs easy.

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