

Govind Singh and ors. Vs. Man Singh and ors.

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Court : Rajasthan

Decided On : Jan-16-1998

Reported in : AIR1999Raj22; 1999(2)WLC218; 1998(1)WLN88

Judge : A.S. Godara, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115; Evidence Act - Sections 74; Code of Civil Procedure (CPC) (Amendment) Act, 1976

Appeal No. : Civil Revn. Petn. No. 560 of 1996

Appellant : Govind Singh and ors.

Respondent : Man Singh and ors.

Advocate for Def. : U.S. Bhargava and; Shambhu Singh, Advs.

Advocate for Pet/Ap. : D.S. Shishodia and; Manish Shishodia, Advs.

Disposition : Revision allowed

Judgement :

ORDER

A.S. Godara, J.

1. This Revision Petition has been preferred under Section 115, Civil Procedure Code, 1908 (for short 'the CPC') against the appellate order dated 7-2-96 passed

by the Civil Judge (SD), Rajsamand in Civil Misc. Appeal No. 3/91 thereby setting aside the order dated 13-8-87 passed in Civil Misc. Case No. 10/87 by the then Munsif, Bhim in Civil Original Case No. 33/75.

2. Briefly stated, the facts relevant for disposal of this petition are that the plaintiff Udai Singh (since deceased), whose sons, widow and daughter are petitioners before this Court, brought a suit for pre-emption of the agricultural land which was sold by the defendant-non-petitioner Vijay Singh to the defendant-non-petitioners Man Singh and Keshar Singh who are real brothers and are residents of Village Sadaran, before the trial Court on 10-2-75. The summonses were accordingly issued to the defendant-non-petitioners for their appearance on 8-8-75. The summonses so issued to the defendant-non-petitioners were duly served on the date of hearing, i.e., 8-8-75. Man Singh and Vijay Singh did not appear before the trial Court whereas Keshar Singh, brother of Man Singh, appeared before the trial Court who contested the suit seriously. However, in absence of both Man Singh and Vijay Singh, ex parte proceedings were ordered to commence against them and after a full-fledged trial, it was on 27-4-78 that a decree as prayed for was passed in the suit. The defendant-non-petitioner Man Singh filed an application on 26-6-78 under Order 9, Rule 13, CPC before the trial Court alleging that he was living at Ahmedabad whereat he was employed with the Gujarat Sports Club, Ahmedabad and he was at Ahmedabad on 10-6-75 when the process server has reported to have served the summons in the main suit on Man Singh and that he could not have been present in the village and hence there was no service on the defendant Man Singh nor did he ever have any knowledge about institution and pendency of the suit brought by Udai Singh. He also alleged that it was on 21-6-1978, for the first time, that on coming to his village, while working in his field, the son of Udai Singh Plaintiff informed about the ex parte decree having been obtained against him as well, and so it was requested that the ex parte decree may be set aside and instead he may be allowed to defend the suit.

3. However, the plaintiff Udai Singh refuted all these allegations of the application so moved by the defendant-non-petitioner Man Singh on the ground that it was on 10-6-75 that Man Singh was duly served with a summons personally as endorsed on the summons and, accordingly, there was due service of summons on Man

Singh and, simultaneously, his brother Keshar Singh was also personally served with summons who had throughout appeared in the suit and contested the same and, therefore, there was a due service of summons on the defendant-non-petitioner Man Singh and that he had also, implicitly, knowledge of the pendency of the suit against him. The plaintiff also filed affidavit in support to the reply filed to the application of the defendant Man Singh.

4. In the first instance, the learned trial judge dismissed the application to set aside the ex parte decree against Man Singh defendant vide its order dated 4-11-1978 but, an appeal having been preferred there against, the appellate Court set aside the order of rejection of the application on 18-11-1979 with the direction to afford an opportunity to the contesting parties to adduce evidence in support and against their rival contentions and to dispose of the same afresh.

5. The trial Court, consequent upon remand of the case, examined A. W. 1 Man Singh, N.A.W. 2 Govind Singh in support of the application and, since Udai Singh plaintiff was dead and his sons were brought on record as his legal representatives, C.W. 1 Sawai Singh, Process Server was examined by the trial Court and, after hearing both the sides, the learned trial Judge vide his order dated 13-8-87, while relying on the direct testimony of Sawai Singh and so also on comparison of signatures of defendant-non-petitioner Man Singh on 'Vakalatnama', application dated 26-6-78 and the affidavit as well as sworn statement given in the Court on 6-4-87 and the signatures A to B on Ex. 1 summons, as per the contention of the plaintiff-petitioners' side, having been made by Man Singh himself, concluded that since disputed signatures on the summons of Man Singh tallied with the signatures of Man Singh made on the aforesaid application, affidavit, 'Vakalatnama' and the sworn statement and, accordingly, while holding that Ex. 2 Certificate purporting to have been issued by the Gujarat Sports Club, Ahmedabad was not duly proved and hence the plea of alibi of Man Singh was brushed aside and, instead, it was held that there was due service of summons on Man Singh whose brother Keshar Singh was contesting the suit from the very beginning and so also he had knowledge about the pendency of the suit and hence assuming that, as alleged by the defendant-non-petitioner Man Singh, in case there was some irregularity in service of the summons by C.W. 1 Sawai

Singh, in the aforesaid circumstances, in view of the second proviso added by amendment of 1976 in Rule 13 of Order 9, CPC, the Court is further mandated not to set aside a decree passed ex parte merely on the ground that there has been any irregularity in service of summons if it is satisfied that the defendant had notice of the summons and sufficient time to answer the plaintiffs claim and, consequently, the trial Court held that since there was personal service of summons on Man Singh and he had also notice of the pendency of the suit besides sufficient time to have appeared before the Court whereas, while his real brother Keshar Singh was contesting the suit, he did not contest the same and, therefore, there was no merit in the application so filed by defendant-applicant Man Singh and, consequently, the application was dismissed. Man Singh defendant further preferred a Civil Misc Appeal No. 3/91 in the Court of Civil Judge (SD) Rajsamand and, [he learned appellate Judge, disagreeing with the conclusions and consequential rejection of the application moved by the defendant-appellant Man Singh and, consequently, accepted the appeal and set aside the order passed by the trial Court and hence this revision petition by the legal representatives of Udai Singh plaintiff.

6. I have heard the learned counsel for the parties at length and have also perused and considered the legality and regularity in exercise of jurisdiction by the lower appellate Court along with the record of the case.

7. The learned counsel for the petitioners, while taking through the record and evidence adduced by both the sides and so also the impugned order of the lower appellate Court, submitted that the learned appellate judge committed illegality and material irregularity in exercise of its jurisdiction in reversing and setting aside the order passed by the trial Court and the reasons given in support thereof are wholly untenable. Udai Singh having died before he could be examined in support of his reply to the application filed by the defendant Man Singh. His affidavit being already on record, no finding could have been arrived at as a result of his non-examination and the learned appellate judge also erroneously relied on Ex. 2 certificate filed by the defendant-applicant Man Singh to prove his alibi by way of showing his presence on 10-6-75 at Ahmedabad itself in absence of other record and supporting evidence and the reasons given therefore are not sustainable in

view of the observations and findings given by the learned trial Judge. Similarly, the appellate Judge committed serious irregularity while observing that comparison of disputed signatures of Man Singh defendant by exercising power vested under Section 73 of the Evidence Act, by the trial Court, was full of risk and so also holding that there was no due service of summons on the defendant-applicant Man Singh and he had had no knowledge about the institution and pendency of the suit as well and, therefore, further holding that the plaintiff-petitioner could not prove that there was due service of summons and there was also knowledge of institution and pendency of the suit to the defendant and, lastly, the finding of the learned appellate Judge that the amendment by way of addition of second proviso to Rule 13 of Order 9, CPC by amendment Act 1976 could not be applied to the case in hand since the original suit was already pending when the amendment came into force and hence no retrospective effect could be given to the newly added provision of Rule 13 of Order 9, CPC.

8. However, the learned counsel for the non-petitioners vehemently opposed all these contentions raised from the side of the petitioners on the ground that in view of the appellate order passed by the lower Court, no revision there against under Section 115, CPC could lie and there was neither any illegality nor any material irregularity in exercise of its jurisdiction by the lower appellate Court. Besides, the learned appellate judge, has rightly disagreed with the findings of fact arrived at by the learned trial Judge and, instead, to have held that the summons for appearance on 8-8-75 alleged to have been personally served on defendant-applicant Man Singh on 10-6-75 was never served on Man Singh who was at Ahmedabad who rarely happened to come to his village specially at the time of sowing crops in the rainy season and, besides, Ex. 2 Certificate also helps the defendant-applicant Man Singh to prove that there was no personal service on Man Singh on this date and, similarly, he had had no knowledge about institution and pendency of the suit and, consequently, the order of rejection of the application passed by the trial Court has been rightly set aside by the learned appellate Judge. The petitioners are required to show that there was an illegality or material irregularity in exercise of its jurisdiction by the appellate Court while passing the impugned order resulting in setting aside of the order passed by the trial Court and hence the impugned appellate order deserves to be set aside.

9. In an application filed under Order 9, Rule 13, CPC 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 which cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also. It further provides 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.

10. A.W. 2 Man Singh defendant-non-petitioner has stated before the trial Court that he was at Ahmedabad on 10-6-75 whereat he was living for last about 23 years being in service of Gujarat Sports Club, Ahmedabad and that he had never made A to B signature existing on Ex. 1 summons as reported by C.W.1 Sawai Singh. He has filed Ex. 2 Certificate issued by Major. Mr. Desai, of the club which states that he was present at the Club on duty on 10-6-75 at Ahmedabad. However, in an attempt to falsely stick to his statement that he never made disputed signatures on the summons alleged to have been personally served on him by C.W. 1 Sawai Singh, he went to the extent of denying his admitted signatures A to B on his application filed under Order 9, Rule 13, CPC as well as on his sworn affidavit at A to B besides on the 'Vakalatnama' as well. However, the second signatures made at C to D on the affidavit, though he did not admit unequivocally that he had made these signatures, however, he hesitatingly stated that these signatures might have been made by him. In view of this statement of the defendant-applicant Man Singh, the learned trial Judge rightly exercised his power under Section 73 of the Evidence Act to compare the admitted signatures made by Man Singh on the aforesaid documents as well as the disputed one on Ex. 1 summons and the learned lower appellate Judge has illegally held that, in these circumstances, comparison of the disputed signatures with those admitted

signatures by the trial Court is fraught with great danger. In case there is finding based on the knowledge and experience of the Judge resulting from an observation and analysis of the disputed and the admitted hand-writing, the same may be fallible but, in the present case, since there is direct testimony of C.W. 1 Sawai Singh who has clearly stated that he had got the summons of the suit served on Keshar Singh who is none but the real brother of Man Singh residing in the adjoining house of Man Singh and there was a common 'pol' (gate) of their houses. Meaning thereby that on the face of contest of the suit by Keshar Singh, being real brother of Man Singh, over three years, since Man Singh has clearly admitted that he usually comes to his village for cultivation and sowing his fields jointly with his brother Keshar Singh in the month of June and, therefore, it cannot be presumed that Man Singh never visited his village on or after 10-6-75 before 26-6-1978 when he moved application for setting aside ex parte decree passed against him before the trial Court and, consequently, on the face of admission of Man Singh himself that he had had no animosity with Sawai Singh nor did the latter have any axe to grind against him and, in view of these circumstances, C.W. 1 Sawai Singh, Process Server, has clearly admitted that he had served summons of suit on Keshar Singh, brother of Man Singh and, besides, though on 20-5-75 Man Singh was not present at his house and a report was accordingly made on his summons but on his second visit falling on 10-6-75, Man Singh was present at his house who was offered the summons and, accordingly, after delivery of a copy thereof along with copy of plaint, his signatures A to B was obtained on summons Ex. 1. Since Man Singh resided in the adjoining house of Keshar Singh, being his real brother, who was already served with a summons on an earlier occasion and, on 20-6-75 due to absence of Man Singh, Sawai Singh could not be able to, serve summons on Man Singh personally and he had correctly reported his absence from his house and on second occasion falling on 10-6-75 he obtained signatures of Man Singh A to B on Ex. 1 summons which are tallying, as also rightly concluded by the learned trial Judge, with the admitted signatures of 'Vakalatnama', application under Order 9, Rule 13, CPC filed by Man Singh on 26-6-78 as well as the affidavit filed by Man Singh in support of his application and were of Man Singh himself and none else.

11. There was no motive or extraneous consideration for Sawai Singh to have falsely reported personal service of summons on Man Singh nor has it been directly suggested in his cross-examination to Sawai Singh that he had made a false report and that A to B signatures on Ex. 1 were forged at all. In view of these circumstances, when the statement of Man Singh does not inspire confidence and, instead, the statement and evidence of C.W. 1 Sawai Singh inspire confidence and, there is no rhyme or reason to disbelieve his testimony and, besides, the comparison of the disputed signatures of Man Singh along with admitted signatures, as above, further leave no doubt that A to B signatures existing on summons Ex. 1 are of Man Singh defendant-applicant and none else. Besides, since C.W. 1 Sawai Singh. while reporting service of summons on Man Singh defendant-non-petitioner, was acting in his official capacity and obviously presumption under Section 114(e) of the Evidence Act can be validly raised that official acts have properly been done by the process server since there is no proof otherwise (*Ajai Krishan Singhal v. Union of India* (1996) 10 SCC 721 : (AIR 1996 SC 2677). Accordingly, it is held that there was personal service of summons on Man Singh on 10-6-75 who, having served with notice of the suit for hearing fixed on 8-8-75, did not put in his appearance to contest the suit before the trial Court on 8-8-75 or at any other date subsequent thereto before an ex parte decree was passed against him as late as on 27-4-78, besides, summons of the suit along with copy of the plaint having been so served on him on 10-6-75, having acquired the knowledge of institution and pendency of the suit of pre-emption against him as well as his brother Keshar Singh in respect of the agricultural land purchased jointly by these two brothers from their co-defendant Vijay Singh, though Keshar Singh regularly appeared before the Court and contested the suit on merit till last while Man Singh opted to abstain and did not put in his appearance before the trial Court will he came forward with an application under Order 9, Rule 13, CPC on 26-6-78 and, therefore, as also held by the learned trial Judge, because of any irregularity in the mode of service of summons proved to have been personally served on Man Singh defendant-applicant, any irregularity in the service by itself is not a ground for setting aside ex parte decree passed against the defendant-applicant in absence of any sufficient cause which prevented him from appearing when the suit was called for hearing and on subsequent dates till final disposal of

the suit as late as on 27-4-78. Accordingly, though during the proceedings pending before the trial Court, statement of A.W. 1 Man Singh s/o Himmat Singh has also been recorded. He has stated that Man Singh defendant was living at Ahmedabad for last about 20 to 25 years. He has stated that he had not seen him in the village for last about six years but on the face of admission of Man Singh himself, this statement is false except that Man Singh is serving at Ahmedabad for last about 20 to 25 years.

12. N.A.W.1 Govind Singh stated that Man Singh and Keshar Singh defendants are real brothers who had jointly purchased the suit land and Man Singh often visited his village.

13. As regards non-mention or certification of identity of Man Singh. in view of the aforesaid conclusion that the disputed signatures on Ex. 1 summons were of defendant Man Singh and none else since Man Singh has also not been able to get the disputed signatures examined by a handwriting expert to show that the same were never made by Man Singh and instead the same were forged. On the face of statement of Sawai Singh who had earlier effected similar personal service of summons on the defendant Keshar Singh brother of Man Singh at the latter's house situated just adjoining to that of Man Singh defendant himself and, subsequently, on second occasion, Sawai Singh got the summons served on Man Singh at his residence and he has clearly stated that it was Udai Singh plaintiff who, on the second occasion, in his presence identified Man Singh and Udai Singh, who died before he could be examined by the Court in his sworn affidavit in reply to his reply to the application itself, clearly stated that the summons was personally served on Man Singh. There is nothing on record to believe that the disputed signatures were made by any person other than Man Singh defendant and to hold that there was no legal and valid service on Man Singh defendant.

14. The requirement so Rule 16 of Order 5 CPC are that where the serving officer delivers or tenders a copy of the summons to the defendant personally, he shall require the signatures of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons. Rule 18 of the same order further says that the serving officer shall, in all cases in which the

summons has been served under Rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if, any) identifying the person served and witnessing the delivery or tender of the summons.

15. Ex. 1 says that C.W. 1 Sawai Singh has sworn on oath that a copy of, summons dated 11-3-75 received by him was received by Mini Singh on 10-6-75 at 10(A.M.) and his signatures were obtained and this statement of the process server has been duly sworn before the Assistant Nazir of the Court of Munsif, Bhim on 14-6-75 who has certified the same accordingly. There is omission of the mention of the fact whether Man Singh was in fact, personally known to the process server or that he was so identified by any other person on Ex I but in view of the aforesaid discussed since this summons has been held to be signed by defendant Man Singh alone at his house situated just adjacent to that of his co-defendant Keshar Singh, his real brother, whereat similar summons was served on Keshar Singh on 19-6-75 who has not disputed service and, instead, he put in his appearance on 8-8-75 when the first hearing after service of summons on the defendant was fixed before the trial Court who regularly contested the suit, as above. In view of these circumstances, though there is mention of the fact that the defendant Man Singh being not personally known to the process server was either identified by Udai Singh alleged to be present at the site of service of summons, as deposed by C.W. 1 Sawai Singh but, Udai Singh has sworn an affidavit before his death that the summons on defendant Man Singh was served on him on 10-6-75 and, consequently, non-mention of the person identifying (witness) served summons on Man Singh was also present, on Ex. 1, is of no consequence and the learned trial Judge did not commit any serious illegality while holding that even if there was an irregularity in service of the summons, in view of the proviso to Rule 13 of Order 9, CPC, no significance, on the basis of aforesaid discussion, can be given to this omission and the contrary observations of the learned appellate Judge are far from being sustained.

16. As regards Ex. 2 Certificate issued by the Secretary of the Gujarat Sports Club, Ahmedabad, though it purports to have been signed by its Manager but

neither the Manager nor anybody else having knowledge or familiarity with/about signatures of the person putting his signatures on Ex. 2 has been examined. This certificate also does not bear any despatch number and the Gujarat Sport Club is not a public authority nor this Certificate purports to have been issued under any provisions of law, rule or bye-laws and, consequently, specially when Man Singh defendant-applicant himself admitted that there was a regular register of attendance maintained by the Club in which his attendance is marked but the same has not been produced before the Court nor any official witnessing fact of attendance ever having been marked showing presence of Man Singh on his duties with the Club on 10-6-75 has been produced and, in view of these circumstances, since this certificate does not warrant any inference of its correctness being an official document coming from the custody of appropriate authority and, in view of the aforesaid discussion, usually it is not impossible for an employee of the Club to procure a false certificate as well and, consequently, the learned appellate Judge had no compelling reasons to have arrived at a different conclusion from the one arrived at by the learned trial Judge while placing reliance on Ex. 2 to hold that Man Singh defendant was not present at his residence in his village when he is alleged to have made disputed signatures on Ex. 1 and, instead, he was present at Ahmedabad.

17. Besides, having regard to the fact that since the suit was also throughout and with all requisite earnestness as well as seriousness, being contested by Keshar Singh brother of Man Singh and the suit property was jointly purchased by them and, as also admitted by Man Singh himself, both the brothers purchased the suit land jointly and Man Singh often visited his village at the time, of cultivation of his fields every year and, therefore, there are overwhelming circumstances enabling the Court to conclude that Man Singh defendant had had every notice and knowledge of institution and pendency of the suit before the trial Court who had left his own brother Keshar Singh alone to contest the suit and, on the face of defence raised by Keshar Singh against the suit filed by Udai Singh, it is apparent that Man Singh could not have had any better and different defence to have raised as opposed to that one raised by his brother and co-purchaser of the suit land. In view of these circumstances as well, the application so moved by the defendant-applicant Man Singh did not deserve to be accepted and the conclusion of the trial

Court was well merited but the learned appellate Judge taking an erroneous view of the evidence reached to a contrary conclusion as opposed to one reached by the trial Court and hence has acted with material irregularity in exercise of its jurisdiction while holding that there was neither any service or summons of the suit on the defendant-non-petitioner Man Singh nor had he any notice/knowledge of institution and pendency of the suit before 21-6-78 when he received this information for the first time.

18. The learned appellate Judge, besides, took an erroneous view in regard to application of second proviso appended to Rule 13 of Order 9, CPC by the amendment of 1976 holding that since the suit of the plaintiff-petitioner was pending before the amended provisions were inserted and, consequently, this provision could not be applied in this case.

19. The learned counsel for the petitioners has relied on the ratio of decision rendered in *Commissioner of Wealth-tax v. Sharvan Kumar Swarup & Sons* (1994) 6 SCC 623 : (1994 AIR SCW 5145) in which while referring to various legal treatises and legal dictionaries as well as decisions, the Hon'ble Supreme Court clearly held that the procedural law, generally speaking, is applicable to pending cases. No suitor can be said to have a vested right in procedure. It must, however, be noted that a provision can be partly substantive and partly procedural. Accordingly, no presumption against retrospective (operation) applies to legislation concerned merely with matters of procedure or of evidence, on the contrary, the provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of parliament (Halsbury's Laws of England (Fourth Edn., Vol. 44, para 925), as quoted by the Hon'ble Apex Court in the said decision. Consequently, the learned appellate judge yet fell into another jurisdictional error while holding that the aforesaid second proviso to Rule 13 of Order 9, CPC could not be applied to the proceedings of the suit which were already pending at the time of insertion of the amendment as such.

20. The learned counsel for the petitioners has also relied on the ratio of decision rendered in *Murarilal v. State of M.P.* AIR 1980 SC 531 : (1980 Cri LJ 396), in regard to scope and purpose of Section 73 of the Evidence Act and the power,

authority and duty of the Court to resort to comparison of the disputed hand-writing with admitted or proved hand-writing to ascertain whether the writing is that of the person by whom it has been written and it is worthwhile to quote para 12 of the decision which runs as under :

'12. The argument that the Court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. Section 73 of the Evidence Act expressly enables the Court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. If it is hazardous to do so, as sometimes said, we are afraid it is one of the hazards to which judge and litigant must expose themselves whenever it becomes necessary. There may be cases where both sides call experts and the voices of science are heard. There may be cases where neither side calls an expert, being ill able to afford him. In all such cases it becomes the plain duty of the Court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the Court. Where there is none, the Court will have to seek guidance from some authoritative textbook and the Court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence. We may mention that *Shashi Kumar v. Subhodh Kumar and Pakhruddin v. State of Madhya Pradesh* were cases where the Court itself compared the writings. 21. In view of aforesaid circumstances, when the learned appellate judge illegally considered Ex. 2 Certificate, besides, holding that the approach of the learned trial judge in examining and comparing the disputed signatures with the admitted signatures was fraught with great danger resulting in reversal of findings arrived at by the learned trial judge, this act of the learned appellate judge, on which the impugned appellate order has been based, suffers from a material illegality as well as material irregularity in exercise of its jurisdiction.

22. In view of these circumstances, as relied upon by the learned counsel for the petitioners, in *Savarala Venkatasubbiah v. Kumara Ramiah* AIR 1935 Mad 184, it has been held that when the impugned order has been passed by the learned appellate judge while discarding admissible evidence and, instead, inadmissible

evidence having been relied upon contrary to the principles of evidence, the conclusion so arrived at amounts to exercise of its jurisdiction with material irregularity necessitating revision of the order. The learned counsel for the petitioners also relies on the decision rendered in *Gopikabai v. Narayan Govinda Samarath*, AIR 1953 Nagpur 135 in which it has been even held that the court setting aside abatement on application of party treating affidavit filed in support as evidence, the same being impermissible acts with illegality in exercise of its jurisdiction and, in view of the aforesaid facts and circumstances and the proposition of law, the contentions of the learned counsel for the non-petitioners that the impugned appellate order neither suffers from any illegality nor any material irregularity in exercise of its jurisdiction by the appellate court warranting any interference in revision, holds no ground and all objections as opposed to the aforesaid conclusion arrived at are not sustainable.

23. The learned counsel for the petitioners has relied on the decisions rendered in *M/s. Anand Thalee Bhandar v. Ganganagar Sugar Mills Ltd.* 1989 (2) RLR 94, *Dr. Can Nath v. Chiman Lal* 1980 RLW 239 and *Bidha v. Board of Revenue, U.P. at Allahabad* 1986 All LJ 1073 in support of his aforesaid contentions to repeal objection of the learned counsel for the non-petitioners that no revision petition would lie against the impugned order, in which it has been held that pursuant to proviso second appended to Rule 13 of Order 9, C.P.C. which clearly lays down that even if there is any irregularity in service of summons, as has been held by the learned appellate judge, since after service of summons, as above, in the present case also, the defendant-applicant Man Singh had sufficient notice of date of hearing having been fixed on 8-8-75 and there being a time of about 2 months to enable the defendant to appear before the trial court, he intentionally omitted to appear before the court in the aforesaid circumstances and so the defendant-non-petitioner Man Singh having had full knowledge of institution and pendency of the suit, did not appear before the trial court during the pendency of the suit on any ground whatsoever and, in view of these circumstances, even if there is any irregularity in service of summons, the ex parte decree passed against the defendant-applicant Man Singh cannot be set aside on this ground as well and the impugned order having been passed overlooking these legal provisions is nothing but an illegality and material irregularity in exercise of its jurisdiction by the

appellate court.

24. Resultantly, from whichever angle it is viewed, this revision petition is maintainable and, besides, there being an illegality and material irregularity in exercise of jurisdiction by the appellate court in passing the impugned order and setting aside the one passed by the lower court and hence the same is well merited and there is every justification for interference with and setting aside of the impugned order of the appellate court.

25. In view of the aforesaid conclusion, no other argument either from the side of the petitioner or the non-petitioners is helpful in disposal of this petition.

26. Resultantly, on the basis of aforesaid discussion and conclusion, this revision petition is accepted and the impugned order dated 7-2-96 passed by the learned appellate judge is hereby set aside resulting in restoration of the order dated 13-8-87 resulting in dismissal and rejection of the application dated 26-6-78 filed by the defendant-non-petitioner Man Singh under Order 9, Rule 13, C.P.C.

27. No order as to costs.

28. This petition along with its connected stay petition is disposed of accordingly.

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