

Singh Vs. Purbia

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Court : Himachal Pradesh

Decided On : May-27-1988

Reported in : AIR1989HP26

Judge : V.K. Mehrotra, Actg. C.J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 115 - Order 5, Rules 2, 3, 10 and 17 - Order 9, Rule 13

Appeal No. : Civil Revn. No. 8 of 1982

Appellant : Singh

Respondent : Purbia

Advocate for Def. : Kedar Ishwar, Adv.

Advocate for Pet/Ap. : Rajeev Mehta, Adv.

Judgement :

ORDER

V.K. Mehrotra, Actg. C.J.

1. A suit was institute by Purbia, who is the respondent in this revision, in the Court of Senior Sub-Judge, Mandi, being suit No. 29 of 1979. The plea raised in the suit was that defendants Nos. 2 and 3, namely, Karam Dass and Barthi, both his brother and sister, had transferred their 1/3rd and 1/6th share, respectively, in land

on Jan., 19, 1978 in favour of Singh, who is the applicant in this revision, for Rs. 3000/-. This sale, according to the case set up in the plaint, was void as the property was joint Hindu family co-parcenary property and there was no legal necessity and, therefore, Karam Dass could not alienate it. Also, that Barthi had no right to sell the property.

2. The suit was decreed ex-parte as defendants No. 1, the present applicant, failed to appear in spite of service of summons upon him. The decree was passed on Oct. 27, 1979 by which it was declared that the sale aforesaid was void. A decree for possession was also granted in favour of the plaintiff.

3. An application under Order IX, Rule 13, C.P.C. was made by Singh for setting aside the ex parte decree, on Jan. 18, 1980. It was registered as Miscellaneous application No. 2 of 1980. The trial Judge came to the conclusion that the defendant was duly served and was, therefore, not entitled to the relief of setting aside of the ex parte decree. The finding was that the service of summons was effected upon him by affixation. In appeal, which Singh preferred against the aforesaid order, the conclusions arrived at by the trial Judge were affirmed. The appeal (C.M.A. No. 6 of 1981) was dismissed on Nov. 24, 1981 by the learned District Judge, Mandi. Thereafter, the present application in revision by Singh under Section 115, C.P.C.

4. The submission which was initially made by Shri Rajeev Mehta, appearing for the applicant, was that the finding of the courts below that the applicant was duly served and had failed to contest the suit in spite of the service of summons effected on him, was erroneous. This submission can, however, not be countenanced in the present revision for the two courts below have, on appreciation of evidence on record, concurrently concluded that the applicant was served by affixation under Rule 17 of Order 5, CP.C.

5. Another submission which Shri Mehta made, was that in this case service of summons was not made in accordance with law, and, in the eyes of law, the applicant could not be treated to have been served even by affixation. In this context, Shri Mehta relies upon the observations made by the learned District Judge in the appellate order that a copy of the plaint had not, admittedly, been

pasted along with the summons on the door of the applicant by the Process Server. This factual statement, in the order of the learned District Judge, has not been cotnroverted by the learned counsel appearing for the plaintiff in this court.

6. Order 5, C.P.C deals with service of summons. Rule 2 of the Order says that 'Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.' Rule 10 says that 'service of the summons shall 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.'

7. It is not in dispute that summons served under Rule 10 must be accompanied by a copy of the plaint or else, if permitted by the Court, by a concise statement. The law is settled that if a copy of the plaint is not served on the defendant who is served under Rule 10, the service cannot be said to be in accordance with law.

8. Rule 17, of Order 5, inter alia, provides for affixation of 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. The Rule contemplates service of summons by affixation, amongst others, for the reason that the defendant refused to accept summons tendered to him by the Process Server.

9. It is implicit in the scheme of Order 5 that whenever summons are served by affixation, they should be accompanied by the copy of the plaint in the same manner in which they are to be accompanied by such a copy in the event of personal service under Rule 10. What is so implicit has, however, been made explicit by the provisions contained in the Rules and Orders of the Punjab and Haryana High Court, which have been adopted by this Court. Part B of Chapt. 7 of the Punjab High Court Rules and Orders, (Vol. IV), deals with service of process. The proof of service is dealt with in these Rules in Section (c) of Part B. Rule 3 of this .S. (c), dealing with the proof of service, enumerates the nature of proof of service which the court is to require in each case, according as it falls under one or the other relevant provisions of the C.P.C. relating to service of summons. Sub-rule (i) dealing with personal service, states that 'when the summons or notice is served on the defendant or respondent personally, the service and the signature of

the defendant or respondent on the back of the process should be proved.'

10. Sub-rule (v) of Rule 3 of Section (c), dealing with service under Rule 17 of Order 5, states that 'If the service be made under Order 5, Rule 17, it should, in like manner, be proved according to the circumstances, of the case.....;and, that the house, on the outer, door of which a copy of the process was affixed, was the ordinary residence or place of business of the defendant at the time when it was so affixed.....'. It is clear, therefore, that service under Rule 17 of Order 5, C.P.C. is to be made in like manner which obviously, refers to the manner in which service is to be made under Rule 10 of Order 5, C.P.C.

11. The intendment of the aforesaid Rule clearly is that where service of summons is to be made by affixation under Rule 17 of Order 5, summons should also be accompanied by a copy of the plaint. I am supported in this view by a decision of the Punjab and Haryana High Court in Kesar Singh v. Tara Chand, (1971) 73 Punj LR 198.

12. Where the summons served under Rule 17 are not accompanied by a copy of the plaint, it would not be a mere irregularity in service of summons. It would be an illegality in the service in the same manner as there is illegality in service of summons under Rule 10 of Order 5, C.P.C. without a copy of the plaint accompanying the summons which is tendered to the defendant.

13. Shri Kedar Ishwar, appearing for the plaintiff-respondent, strenuously urged that the absence of a specific requirement in Rule 17 of O 5, C.P.C. that a copy of the plaint should accompany the summons, clearly indicates the legislative intent that the failure to affix a copy of the plaint, with the summons on the door of the defendant was not treated by the legislature to be of much consequence and was, therefore, only an irregularity in the service of summons. As such, in his submission, the ex parte decree should not be set aside under Order 9, Rule 13, C.P.C. on account of this irregularity, as contemplated by the Second proviso, added by the Code of Civil Procedure (Amendment) Act, 1976, to Rule 13 of Order 9, C.P.C. in the following terms:--

'Provided further 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 plaintiff's claim.'

What was emphasised by Shri Iswhar in his submission was that the proviso contemplated that where the court is satisfied that the defendant has notice of the date of hearing and has sufficient time to appear and answer the plaintiff's claim, the decree passed ex parte should not be set aside on account of the irregularity in the service of summons. This submission overrules the consideration that, as held earlier, the non-affixation of the copy of the plaint with the summons, while effecting service of summons under Rule 17 of Order 5, C.P.C., is not a mere irregularity in the service of summons, but is an illegality. Further, the legislature has not, in specific terms, provided even in Rule 10 that a copy of the plaint must be tendered to a defendant while effecting service on him and yet, having regard to the provision contained in Rule 2 of Order 5, C.P.C., courts have laid down that tendering a summons, without the copy of the plaint under Rule 10, vitiates the service as illegal.

14. In *Raghubir Sahai v. Bhakt Sajjan*, AIR 1978 All 139, Division Bench of the Allahabad High Court was concerned with a different situation altogether. There, the error in service under Rule 17, of Order 5, C P.C. which was pointed out, was that the summons was not affixed at the outer door of the place of residence or business, and the failure to do so was pressed into aid as a ground for setting aside the ex parte decree. The Division Bench took the view that the lapse aforesaid was only in the nature of an irregularity.

15. Since, in the instant case, it is not indispute that the copy of the plaint was not affixed along with the summons, the service of summons upon the applicant-defendant under Rule IV of Order 5, C.P.C., cannot be treated to be due service of summons. The ex parte decree can, therefore, not be allowed to stand.;

16. The decision of the courts below is set aside. The application of applicant, Singh, made under Rule 13 of Order 9, C P.C. deserves to be and shall stand allowed, on the condition that a sum of Rs. 1000/- is deposited by the applicant

before the trial court within two months from today, which amount shall be put in a fixed deposit with a Nationalised Bank by the trial court for a period of 37 months, and the disposal of this amount together with interest earned, shall be in accordance with the result of the suit. The parties shall appear before the trial court with a copy of this judgment on June 27, 1988 and the trial court shall rehear the suit expeditiously in accordance with law thereafter.

17. In case the applicant fails to deposit the aforesaid amount within the time allowed, his application under Rule 13, Order 9 C.P.C. shall stand dismissed.

18. Parties shall bear their own costs in this Court.

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