

The Indian Law Reports

Before : R. N. Mittal, J.

PAKHAR SINGH,—Petitioner

versus

BHAJAN SINGH and others,—Respondents.

Civil Revision No. 1521 of 1979

November 14, 1986

Code of Civil Procedure (V of 1908)—Order 5, Rule 2 and Order 9, Rule 13—Ex parte decree made against defendant—Such decree sought to be set aside on the ground that copy of plaint not supplied to the defendant along with the summons—Non-supply of the plaint—Whether an irregularity and thereby curable under the second proviso to Rule 13 of Order 9—Ex parte decree—Whether liable to be set aside.

Held, that Rule 2 of Order 5 of the Code of Civil Procedure, 1908 provides that every summons shall be accompanied by a copy of the plaint or if so permitted by a concise statement. A reading of Rule 13 of Order 9 would show that an *ex parte decree* can be set aside on two grounds; firstly, if the court finds that the summons was not duly served on the defendant and secondly, if the defendant was prevented by a sufficient cause from appearing in the Court on the date of hearing. The second proviso is a rider to the aforesaid rule. It provides that if the defendant comes to know about the date of hearing of the suit and there is sufficient time at his disposal to appear in the Court, it is incumbent on him to appear and file reply in the case. Therefore, the test for determining as to whether the service is proper or not is firstly, whether the defendant had come to know about the date of hearing of the suit and secondly, whether there was enough time to appear in the court. In case these tests are satisfied the service is proper even if there is non-compliance of some provision of the Code. As such the service of the summons without a copy of the plaint is an irregularity, which is curable under the second proviso to Rule 13 of Order 9. Therefore, an *ex parte decree* is not liable to be set aside on the ground that the summons was served on the defendant without a copy of the plaint.

(Para 6).

Petition under section 115 C.P.C. for revision of the order of Shri Des Raj Mahajan, Additional District Judge, Ludhiana, dated 2nd February, 1979, reversing that of Shri S. S. Hundal, PCS, Sub-Judge, III Class, Ludhiana, dated 10th February, 1978, accepting the appeal and setting aside the order under appeal, set aside the ex parte decree, dated 28th March, 1974 and directing the parties to appear before the learned trial court on 2nd March, 1979.

Claim:—Application on behalf of Bhajan Singh and Jagjit Singh defendants No. 1 and 2 under order 9, Rule 13 read with section 151, C.P.C. for setting aside the ex parte decree passed against them on 28th March, 1974.

Claim in Revision—For reversal of the order of the Courts below.

Ujagar Singh, Senior Advocate, with Mr. S. S. Punia, Advocate, for the Petitioner.

G. R. Majithia, Senior Advocate, Mr. Sanjay Majithia, Advocate, with him for Respondent No. 1.

JUDGMENT

R. N. Mittal, J.—

(1) This revision petition has been filed by the plaintiff against the order of the Additional District Judge, Ludhiana, dated 2nd February, 1979.

(2) Briefly the facts are that the plaintiff-petitioner filed a suit against the defendants for declaration that he was the owner of the land in dispute. The defendants were served with summonses under registered post for 27th December, 1973. Bhajan Singh and Jagjit Singh, defendants Nos. 1 and 2, did not appear on that date and were proceeded against *ex parte*. The case was adjourned to 10th January, 1974 for the written statement of Karam Singh, defendant No. 3. On 10th January, 1974 Karam Singh, defendant No. 3, admitted the claim of the plaintiff in his written statement. On 28th March, 1974 a decree was passed in favour of the plaintiff.

(3) The defendants Nos. 1 and 2 filed an application for setting aside the *ex parte* decree on 24th October, 1975 and they pleaded that they came to know about the *ex parte* decree on 16th October, 1975 when a copy of the application under section 152 of the Code of Civil Procedure for amendment of the judgment was supplied to them on behalf of the plaintiff. Consequently they prayed that the *ex parte* decree be set aside and they be

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allowed to contest the suit. The application was opposed by the plaintiff who *inter alia* pleaded that the application was beyond limitation and there were no sufficient grounds for setting aside the *ex parte* decree.

(4) The learned trial Court held that there was proper service of the defendants, that they failed to appear in the court on 27th December, 1973 and that the application was barred by limitation. Consequently it dismissed the same. The defendants went up in appeal before the Additional District Judge, Ludhiana who came to the conclusion that the summonses served upon defendants Nos. 1 and 2 were not accompanied by copies of the plaint and, therefore, it could not be held that the defendants had been duly served. It also held that the defendants came to know about the decree on 16th October, 1975 and, therefore, the application for setting aside the *ex parte* decree was within limitation. Consequently it accepted the appeal and set aside the *ex parte* decree dated 28th March, 1984 against defendants Nos. 1 and 2. The plaintiff has come up in revision to this Court.

(5) It is contended by Mr. Ujagar Singh that defendants Nos. 1 and 2 had been served with summonses for 27th December, 1973 and they had the knowledge of the date of hearing. If the copies of the plaints were not attached with the summonses served upon them it was to be treated as a mere irregularity under the second proviso to order 9, rule 13 of the Code of Civil Procedure. Therefore, the defendants cannot plead that they had no knowledge about the date of hearing. The application for setting aside the *ex parte* decree has been filed after more than 1½ years and thus it is clearly barred by limitation. On the other hand, Mr. Majithia has submitted that under Order 5, rule 2 of the Code it was mandatory that copies of the plaint should have been annexed with the summonses served upon defendants Nos 1 and 2 and in the absence of the copies of the plaint it was no service in the eye of law. According to him, second proviso to Order 9, rule 13 applies in case there is irregularity in the service and not if there is illegality therein. In support of his contention he has placed reliance on *M. G. Dua v. Balli Mal Naval Kishore* (1), *Jagat Ram v. Shanti Sarup* (2), *Kesar Singh v. Tara Chand and another* (3), *Jagan Nath*

(1) AIR 1959, Pb. 467

(2) 1965 P.L.R. 45

(3) 1971 P.L.R. 198

and another v. Tek Chand (4), M/s Parma Nand Bhalothia & Sons v. M/s Adarsh Oil Mills (5), Smt. Hiren Ghosh v. Smt. Sasikala Padhi & others (6), Karnail Singh v. Dina Nath and others (7) Bheru Lal v. Shanti Lal (8).

(6) I have duly considered the arguments of the learned counsel, Order 5, rule 2 of the Code provides that every summons shall be accompanied by a copy of the plaint or if so permitted by a concise statement. Order 9, rule 13 relates to setting aside of *ex parte* decree against the defendant. It reads as follows :—

“13. 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 his 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...

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.

Explanation...”

The second proviso was added to the rule in 1976. The objects and reasons of adding the proviso were as follows:—

“Rule 13 deals with setting aside of *ex parte* decree against defendants. A new proviso is being added to the rule to ensure that the Court should not set aside an *ex parte* decree merely on the ground of irregularity in the

(4) 1974 P.L.R. 339

(5) 1976 P.L.R. 485

(6) 57 (1984) Cut. L.T. 494

(7) 1985 (2) Rent. L.R. 539

(8) AIR 1985 Raj. 53

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service of the summons in a case where the defendant had adequate notice of the date of hearing of the suit.”

It is evident from a mere reading of the rule that an *ex parte* decree can be set aside on two grounds; firstly, if the Court finds that the summons was not duly served on the defendant and secondly, if the defendant was prevented by a sufficient cause from appearing in the Court on the date of hearing. The second proviso is a rider to the rule. It provides that if the defendant comes to know about the date of hearing of the suit and there is sufficient time at his disposal to appear in the Court, it is incumbent on him to appear there and file reply in the case. The purpose of introducing the proviso appears to be that the defendant may not be able to prolong the litigation and thus defeat the ends of justice. It is true that Order 5, rule 2 provides that the copy of the plaint should accompany the summons and the Courts before the introduction of the proviso have held, that if a copy of the plaint is not attached with the summons, it is an illegality in the service. However, after introduction of the proviso, that interpretation does not hold good. It is a settled principle of law that if there is some conflict in different provisions of an Act, they should be construed harmoniously. It is also a settled principle of law that the provisions of an amending Act should be given effect to and they should be construed in such a way that the object of the amendment is not frustrated. As already mentioned the proviso says that the service of the defendant is to be treated as proper if he comes to know about the date of suit sufficiently prior to the date of hearing. Therefore, the test for determining as to whether the service is proper or not is, firstly, whether the defendant had come to know about the date of hearing of the suit and secondly, whether he had enough time to appear in the Court. In case these tests are satisfied, the service is proper even if there is non-compliance of some provision of the Code. Consequently I am of the opinion that if a summons is served on the defendant without a copy of the plaint, it is an irregularity, which is cured by the 2nd proviso.

In the above I am fortified by the observations in *Anaithalayan v. Marudamuthu*, (9), *Raghubir Sahai Bhatnagar v. Bhakt Sajjan* (10), *S. P. Srivastava v. Smt. Lata Srivastava* (11). The Madras

(9) AIR 1953 Mad. 528

(10) AIR 1978 All. 139

(11) AIR 1980 All. 336

High Court had added a similar proviso under Order 9, rule 13. In *Anaithalayan's case* (supra) the summons was tendered to the defendant but he refused to sign the acknowledgment. The summons was not pasted after refusal on the outer door of the house. The Court proceeded against the defendant *ex parte* and passed an *ex parte* decree. An application for setting aside the *ex parte* decree was made by the defendant which was dismissed by the trial Court. It was observed in revision by the High Court that the proviso applied to all cases in which there was failure to observe provisions as to service of summons under Order 5, including the failure to affix summons on outer door on refusal to sign acknowledgment. It was further observed that in all such cases if it be proved that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim, it would be an irregularity which is cured by the proviso. Similar proviso was added by the Allahabad High Court under Order 9, rule 13. The same question came up before that Court in *Raghubir Sahai Bhatnagar's case* (supra). In that case too the defendant had refused to accept the summons and the process-server did not affix the copy of the summons on the defendant's house. It was observed by a Division Bench that the proviso to Order 9, rule 13 comes into play when some irregularity occurs in the service of the summons. No doubt, Order 5, rule 17 requires that on defendant's refusal to accept the summons the process-server should affix the same on the outer door of the defendant's place of residence or business, but his failure to go through the prescribed formality is a technical fault amounting to an irregularity. The above view was followed by that High Court in *S. P. Srivastava's case* (supra).

(8) Now I advert to the cases referred to by Mr. Majithia. It is true that in *M. G. Dua's*, *Jagan Nath's* and *M/s Parma Nand Bhalothia & Sons' cases* (supra), it was observed that a summons cannot be regarded as duly served unless it is accompanied by a copy of the plaint. However, those observations were made when the proviso was not added to Order 9, rule 13. The learned Judges had no occasion to consider the effect of the newly added proviso. After the introduction of the proviso, the service of summons without a copy of the plaint ceases to be a sufficient ground for setting aside an *ex parte* decree as already discussed if the defendant has the knowledge of the date of hearing and he had sufficient time to appear and defend the proceedings. The addition of the proviso has made all the difference. In *Jagat Ram's case* (supra), the question was as to which date should be considered as first date of

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hearing under the provisions of the East Punjab Urban Rent Restriction Act. In my view the ratio in these cases is of no assistance. In *Kesar Singh's case* (supra) the defendant refused to accept service and the summons was affixed on his outer door without copy of the plaint. It was held by the learned Judge that in view of Order 5, rule 17 a copy of the plaint should have been affixed at the outer door of his house and, therefore, the same was illegal. The learned Judge also relied on *Jagat Ram's case* (supra) which I have already dealt with.

(9) I am of the view that the ratio in the above case no longer holds good. The facts of *Karnail Singh's case* (supra) are the same as those of *Kesar Singh's case* (supra). For similar reasons I do not find that this case is helpful to Mr. Majithia.

(10) The observations in *Smt. Hiran Ghosh's case* (supra) support the contention of Mr. Majithia. However, with due deference to the learned Judge I regret my inability to accept the said view. In *Bheru Lal's case* (supra) it was held in the facts of that case that the defendant had no knowledge of the date of hearing and consequently the proviso to rule 13 *ibid* did not apply. The facts of that case are also distinguishable. However, the following observations in that case help the counsel for the petitioner :—

“The second proviso to Order 9, rule 13 CPC does not contemplate that despite the irregular service the *ex parte*, decree would not be set aside if the defendant could have acquired knowledge of the date of the hearing of the suit. What it says is that the court shall not set aside a decree.....If it is satisfied that the defendant had notice of the date of hearing. Therefore, in order to get the benefit of this proviso the plaintiff has to show that the defendant had knowledge of the date of hearing of the suit despite the irregular service. He cannot take advantage of this proviso merely by showing that the defendant could have acquired knowledge of the date of hearing if he so chose.”

(11) Faced with this situation Mr. Majithia has argued that in the revision the impugned order should not be interfered with. To fortify his argument he made reference to *Nem Chand and another v. Mst. Man Bhari and another* (12) and *Union of India v.*

Smt. Bishan Devi and another (13) I do not find any substance in this submission as well. It is well settled that if a Court has acted with material irregularity in the exercise of its jurisdiction an aggrieved party can always file a revision to this Court. In the present case, as already mentioned above, the petitioner had the knowledge of the date of hearing but he failed to appear in the Court on that date. He in order to delay the proceedings, filed the application for setting aside *ex parte* decree after more than one and a half years. The appellate Court without taking into consideration the second proviso to rule 13 *ibid* set aside the decree passed against the defendant-respondent. In the circumstance, in my view, the revision petition is maintainable. In *Nem Chand's case* (supra) the learned Chief Justice refused to interfere with the order of the trial Court because he was of the view that substantial justice had been done between the parties. It is sufficient to observe that the facts of both the cases referred to above are distinguishable and, therefore, the observations therein are of no assistance to Mr. Majithia.

(12) For the aforesaid reasons, I accept the revision petition with costs, set aside the order of the Additional District Judge and restore that of the trial Court. Counsel's fee Rs. 400.

H.S.B.

Before : M. R. Agnihotri, J.

MADAN LAL,—Petitioner.

versus

PUNJAB STATE ELECTRICITY BOARD and

another,—Respondents.

Civil Writ Petition No. 4472 of 1979

December 19, 1986

Punjab Civil Services (Punishment and Appeal) Rules, 1970—Rule 5 and 8—F.I.R. under Corruption Act registered against official—Said official also charge-sheeted on same charge—No