

Before : Hon'ble A. P. Chowdhri, J.

BIMLA WATI SHARMA,—Petitioner.

versus

STATE BANK OF PATIALA & OTHERS,—Respondents.

Civil Revision No. 903 of 1991

September 4, 1991.

Code of Civil Procedure (66 of 1956)—Order 5, Rule 2—Due service of summons—Copy of the plaint not accompanies summons—Defendant refusing to accept summons without copy—Service not duly effected.

Held, that no summons can be regarded to have been duly served unless it is accompanied by a copy of the plaint. 'Due service' means service of summons along with the plaint. It cannot be held that the word 'due' has been superfluously used by the Legislature. Compliance of the provisions of Order 5 Rule 2 C.P.C. is a must and it cannot be held to be directory.

(Para 5)

Further held, that in the facts of the present case, admittedly copy of the plaint was not tendered with the summons to defendant No. 6 and, therefore, it must be held that the petitioner had not been duly served in the suit.

(Para 6)

Petition Under Section of Act U/S 115 of C.P.C. for Revision of the order of the Court of Shri S. S. Hundal, Sub-Judge, 1st Class, Nabha, dated 14th January, 1991 rejecting the application of Bimla Wati to file written statement.

Claim : Suit for recovery of Rs. 5,59,172 (Principle amount of Rs. 5,59,172 only plus Rs. nil only as overdue interest at the rate of 16.5 per cent P.A. with quarterly rests upto the date of filing of the suit, and incidental charges on the basis of oral and documentary evidence, alongwith future interest with effect from 19th May, 1988 at the rate of 18.5 per cent P.A. with quarterly rests till realisation by the sale of hypothecated stocks of trade, machinery and by the sale or property under equitable mortgage in favour of the plaintiff, fully detailed in the plaint, as under :—

Hypothecated stocks

Paddy Rice.

Property under equitable mortgage

1. House of situated at Purani Nahhi, Nabha, and bounded as under :—

South : 80'—8" House of Amar Chand, Nand Lal and Sampuran Singh.

North : 44'—6" House of Roshan Lal &
 25'—2" House of Ruldu Ram,
 West : 39'—2" House of Ruldu Ram.
 East : 29'—9" House of Bachan Lal Basanti Devi.

Total area 324 Sq. Yard as per sale deed No. 2668 dated 11th November, 1986 of defendants No. 3 to 6.

2. House and shops of defendant No. 5 Adarash Mohan Sharma as per sale deed No. 2653 dated 27th January, 1981 and bounded as under :—

South : Street 22—1/2"
 North : Government Godown 22—1/2'
 East : Shivji 45'

West : Na Nala 45', total area 112—1/2 Sq. Yards situated at Cinema Road, Nabha.

3. Land alongwith constructed building of Rice Sheller there upon as well as stores and office etc. in khewat No. 251 Khatauni No. 337, Khasra No. 1031 (6-5), 1046 (2-10) total area 8 Bighas 15 Biswas situated at village Alohran Tehsil Nabha as per jamabandi 1980-81,—*vide* regd. Sale Deed No. 2586 dated 31st October, 1986 of defendants No. 3 to 5.

Claim in Appeal : For reversal of the order of the Lower Appellate Court.

J. C. Nagpal, Advocate, for the Petitioner.

J. S. Narang, Advocate and P. D. Mehta, Advocate, for the State Bank of Patiala.

JUDGMENT

(1) The brief facts relevant for the disposal of this revision petition against the order dated January 14, 1991, of the Subordinate Judge 1st Class, Nabha, are as follows :—

The State Bank of Patiala instituted a suit on May 19, 1988, for the recovery of Rs. 5,59,172 as the principal amount, besides interest, against M/s Sharma Rice Mills, a partnership concern. The partners of the firm, namely, Sham Lal Sharma, his sons Vinod Kumar Sharma, Parmod Kumar Sharma and Adarsh Mohan Sharma, besides Sham Lal Sharma's wife Bimla Wati Sharma as guarantor were impleaded as parties. The suit is being contested by the

aforesaid five defendants. At the stage of service on the defendants Mr. Nikka Singh, Advocate, filed a memo. of appearance on May 22, 1989, on behalf of Sham Lal Sharma, Adarsh Mohan Sharma and Bimla Wati Sharma. On the next date fixed in the suit i.e. June 9, 1989, the said Advocate filed power-of-attorney on behalf of Sham Lal Sharma, defendant No. 2, and Adarsh Mohan Sharma, defendant No. 5, but did not file power-of-attorney in so far as Smt. Bimla Wati Sharma defendant No. 6 is concerned. Issues were framed. The plaintiff closed its evidence on February 27, 1990. Thereafter the defendants started their evidence and already three witnesses have been examined. At that stage Smt. Bimla Wati Sharma made an application under Order 9 Rule 7 of the Code of Civil Procedure (hereinafter referred to as 'the Code') for setting aside the *ex-parte* proceedings against her on 14th January, 1991. The said application having been opposed by the plaintiff-Bank was dismissed by the impugned order. By noticing the fact that Mr. Nikka Singh, Advocate, had put appearance on behalf of the applicant and had filed a memo. of appearance on May 22, 1989, and later on he had failed to file power-of-attorney on her behalf, the learned trial court held that there was no ground for setting aside the *ex parte* proceedings to permit the said applicant to file a written statement. Aggrieved by the order, Smt. Bimla Wati Sharma, defendant No. 6, has filed this revision.

(2) Mr. J. C. Nagpal, learned counsel for the petitioner, has contended that Smt. Bimla Wati Sharma was not served in the suit. According to the learned counsel the petitioner is entitled to have the *ex parte* proceedings set aside and be relegated to the stage of her appearance in the Court in response to the service of summons:

(3) The contention of Mr. J. S. Narang, learned counsel for the respondent-Bank, on the other hand, is that the petitioner is wife of Sham Lal Sharma and mother of respondents 3 to 5. She was living along with the aforesaid persons. A number of attempts were made to effect service on her. She had adequate notice of the suit and of the various dates fixed therein and on more than one occasion, summons was tendered to her and she declined to accept the same on the ground that the summons was not accompanied by a copy of the plaint. According to the learned counsel, the non-furnishing of a copy of the plaint along with the summons was a mere irregularity

and the trial Court was justified in dismissing the petitioner's application.

(4) I have given my due consideration to the respective submissions of the learned counsel for both the parties.

(5) The primary question arising for consideration in this case is—whether Smt. Bimla Wati Sharma was duly served in this case? For October 26, 1988, a date fixed in the case for service on the defendants, the report was that proclamation had been done and summons had also been affixed at the outer door of the house of the defendants, which was otherwise locked. The service was not considered adequate for the simple reason that there was no order for effecting substituted service. The Court directed fresh summons to be issued for February 23, 1989. The report dated February 20, 1989, was that Smt. Bimla Wati Sharma was found at home and was tendered summons. She, however, declined to accept the same on the ground that a copy of the plaint be furnished along therewith. Again report dated March 2, 1989, made by the process-server is to the effect that Smt. Bimla Wati Sharma was tendered summons. She declined to accept the same on the ground of non-furnishing of copy of the plaint. It is not disputed that at no stage was a copy of the plaint tendered to the petitioner along with the summons. The question, therefore, is whether in the circumstances it can be held that the petitioner was duly served or not. There was a conflict of views on the question—whether the requirement of furnishing a copy of the plaint or where permitted a concise statement thereof along with the summons as laid down in Order 5 Rule 2 of the Code is a mandatory requirement or only directory? In certain cases, it was held that the required was mandatory and non-compliance thereof rendered the service of summons invalid. In another set of rulings, as *Risaldar Pakhar Singh, v. Bhajan Singh (died) and others* (1), it was held that non-furnishing of copy of the plaint along with the summons was a mere irregularity within the meaning of the second proviso to Order 9 Rule 13 of the Code. If the defendant came to know about the date of hearing of the suit and had enough time to appear in the Court, the said irregularity in the service of summons was no ground to set aside the *ex parte* decree under Order 9 Rule 13 of the Code. It was further held that in view of the insertion of the second proviso to Order 9 Rule 13 by the Amending Act of 1976, rulings, in which it was held that non-furnishing of copy of the plaint-rendered the service to be invalid, ceased to hold the field. The aforesaid conflict

(1) 1987 P.L.R. 146.

has been set at rest by a Division Bench of this Court in *Babu Ram Bhatnagar v. Satish Kumar Rawal*, (2), wherein this very question was examined in detail. After reviewing the case law, including the decision in *Risaldar Pakhar Singh's case* (supra) the conclusion was stated by the learned Judges in paragraph 7 as under :—

“On an analytical examination of the entire case law cited at the Bar and on pursuing Order 5 Rule 2, C.P.C. it can safely be held that attachment of the copy of the plaint or a concise statement thereof along with the summons is mandatory. No summons can be regarded to have been duly served unless it is accompanied by a copy of the plaint. ‘Due service’ means service of summons along with the plaint. It cannot be held that the word ‘due’ has been superfluously used by the Legislature. Compliance of the provisions of Order 5 Rule 2 C.P.C. is a must and it cannot be held to be directly.”

(6) In the facts of the present case, admittedly copy of the plaint was not tendered with the summons to defendant No. 6 and, therefore, it must be held that the petitioner had not been duly served in the suit.

(7) Mr. J. S. Narang, learned counsel for the respondent-Bank, relied on the following authorities :—

- (1) *Bishan Swarup v. Canara Bank and others* (3);
- (2) *Iqbal Nath Wadhawan v. Central Bank of India and others* (4); and
- (3) *Sanjeev Ahuja v. Bank of India and others* (5).

In view of the conclusion that the petitioner was not duly served, these authorities are of no assistance. This is particularly so because the petitioner is not a partner of the firm but has been impleaded as alleged guarantor of the other defendants. The provisions of Order 30 Rule 3 of the Code permitting partnership to be served through one or more partners does not in terms apply to the case of a guarantor of the partnership.

(2) 1991 (2) P.L.R. 234.

(3) 1990 I.S.J. (Banking) 139.

(4) 1990 I.S.J. (Banking) 196.

(5) 1990 I.S.J. (Banking) 560.

(8) The next contention of Mr. Narang is that the petitioner is living with defendants 2 to 5, who are respectively her husband and sons, and, therefore, it will be ridiculous to believe that the petitioner was not aware of the proceedings. Mr. Narang submitted that the suit involves a substantial amount of money and at this late stage the petitioner has put in appearance in order to reopen the case and prolong the proceedings. Mr. J. C. Nagpal, learned counsel for the petitioner, in order to show his *bona fides* stated that the petitioner may be permitted to file a written statement which raises only one question, namely, whether the guarantee bond alleged to have been furnished by the petitioner ceased to be effective on various grounds mentioned in the written statement. He further stated that only manager and one official of the bank, who have already been examined by the plaintiff, will be required to be resummoned for further cross-examination only on the said aspect of the case, namely, that the guarantee bond had been rendered unenforceable for various reasons mentioned in the written statement. Otherwise, the petitioner adopts all the proceedings that have so far taken place, including the evidence which has been recorded. Learned counsel also pointed out that the petitioner was not interested in causing delay because liability to pay interest continued and the defendants had pledged property worth much more than the amount claimed in the suit together with interest.

(9) On a balancing of the various factors, I am of the view that it will be in the interest of justice to permit the petitioner to file a written statement as stated by her learned counsel. If necessary, the issue with regard to enforceability of the guarantee bond alleged to have been furnished by defendant No. 6 shall be framed. Thereafter only the bank manager and one official of the bank already examined shall be recalled for further cross-examination by the petitioner only on the aforesaid aspect of the case, whereafter the case will be dealt with and disposed of according to law. As stated by the petitioner's counsel, the evidence already recorded in the suit has been adopted by the petitioner and the same shall accordingly be read as evidence in the case.

The revision petition is allowed in the terms indicated above. Parties through their counsel are directed to appear in the trial court on September 20, 1991, for further proceedings according to law. In the facts and circumstances of the case, the parties shall bear their own costs in this revision.