(2016) 10 DEL CK 0032

DELHI HIGH COURT

Case No: FAO (OS) 108 of 2016

Sweety Gupta	APPELLANT
Vs	
Neety Gupta	RESPONDENT

Date of Decision: Oct. 25, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 17, Order 5 Rule 18, Order 5 Rule 9, Order 9 Rule 13, Order 9 Rule 6
- Evidence Act, 1872 - Section 114
- General Clauses Act, 1897 - Section 27

Citation: (2017) AIRCC 344 : (2016) 160 DRJ 93

Hon'ble Judges: Mr. Badar Durrez Ahmed and Mr. Ashutosh Kumar, JJ.

Bench: Division Bench

Advocate: Mr. Abhijat with Mr. Rishab Bansal and Mr. Anuj Chaturvedi, Advocates, for the Appellant; Mr. Praveen Kumar, Advocate, for the Respondent No. 1

Final Decision: Disposed Off

Judgement

Mr. Ashutosh Kumar, J. - Sweety Gupta, appellant/defendant No.4 has put up a challenge to the order dated 28.01.2016 passed in IA No.19352/2011 in CS(OS) No.2209/2008 whereby the application preferred by her for setting aside the ex-parte preliminary decree dated 27.09.2011 passed by a learned single Judge of this Court directing that the plaintiff/respondent No.1 and defendant Nos.1 to 4, all of whom are own sisters, would be entitled to ⅕th share in the suit property bearing Nos.B-7, 80/2, Safdarjung Enclave, New Delhi-110029 and B-9, Rohit Kunj, Pitampura (Rohtas Cooperative House Building Society, Delhi), has been rejected.

2. The singular issue which arises for determination in the present case is whether the appellant who was defendant No.4 in the main suit had been served with the summons of the suit and whether ex-parte proceeding against her is justified.

3. Before we proceed to examine the facts of this case, we deem it expedient to notice the relevant provisions of law regarding appearance of parties in a suit and consequences of non appearance as well as rescinding of an ex-parte judgment along with the provisions of the Code of Civil Procedure which deal with the service of summons.

4. Rules 17 & 18 of Order 5 of CPC, 1908 reads as follows:-

17. Procedure when defendant refuses to accept service, or cannot be found - Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, 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 at 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 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 do, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

18. Endorsement of time and manner of service- 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."

5. These two rules, referred to above, provide for contingencies in which a defendant in a suit refuses to accept service or cannot be found as well as the responsibility of the serving officer to endorse or cause to be endorsed a return stating the time and the manner in which the summons were attempted to be served or served.

6. Order 9 of the Code of Civil Procedure, 1908 primarily deals with the requirement of parties to a suit to appear and provides for the manner of disposal of a suit in the event of either of the parties not appearing before the Court or when neither of the parties would choose to appear before the Court.

7. Rule 6 Order 9 reads thus:-

6. Procedure when only plaintiff appears- (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then-

[(a)] When summons duly served-if it is proved that the summons was duly served, the Court may make an order that the suit shall be heard ex parte.]

(b) When summons not duly served-if it is not proved that the summons was duly serve, the Court shall direct a second summons to be issued and served on the defendant;

(c) When summons served but not in due time-if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiffs'' default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement."

8. The provisions contained in Rule 6 (Supra) contemplates three circumstances when on a date fixed for hearing, the plaintiff appears and the defendant does not appear. In that event three alternatives are provided for, to be resorted to by the Court. The three situations/circumstances are (i) when summons duly served; (ii) when summons not duly served; and (iii) when summons served but not in due time. In the present case we are concerned with situation (ii) i.e when the appellant/defendant No.4 asserts that the summons have not been duly served.

9. It is to be noted that when summons are duly served but the defendant chooses not to appear, the Court may make an order that the suit be heard ex parte. In case it is not proved that the summons are duly served, the Court is under an obligation to direct a second summons to be issued and served on the defendant. In the event of the defendant not having sufficient time to appear, the Court can postpone the hearing of the suit to a future date whereafter fresh notice of such date is required to be given to the defendant.

10. The last corrective provision in the Code of Civil Procedure, 1908 is Rule 13 Order 9 which provides the circumstances under which an ex parte judgment and decree could be set aside/rescinded. Rule 13 Order 9 reads as hereunder:-

13. Setting aside decree ex parte against defendant-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 that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[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.-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of an any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]

11. It would be relevant here in this context to state that before the amendment in the Code of Civil Procedure, Rule 13 Order 9 provided that when a decree had been passed ex parte against the defendant who satisfied the Court that summons were not duly served upon him, the Court was bound to set aside the decree. It was immaterial whether the defendant had knowledge about the pendency of suit or whether he was aware as to the date of hearing and yet did not appear before the Court. The Law Commission, after considering the expression "duly served", recommended for amendment of Rule 13 and a second proviso was added mandating that an ex-parte decree shall not be set aside merely on the ground of irregularity in the service of summons if the Court was satisfied that the defendant was aware of the date of hearing and had sufficient time to appear and answer the plaintiff''s claim.

12. Thus under the amended provision it makes no difference as to whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order 5 of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. If the answer to the aforesaid two posers are found in the affirmative, there can be no rescinding of an ex-parte decree even if it is proved that the summons were not duly served. What is of importance now is that the Court is required to be convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered to the claim of the plaintiff.

13. The facts giving rise to the present dispute are as hereunder.

14. A suit for partition, injunction and rendition of accounts was filed by plaintiff/respondent No.1 being CS(OS) No.2209/2008 titled "Neety Gupta v. Usha Gupta & Ors", claiming ⅕th share in the suit properties namely immoveable properties bearing Nos.B-7, 80/2, Safdarjung Enclave, New Delhi-29 and B-9, Rohit Kunj, Pitampura (Rohtas Cooperative House Building Society, Delhi) as well as movable properties of the estate of her deceased parents.

15. By order dated 20.10.2008 summons were directed to be issued to the defendants subject to the plaintiff taking steps within five days by all modes prescribed under Order 5, Rule 9 of the CPC. In the meantime the defendants were restrained from alienating, transferring, selling or parting with possession of the suit properties till the next date of hearing. On 02.02.2009, fresh summons were issued to the defendants, returnable for 07.07.2009.

16. On 07.07.2009, defendant No.2 appeared and was directed to file the written statement within four weeks. Since the Registry had reported that defendant Nos.1, 3 & 4 (appellant) had refused the service, they were directed to be proceeded ex-parte.

17. Since defendant No.2 had admitted the claim of the plaintiff and there was an order for proceeding ex parte as against other defendants including the present appellant, the Court vide order dated 27.09.2011 passed a preliminary decree holding the parties to have ⅕th share each in the suit property. By the same order, one advocate was appointed as Local Commissioner to suggest the mode of partition and was directed to issue notices to all the parties before suggesting such mode of partition and then submit her report by the next date of hearing. It was further directed that a copy of the preliminary decree be served by the Local Commissioner on all the defendants for them to appear before her and suggest the mode of partition.

18. The appellant/defendant No.4, grieving that the order dated 27.09.2011 was passed in her absence and without her having been served with the summons in the suit and which fact she came to learn only on 02.11.2011 through defendant No.3, preferred IA No.19352/2011 under Order 9, Rule 13 CPC for setting aside of the preliminary decree, primarily on the grounds that she had been residing in B-7, 80/2, Safdarjung Enclave, New Delhi-29 which was given to her by her late mother by virtue of a registered Will dated 17.09.2001 and which fact was known to the plaintiff/respondent No.1 and that the appellant was never served with the summons in the suit nor did she have any knowledge of the suit or was she ever intimated about the pendency of the suit, especially regarding the property which had devolved upon her.

19. The aforesaid application of the appellant/defendant No.4 was contested by the plaintiff/respondent No.1 who submitted that the summons in the suit was sent to the appellant vide registered post bearing registration No.R1 6773 dated 27.05.2009 which was returned with the remark "refused" on 28.05.2009. Apart from this mode of service, it was contended by the plaintiff/respondent No.1 that the summons were also sent through ordinary process which was attempted to be served on 02.06.2009 and 25.06.2009 but to no avail. A copy of the plaint was also sent by the counsel for the plaintiff/respondent No.1 to the appellant vide registered letter No. RL ADA 3381 dated 22.10.2008. The Local Commissioner is also stated to have sent notice of the order dated 27.09.2011 to the appellant vide registered post No. RD

076732354IN dated 17.10.2011 and through speed post No. ED 341520145 IN. It was, thus stated by the plaintiff/respondent No.1 that the appellant/defendant No.4, in collusion with the other defendants, made desperate efforts to avoid appearing before the Court and thereby sought to prevent the Court from passing the preliminary decree which ultimately was passed on 27.09.2011.

20. While dealing with the aforesaid application under Order 9, Rule 13 of the CPC referred to above, the learned Single Judge on 26.11.2012 framed the following issue:-

"Whether the applicant/defendant No.4 did not refuse to accept process when tendered by the postman on 29.05.2009."

21. The learned Single Judge after analyzing the provisions of Order 9, Rule 13 of the CPC and the relevant judgments of the Supreme Court declaring that once there is an endorsement of refusal, it is incumbent upon a person who wants to rebut the presumption of service, to disprove such service by summoning the postman and also noticing the fact that there was an intimation/letter by DDA dated 20.04.2009 (Exh.PW1/VII) informing the appellant/defendant No.4 that the mutation over one of the suit properties was not possible till the disposal of the suit bearing No. CS(OS) 2209/2008 i.e. the present suit (Smt Neety Gupta v. Usha Gupta & Ors) is settled by the High Court, rejected the prayer of the appellant for setting aside of the preliminary decree dated 27.09.2011.

22. Mr. Abhijat, learned advocate appearing for the appellant assailed the order on the ground that the service of summons by registered post or through ordinary post have not been proved in as much as the postman and the concerned process server have not been examined. It has been further submitted by Mr. Abhijat that the so called notice sent by the counsel for the plaintiff/respondent No.1 dated 22.10.2008 also could not be proved because neither the counsel nor the postman was examined by the plaintiff/respondent No.1. It was only a bald allegation of collusion of the appellant with other defendants, which fact also could not be established. Finally, it has been submitted that the burden of proof regarding the factum of service rests entirely with the plaintiff/respondent No.1 as "due service" is asserted by the plaintiff. A reference was made to Sections 101 and 103 of the Indian Evidence Act, 1872.

101. Burden of proof - Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

103. Burden of proof as to particular fact - The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

23. Mr. Abhijat, therefore, relied upon the decisions in **Jagat Ram Khullar and Anr. v. Battu Mal, 1976 RCJ 94** and **Shiv Dutt Singh v. Ram Dass, AIR 1980 All 280** wherein the statements on oath by the addressees, denying the "tender and refusal" of a document was held to be sufficient to rebut the presumption of service. The onus, according to the aforesaid decisions, shifted on the sender to establish the actual "tender and refusal" by producing the postman concerned.

24. Mr. Pravin Kumar, learned advocate appearing for the plaintiff/respondent No.1 sought to defend the impugned order on the ground that there is a presumption of service of a document if the same is returned with a postal endorsement that the addressee refused to accept the same. He further submits that such presumption is rebuttable but the burden would be upon the person denying such presumption. It was further submitted that neither the postman nor the process server was summoned and the mere statement of the appellant of not having been served cannot result in rescinding of an ex-parte decree. It was further contended that no challenge has been put up against order dated 07.07.2009 by which the appellant and defendant Nos.1 & 3 were directed to be proceeded ex parte. Mr. Pravin Kumar, Advocate referred to Section 102 of the Indian Evidence Act, 1872 wherein it is clearly emphasised that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. If no evidence is given with regard to service of summons, the fact that the postman or the process server reported refusal/non acceptance of the service would have to be accepted as correct.

25. We have given our anxious consideration over the rival factual and legal submissions of the parties. We do find several infirmities and lapses on the part of the process server especially with regard to non observance of the requirements under Rule 17 and 18 of Order 5 of CPC. Nonetheless in the absence of any evidence to establish non-service of summons at the instance of the appellant/defendant No.4, we would have to, per force, accept the endorsement of the process server and the postman as correct.

26. In **Gujarat Electricity Board and Anr v. Atmaram Sungomal Poshani, (1989) 2 SCC 602**, the Supreme Court, though dealing with a service matter held as hereunder:-

8. There is presumption of service of a letter sent under registered cover, is the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse him. The burden to rebut presumption lies on the party, challenging the factum of service. In the instant case respondent failed to discharge this burden as he failed to place material before the court to show that the endorsement made by

the postal authorities was wrong and incorrect. Mere denial made by the respondent in the circumstances of the case was not sufficient to rebut the presumption relating to service of the registered cover. We are, therefore, of the opinion that the letter dated April 24, 1974 was served on the respondent and he refused to accept the same. Consequently, the service was complete and the view taken by the High Court is incorrect."

(Emphasis provided)

27. In the case of **Basant Singh and Anr v. Roman Catholic Mission, 2002 (7) SCC 531**, the Supreme Court again clarified as to how the onus of proof would be discharged in a case under Order 9, Rule 13 CPC. It was clarified that the defendant would be required to examine the postman, who would have been the material witness and whose evidence would have bearing for proper adjudication of the issue. Since in that case the defendant had failed to discharge the onus cast upon him by the Statute, the ex parte decree was not set aside. Para 11 of the aforesaid judgment is quite instructive:-

11. Once it is proved the summons were sent by registered post to a correct and given address, the defendants'' own conduct becomes important. Before the Trial Court, the appellants were allowed to lead evidence in support of their contentions. An order to this effect was passed by the Trial Court on 11.1.1991. The premises in question is occupied by two defendants jointly-Hari Singh and Basant Singh. Hari Singh appeared and examined himself stating that he did not receive the registered letter. However, the defendant Basant Singh did not appear and no evidence whatsoever, on his behalf, has been led to rebut the presumption in regard to service of summons sent to him under registered post with acknowledgment due. His own conduct shows that the registered summons had been duly served on him. As already noticed, Hari Singh appeared and save and except the bald statement that registered letter was not tendered to him, no evidence whatsoever was led to rebut the presumption. He could have examined the postman, who would have been the material witness and whose evidence would have bearing for proper adjudication. He has failed to discharge the onus cast upon him by the Statute. This apart, it is inherently improbable that the registered summons were duly served on Basant Singh but not to Hari Singh when they occupied the tenanted premises jointly."

(Emphasis provided)

28. Admittedly, the postman and process servers were neither asked to be summoned nor produced or examined by the appellant/defendant No.4.

29. A combined reading of Section 114 (illustration f) of the Evidence Act, 1872 and Section 27 of the General Clauses Act, 1897, would lead one to notice the drift towards presumption of the addressee having received the summons/letter sent by registered post. The aforesaid presumption, no doubt is rebuttable but only on

evidence of "impeccable character".

30. The second proviso to Rule 13 Order 9 further clarifies that an ex parte decree cannot be set aside if the Court is convinced that defendant had the knowledge of the proceedings and he could have appeared and answered to the plaintiffs claim.

31. It is not the case of the appellant/defendant No.4 that wrong address was given in the summons or that there was any collusion between the plaintiff/respondent No.1 and the postman, process server and the Local Commissioner for non service of summons on the appellant. What has really been argued by the appellant all through is that one endorsement of a postman/process server cannot form the basis for deciding that she refused to accept the notice.

32. We find substance in the argument of the learned counsel for the plaintiff/respondent No.1 that the appellant had the knowledge about the proceedings as prior to the summons in the suit, notices were attempted to be served on the appellant/defendant No.4 in compliance of Order 39, Rule 3 CPC vide postal article dated 22.10.2008 which too was refused by the appellant/defendant No.4 (postal article is Exh.PW-1/6).

33. The report of the process server on 02.06.2009 (Exh.AW1/P3) that one Usha Gupta opened the door and informed that the appellant is not available makes it very clear that the appellant would surely have the knowledge of the pendency of the suit as Usha Gupta, another sister is also a defendant in the suit. What really catches the attention of this Court is that consistently the appellant has stated that she learnt about the pendency of the suit through Chitra Gupta one of the defendants on 02.11.2011. It does not appear to reason that Chitra Gupta who is also one of the defendants and who too has been proceeded ex parte would come to Delhi to participate in the proceedings of the Local Commissioner and would not inform the appellant about the suit.

34. Though an objection has been raised on behalf of the respondent No.1 about the registered Will dated 17.09.2001 not having been proved within the period of limitation and the present appeal being time barred, we are not inclined to look into those aspects, as the appeal fails on other counts which have been stated above.

35. There is no reason to interfere with the impugned order. The present appeal is dismissed but without costs.

CM 11858/2016 & 16366/2016

1. In view of the appeal having been dismissed, the applications have become infructuous.

2. The applications are disposed of accordingly.