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SUSHIL KUMAR SABHARWAL

v.

GURPREET SINGH AND ORS.

APRIL 23, 2002

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[R.C. LAHOTI AND B.N. AGRAWAL, JJ.]

Code of Civil Procedure, 1908:

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Order 9, Rule 13, second proviso—Suit for recovery of arrears of rent and for eviction of tenant—Ex-Parte decree—Application for setting aside ex-parte decree—Tenant stating on oath that no summons was tendered to him—Process server stating that he tendered summons to tenant a day prior to date of hearing but latter refused to accept the same—Held, it is a case of oath against oath—Oath of tenant was more weighty than that of process server—

D

Besides, procedure of service as laid down in Order 5, Rules 17 and 18 not followed—It is not a case of mere irregularity in service of summons, but a case of non-service of summons—Landlord's contention that tenant had knowledge of the proceedings is of no avail—It is the knowledge of the 'date of hearing' and not the knowledge of 'pendency of suit' which is relevant for purpose of the second proviso to Order 9, Rule 13—As summons was not

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served on tenant, he did not have opportunity of appearing in court and contesting the suit—Trial court and High Court erred in law, resulting in failure of justice, by refusing to set aside the ex-parte decree—Ex-parte decree set aside—Trial court to proceed with the hearing of the suit in accordance with law.

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Order 9, Rule 6—Suit—Ex-parte hearing—Held, the provision casts an obligation on the court and simultaneously invokes a call to the conscience of the court to feel satisfied in the sense of being 'proved' that the summons was duly served when and when alone, the court is conferred with a discretion to make an order that the suit be heard ex-parte—The date appointed for hearing

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in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the court to satisfy itself on the service of summons—Any default or casual approach on the part of the court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex-parte decree or proceedings in the suit wherein he was deprived of hearing for no

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fault of his—If only the trial court would have been conscious of its obligation cast on it by Order 9 Rule 6, the case would not have proceeded ex-parte against the defendant—Appellant and a wasteful period of over eight years would not have been added to the life of this litigation—Ex-parte decree set aside. A

Order 5, Rules 17 and 18—Service of summons—Process server reporting that he tendered summons to tenant who refused to accept the same—No evidence that on such refusal process server affixed copy of plaint and summons on wall of premises—Nor signatures of two witnesses obtained—Trial court decreeing suit against tenant ex-parte—Held, it is the case of non-service and not mere irregularity in service of summons. B C

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5111 of 2000.

From the Judgment and Order dated 2.2.2000 of the Punjab and Haryana High Court in C.R. No. 3783 of 1999. D

K.T.S. Tulsi, R.C. Mishra, Dr. Meera Agarwal and Rishi Malhotra for the Appellants.

P.N. Puri for the Respondents.

The following Order of the Court was delivered : E

This is a landlord-tenant litigation. The tenant is aggrieved by an ex-parte decree dated 9.10.1993 for recovery of arrears of rent and eviction from the suit premises bearing plot No. 9, Chowk Shakti Nagar, Amritsar where the tenant carries on his business of selling shoes. An application under Order 9, Rule 13 of the C.P.C. seeking setting aside of the ex-parte decree was filed which was opposed, enquired into and rejected by the Trial Court. The Civil Revision preferred by the tenant met with the same fate. The tenant has filed this appeal by Special Leave. F

A perusal of the record of proceedings shows that the process server was entrusted with summons for service on the defendant-tenant. The date of hearing appointed was 23.2.1993. According to the process server, Narinder Jeet Singh, he went to the shop of the tenant-appellant on 22.2.1993 and tendered to him the summons accompanied by a copy of the plaint. The tenant refused to accept the summons. Then, he returned the summons alongwith an endorsement of refusal on the back of summons to the Court H

A on 23.2.1993. On 23.2.1993, the Court recorded default in appearance of the defendant-tenant and proceeded ex-parte resulting into the ex-parte decree dated 9.10.1993.

B The singular issue which arises for determination in the case is whether the defendant-tenant can be said to have been properly served in the manner contemplated by the Code of Civil Procedure?

C Before we proceed to notice the relevant provisions of law, it will be relevant to state what was endorsed by the process server on the back of the summons and what was deposed to by him in the court when he was examined in the court as a witness for the landlord-respondent.

The endorsement made by the process server reads as under:

“REPORT OF PROCESS SERVER

Sir,

D I visited Sushil Kumar Sabharwal C/o Sabharwal Shoes, House 9. He met me on the spot present. But he refused to accept the summons, Copy of the plaint alongwith summons is returned to the Court.

E Report submitted accordingly.

Sd/-
Narinder Jeet Singh
Dated : 22.2.93

Translation from Punjabi to English.

F Attested to the true.

(Rajesh Bhandari)

Note : No witness available on the spot.

G Refusal - 23.2.1993”

The facts deposed to by Narinder jeet Singh, Process Server in the court show his having tendered the summons alongwith the copy of the plaint to the defendant and thereupon, the defendant’s refusal to accept the same. He affirmed the endorsement made by him on the back of the summons.

H However, he proceeded to state “if the person refuses to accept the same, a

copy of the summons and copy of the application be pasted on the wall of the said shop". His deposition runs counter to his own endorsement made on the back of the summons, according to which, on refusal by the defendant to accept the summons "copy of the plaint alongwith summons" was returned to the Court. A

Rules 17 and 18 of Order 5, C.P.C. which lay down the procedure of service when the defendant refuses to accept service and the endorsement to be made by the serving officer, read thus: B

"17. Procedure when defendant refuses to accept service, or cannot be bound.—Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, 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 of some other conspicuous part of the house in which the defendant ordinarily reside 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 so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed. C D E

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. F G

We find several infirmities and lapses on the part of the process server. Firstly, on the alleged refusal by the defendant either he did not affix a copy of the summons and the plaint on the wall of the shop or if he claims to have done so, then the endorsement made by him on the back of the summons H

A does not support him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy of the plaint on the wall should have been witnessed by persons who identified the defendant and his shop and witnessed such procedure. The endorsement shows that there were no witnesses available on the spot. The correctness of such endorsement is difficult to believe even *prima facie*. The tenant runs a shoe shop in the suit premises. Apparently, the shop will be situated in a locality where there are other shops and houses. One can understand refusal by unwilling persons requested by the process wherever to witness the proceedings and be a party to the procedure of the service of summons but to say that there were no witnesses available on the spot is a statement which can be accepted only with a pinch of salt. Incidentally, we may state that though the date of appearance was 23rd February, 1993 the summons is said to have been tendered on 22nd February, 1993, i.e., just a day before the date of hearing.

D The appellant has himself appeared in the witness box and deposed on oath that no summons was tendered to him by any process server of the Court. It is a case of oath against oath. In view of the facts which we have noticed here-in-above clearly the oath of the appellant was more weighty than the oath of the process server. In the ordinary course of events, the court of facts should have discarded the statement of the process server and believed the statement of the appellant.

E The learned counsel for the landlord-respondent submitted that there is an interpleader suit filed by the appellant because there was a dispute between the heirs of the original landlord who unfortunately died and his widow and the grandsons (who are the respondents herein), each of the two was claiming itself to be the landlord and entitled to recover rent setting up a will in its favour. The appellant has admitted in the plaint therein that he was aware of the pendency of the suit filed by the respondent in the court of the Rent Controller, Amritsar. In fact, this admission of the appellant has weighed heavily with the High Court which has opined that even if the summons was not duly served, the appellant was aware of the pendency of the suit and, therefore, the application under Order 9, Rule 13 C.P.C. did not have any merit.

H The High Court has over looked the second proviso to Rule 13 of Order 9 C.P.C., added by the 1976 Amendment which 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 plaintiff's claim. It is the knowledge of the 'date of hearing' and not the knowledge of 'pendency of suit' which is relevant for the purpose of the proviso above said. Then the present one is not a case of mere irregularity in service of summons; on the facts is a case of non-service of summons. The appellant has appeared in the witness box and we have carefully perused his statement. There is no cross-examination directed towards discrediting the testimony on oath of the appellant, that is, to draw an inference that the appellant had in any manner a notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim which he did not avail and utilise.

The provision contained in Order 9 Rule 6 of the C.P.C. is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the Court depending on the given situation. The three situations are: (i) when summons duly served, (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard *ex-parte*. The provision casts an obligations on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being 'proved' that the summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard *ex-parte*. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an *ex-parte* decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the Trial Court would have been conscious of its obligation cast on it by Order 9 Rule 6 of the C.P.C., the case would not have proceeded *ex-parte* against the defendant-appellant and a wasteful period of over eight years would not have been added to the life of this litigation.

Be that as it may, we are satisfied that the summons was not served on the defendant-appellant. He did not have an opportunity of appearing in the Trial Court and contesting the suit on merits. The Trial Court and the High Court have committed a serious error of law resulting in failure of justice by

A refusing to set aside the *ex-parte* decree.

The appeal is allowed. The orders of the Trial Court and the High Court are set aside. The application under Order 9, Rule 13 C.P.C. filed by the defendant-appellant is allowed. The *ex-parte* decree dated 9.10.1993 is set aside. The proceedings of the Trial Court shall stand relegated back to 23.2.1993. The parties through their respective learned counsel are directed to appear before the Trial Court on 5.8.2002, on which date, the Trial Court shall appoint a date of hearing and proceed ahead with the hearing of the suit in accordance with law. No costs. Let the record of the Trial Court be transmitted back at the earliest accompanied by a copy of this Order.

C R.P.

Appeal allowed.