

A

BASANT SINGH AND ANR.  
v.  
ROMAN CATHOLIC MISSION

OCTOBER 3, 2002

B

[Y.K. SABHARWAL AND H.K. SEMA, JJ.]

*Civil Procedure Code, 1908: Order 5 Second proviso to Rule 19A and Order 9 Rule 13:*

C

*Substituted Service—Trial Court directed substituted service by ordering publication of summons in a certain local daily newspaper—Publication of summons in another local daily—Effect of—Held, it amounts to mere irregularity in service of summons—However, it is inherently probable that publication of summons in another local daily with wide circulation in the area would have constituted sufficient notice to the defendants.*

D

*Service of Notice—Proof of—Presumption—Discussed—General Clauses Act, 1897: Section 27.*

E

**Respondent-landlord filed a suit against the appellant-tenants. Trial Court ordered issue of summons to tenant-appellant both by ordinary process and by registered post. Awaiting receipt of the service report, Court again ordered issue of summons and also substituted service by publication of summons in a certain local daily newspaper. However, summons were published in another local daily. Appellant did not turn up, and Court passed an ex-parte decree. Subsequently, the Court rejected the application filed by the appellant for setting aside ex-parte decree. Appeal thereon and Revision Petition were rejected by the High Court. Hence this appeal.**

F

G

**It was contended for the appellant that the Trial Court acted in violation of the procedure prescribed under Order 5, CPC; and that since Trial Court did not pass any order of its satisfaction that defendant was avoiding the service, it ought not to have ordered substituted service.**

**Dismissing the appeal, the Court**

H

**HELD: 1. Once it is proved that summons were sent by registered post to a correct and given address, the defendants' own conduct becomes important. The premises in question is occupied by two defendants jointly-one appeared and examined himself stating that he did not receive the registered letter. However the other defendant 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. In regard to other defendant, 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. It is inherently improbable that the registered summons were duly served on one of the tenants but not to other when they occupied the tenanted premises jointly.** [74-D, E, F, G]

**2.1. The Court's satisfaction that defendant is avoiding the service is implicit in the order directing service by publication.** [73-B]

**2.2. It is inherently probable that publication in the other local daily which is also widely circulated in the area would have constituted sufficient notice to the defendants. The publication of the substituted service in the local daily other than the one which is ordered by the Court is mere irregularity in service of summons. Second proviso to Order 9 Rule 13 casts an embargo on the Court that a decree passed ex-parte shall not be set aside merely on the ground that there has been an irregularity in the service of summons.** [73-F; H; 74-A]

**CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6489 of 2002.**

**From the Judgment and Order dated 13.9.2000 of the Madhya Pradesh High Court in C.R. No. 416 of 1998.**

**M.L. Lahoty, Sushil Kr. Jain, Ms. Pratibha Jain and Paban K. Sharma for the Appellants.**

**S.K. Gambhir and R.K. Maheshwari for the Respondent.**

**The Judgment of the Court was delivered by**

**A SEMA, J. Leave granted.**

The sole question that falls for consideration in this appeal is, whether the service of notice sent by registered post with acknowledgement card in terms of Order 5 second proviso to Rule 19A of the Code of Civil Procedure read with Section 27 of the General Clauses Act, 1897 can be accepted as a sufficient notice.

This appeal filed by the defendants (judgment debtors) arises out of the following material facts. Suit No 473 of 1985 filed by the landlord ended in passing of an ex-parte decree by the Trial Court on 30.5.1986. The appellants preferred an application on 6.10.1986 under Order 9 Rule 13 for setting aside the ex-parte decree which was rejected by the Trial Court. Their appeal before the appellate court and revision petition before the High Court ended without any success. It appears, initially the plaintiff (respondent herein) could not deposit the requisite process fee for which the summons could not be issued to the appellants-defendants. On 2.4.1986, the Trial Court ordered the summons to be issued to the defendants, both by ordinary process and by registered post, and the case was adjourned to 30.4.1986. On a perusal of the record, and not disputed by the parties, we find that the registered notices were issued to the defendants vide postal receipt Nos. 875 and 876 dated 24.4.1986. As on 30.4.1986, summons issued by registered posts were not received back, the case was adjourned to 30.6.1986 awaiting the receipt of the service report. On 30.6.1986, the Trial Court again ordered that fresh summons both by ordinary post and registered post be issued within three days. The Trial Court also ordered substituted service by resorting to Order 5 Rule 20 C.P.C. by publications of summons in local daily "Dainik Bhaskar". On 5.8.1986, it appears that a notice of publication in daily newspaper "Aacharan" instead of "Dainik Bhaskar" as ordered by the Court has been produced. This is one of the grievances of the appellants, which we shall be dealing at appropriate place. On 22.8.1986, the Trial Court passed an order to proceed ex-parte and fixed the case for 4.9.1986 for evidence of the plaintiff. As the date fixed - 4.9.1986 was declared a public holiday, the plaintiff's witness was examined on 5.9.1986 and the ex-parte judgment and decree was passed on 30.9.1986. It is stated that the appellants came to know of the ex-parte decree on 1.10.1986 and filed an application on 6.10.1986 of setting aside the ex-parte decree, as noticed above.

Learned counsel for the appellants contended that the Trial Court has acted in violation of the procedure prescribed under Order 5 of the Code of

Civil Procedure, in issuing summons to the defendants. He further contended that the substituted service can be restored to only when the court is satisfied that the defendant is avoiding the service or the service cannot be effected in an ordinary way. The Trial Court having not passed any order about the satisfaction as envisaged under the Code, it was not open to the Trial Court to order for substituted service. This submission need not detain as any longer. On the facts of the case the court's satisfaction is implicit in the order directing service by publication.

Order 9 Rule 13 of Code of Civil Procedure insists that the applicant must satisfy the court two conditions (a) that the summons was not duly served and (b) that the applicant was prevented by any sufficient cause from appearing before the court when the suit was called on for hearing. In present case second condition is not attracted.

Regarding the contention of the counsel for the appellants that the summons were not duly served, as the substituted service has been published in the local daily "Aacharan" instead of "Dainik Bhaskar", we may point out that it is in the evidence on record that both "Aacharan" and "Dainik Bhaskar" are the local dailies and are widely circulated in the area. In ordinary circumstances, if both the local dailies are widely circulated in the area the change of the name of the local daily from "Dainik Bhaskar" to "Aacharan" would not materially affect the service of notice by way of substituted service, deemed to have been served, and would not invalidate the effect of substituted service just because the notice for substituted service has been published in the local daily which is not ordered by the court. It is the specific contention of the plaintiff-respondent that the notice has been published in the local daily "Aacharan" on 9.8.1986 and the said local daily is widely circulated in the area and the substituted service would construe as sufficient notice upon the defendants. We are also of the view that it is inherently probable that publication in the local daily "Aacharan" which is widely circulated in the area would have constituted a sufficient notice to the defendants.

Before the Trial Court the stand taken by the plaintiff was that the defendants had knowledge about the suit filed by the plaintiff and they had sufficient time to appear and answer the plaintiff's claim but they did not appear and the application had been filed with intention to cause the delay. Be that as it may, we are of the view that the publication of the substituted service in the local daily "Aacharan" instead of "Dainik Bhaskar" is a mere irregularity in service of summons.

A Second proviso to Order 9 Rule 13 casts an embargo on the court that a decree passed ex-parte shall not be set aside merely on the ground that there has been an irregularity in the service of summons.

B Order 5, proviso to sub-rule (2) of Rule 19A of C.P.C. provides that where the summons are properly addressed, prepaid and duly sent by registered post with acknowledgement due, notwithstanding the fact that the acknowledgement having been lost or mislaid or for any other reason, has not been received by the Court within thirty days from the date of the issue of the summons, the Court shall presume that notice is duly served. Further, Section 27 of the General Clauses Act, 1897 (in short 'Act) provides similar provision. The presumptions are rebuttable. It is always open to the defendants C to rebut the presumption by leading convincing and cogent evidence.

D It is nobody's case that the postal addresses of the defendants are not properly addressed and, therefore, the registered summons could not be served. It is also nobody's case that the registered summons are not pre-paid and not duly sent. In fact the registered summons, bearing receipt Nos. 875 and 876 dated 24.4.1986, were issued is borne out from the record.

E Once it is proved that 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 F 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 G 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.

H As noticed above, the registered summons were sent to Basant Singh

and Hari Singh vide postal receipt Nos. 875 and 876 dated 24.4.1986 on the correct and given address is borne out from the record. Ex-parte proceedings were ordered on 22.8.1986 and ex-parte decree was passed on 30.9.1986. A

In the facts and circumstances as noticed above, this appeal is devoid of merit and it is, accordingly, dismissed. No costs.

S.K.S.

Appeal dismissed. B