

(2022) 04 RAJ CK 0017

In the Rajasthan High Court

Case No : S. B. Civil Revision Petition No. 62 Of 2021

Banwari Lal

APPELLANT

Vs

Sarita Bishnoi And Others

RESPONDENT

Date of Decision : 05-04-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Section 115, 151, Order 5 Rule 14, Order 5 Rule 15, Order 5 Rule 16, Order 5 Rule 17, Order 9 Rule 13

Citation : (2022) 04 RAJ CK 0017

Hon'ble Judges : Rameshwar Vyas, J

Bench : Single Bench

Advocate : S.L. Jain, S.R.Godara

Final Decision : Dismissed

Judgement

Rameshwar Vyas, J

The instant civil revision petition under Section 115 of the Code of Civil Procedure, 1908 has been preferred by the petitioner-defendant of Civil Original Suit No. 63/2007, whose application filed under Order IX, Rule 13 of C.P.C. for setting aside ex-parte Judgment & Decree dated 03.07.2009 was dismissed by the Additional Civil Judge No. 2, Sri Ganganagar vide Order dated 15.09.2017 passed in Civil Misc. Case No. 76/2011 (Banwari Lal Vs. Smt. Sarita Bishnoi & ors.). The appeal filed by the defendant-petitioner against the same was also dismissed by the Additional District Judge No. 2, Sri Ganganagar vide Order dated 04.09.2021 passed in Civil Misc. Appeal No. 24/2017 (Banwari Lal Vs. Smt. Sarita Bishnoi & anr.).

The brief facts of the case are that the plaintiffs (respondents herein) filed an eviction suit against the defendant – Banwari Lal (petitioner herein) on 18.09.2007. On 29.09.2007, the summon was issued to the defendant for 17.11.2007, which was returned unserved with the report that the defendant was not found in the house, however, his adult son was found present, who

refused to receive the summon, then the same was affixed on the house of the defendant. On 04.01.2008, without assigning any reason for not relying upon the said report, the trial court again issued summon to the defendant Banwari Lal for 16.02.2008, which was returned unserved with the report that the house of the defendant was found locked. On third occasion, the summon issued for 09.05.2008, which was returned with the following report :-

श्रीमान जी, रामकुमार सवार कण्ठरुण् कोर्ट श्री गगनगर में हल्फिया रिपोर्ट करता हू कि मैने दि. 29/2/08 को दर्ज पते पर जाकर मैने श्री बनवारीलाल S/o श्री नत्थूराम विश्वोई को तलाश किया मकान पर श्री बनवारीलाल की पत्नी मिली उसने अपना कमलादेवी बताया श्री बनवारीलाल को कही जाना व शामिल रहना बताया नोटीस प्राप्ती के लिए कहा तो नोटीस प्राप्ती से इन्कार किया इन्कारी करने पर नोटीस मय वाद नकल खुले मकान पर चस्पा किया मौके पर किसी ने गवाही नहीं कि पत्नी द्वारा इन्कारी पर चस्पा रिपोर्ट श्रीमान जी कि सेवा में पेश है।

On the basis of above report, service of summon upon the defendant was treated sufficient and on account of non-appearance of the defendant, ex-parte proceedings were initiated against him on 09.05.2008. Afterwards, the case was adjourned for six times for recording ex-parte evidence of the plaintiffs. On 18.04.2009, ex-parte evidence was recorded and after hearing the arguments on 15.05.2009, ex-parte decree was passed against the defendant on 03.07.2009. Aggrieved with ex-parte judgment and decree, the defendant filed an application under Order IX, Rule 13 read with Section 151 of C.P.C. on 19.11.2011 alleging that report of the process server was false. The defendant came to know about ex-parte decree on 08.11.2011 when Najir of the Court tried to proceed against him. The application was replied by the plaintiffs. The trial court after recording the evidence of both the parties, dismissed the application of the defendant filed under Order IX, Rule 13 of C.P.C. vide Order dated 15.09.2017. The trial court relied upon the report of the process server and found that there was no irregularity in the service of summon against the defendant. The objection of the defendant-petitioner to the effect that house number was not mentioned on the summon, was not accepted. The trial court observed that wife of the defendant was Ward Member since the year 2009 and the name of the colony was specifically mentioned on the summon. The trial court also took note of the previous reports on the summons issued against the defendant. Aggrieved with the order of rejection of the application, the defendant filed an appeal before the appellate court bearing Civil Misc. Appeal No. 24/2017, which was also dismissed on 04.09.2021, which is impugned in this revision petition.

Heard learned counsel for the parties and perused the orders impugned as well as record of the courts below.

Learned counsel for the petitioner while relying upon the judgments rendered by the Hon'ble Punjab & Haryana High Court in the case of Dev Raj Vs. Harcharan Singh reported in 1988 1 RCR (Rent) 576; this Court at Jaipur Bench in the case of Bhajan Singh Vs. M/s Shri Ganesh Building Material Store, Khairthal Mandi reported in RLW 1997(3) Raj 1719 and the Hon'ble Supreme Court in the case of Sushil Kumar Sabharwal Vs. Gurpreet Singh & Ors. reported in JT 2002 (4) SC

489, contended that the process server did not obtain the signatures of the witnesses on the report made upon the summon. The house number of the defendant was not mentioned in the summon. No persons identified the house of the defendant. Learned counsel drew attention of this Court towards some contradictions occurred in the cross-examination of the witnesses produced on behalf of the plaintiffs-respondents. He submitted that in the evidence, it was averred that Sarita and Chandra Shekhar were present at the time of affixing the copy of the summon on the house of the defendant, whereas, the process server did not aver that anybody was present on the spot. He further submitted that the compliance of the provisions of Order V, Rule 15 & 17 of C.P.C. was not made. Relying upon the judgments referred above, learned counsel for the petitioner submitted that the impugned orders passed by both the courts below were illegal, improper and against the provisions of law, hence, liable to be set aside.

On the other hand, learned counsel for the respondents submitted that the colony, where house of the defendant was situated, was not a big colony. The wife of the defendant was well known lady being Ward Member of the area. There was concurrent findings recorded by both the courts below, in which no illegality was committed. The defendant (petitioner herein) always evaded the service of summon to be served upon him. On previous two occasions also, he evaded service of summons. There was no reason to disbelieve the statement of the process server, who stated that the defendant was not found in the house, his wife who was found, refused to accept the summon.

Thereafter, the same was affixed on the house and in the report, it was also mentioned that nobody became a witness on the report.

Perused the record of the courts below and considered the arguments advanced by learned counsel for the parties.

In the case of Dev Raj (supra), the Hon'ble Punjab & Haryana High Court set aside ex-parte order considering the fact that the process server had no knowledge of the locality or identity of the house where the petitioner resided and held that before recording the report of refusal of summons, it is incumbent on the Process Server to ascertain not only the identity of the party but also the place of its residence. For this purpose, the assistance of a resident of the locality in the normal course, should be sought for.

In the case of Bhajan Singh (supra), a coordinate Bench of this Court at Jaipur Bench held that according to Order V, Rule 17 of C.P.C., it was incumbent upon the process server to explain the circumstances under which the service of summons was effected and it was necessary for him to mention the names and addresses of the persons if any, by whom the house was identified and in whose presence the copy of the summon was affixed.

In the case of Sushil Kumar Sabharwal (supra), the Hon'ble Apex Court did not find sufficient service of summons on the opposite side on the grounds that 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 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 person who identified the defendant and his shop and witnessed such procedure. In that case, the Hon'ble Apex Court disbelieved the statement of the process server and ex-parte proceedings were set aside on the ground of non-service of summons.

Coming to the facts of the present case, the application under Order IX, Rule 13 of C.P.C. was based on the ground that the report of the process server was totally false. No one came to the house of the defendant to serve the summons on him. The defendant – Banwari Lal (petitioner herein) in his cross-examination submitted that he did not complain against the report of the process server. He did not see the report of the process server made on the summons. The wife of the defendant – Banwari Lal admitted in her cross-examination that she was elected as Ward Member (Parshad) in the year 2009 and thereafter, she was again elected in the year 2014. She also admitted that people knew her and her house. The process server Ramkumar (N.A.W. 3) in his statement submitted that he went to the house of Banwari Lal. He was not found present in the house. His wife Kamla Devi was present in the house, who informed that Banwari Lal was not available in the house. Then, he tendered summons to her but she refused to accept the same, upon which, he affixed the copy of the summon on the house. He also stated that nobody signed as a witness. In cross-examination, he admitted that on the summons, house number was not mentioned. However, no suggestion was made to this witness to the effect that he could not identify the house of the defendant. This witness denied the suggestion of the defendant that he affixed the summons on the vacant plot. This witness categorically described the opening of the house. In the considered opinion of this Court, the courts below did not commit any error in appreciating the evidence produced by both the parties. In the present case, there was no dispute regarding identification of the house. The house of the defendant was well known, happened to be the house of the Ward Member (Parshad). In the considered opinion of this Court, there was no mandatory requirement provided under the provisions of Order V, Rule 17 of C.P.C. to mention the name and address of the witness, in whose presence, the copy was affixed. As per the provisions of Order V, Rule 15 of C.P.C., service can be made on any adult member of the family, whether male or female, who is residing with him in case, the defendant is absent from his residence at the time when the service of summons 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.

As per provisions of Order V, Rule 16 of C.P.C., the person to whom the summon is tendered, is required to give receipt of the same. As per provisions of Order V, Rule 17 of C.P.C., when such aforesaid person refuses to sign the acknowledgment, 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, and shall then return the original to the Court with an endorsement thereon 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.

In the present case, the main contention of the learned counsel for the petitioner was regarding identification of the house of the defendant. In the facts and circumstances of the case, the identification of the house of the defendant was not in dispute. As earlier discussed, the wife of the defendant was Ward Member (Parshad) and house was well known. On previous occasion also, summon could not be served on account of non-availability of the defendant and on another occasion, the house was found locked. The above circumstances suggest that the defendant evaded the service of the summons. The process server was not at fault when he affixed the copy of the summons on the house, since he disclosed the circumstances under which he affixed the summons on the house and could not get signatures of the witnesses. It is also relevant to mention that the Courts cannot expect from the process server who is Class IV servant, to make full fledged compliance of the provisions of Order V, Rule 14 to 17 of C.P.C. As per proviso to Order IX, Rule 13 of C.P.C. also, the Court shall not set aside the decree passed ex-parte merely on the ground that there is 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. In the present case, the service of summons was made on the defendant on 11.03.2008, whereas, hearing date was fixed as 09.05.2008. The petitioner failed to disclose the circumstances, in which he came to know regarding ex-parte decree passed against him. In this regard, the petitioner neither disclosed that any execution proceedings were filed against him nor he filed the copy of the same for perusal of the Courts below to appreciate the fact that he had no notice of the summons being served against him or any proceedings pending against him.

In the result, this Court finds that there is no substance in this revision petition.

Dismissed accordingly.