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**(2001) 08 AHC CK 0058**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition No. 14918 of 1985

Bhagwan Pandey

APPELLANT

Vs

IIIrd Addl. District Judge, Ballia & Ors.

RESPONDENT

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**Date of Decision :** 07-08-2001

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2001) 08 AHC CK 0058

**Hon'ble Judges :** S.K.Singh, J

**Final Decision :** Dismissed

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## Judgement

S.K. Singh, J.—By means of this writ petition, the petitioner has challenged the judgments of Respondent Nos. 1 and 2 dated 17 885 and 31884 (Annexures 3 and 1 respectively). By the aforesaid judgments application as was filed by the petitioner's father to set aside the ex parte decree has been rejected.

2. Respondent No. 3 appears to have filed a suit bearing Original Suit No. 72 of 1977 for recovery of amount of Rs. 8,568/ against Radha Pandey, petitioner's father, on the basis of Sarkhat dated 1561976. In the aforesaid suit the defendant Radha Pandey did not put in appearance and it appears that the trial Court after accepting the service on defendant as sufficient proceeded in the matter ex parte and by its judgment and decree dated 10378, the claim of plaintiff was decreed. It is thereafter, Radha Pandey, filed a restoration application under Order 9, Rule 13, C.P.C. on 6879 on the allegation that no summons were served and the endorsement of refusal on the registered notice, which led the trial Court to accept the sufficiency of service, is actually a manipulation and therefore, as the defendant could not know about filing of the suit by plaintiff, decree as has been passed be set aside. During the pendency of miscellaneous case which was moved by Radha Pandey on his death the present petitioner and Respondent Nos. 4 to 7 were substituted as his heirs. The trial Court after having objection from the side of plaintiff on consideration of material as existed on record rejected application of petitioner by the judgment dated

31884 against which miscellaneous appeal was filed by the petitioner which was dismissed by Respondent No. 1 vide its judgment dated 17885. It is these two judgments of Respondent Nos. 1 and 2 which have been taken up by the petitioner before this Court in this petition.

3. It has been submitted by Sri Rakesh Pandey, learned Advocate who has appeared on behalf of the petitioner that the Courts below have recorded a clear finding that there was no service of the summons on Radha Pandey defendant in the suit and the evidence as has been given from the side of plaintiff have been repelled by the Court in this respect and therefore, according to the learned Counsel, in view of this finding alone the judgment and decree which was passed by the trial Court was liable to be set aside. According to the learned Counsel, the finding of Court below that it is in the proceedings of attachment, defendant, Radha Pandey appears to have come to know about the proceedings of the suit and therefore he had knowledge of the suit is totally perverse and is uncalled for as once the finding was recorded about absence of service on defendant the conclusion to set aside the ex parte decree, was a must. It has been further argued that even the finding as has been recorded by the Court about the knowledge to defendant about the suit in view of the proceeding of attachment, appears to have been recorded on the statement of Advocate Commissioner and Kurk Amin is also perverse as the statements of aforesaid witnesses do not establish that fact as has been found by the Court below.

4. In response to the aforesaid submission, Sri S.N. Singh, learned Advocate who appears on behalf of the respondents has argued that the finding in respect to knowledge of the suit to the defendant, in view of the proceedings of attachment, being a finding of fact, having been recorded by the Courts after referring statements of those two witnesses, cannot be said to be vitiated under law calling for interference by this Court. According to the learned Counsel for the respondents, there is no error apparent much less any legal error, which may be corrected by this Court in the writ jurisdiction.

5. The finding as has been recorded by the Courts below about lack of service on the defendant, inspite of objection from the side of plaintiff is to be accepted by this Court. In view of this, it is clear that so far the trial Court is concerned the jurisdiction or proceed with the matter only comes after satisfaction of due service on the defendant and as such in view of the finding recorded by the Courts that service on the defendant was not sufficient, in my opinion the trial Court lacked jurisdiction to proceed in the matter on merits and thus after giving finding about the lack of service on defendant the ex parte decree was liable to be set aside and the matter was to be proceeded afresh after affording opportunity to the defendant. So far finding in respect to the knowledge of the defendant, in view of the proceedings of attachment, suffice it to say that the statements of those two witnesses, namely, Ishwar Saran Srivastava, Advocate Commissioner and Govind Prasad Srivastava, Kurk Amin as has been placed before me by the learned Counsel for the petitioner which have been annexed as Annexures 4 and

5 to the writ petition, falls short, to accept the presence of the defendant on the spot. The statement in this regard appears to be too vague to be accepted for the presence of defendant on the spot and therefore, in my opinion the finding so recorded in this respect is not based on any cogent evidence.

6. In view of the aforesaid premises, the decree as was passed by the Courts below against the defendant being ex parte that was liable to be set aside and therefore, the application as was filed by the petitioner's father appears to have been illegally rejected.

7. In view of the aforesaid analysis, this writ petition succeeds and the impugned order as has been passed by Respondent Nos. 1 and 2 dated 17885 and 31884 are hereby quashed. The ex parte decree as was passed against the defendant in Original Suit No. 72 of 1977 dated 10378 is hereby set aside, the suit as was filed by the plaintiff stands revived and as the suit relates to the year 1977 it is expected that the trial Court keeping in view long time, which has already lapsed, will proceed with all expedition with the cooperation of both the parties to which the learned Counsel who have appeared on behalf of both the parties assured that no unnecessary adjournment shall be taken by their clients.

8. Parties are directed to bear their own costs.