
(1949) 10 RAJ CK 0008
In the Rajasthan High Court
Case No : Civil Revision No. 136 of St. 2005

Dalu and Another

APPELLANT

Vs

Khema and Others

RESPONDENT

Date of Decision : 25-10-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 17, Order 9 Rule 13

Citation : AIR 1951 Raj 132

Hon'ble Judges : K.D. Sharma, J

Bench : Single Bench

Advocate : Goverdhan Lal Bhatt, for the Appellant; Tej Singh Mehta, for the Respondent

Final Decision : Dismissed

Judgement

Sharma, J.—This is pltf's. appln. for revn. of an order dated 19-7-1949 of the learned Munsiff Chittor Betting aside the ex parte decree dated 4-4-1949. The facts are as follows:

2. The pltf. appct. filed a suit for recovery of possession of certain land against the non-appct. Summonses were issued & a report was made that the process server went to the houses of the defts. on 17-2-1949 but they had all gone out to some other village. The process server again went to the village of the defts. & on 4-4-1949, he personally served all the defts. except Hema with summonses. As regards Hema, his report was that he (Hema) had gone to Udaipur and therefore the copy of the plaint was affixed to his house. The case came on for hearing on 4-4-1949 & because none of the defts. appeared it was decreed ex parte. The defts., however made an appln. for restoration on 29-4-1919 on the ground that they were not properly served with summons. The learned Munsiff held that all the defts. except Hema were duly served. As regards Hema he held that he was not duly served & consequently set aside the ex parte decree & restored the suit. Against this order the pltf. has come in revn. to this Ct.

3. I have heard the learned counsel for both the parties. The question to be decided in the case is whether Hema deft. was duly served with summonses. According to the report of the process server himself, Hema was not served on 17-2-1949. As a matter of fact none of the defts. was served on that date. Again according to the report of the process server dated 4-3-1949, Hema was not found in the village & was reported to have gone to Udaipur. A copy of the plaint was, therefore, affixed to his house. The question is whether inspite of the fact that the process server knew that Hema had gone to Udaipur, the affixing of a copy of the plaint would be taken to be due service of the summons on him. Under Order 5, Rule 17, Civil P. C., where the deft. or his agent or such other parson as aforesaid refuses to sign the acknowledgment or , where the serving officer after using all due & reasonable diligence cannot find the deft. & 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 deft, ordinarily resides or carries on business or personally works for gain. By "such other person as aforesaid" is meant "other persons" mentioned in Rule 16 In the present case from the report of the process-server dated 4-3-1949, it is clear that he did no use all due & reasonable diligence in finding Hema. He was known to have gone to Udaipur & it cannot be said that he could not be found after the exercise of all due & reasonable diligence nor did the process-server try to find out whether there was any agent empowered to accept service of the summons on behalf of Hema as there was any other parson on whom service could be made. Under these circumstances, the process server was not entitled to affix a copy of the summons on Hetma"s house But when the affixing of the copy of summons is not to be found in the report dated 4-3-1949, the only thing mentioned is that a copy of the plaint was affixed. Rule 17, Rule 8 requires that in order that the service of summons might be considered to be due service a copy of summons should be affixed. The report of the process server shows as said above that only a copy of the plaint was affixed which was not due service according to law. I cannot, therefore, find any fault with the order of learned Munsiff.

4. It was argued on behalf of the appct. that there was no complaint about the service of 4 3-1949, in the appln & therefore the lower Ct. should not have adverted himself to the endorsement of 4-3-1949. The complaint of the non-appct. Hema, was simple. He averred that the summons was not duly served on him. The report of the process-server himself supported this complaint. Therefore it cannot be said that the learned Munsiff acted on no evidence in allowing the appct. Hema for restoration.

5. It was urged that at any rate the whole of the decree should not have been set aside. According to Order 9, Rule 13 where the decree is of such nature that it cannot be set aside as against one deft, only who applies for restoration, it may be set aside as against all or any of the other deft. also. In the present case, the dispute is about a certain piece of land which the non-appcts. are

cultivating. There, is no allegation that each of the defts is in possession of a specified portion out of that land. Under these circumstances, the decree could not be set aside against some defts. only. I do not find that in setting aside the decree against all the defts. the lower Ct. committed any illegality or material irregularity in the exercise of his jurisdiction. The appln. is dismissed but under the circumstances I make no order as to costs.