
(2009) 06 CHH CK 0010
In the Chhattisgarh High Court

Dhelabai and Others

APPELLANT

Vs

Ramnath Gayaram Yadeo and Others

RESPONDENT

Date of Decision : 26-06-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 17, Order 5 Rule 19A, Order 5 Rule 20, Order 5 Rule 5, Order 5 Rule 9

Citation : AIR 2010 Chh 11

Hon'ble Judges : T.P. Sharma, J

Bench : Division Bench

Judgement

T.P. Sharma, J.—By this revision, the applicants have challenged the legality and propriety of the order dated 2-2-2002 passed by the Second Additional District Judge, Baloda Bazar in Misc. Civil Appeal No. 29/98, affirming the order dated 4-5-93 passed by the Civil Judge Class-II, Baloda Bazar in Misc. Civil Suit No. 13/93 whereby the learned Civil Judge, Class-II dismissed the application under Order 9, Rule 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") filed by the applicants for setting aside ex parte decree passed against them.

2. The order is challenged on the ground that the finding of the Courts below are perverse and caused substantial injustice to the applicants.

3. Brief facts of the case are that Civil Suit No. 61A/90 was filed by deceased Ramnath (father of non-applicant No. 1 and husband of non-applicant No. 2) against Hari and Jaita which was decided ex-parte on 18-12-90. An application for setting aside ex-parte judgment and decree was filed by Hariram on the ground that summons of the suit have not been served upon him and only on the basis of endorsement of the postman relating to refusal of registered notice, the Court has proceeded ex parte and ex parte decree was passed. After affording an opportunity of hearing to the parties, learned Civil Judge Class-II has dismissed an application for setting aside ex-parte decree vide order dated 4-5-93. Being aggrieved and dissatisfied with the said order, an appeal was preferred and the

same was also dismissed by the order impugned.

4. I have heard learned Counsel appearing for the parties.

5. Learned Counsel appearing for the applicants argued that summons have not been served upon the applicants and only on the ground of endorsement of refusal made by postman, the Court has proceeded ex parte against Hariram and passed ex parte decree. The Court below has not considered the fact that summons have not been served upon Hariram and Hariram was not having any knowledge of pendency of the suit. Learned Counsel further argued that summons through usual mode have not been issued against Hariram, therefore, even any refusal of summons notice through registered post is not sufficient for proceeding ex parte against the applicants/defendants. Learned Counsel also argued that order dated 27-6-90 passed in Civil No. 61-A/90 shows that no summons through usual mode have been issued and only the Court has directed to issue summons through registered post and the same is illegal. Even the Court below has not examined the postman who has made endorsement of refusal. 6. I have perused the order impugned and records of the Courts below. Order 5, Rule 20 of the Code is provided under Order 5 in accordance with Rule 1 read with Rule 9 of Order 5 of the Code. Service should be affected on the person by delivering the copy of the same and if the person refuses to accept the service, then service may be affected under the provisions Order 5, Rule 17 of the Code. Order 5, Rule 19-A of the Code provides service by post which was amended in the year 1977 and was deleted by Act of 46 of 1999 with effect from 1-7-2002. Provisions were available in the Code from 1977 to year 2002 which reads as follows:

19A. Simultaneous issue of summons for service by post in addition to personal service.- (1) The Court shall, in addition to and simultaneously with, the issue of summons for service in the manner provided in Rule 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgment due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case the Court considers it necessary.

(2) When an acknowledgment purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant.

Provided that where the summons was properly addressed, prepaid and duly

sent by registered post, acknowledge due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for other reason, has not been received by the Court within thirty days from the date of the issue of the summons.

7. It reveals from Order 5, Rule 19A of the Code that the service by registered post is an additional mode of service and the Court was empowered to order the service by registered post in addition to usual mode and simultaneously with, the issue of summons for service by usual mode. At the time of issue of summons by post, time Court was under obligation to issue summons through usual mode and issue of summons through usual mode was sine qua non for issue of summons.

8. Orders dated 12-6-90, 20-6-90 and 27-6-90 reveal that summons have been issued against the applicants/defendants through usual mode as also through registered post and summons through registered post were received with an endorsement of refusal by Hariram. An application for setting aside ex parte decree was filed by Hariram, but he had not examined himself as a witness and has executed General Power of Attorney in favour of his son Chatur Singh (AW-1) who has examined himself as a witness in which he has specifically admitted in paras 9 and 14 of the evidence that during pendency of the suit, process server has come to his residence and told him that suit is pending against them and they are not appearing in their suit. He has also specifically admitted that his father had told him that postman came to him with the notice but he refused to sign, then postman took the notice back. The admission of service of Chatur Singh relating to the knowledge of pendency of the suit and refusal of notice through registered post by Hariram is sufficient to draw inference that the service through registered post has been affected upon Hariram, but Hariram failed to appear before the Court personally or through his counsel and the Court was justified for drawing inference that the service has been legally affected upon Hariram. On the basis of admission of Chatur Singh, son of Hariram, an application for setting aside ex parte decree was dismissed by the Civil Judge, Class-II and the same was affirmed by the lower appellate Court in the order impugned.

9. Taking into consideration the admission of Chatur Singh, son of Hariram, no option to the Court except to dismiss an application for setting aside ex parte decree was left. The Court below has not committed any illegality or infirmity or has not failed to exercise the jurisdiction vested in it. I do not find any scope for interference in the order impugned in exercise of revisional jurisdiction.

10. Consequently, the revision is liable to be dismissed and it is hereby dismissed. No order as to cost.