

(1989) 11 AHC CK 0015

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 23448 of 1989

Dilbagh Singh

APPELLANT

Vs

Deputy Director of Consolidation and Others

RESPONDENT

Date of Decision : 03-11-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 15, Order 9 Rule 13
Constitution of India, 1950 — Article 226
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 48, 48(1), 49
Uttar Pradesh Consolidation of Holdings Rules, 1954 — Rule 58(2)
Uttar Pradesh Land Revenue Act, 1901 — Section 41

Citation : (1990) 1 AWC 363

Hon'ble Judges : B.L. Yadav, J

Bench : Single Bench

Advocate : Satya Prakash and V.K. Nagaich, for the Appellant;

Final Decision : Dismissed

Judgement

B.L. Yadav, J.—Present petition Under Article 226 of the Constitution is directed against the order dated 27-9-1986 passed by the Deputy Director of Consolidation, Respondent No. 1 allowing restoration application filed by Mangali, the Respondent No. 5 chak holder No. 217 after holding that the service of notice on son, Jai Singh, Respondent No. 6, who has a separate chak No. 103 would not be taken to be sufficient notice on the father who has a separate chak No. 217.

2. Mr. Satya Prakash, learned Counsel for the Petitioner urged that notice was served on Jai Singh chak holder No. 103, the son of Mangali who has common interest with his father, hence service of notice on son, was service of notice on the father. The report of the process server (Annexure 4, vide page 24 of the petition) evinces that the notice has been correctly served on the son before witnesses. The father was not available hence there was no justification for restoration as in view of second proviso and third proviso added by U.P. Amendment, the Respondent No. 5, (Mangali) could have known about the date fixed, just on the basis of the irregularity in summons no exparte order could be

set aside. Attention was drawn particularly to the provisions of Order 5 Rule 15 and order 9 Rule 13 of the CPC (for short the Code). It was further urged that an application was filed by the Counsel for the opposite parties there, that before deciding the revision an opportunity of hearing may be given to the opposite parties. The revision was decided thereafter on 20th April, 1986 after affording Mangali, Respondent, opportunity of being heard, therefore order dated 27th September, 1989 allowing restoration application is manifestly erroneous and deserves to be quashed.

3. Admittedly Mangali and his sons were different opposite parties in revision as well as in this petition. Mangali was chak holder number 217 whereas his son Jai Singh was chak holder No. 103. During consolidation operation concept of Joint Hindu family cannot be imported as between different chak holders unless one chak holder has authorised the other chak holder to be his representative, latter cannot represent former. As Mangali was a party to the revision notice must have been served upon him in accordance with the procedure contemplated Under Rule 58(2) of U.P. Consolidation of Holdings Rules, 1954 (for short the rules) framed under the U.P. C.H. Act (for short the Act).

4. Much emphasis was laid by the Counselz on the provisions of Order 5 Rule 15 CPC and U.P. Amendment of IInd proviso to Order 9 Rule 13 CPC which are set out below:

Order 5 Rule 15 Code of Civil Procedure

15. Where service may be on adult member of Defendant's family: Where in any suit 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 and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female who is residing with him.

State Amendment Allahabad. Add the following further proviso:

Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons if the Court is satisfied that the Defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the Plaintiff's claim.

Rule 58(2) of the Rules is set out below:

2. In delivering a document or effecting the service of any document, notice or summons on any tenure holder or other person, the serving officer may, where the tenure holder or the person concerned (his guardian or legal representative) is not present at his residence at the time of delivery of service or, where he cannot be found after using all due and reasonable diligence or where he refuses to take the document, notice or summons, effect delivery or service by affixation of the document notice or summons on the outer door or at some other

conspicuous part of the house in which he ordinarily resides, but if he has no such residence, in the unit, by affixing a copy of the document notice of summons at some place of public resort on or adjacent to the land to which such documents refers. In either case the Serving Officer shall get the affixations attested by two residents of the unit. The service of certificates of compensation shall not however, be made by affixation.

There is no quarrel with these salutary principles of law. The difficulty is that provisions of CPC 1908 do not apply to the consolidation proceedings. u/s 41 of the Act Chapters IX and X of the U.P. Land Revenue Act apply. The substance, spirit of the provisions of CPC can be applied in the ends of justice. Even in view of Rule 15 of Order 5 of the Code summons ought to have been served on Mangali the Respondent No. 4 in person, otherwise the process-server could wait for a reasonable time to ascertain if there was any agent authorised by him (Mangali) to accept notice on his behalf. No such efforts appear to have been made by the Procure Server. His report indicates that Mangali was not available at his residence consequently notice was served on his son. Why the notice was served on the son who was a different chak holder and poses a big question mark.

5. Broadly speaking even assuming Order 9 Rule 13 of the code to apply to the present case there are two conditions which have to be fulfilled before an *ex parte* decree could be set aside. First is that the summon was not duly served on the Defendant and in the alternative it has to be proved that the Defendant was prevented from appearing when the case was taken up for hearing. Much emphasis by the legislature is that not only summons has to be served on the Defendant but it has to be duly served. Only service of summons would not sufficient unless it has been duly served.

6. The connotation of word "duly" may be ascertained. According to the Lexicon Webster's Dictionary of the English language, the word "duly" means in a due and proper manner and at the proper time. According to Black's Law Dictionary the word "due" means just, proper, regular, lawful, sufficient and word "duly" means in due and proper form or manner, according to legal requirements.

7. The U.P. Amendment to the proviso II to Rule 13 of Order 9 (*supra*) is in substance, that in case Court is satisfied that Defendant knew, just on the basis of irregularity in service of summons the *ex parte* decree or order could not be set aside.

8. In the present case, the meaning of the word "duly" has to be emphasised and noticed. The service of notices must be properly and lawfully served and it must not be a service just in form devoid of substance.

9. In fact the relevant provision for service of notice is Rule 58(2) of the Rules, which provides that summons has to be served on the tenure holder i.e. Mangali, and in case he is not present at the time of delivery or he cannot be found after using due diligence, or he refuses the service in that event notice could be

served by affixation on the outer door. In case the tenure-holder is not found, due diligence must have been exercised to ascertain facts about his absence and possibility of coming back. Process server must not only exercise diligence but must exercise due diligence. "Due" means just, proper, sufficient. In brief the process server must exercise proper and sufficient diligence. In these matters the object of legislature in enacting Rule 58(2) has to be kept in mind. The motive, object and philosophy of the legislature in enacting Rule 58(2) or Rule 13 of Order 9 of the Code has to be kept in mind. The notice has to be served properly and sufficiently. It has not to be done cursorily. The process server has to trace out the tenure holder to be served. In case he is not available due diligence has to be exercised about his whereabouts. In case he cannot be traced out, or would not be available in reasonable time notice may be fixed on his outer door or it may be served on his guardian or representative. In the present case Mangali was tenure holder being chak holder No. 217. His son Jai Singh was chak holder No. 103.

10. It is well recognised principle for dispensation of justice that notices are served on the parties concerned, what is to be high-lighted is that u/s 48(1) of the Act, the statutory provision is that a revision can be decided only after allowing the parties concerned an opportunity of being heard. This is mandatory requirement and there should be no deviation from this. It is not just a ritualistic formality. If opportunity of hearing has to be afforded to the parties concerned as is manifested by the intention of legislature u/s 48 of the Act, the notices have, also to be served on the parties concerned or their authorised representatives.

11. In American Jurisprudence Vol. I (page 538-539 paras 36-37) there is statement:

The principal object of construction of laws is to ascertain and carry out the intent of the legislature. The Courts have no power to legislate and may not amend an Act directly or indirectly by construction.

12. In the present case the intention of legislature was manifest by using the expression "allowing the parties concerned an opportunity of being heard." As the parties are to be heard, it is they who have to be served and not their relations howsoever close they might be. Simply because some one is a son he need not be served in place of father, particularly when father and son have different chaks and have been made parties separately.

13. There was no evidence that father has authorised his son to receive notices on his behalf. Deputy Director of Consolidation has correctly recorded the finding that as the son was served in place of father, the procedure prescribed for effecting service was not followed, hence such service is of no avail in the eyes of law. The restoration application has correctly been allowed. In the matters as present one, where the proceedings are going to be finalised and non filing of an objection would bar the future suit or proceedings u/s 49 of the Act, all efforts must be made to see that parties are afforded reasonable and sufficient

opportunities of hearing, before taking decision affecting their rights.

14. In view of the premises aforesaid the petition lacks merits and is hereby dismissed.