

(2006) 01 AHC CK 0009

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 41943 of 2000

Jagat Pal Upadhyay

APPELLANT

Vs

The Commissioner, Basti Division, Additional District
Magistrate, The Tehsildar and Mahngu Harakh

RESPONDENT

Date of Decision : 12-01-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 17, Order 5 Rule 19A, Order 5 Rule 20, Order 5 Rule 20(1), Order 9 Rule 13
General (Civil) Rules, 1986 — Rule 140, 141
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 209, 229B

Citation : (2006) 4 AWC 3374 : (2006) 2 RD 36

Hon'ble Judges : Shishir Kumar, J

Bench : Single Bench

Advocate : S.S. Chauhan, for the Appellant; S.N. Yadav and S.C., for the Respondent

Final Decision : Dismissed

Judgement

Shishir Kumar, J.—The present writ petition has been filed for quashing the orders dated 14.6.2000 and 6.5.2000 passed by opposite parties" No. I and 2 respectively and further prayer is for issuing a writ in the nature of mandamus commanding the respondents not to interfere with regard to the petitioner"s possession over the land in dispute.

2. The facts arising out of the present writ petition are that the petitioner was in possession over Land No. 61 area 0-2-6, No. 68 area 0-3-14. No 69 area 0-1-8 and No. 65 area 0-2-3 for the last 12 to 15 years. The petitioner filed Suit No. 1162 of 1998 in the Court of Additional District Magistrate u/s 229B and 209 of the U.P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as the Act).

3. Notices were issued and the concerned opposite party No. 4 entered into compromise and as such the suit was decided in terms of the compromise vide

its judgment and decree dated 14.10.1998. After the compromise decree the name of the petitioner was recorded in the revenue record and the petitioner was in possession of the said land. For the reasons best known to respondent No. 4, he filed an application under Order IX Rule 13 C.P.C. before opposite party No. 2 for canceling the compromise decree dated 14.10.1998. The petitioner had no knowledge regarding filing of the aforesaid application and no notice was ever served upon the petitioner. Opposite party No. 2 passed an order on 6.5.2000 setting aside the compromise decree dated 14.10.1998 on an application filed by opposite party No. 4 under Order IX Rule 13 C.P.C. Opposite party No. 4 moved an application on 9.5.2000 for mutation of his name over the land in question. When the petitioner came to know, he filed an appeal before respondent No. 1 mentioning therein that the order dated 6.5.2000 is wholly illegal without service of notice and without sufficient service of the application under Order IX Rule 13 C.P.C.

4. It has been submitted on behalf of the petitioner that the application filed under Order IX Rule 13 C.P.C. itself is not maintainable. As the mode of service which is provided under the CPC has not been followed, therefore, the procedure which has been adopted to gazette in the local newspaper cannot be treated to be sufficient service, but the revisional court has dismissed the revision vide its order dated 14.6.2000. The petitioner aggrieved by the aforesaid order has filed the present writ petition.

5. The writ petition was entertained and the notices were issued but no interim order was granted.

6. It has been submitted on behalf of the petitioner that admittedly on the basis of the compromise application filed before the Court the case was decided on 14.10.1998, therefore, the order dated 6.5.2000 by which the decree of compromise has been set aside without service of notice is an order which is apparently illegal in view of the well settled principle of law. It has further been submitted that in view of the Order IX Rule 14 CPC, no decree can be set-aside without notice to the opposite party. Further submission has been made by the petitioner regarding Rules 140 and 141 of the General Rules (Civil), which lay down the criteria regarding summons and other mode of service. Rules 140 and 141 of the General Rules (Civil) are reproduced below:

140 Sufficiency of service and re-issue of processes. When a process is received back with a service report as Contemplated under Order V, Rule 17 shall be promptly laid before the court for orders under Order V, Rule 19-A fresh service on payment of necessary process fee shall ordinarily be ordered if there is sufficient time for service to be effected.

141 Service by publication-Recourse to the mode of substituted service by publication in a newspaper shall be had only when service by any other method is considered impracticable.

1[A careful discretion shall be exercised in selecting the newspaper in which the

publication is to be made under Order V, Rule 20 C.P.C. Only a daily newspaper circulating in the locality in which defendant to be served is last known to have naturally and voluntarily resided or carried on business or personally would for given, shall be selected.]

No summons or notice shall be published in a magazine.

7. Further reliance has been placed by the petitioner on the Division Bench judgment of this Court reported in *Lakshmi Bangle Stores Vs. Union of India (UOI) and Others*, and paragraphs 12 and 15 of the said judgment have been referred which are reproduced below:

12. In the present case, the trial court has observed as below:

Ant men prarthi ki ore se yah kaha gaya hai ki us par summons myamanusar tamil nahi hua. kintu sunshodhit aadesh 9 myam 13 CPC ke antargat summon ki tamili ki trutipurna prakriya ke tark par ek pakshtya aagyapti ko mrast nahi kiya ja sakta hai.

The trial court has not recorded any categorical and positive finding to the effect that it was satisfied that the defendants had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. Yet it has repelled the contention of the defendants relying upon the proviso regarding the irregularity in the service of summons. We shall demonstrate hereafter that the defendants had really not been served about the date of hearing after restoration of the suit dismissed in default of the parties. It is noteworthy that the trial court has patently erred in placing reliance upon the proviso quoted above, while rejecting the defendant's application for setting aside ex parte decree.

15. The learned Counsel for the plaintiff -respondent has emphasized before us that in the facts and circumstances of this case, the substituted service upon the defendants was as good as personal service on the defendants. Therefore, the trial court was right in holding that the defendants' application for setting aside the ex parte decree was beyond time. It is noteworthy that the trial court has not paid due regard to the provisions of Order 5 Rule 20 of the CPC in the present case. A perusal of the order-sheet indicates that the direction of the trial court for issuing notice intimating the defendant about the date of hearing had not been carried out yet on 31.7.1966, the trial court ordered for substituted service by publication in *Jaidesh*. In our opinion, the trial court has hastened to take recourse to the substituted service in the facts and circumstances of the present case without paying due regard to the provisions of Order 5 Rule 20 CPC.

Further reliance has been placed by the counsel for the petitioner on the judgment reported in 1984 A.C.J. 15, *Rangi Lal v. Laxmi Narain Gupta and Anr.* and paragraph 10 of the said judgment has been referred.

8. In view of the aforesaid submissions the petitioner has submitted that unless and until the proper procedure regarding service upon the defendant or plaintiff is proved, the Court cannot adopt a procedure of publication directly without

recording a finding to this effect that other mode of service as provided in the CPC has been adopted. As no finding has been recorded the order dated 6.5.2000 by which the decree dated 14.10.1998 has been set aside is liable to be quashed. It has also been submitted that the revisional court has also not considered the said aspect of the matter regarding service of notice, as such the order dated 14.6.2000 is against the well settled principles of law.

9. On the other hand, the counsel for the respondents has submitted that the petitioner has filed a forged compromise application before the respondent No. 2. The respondent had no knowledge and he has not signed on any document. The contention of the petitioner is not correct that as a notice was issued to the petitioner who refused to accept the same. The notice under Order V Rule 20 C.P.C. was published in the daily newspaper which is widely circulated newspaper in the locality. Respondent No. 2 after fully satisfying himself that there was no reason to disbelieve that the petitioner was keeping out of way for the purpose of avoiding service. It is incorrect to state that the application under Order IX Rule 13 C.P.C. was not maintainable. The service of notice published in local newspaper will be deemed to be sufficient under Sub Rule (1)(a) of Rule 20 of Order V of the Code of Civil Procedure. The court below after taking into consideration the fact that the order dated 14.10.1998 which was the order on the basis of the application filed on behalf of the petitioner for compromise, it clearly appears that the Court has not taken into consideration the fact whether there was any genuine signature of the respondent on the said application or not. Therefore, the Court immediately when the application under Order IX Rule 13 C.P.C. was filed for setting aside the *ex parte* order, issued the notice and when the summons were refused it was published in the newspaper and then the court has set aside the order dated 14.10.1998. It has further been submitted on behalf of the respondents that admittedly the order dated 14.10.1998 was passed without an opportunity to the petitioner and when the genuineness of the compromise itself was disputed by respondent No. 4, then the court in the interest of justice has set aside the order dated 14 10.1998 and the revisional court has also recorded a finding of fact that the notices were issued and when it was not served, then publication was made. A finding has also been recorded that the revisionist-petitioner has not stated anywhere that the notices and summons have not been issued against the petitioner. Taking into fact and the principles of natural justice the respondent has dismissed the revision and now the matter will be decided after affording opportunity to the respective parties. Therefore, there is no illegality and the writ petition is liable to be dismissed.

10. I have heard the learned Counsel for the petitioner and the respondents and have also perused the record. From the order dated 14.10.1998 it clearly appears that on an application filed on behalf of the petitioner for compromise only one line order has been passed to the effect that the suit is decreed in terms of compromise. The Court has not verified the signatures of respondent No. 4 and has also not made any effort to verify the genuineness of the said compromise. Therefore, immediately when the application under Order IX Rule

13 C.P.C. was filed by respondent No. 4, the court has taken a proper care and the notices have been issued and even the registered notice was also issued but the court has taken a precaution in spite of the registered notice to publish the same in the newspaper. The court was satisfied that the order-dated 14.10.1998 has been passed without any verification regarding the genuineness of the application for compromise. Therefore, the court vide its order dated 6.5.2000 had set aside the order dated 14.10.1998 and has directed the Court that the parties will appear on 31.5.2000 and after giving an opportunity the order may be passed.

11. The revisional court has also recorded a finding to the effect that it has nowhere been stated by the revisionist -petitioner that no notice and summons were issued and no affidavit has been filed; by the petitioner before the court that on the compromise application which was filed before the Court, there was a genuine signature of respondent No. 4 though respondent No. 4 has filed an affidavit before the court below that he has not made any signature on the compromise application. A finding to this effect has also been recorded by the revisional court that the petitioner has filed an affidavit dated 12.5.2000 but the same has not been verified by the oath commissioner, therefore, that cannot be treated to be an affidavit. Regarding service the revisional court has also recorded a finding of fact that the petitioner has deliberately not appeared before the Court. The Court has also perused the order-sheet, which has been annexed with the record. In the order dated 9.6.1999 it is mentioned that "AAJ PESH HUA, PUKAR PAR FARIKAIN MAY COUNSEL HAZIR AAYE. AADESH HUA DINANK 18.6.1999 KO KAYAMI PAR SUNWAJ HETU PESH HO." From the perusal of the order dated 18.6.1999 it clearly appears that there is a clear order that notices be issued to the opposite party and further order has been passed that summons be sent by registered post and the case will be taken up on 23.7.1999, It appears that in spite of the summons by registered post when the petitioner has not appeared then the mode of service by publication was adopted by the court which is clear from the order dated 6.5.2000, In such a situation the contention raised on behalf of the petitioner is not acceptable as admittedly the order-dated 14.10.1998 was passed without any opportunity to the respondent No. 4. The Court has also not verified the genuineness of signature on the compromise application alleged to have been filed before the Court. The Court while considering all these aspects of the matter was pleased to set aside the order dated 14.10.1998. It can be said that there may be some irregularity in the service of summons but keeping in view of the principles of natural justice as well as the notice and opportunity, in my opinion, it cannot be said that the order dated 6.5.2000 and the revisional order dated 14.6.2000 are liable to be quashed on very hyper technical ground. As the rights of the parties are going to be affected, therefore it will be expedient in the interest of justice that both the parties may be afforded an opportunity to submit their case before the trial court and a party should not be non-suited only on the basis of some technicality. In such a way the contention raised on behalf of the petitioner is not acceptable

12. In the result the writ petition is devoid of merit and is hereby dismissed. No order as to costs.