

(2002) 08 AHC CK 0161
In the Allahabad High Court
Case No : Civil Revision No. 61 of 1995

Lawyers Co-operative Housing Society Ltd.	APPELLANT
Vs	
Shri Krishna Grih Nirman Samiti Ltd. and Others	RESPONDENT

Date of Decision : 14-08-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20(1A), Order 9 Rule 13

Citation : (2002) 4 AWC 2890

Hon'ble Judges : U.S. Tripathi, J

Bench : Single Bench

Advocate : G.N. Verma, A.N. Verma, H.M.B. Sinha, Yasharth and J.L. Garg, for the Appellant; Ratnakar Bharti and Neeraj Pandey, for the Respondent

Final Decision : Dismissed

Judgement

U.S. Tripathi, J.—The plaintiff of the suit has filed this revision against the order dated 31.10.1994 passed by VIIIth Additional Civil Judge, Agra in Misc. Case No. 12 of 1994, allowing the application of the respondent No. 1 under Order IX Rule 13, C.P.C. and setting aside the ex parte decree dated 7.3.1987 in Original Suit No. 103 of 1983.

2. The applicant society filed Suit No. 103 of 1983 against the opposite parties. The above suit was decreed ex parte on 7.3.1987. Thereafter the opposite party No. 1 moved an application for setting aside above ex parte decree on the grounds, inter alia, that the summons of the suit had not been served upon it. The summons were neither tendered by the post man or Process Server upon it, nor it were ever refused to accept. The plaintiff/applicant obtained ex parte decree by concealing the above facts and alleged service of summons on the opposite party No. 1, was said to have been effected through publication in a newspaper, which was not daily news paper nor had any circulation in the area where the opposite party No. 1 had its office. The opposite party No. 1 came to know about the decree of the suit for the first time on 19.1.1994, when the applicant's pairokar Devi Prasad informed to its Secretary that he had obtained

decree and was getting the sale deed executed. The opposite party No. 1 got the file inspected on 25.1.1994 and moved the application.

3. The above application was opposed by the applicant, mainly on the ground that the opposite party No. 1 had full knowledge of the suit and deliberately avoided the service of summons by refusing to accept the same. The notices were ultimately published in a news paper which had wide circulation in the locality. The opposite party No. 1 also wrongly alleged the source of knowledge of decree. It further contended that the opposite party No. 2 had filed objections against the execution, which had been dismissed by the Executing Court and she preferred Civil Revision No. 142 of 1992 before this Court in which the opposite party No. 1 was also served.

4. The opposite party No. 1 filed Case No. 118 of 1985 before Deputy Registrar/ Assistant Housing Commissioner. The applicants filed an affidavit in the said case in which it mentioned about the pendency of Suit No. 103 of 1983 In the Court of Civil Judge, Agra. The opposite party No. 1 was also party in said case and had full knowledge of the pendency of suit much before the passing of the ex parte decree.

5. Learned Civil Judge on considering the case and evidence of the parties held that after institution of suit on 1.3.1983, notices/summons were first sent to defendants through Advocate Commissioner. but according to the report of the Advocate Commissioner, the notice could not be served on the opposite party No. 1 and it was returned unserved. Thereafter, notices were sent through registered post and the same was received back undelivered for want of complete address and the addressee was not found residing at the address mentioned in the notice. Therefore, the summons were never served upon the opposite party No. 1 and other defendants. It never refused to accept any summons sent to it. The summons and notices were also issued through process server and the same were also returned unserved.

6. Regarding service by publication, the trial court held that summons were published in the news paper "Aaj Ka Hangama", a small news paper published from Agra. It was not a daily news paper. There was nothing on record to show that the above news paper was having wide circulation in the locality, where the defendants resided and carried on the business. Hence the summons were never served on the defendants/ opposite party No. 1 in accordance with law.

7. Regarding the objections filed by the applicant before the Deputy Registrar/ Housing Commissioner, U. P. on 7.3.1985, the trial court held that on going through the entire objection of the applicant, it simply showed that the opposite party No. 1 had only this much knowledge that Suit No. 103 of 1983 was pending in the Court of the Civil Judge, Agra. The objection was filed on 7.3.1985 and 17.4.1986, while the ex parte decree in the suit was passed on 7.3.1987. Thus, it was absolutely clear that the applicant had no knowledge about the passing of the ex parte decree in Original Suit No. 103 of 1983. At the most, it could be

only presumed that the opposite party No. 1 had knowledge that the Suit No. 103 of 1983 was pending before the Civil Judge, Agra. With these findings, the trial court allowed the application and set aside the ex parte decree dated 7.3.1987 in Original Suit No. 103 of 1983.

8. The above order has been challenged in this revision.

9. Heard the learned counsel for the parties and perused the record.

10. The trial court has recorded a finding of fact that summons of the suit were neither tendered nor refused to accept by the opposite party No. 1 and that there was no service of summons on the opposite party No. 1. It also recorded a finding of fact that service by publication in the news paper was also not in accordance with law as the news paper concerned was not a daily news paper, and had no circulation in the area and locality, where the opposite party No. 1 resided or carried on the business. The above findings of the trial court are based on evidence on record and endorsement of the Advocate Commissioner, the process server and the postman on the summons. There appears no Illegality or irregularity in the above findings of fact recorded by the trial court.

11. Learned counsel for the applicant contended that the opposite party No. 1 had full knowledge of the pendency of Suit No. 103 of 1983. He pointed out that a case was filed before the Deputy Registrar/Assistant Housing Commissioner, U. P. In the said case, the applicant filed objections on 7.3.1986 and 17.4.1986 in which it clearly mentioned that Original Suit No. 103 of 1983 was pending between the parties and ad interim injunction was issued in the said suit, which was in force. He further contended that second proviso to Rule 13 of Order IX, C.P.C. as added by Allahabad Amendment and in force in the State of U. P. says that no ex parte decree shall be set aside 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 plaintiffs claim ; that on filing above objection by the applicant in the above noted case before the Assistant Housing Commissioner, the defendant/ opposite party No. 1 knew about the pendency of the suit, but it had not been proved that he could not know the date of hearing in sufficient time to appear and answer plaintiffs claim and, therefore, the ex parte decree was not liable to be set aside. The learned counsel for the applicant placed reliance on two Division Bench decisions of this Court in Raghubar Sahai Bhatnagar Vs. Bhakt Sajjan, and Raja Ram Gupta v. Firm Jaiswal Iron and Steel Works and Ors. 1980 AWC 110.

12. Second proviso to Rule 13 of Order IX, C.P.C. as added by Allahabad Amendment vide notification dated 24.7.1926 prior to C.P.C. Amendment by C.P.C. Amendment Act of 1976, read as follows :

"Provided also that no such decree shall be set aside merely on the ground of irregularity in 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 plaintiffs claim."

13. Relying on the above proviso, this Court held in the case of Raghuvar Sahai Bhatnagar (*supra*), that where the ex parte decree is passed in defendant's absence, he is entitled to get the decree set aside under Order IX Rule 13, C.P.C., if he satisfies the Court that summons was not duly served on him and he had sufficient cause for his absence. But in view of the proviso added by Allahabad High Court to Order IX. Rule 13, an ex parte decree cannot be set aside on the ground of any irregularity in the service of summons, if the Court is satisfied that the defendant had knowledge, but for his wilful conduct, he had sufficient time to appear and answer plaintiffs claim. The Proviso added by this Court has now been engrafted in Rule 13 itself by Parliament by the Amendment Act No. 104 of 1976. Admittedly, at the relevant period when the question arose before the court below, the proviso as added by this Court was in force. Both the Courts held that the process server's failure to affix the summons at the outer door of the defendant/applicant's place of residence was a mere irregularity and since the defendant/applicant had knowledge of the date of hearing, he had no sufficient cause for his absence. Further held that the courts below have rightly held that the defect, if any, in the service of summons was a mere irregularity and since the defendant/applicant had knowledge of the date of hearing, he had no sufficient cause for his absence and as such the ex parte decree could not be set aside.

14. In the case of Raja Ram Gupta v. Firm Jaiswal Iron and Steel Works and Ors. (*supra*), this Court held that second proviso to Rule 13 as added in this State, however, lays down that an ex parte decree shall not be set aside in a case where there has been some irregularity in service of summons, i.e., in a case where the summons have not been duly served, if it is satisfied either that the defendant knew or he would have, but for his wilful conduct, known of the date of hearing in sufficient time to enable him to appear and answer plaintiffs case. It thus, appears that the absolute right conferred upon the defendant by the main rule to have the ex parte decree set aside in a case where the summons were not duly served had, in this State, been curtailed. According to the law prevailing in this State, this right ceases to be available in a case where 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 plaintiffs claim. Accordingly, in a case where summons have not been duly served upon the defendant and the exact date of hearing is not known to the defendant but he comes to know of the proceedings well in time he can easily find out the date and put in appearance and answer the plaintiffs claim. If he without any justification fails to take steps to find out the date of hearing the only conclusion which can be drawn would be that but for his wilful conduct he would have known the date of hearing in sufficient time so as to enable him to appear and answer the plaintiffs claim.

15. The above decisions related to the cases prior to Amendment of C.P.C. by Act No. 104 of 1976. Undisputedly, the case under hand relates to the period after Amendment of 1976 coming into force. Second proviso to Rule 13 of Order IX as

amended by Amendment Act No. 104 of 1976 reads as under :

"Provided further that no Court shall set aside the decree passed ex parte merely on the ground that there has been an irregularity in service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim."

16. If the second proviso added by Allahabad Amendment prior to C.P.C. amendment by Amendment Act, 1976 and second proviso added by C.P.C. Amendment Act, 1976, are compared, it would appear that the words "or but for his wilful conduct would have known of the date of hearing" occurring in Allahabad Amendment was purposely omitted by C.P.C. Amendment Act of 1976. In the proviso added by C.P.C. Amendment Act of 1976, the satisfaction of the Court should be that the defendant had the notice of the date of hearing and had sufficient time to appear and answer plaintiff's claim.

17. The above wordings of the newly added second proviso clearly indicate that the Court should satisfy itself that the defendant had notice of the date of hearing and had sufficient time to appear and answer plaintiffs claim, while the second proviso added by Allahabad Amendment prior to 1976 Amendment Act. required satisfaction of the Court only about the knowledge of the defendant regarding pendency of suit and then the defendant had to satisfy that but for his wilful conduct, he could have not known the date of hearing in sufficient time to enable him to appear and answer the plaintiffs claim. Therefore, by newly added second proviso, the Court must satisfy itself that the defendant had notice of the date of hearing. In the case under hand, the objection of the applicant in a proceeding before the Assistant Housing Commissioner simply indicated that Suit No. 103 of 1983 in between the parties in respect of the land In suit was pending in the Court of Civil Judge, Agra. There is nothing in the said objection to indicate about the date of hearing of the suit. This shows that by above objection, the defendant had no "notice of the date of hearing of the suit". Therefore, the rigour of second proviso to Rule 13 of Order IX, C.P.C. is not applicable in the instant case.

18. Moreover, irregularity in the service of summons is a condition precedent for applicability of the above second proviso, which means that for applicability of the above proviso, it must be proved that there was service of summons, but the summons were not duly served. "Irregularity" is something different from "illegality". Irregularity contemplates defect in procedure and non-compliance of the prescribed formality, which cannot be of substantial nature. Illegality, on the other hand, connotes contravention of statute which may in some cases, make the action void. Illegality contemplates an action forbidden by law while irregularity is mere defect in the procedure. As held in Raghuvar Sahai's case (supra), if this basic difference in the two expressions is kept in mind, the expression "irregularity" in the service of summons occurring in proviso added to Order IX Rule 13 would mean the defect in following the procedure prescribed for service of summons, such as non-affixation of the copy of summons at the outer

door of the defendant's house in case he refuses to take the summons. In the instant case, there is categorical finding of fact recorded by the trial court that the defendant was not served at all as it was clear from the report of the Commissioner, the report of process server and the report of the post man. Regarding alleged service by publication, the trial court has recorded a finding of fact that the news paper "Aaj Ka Hangama" in which summons were allegedly published was not a daily newspaper and had no circulation in the locality in which the defendant was last known to have actually and voluntarily resided, carried on business or personally worked for gain. Sub-rule (1A) of Rule 20 of Order V, C.P.C. which deals with substituted service says as below :

"Where the Court acting under Sub-rule (1) orders service by advertisement in a news paper, the news paper shall be a daily news paper and circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain."

19. Thus, for taking benefit of above rule the plaintiff had to prove that the service by advertisement was effected in a daily news paper. If the news paper was not a "daily news paper", it was against the provisions of the above rule and amounted to illegality in service of summons.

20. Therefore, the alleged service by advertisement in a news paper was also not in accordance with law and, therefore, illegal. Thus, in the instant case, there was no service of summons on the defendant at all and it was not the case of mere "irregularity in service of summons". Consequently, the second proviso added by C.P.C. Amendment Act, 1976, to Rule 13 of Order IX is not applicable in the instant case. Therefore, the contention of the learned counsel for the applicant that the defendant/opposite party No. 1 would be deemed to have been served with the summons of the case is not tenable and cannot be accepted.

21. In view of above discussion and finding that the defendant was not served with the summons of the case and had no notice of the date of hearing, the trial court was justified in allowing the application under Order IX Rule 13, C.P.C. and setting aside the ex parte decree.

22. The revision has no force and is liable to be dismissed.

23. The revision is accordingly dismissed. In the circumstances of the case, the parties shall bear their own costs.