

(1997) 07 MP CK 0082
In the Madhya Pradesh High Court
Case No : M.A. No. 237 of 1996 (I)

M/s D. Vasudoe rao and Others

APPELLANT

Vs

State Bank of India, Indore

RESPONDENT

Date of Decision : 02-07-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 1, Order 5 Rule 5, Order 5 Rule 8

Citation : (1998) 2 MPJR 185

Hon'ble Judges : Jayant Govind Chitre, J

Bench : Single Bench

Advocate : M.G. Upadhyaya, for the Appellant; D.S. Kale, for the Respondent

Judgement

J.G. Chitre, J.

The appellants are hereby assailing correctness, propriety and legality of the judgment and decree which has been passed by XVth Additional District Judge, Indore in the matter of Civil Suit No. 106 of 93 wherein ex-parte decree has been passed against the appellants (original defendants.)

The respondent (original plaintiff) filed a suit for recovery of Rs. 4,24,669/- from the appellants on account of non payment of loan which was granted by the respondent to the appellant under cash-credit limit. The interest was agreed to be paid at the rate of 0.5% above the bank rate i. e. 17% per annum. Summonses were issued to the appellants on 25.6.93 directing them to remain present before the Court in respect of "Darkhwast" hearing on 19.7.93. Appellant Nitin Pandit attended the Court of VIIth Additional District Judge, Indore on that date but learnt that the suit was transferred to the Court of XVth Additional District Judge, Indore for disposal according to law by the order of District Judge, Indore. Thereafter the suit was fixed for hearing and on that date the appellants were absent. The proceeding was directed to proceed against the appellants ex parte and an ex parte decree was passed against the appellants.

The appellants submitted an application in view of provisions of Order IX rule 13.

C. P. C. for setting aside the ex parte decree. The trial Court conducted the enquiry and concluded that no case was made for setting aside ex parte decree. The appellants have preferred this appeal challenging the correctness propriety and legality of that judgment and decree.

Shri M. G. Upadhyaya, learned counsel appearing for the appellants submitted that summonses which were issued in this matter were not in accordance with the provisions of CPC and, therefore, the appellants were not given the information of the date of hearing of the suit. He submitted that the Court should have either issued the summonses for the purpose of directing the appellants to file written statement or to attend the Court for the purpose of settling the issues. He submitted that as it was not done by the trial Court, trial Court was not right in passing the ex parte decree against the appellants. Shri Upadhyaya also submitted that when the Court in-tended to decide the suit finally, the summonses should have mentioned that clearly so as to give intimation to the appellants that they were to attend on 19.7.93 when the suit was to be heard finally. In this context he made reference to the provisions of Order V C. P. C. as well as to the forms prescribed for the purpose of sending the summonses. Shri Upadhyaya submitted that prejudice has been caused to the appellants as without due intimation to them the ex parte decree has been passed against them which needs to be set aside.

Shri Kale, learned counsel appearing for the respondent, submitted that no prejudice has been caused to the appellants because the summonses were duly served on wife of appellant Nitin Pandit who was adult member of the family. He further submitted that appellants Nitin Pandit had gone to the Court of 7th Addl. District Judge, Indore for the purpose of making enquiry about the suit but he did not make due enquiry in the Court of 15th Addl. District Judge, Indore where the suit was transferred. In this context he made reference to the statement of Nitin Pandit recorded during the course of enquiry which was conducted by trial Court in context with the application preferred by the appellants in view of provisions of Order IX rule 13.

Shri Upadhyaya further argued that the summonses which were issued to the appellants were in respect of Civil Suit No. 108/93 and the judgment and decree has been passed by the trial Court in Civil Suit No. 106/93.

Pointing out this, Shri Upadhyaya, argued that the appellants did not have due intimation of the final herring of Civil Suit No. 106/93 and, therefore, ex parte decree which has been passed against them and in favour of respondent in Civil Suit No. 106/93 cannot be treated as proper, correct and legal. He submitted that it need to be set aside. Countering to this, Shri Kale argued that the number of suit was changed from 108/93 to 106/93 because the suit was transferred from the Court of Vth Addl. District Judge to the Court of XV the Addl. Distal Judge in routine distribution of the business, by District Judge, Indore. Shri Kale Pointed out that proviso to Order IX Rule 13 provides that no Court shall set aside a decree passed ex parte merely on the ground that there has been an

irregularity in the 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 plaintiff's claim. Shri Kale submitted that in view of proviso to Order IX Rule 13 the defects which Shri Upadhyaya pointed out are nothing but "mere irregularities". He opposed the prayer of Shri Upadhyaya for remanding the suit for retrial by setting aside the decree which is under challenge.

Order V C. P. C. deals with the mode of service of summons. Sub-rule (1) of rule 1 provides that when a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified; provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the claim of plaintiff; provided further that where a summons has been issued the Court may direct the defendant to file written statement of his defence if any, on the date of his appearance and cause an entry to be made to that effect in the summons. Sub-rule (2) provides that; a defendant to whom a summons has been issued under sub-rule (1) may appear (a) in person or (b) by a pleader duly instructed and able to answer all material questions relating to the suit or (c) by a pleader accompanied by some person able to answer all such question. According to sub-rule (3) every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Courts. The language used in summonses in questions is Hindi.

Rule 5 of Order V provides that the Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly; provided that in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

Rule 8 of Order V provides that where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

Normally, the summons should have been issued by the Court after the institution of the suit by following provisions of rule 1 of Order V in the absence of its intention to issue the summonses in view of provisions of rule 5 or rule 8 of Order V. It is pertinent to note that sub-rule (1) of rule 1 provides that when a suit has been duly instituted the summons may be issued to the defendant to appear and answer the claim on a day to be therein specified. If the defendant appears at the time of institution of suit and admit the claim of plaintiff, there is obviously no need of issuing a summons to the defendant. But if he does not appear and admit the claim, summons has to be sent to him and that is for initially directing him to appear before the Court and answer the claim on a day to be specified in summons. Second proviso to sub-rule (1) provides that in such a case the Court may direct the defendant to file written statement of his defence, if any, on the date of his appearance and cause an entry to be made to

that effect in the summons. In view of this provision if the summonses in question are perused, it is clear that the words which are used therein are "Darkhwast Ki Hai Ki". It has been also mentioned that said "Darkhwast" has been filed in suit i. e. "Mukadame Ke". "Mukadama" means suit, as told by both the learned counsel and "Darkhwast" means application. The simple meaning of the contents of the summonses which are in question is that appellants were directed to attend the Court for answering some application filed in the suit. Had those summonses been for the purpose of final decision of the suit, there was no need of suing the word "Darkhwast" in those summonses. Had there been the intention of deciding the said suit finally and directing the defendants / appellants to appear in the Court for final hearing of the suit, the Court would have issued the summonses in view of provisions of Order V rule 8. But that is not so far as summonses on record are concerned. Appendix - B to C. P. C. has given the format of the summons. Part -I provides for summonses for disposal of the suit in view of Order V rule 1 and 5. The language of the summonses in question is not in conformity with the language used in Form No. 1 The summonses are not in conformity with form No. 1

The High Court has framed rules for regulating the business of civil Courts. Part-III. Chapter 18 deals with suit registers. Rule 371 provides that civil suit register shall be maintained in two separate parts to be styled "Part-A Title and other suits and Part B - suits for money and movables; and all suits tried by ordinary procedure shall be entered in it. In Part - A shall be entered suits for immovable property, suits for specific relief, mortgage suits, and other suits not registered in Part-B. In Part - B suits for money or movable property. Suits relating to questions of title under any law relating to land shall be entered in Part-A. Contested applications for probate or for Letters of Administration, as also applications for revocation of probate or Letters of Administration shall be registered as suits in Part - A. Sub-para (2) provides that the name of the Tahsil, from which the suit arises, shall be entered below the date of institution in col. (1). If a suit is instituted on Addl. District Judge side, the letters "ADJ" shall also be entered in red ink in that column. To the serial no. of each suit shown in Col. (2), the distinguishing letters "A" or "C" shall be added according to the part in which the suit is registered. It further provides that the Presiding Judge, when directing the claim to be registered shall endorse on it a note whether the suit is cognizable by a Small Cause Court or not It further provides that in Col. (12) shall be entered not only the date of the first hearing but also each date to which the hearing of the suit may be adjourned. It means that after institution of the suit, the suit it to be laid before the trial Judge who would be doing the necessary compliance and therefore passing the order about the issuance of summons in accordance with provisions of Order V and rules relevant, as the Court finds it proper.

In the present case when the suit was instituted it was first laid before 7th Addl. District Judge. Thereafter it was transferred to the Court of 15th Addl. District Judge. The record shows that the summonses in question were issued by the

Court of 7th Addl. District Judge as well as the Court of 15th Addl. District Judge. The summonses which were issued by the Court of 7th Addl. District Judge were initial summonses. Those summonses should have indicated clearly whether the appellants were to appear before the Court on the prescribed date for the purpose of answering the claim of the respondent (original plaintiff) or otherwise. The summonses which were issued by the Court of 15th Addl. District Judge were issued at later stage and, therefore, those summonses should have also indicated very clearly whether the appellants were to appear before that Court for final hearing of the suit or otherwise. But the summonses which are on record neither of that on the contrary those summons indicate that the appellants were to appear before the Court for the purpose of answering "darkhwast". It could not have been by any stretch of imagination the direction to appellants to appear before the Court for final decision of the suit.

It is pertinent to note, as pointed out by Upadhyaya, that application was moved by the respondent for an order for attachment of the property of the appellants before the judgment in view of Order XXXVIII (which was hypothecated property). The word "Darkhwast" used in the summonses may be having relation to that. Even in that case direction was not to appear before the Court for final decision of the suit.

Unless the Court decided otherwise that means it directs the defendant to appear before the Court for informing the Court whether the defendant intends to contest the suit or not, the defendant should be by issuing the summons directed to appear before the Court for the purpose of answering the claim if the Court is not intending to issue the summons to the defendant in view of Order V rule 8, the summons should be issued for the purpose of directing the defendant to appear before the Court for answering the claim. It means that the defendant should be directed to appear before the Court for informing the Court whether he is admitting the claim of the plaintiff or whether he intends to file written statement indicating non-admission of the claim. It is to be noted that the Court has to cause the entry to be made to that effect in the summons as provided by rule 1 of Order V. The summons which are on record are not indicating that.

After issuance of the summonses the suit was transferred to the Court of 15th Addl. District Judge. So far as the Court of 7th Additional District Judge is concerned, the order-sheet does not show any entry that defendants appeared in that Court and did not file the written statement or did not seek adjournment for filing written statement. Even in that case when the suit was transferred to the Court of 15th Addl. District Judge and the summonses were issued to the appellants / defendants, those summonses should have also been with appropriate entries in that context and should have also indicated that on non-appearance of the present appellants / defendants the suit was to be decided against them ex parte and finally. In the absence of compliance with the provision of Order V, the learned trial Court passed an order directing to proceed against the present appellants ex parte on 20.7.93. In this context it is to be

noted that it is the statement of appellant Nitin Pandit that he had gone earlier to the Court on 7th Addl. District Judge and the clerk working there had told him to go back and that he would be receiving the summons in due course. The trial Court did not find favour with this explanation given by appellant Nitin Pandit. The rejection of this explanation by the trial Court cannot be approved keeping in view the normal behaviour of common litigant who is not equipped with procedural knowledge of the Court's business. Nitin Pandit might have thought that after transfer of the said suit to the Court of 15th Additional District Judge, a fresh summons would be issued to him as told by said clerk. Shri Kale, learned counsel for respondent, submitted on this point that statement of appellant Nitin Pandit, shows that at that stage he had not engaged any lawyer which appears to be unnatural. Shri Kale submitted further that such behaviour of appellant Nitin Pandit does not appear to be normal and probable. He submitted further that some of the litigants keep quite and keep watching on the Court proceeding till the decree is passed and whenever the property involved is to be auctioned, they raise various contentions and objections for the purpose of delaying the proceeding. It may be so in some cases but a person who is faced with a suit for an amount which is more than 4 lacs would not take such a risk unless he happens to be far away from normal prudence. The appellants are the persons dealing with a commercial concern in the business of photography and reside in city and, therefore, none of them would take such a risk of getting a decree against them for such a huge amount along with excessive interest thereon. When the Court is dealing with an application of a defendant praying for setting aside the ex parte decree, the normal behaviour of a common litigant has to be kept in mind and the probable explanation put-fourth by him should not be disbelieved unless the Court finds it to be palpably false and totally non acceptable. When such defendant is faced with a decree of huge amount which has been passed against him ex parte, the explanation given by such defendant has to be considered sympathetically because in such a suit nobody would be keeping himself so indolent. When the Court is dealing with such a prayer to set aside ex parte decree passed against him, the Court has to give proper attention to the point of service of summons and has to get satisfied by application of judicial mind whether the service of summons was effected on such defendant. In that context during the enquiry the Court has to focus its attention to the compliance of the provisions of relevant rules of Order V C. P. C. because the summonses are to be issued with due application of mind and not mechanically and as a matter of routine course. It is to be borne in mind that it is the duty of the Court to determine as to what sort of summons has to be issued to the defendant by applying its mind to the averments made by the plaintiff in the plaint. Had that been done by the trial Court while deciding the applicants of the appellants for setting aside the ex parte decree, the Court would have noticed the important facets which have been discussed in the above paragraph. But that is not so far as the order which is under challenge in this appeal depicts.

So far as proviso to order IX rule 13 is concerned, it will have to be decided

whether the defendants which have been pointed out by Shri M.G. Upadhyaya, learned counsel for the appellants, come under the purview of it or otherwise. Second proviso to Order IX rule 13 provides that no Court shall set aside the decree passed ex parte merely on the ground that there has been irregularity in the service of summons, if it is satisfied that defendant had notice of the date of hearing and has sufficient time to appear and answer the plaintiff's claim. The words "merely" needs to be understood correctly. The use of words "merely" itself indicates that the irregularity should be flippant in nature and should be without any potential to cause prejudice to the aggrieved defendant. If the words "mere irregularity" and "merely" are considered together, one will have to come to the conclusion that this proviso is for the purpose of wiping out the flippant objections taken by such defendant on the count of irregularity which has no important bearing on the rights in litigation and the hardships. The defects which have been pointed by Shri Upadhyaya, learned counsel appearing for the appellants, are not coming under the category of "mere irregularities".

The Court has to advert its attention to such irregularities put-forth by the defendant while considering the application for setting aside the ex parte decree on the count of no proof of valid service of summons. Some irregularities may be of minor nature not likely to cause any prejudice to such defendant so far as his rights in connection with the litigation are concerned or his interest in the said litigation is concerned. Some irregularities may be of important nature and would be sufficient enough to cause a serious prejudice to him resulting in a decree against him. When the irregularities are of significant nature and important so far as the litigation in question is concerned, they assume importance in the enquiry in respect of "valid" service of summons." I am fortified in this context by judgment of this Court in the matter of Sheikh Wahid v. Gokulchand & another (1991 J. L J. 688) wherein the Single Bench of this Court held that it is the duty of the Court to satisfy itself that the requirements contemplated under provisions of Order IX rule 6 (1) (A) of C. P. C. have been duly fulfilled. It has been further held by this Court in the said matter that when provisions of Order V rule 2 are not followed, the summons is not accompanied by the copy of the plaint, there is no valid service of summons and subsequent ex parte proceeding and orders are null and void. It has been held in the said judgment that when the ex parte decree being nullity, such ex parte decree has to be set aside as null and void and order refusing to set aside such decree is also a nullity.

In the matter of Smt. Chhutbai and another v. Madanlal and another (AIR 1989 M. P. 330) the Division Bench of this Court held that whenever summons is issued to a defendant, it must accompany a copy of the plaint or a concise statement. When the summons issued did not accompany a copy of the plaint, the summons mentions the name of the Court, the suit no. and the next date of hearing, as per form prescribed for the summons, it is not enough compliance of the provisions of Order V rule 2 C. P. C. The law is that along with the summons, a copy of the plaint should be served as it is very much essential because the purpose of service a copy of the plaint or if so permitted of a concise statement

thereof is to bring home to the defendant the knowledge of a particular suit having been instituted against him so that the defendant may know that the claim brought about the plaintiff against him and make up the mind against the claim. This is the reason why the law makers have made rule 2 of Order V C. P. C. mandatory by using the word "shall". According if the summons is not accompanied by copy of the plaint, it cannot be said that there is due or valid service on the defendant and if there is no valid service on the defendant, the ex parte decree passed against such defendant should be set aside. In the same judgment it has been further held the Division Bench of this Court that when there is no mention of name of the Court or that of a decree in the notice in respect of execution of decree proceeding and when the defendant filing the application for setting aside the ex parte decree within 30 days from receipt of notice of such execution, the application cannot be treated as barred by limitation because non-mention of the Court which passed the decree or the date of the decree does not furnish proper information to such person the knowledge in respect of that particular decree.

Therefore provision of Order V rule 1, rule 5 and rule 8 if read together make it clear that the summonses have to be issued by following such procedure whenever the Court takes a decision to follow the course indicated by those provisions, after the application of its mind towards the averments made in the plaint. The phraseology used in Order V rule 1 has to be assessed as a whole for the purpose of understanding the correct impact. If that is done it will be clear that the provisions are to be followed as if they are mandatory. The same is the case in respect of provisions of Order V rule 5 and Order V rule 8.

Thus, in view of the discussion above I come to the conclusion that the exparte decree which has been passed in this matter has to be set aside in the circumstances mentioned above and, therefore, I allow this appeal and set aside the ex parte decree passed by the trial Court treating it to be null and void. The trial Court is hereby directed to permit the appellants to submit the written statement after the copy of the plaint along with annexure has been supplied to them. Thereafter the trial Court shall proceed with the matter according to law so far as hearing of the suit on merit is concerned. No order as to costs of this appeal and lawyers fee keeping in view the circumstances of the matter which were not attributable to either original plaintiff or the original defendants. The trial Court is directed to decide the suit as early as possible because it is connected with public money. Parties to appear before the trial Court on 12th August 1997. On that day the plaintiff to furnish copy of plaint along with annexure submitted with the plaint to defendants / appellants. Thereafter on the same day the appellants should inform the Court whether they want to submit the written statement or not. Written statement should be filed within two months. Record of the case be sent back to trial Court so as to reach there before the aforesaid date.