

(2023) 07 CHH CK 0004
In the Chhattisgarh High Court
Case No : Writ Petition (227) No. 104 Of 2020

Ravishankar Shukla

APPELLANT

Vs

Pratima Mishra

RESPONDENT

Date of Decision : 04-07-2023

Acts Referred:

Code of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2, Order 5 Rule 12, Order 5 Rule 15, Order 5 Rule 17, Order 5 Rule 20

Citation : (2023) 07 CHH CK 0004

Hon'ble Judges : Rakesh Mohan Pandey, J

Bench : Single Bench

Advocate : Vibhor Govardhan, Sushobhit Singh, Abyunati Singh

Final Decision : Disposed Of

Judgement

1. Learned counsel for the petitioner would submit that without adhering to the provisions given under Order 5 Rule 17 of CPC, the learned trial Court passed the order for substituted service of summons which is not permissible. He has placed reliance upon the judgment passed by this Court in the matter of Tulsi Bai Vs. Mukesh Kumar, reported in 2014 (3) CGLJ, 316.

2. On the other hand, learned counsel for respondent No.1/plaintiff would submit that the petitioner/defendant No.1 was avoiding service of summons, therefore, an application was moved for substituted service and same was allowed and thus, it may be presumed that summons was duly served upon defendant No.1. He would further submit that in the execution proceedings summons was served. Apparently, summons vide Annexure R 1/2 dated 14.11.2010 shows the signature of the petitioner/defendant No.1 and this fact has been observed by the learned trial Court as well as learned appellate Court whereas the same has been suppressed by the petitioner in this petition, therefore, there is no scope of interference and there is concurrent finding recorded by courts below, thus the petition preferred by the petitioner deserves to be dismissed.

3. I have heard learned counsel for the petitioner and perused the records with utmost circumspection.

4. From perusal of the order-sheets of the Civil Suit No. 05/2019, it appears that on 20.11.2008 summons was issued to the defendants through ordinary as well as registered post for their appearance on 15.12.2008. On 15.12.2008 summons was served upon the defendant No. 2, whereas registered summons sent to the other defendants was returned unserved. On the very date an application was moved by the plaintiff for service of summons upon defendant No.1 by affixing it on conspicuous part of his house where defendant No.1 already resides. On 17.12.2008 order was passed on that application and the plaintiff was permitted to serve summons upon defendant No.1 by substituted service through paper publication and thereafter, summons was published in the Hindi Daily Newspaper Dainik Bhaskar and thus, it was held by learned trial Court that the summons has been served upon defendant No.1 and consequently, judgment and decree was passed on 20.07.2009.

5. Order 5 Rule 12 of CPC deals with service to be on defendant in person when practicable, or on his agent, Order 5 Rule 17 of CPC deals with procedure when defendant refuses to accept service, or cannot be found and Order 5 Rule 20 of CPC deals with substituted service. The provisions of Order 5 Rules 12, 17 & 20 of CPC are reproduced herein below:-

"Order 5 of CPC provides for issue and service of summons:

Rule 12 – Service to be on defendant in person when practicable, or on his agent.– Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

Rule 17 – Procedure when defendant refuses to accept service, or cannot be found.– Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service 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 there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

Rule 20 – Substituted service.– (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of

avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(1A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper 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.

(2) Effect of substituted service.— Service substituted by order of the Court shall be as effectual as if it has been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed.— Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.”

6. From bare reading of these provisions it is apparent that the court cannot directly pass the order for substituted service before adhering to the provisions of Order 5 Rule 12 of CPC and Order 5 Rule 17 of CPC. If the learned trial Court finds that the defendant is avoiding service of summons then substituted methods can be adopted by the learned trial Court, however, in the instant case though the registered notice was not served upon defendant No.1 and application was moved for affixing the summons at the house of defendant No.1, but the learned trial Court passed the order for substituted service by publication of summons in local newspaper which is contrary to the provisions of Order 5 Rule 17 and 20 of CPC.

7. The learned trial Court as well as learned lower appellate Court have not considered the above aspect and came to conclusion that defendant No. 1 avoided the service of summons, he had knowledge of the ex-parte judgment and decree, notice in execution proceeding was duly served upon him and deliberately he did not prefer the application for setting aside the ex-parte judgment and decree within limitation, therefore, his application as well as appeal was dismissed. The finding recorded by the learned courts below cannot be sustained as nowhere it is found that the summons was duly served upon the petitioner according to the provisions of Order 5 Rule 17 of CPC or Order 5 Rule 20 of CPC.

8. In the matter of Tulsi Bai (supra), this Court in Paras-9 & 12 held as under:-

“9. In the instant case, plaintiffs did not take any steps for service of summons through ordinary means as laid down in Order 5 Rule, 12, 15 and 17 CPC and without complying the court order dated 22.10.2009 straightway filed application for substituted service on

25.11.2009, which was allowed by the trial Court, which, in the considered

opinion of this Court, is not correct practice followed by the trial Court for service of summons to the defendants. The trial Court ought to have kept in mind that defendants are rustic villagers residing in remote village of Tahsil Bilaigarh, District Baloda Bazar and, therefore, service of notice by ordinary mode was necessary. If there was any urgency of hearing, the application under Order 39 Rules 1 & 2 for service of notice by special process server could have been filed. Non service of summons to the present defendants through ordinary procedure as envisaged in the rules and straightway granting application under Order 5 Rule 20 of CPC has resulted into serious miscarriage of justice to the appellants/defendants.

12. It is evident from the above that an ex parte decree against a defendant has to be set aside if the party satisfies the court that summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court. The legislature in its wisdom, made the second proviso mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein."

9. In the light of the judgment passed by this Court and considering the fact of the present case, it appears that the orders passed by the learned courts below are erroneous and contrary to the provisions of Order 5 Rules 17 & 20 of CPC, therefore, both the orders are set aside, the Civil Suit is restored to its original number and the parties are directed to appear before the learned trial Court on 02nd of August, 2023. The suit was filed in the year 2008, therefore, the learned trial Court is directed to make all endeavour to conclude the trial within a period of eight months from receipt of copy of this order.

10. In view of the above, the writ petition stands disposed of.