

Jagan Nath, etc. v. Tek Chand, etc. (Tuli, J.)

room as residence. If the outer gate leading to this court-yard was acquired and demolished this would certainly render the remaining portion uninhabitable within the meaning of explanation to section 27 of the Act. I am of the considered view that Piara Singh petitioner comes within the definition of the term "resident house-owner" and he deserves to be provided with alternate residential accommodation before the scheme is put into execution.

(16) No other petitioner asserted before us that he was actually residing in one of the houses which were sought to be acquired. None of them, therefore, can be regarded as a resident house-owner.

(17) As a result of the foregoing discussion, I allow the petition *qua* Piara Singh petitioner only and hold that the scheme shall not be put into execution unless he is allotted alternate residential accommodation. The petition so far as it relates to the other petitioners is dismissed. There shall be no order as to costs.

VERMA, J.—I agree.

N.K.S.

REVISIONAL CIVIL

Before Bal Raj Tuli, J.

JAGAN NATH, ETC.—Petitioners.

versus

TEK CHAND, ETC.,—Respondents.

C.R. No. 1197 of 1972.

March 15, 1974.

Code of Civil Procedure (Act V of 1908)—Section 115(c), Order V Rules 1, 2 and 20 and Order IX Rule 13—Service of summons on the defendant in suit without copy of the plaint—Whether 'due service'—summons of a suit sent to the defendant by registered post without a copy of the plaint accompanying the summons—Refusal of the defendant to receive the registered cover—Such defendant—Whether 'duly served'—Defendant not 'duly served' but proceeded against ex-parte—Court—Whether has option not to set aside the ex-parte decree—Order refusing to set aside the ex-parte decree against a defendant not 'duly served'—Whether revisable under section 115(c).

Held, that according to Rules 1 and 2 of Order V of the Code of Civil Procedure, 1908, a summons is 'duly served' only when it is

served with a copy of the plaint or, if permitted, a concise statement thereof. If only summons is tendered or served upon a defendant, there is no 'due service' of the summons upon him. Mere service of summons is not synonymous with 'due service' as used in Order IX, Rule 13 of the Code. When a defendant is served with a summons of the suit without a copy of the plaint, the Court trying the suit has no jurisdiction to proceed to decide it *ex-parte*.

Held, that service of the summons, by registered post, on a defendant in a suit is permissible under the provisions of the Code. The Court is entitled to hold that the summons has been served if the defendant refuses to receive the postal cover when tendered to him and the postal employee returns that cover to the Court with the endorsement that it had been refused by him when tendered. Where, however, only summons is sent to the defendant in the registered cover without a copy of the plaint, then even if it is presumed that he has been served with the summons because of his refusal to accept the registered envelop, all that can be deemed is that he was served with summons of the suit under Order V, Rule 1 of the Code but without a copy of the plaint which was necessary to be sent to him along with the summons under Order V, Rule 2 in order to constitute 'due service'. Such a defendant cannot be said to be duly served. Hence where a defendant makes out a case that he was not 'duly served' with the summons, the Court has no option but to set aside the *ex-parte* decree passed against him under the first part of Rule 13 of Order 9 of the Code.

Held, that where the Court refuses to set aside the *ex-parte* decree passed against a defendant who was not 'duly served' within the contemplation of that phrase as used in Order 9, Rule 13, the Court acts in the exercise of its jurisdiction illegally and with material irregularity and such an order is revisable under clause (c) of section 115 of the Code.

Petition under Section 41 of Act IX of 1919 and Section 115 of the Code of Civil Procedure for revision of the order of Shri S. S. Sodhi, District Judge, Chandigarh, dated the 23rd October, 1972, affirming with costs that of Shri Harnam Singh Sub-Judge, 1st Class, Chandigarh, dated the 3rd May, 1972, dismissing the application with costs.

C. P. Sapra, Advocate, for the petitioners.

S. K. Aggarwal, Advocate, for Respondent 1.

JUDGMENT

TULI, J.—Tek Chand respondent filed a suit for the recovery of Rs. 7,590 against Shri Jagan Nath, Proprietor, Raj Kumar and Co. (defendant No. 1) and M/s. Raj Kumar and Co., Commission Agents,

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through Shri Jagan Nath, Ropar (defendant No. 2), on October 17, 1970. The learned Sub-Judge on October 20, 1970, passed the following order :—

“Present counsel for plaintiff. Suit be registered. Defendant be summoned for 10th November, 1970. Counsel for the plaintiff requests that summons be issued by registered post. This be done. Registered covers in three days.”

On November 10, 1970, the following order was passed :—

“Present counsel for the plaintiff. Acknowledgment of registered cover not received back. Summonses of defendants be issued again for 4th December, 1970. P. fee in three days.”

On December 4, 1970, the following order was passed:—

“Present counsel for plaintiff. Summons sent to the defendant by registered post has been received back with the report that he has refused to receive it. He is absent. I am satisfied that the defendant has been served but he is absent. Therefore ex-parte proceedings are taken against the defendant. To come up for ex-parte evidence on 29th December, 1970.”

On December 29, 1970, ex-parte evidence was recorded and the suit of the plaintiff was decreed against Jagan Nath (defendant No. 1) alone on December 30, 1970. Jagan Nath filed an application under Order 9, rule 13, Civil Procedure Code, for setting aside the ex-parte decree, on January 27, 1971, in which he pleaded that he was not served for December 30, 1970 and was not aware of the suit; that he came to know of the ex-parte decree passed against him on January 24, 1971 when a demand for the payment of the decretal amount was made by the decree-holder. He further pleaded that since he was not served personally with the process of the Court, he could not be aware of the suit and that the application was being presented within the statutory period of limitation. Tek Chand respondent contested that application and stated that the defendant-petitioner was duly served for December 4, 1970, and as he intentionally did not appear on that date, the ex-parte proceedings had been rightly taken

and there was no sufficient cause for setting aside the ex-parte decree. The learned trial Court framed the following issues:—

- (1) Whether there is sufficient cause for setting aside the ex-parte decree ?
- (2) Relief.

After recording evidence the learned trial Court held that the petitioner was served with the summons of the suit for December 4, 1970, because he refused to accept the registered envelope sent to him. It was also found that he had the knowledge of the suit because some talk about compromise was made in the month of November, 1970, but which did not succeed. On the evidence recorded the learned trial Court decided issue No. 1 against the petitioner and dismissed his application on May 3, 1972. Against that decree the petitioner filed an appeal which was dismissed by the learned District Judge, Chandigarh, on October 23, 1972. The present petition for revision has been directed against that order.

(2) In revision, this Court can interfere only if the case falls within one of the clauses of section 115 of the Code of Civil Procedure. This section reads as under :—

“S. 115. The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

- (a) to have exercised a jurisdiction not vested in it by law,
or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.”

Clauses (a) and (b) of this section are not applicable, but the case, in my opinion, is covered by clause (c).

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(3) Order IX, rule 13 of the Code of Civil Procedure prescribes for the setting aside of *ex parte* decrees, and is in the following terms:—

“In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside, and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit :

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.”

This rule has two parts viz., (i) if the defendant was not duly served with the summons and (ii) if he was duly served but he was prevented by any sufficient cause from appearing, when the suit was called on for hearing. If the defendant is able to make out any of the two conditions to the satisfaction of the Court, the Court has no option but to set aside the *ex parte* decree. It is, therefore, to be seen whether the petitioner as defendant to the suit was duly served with the summons of the suit. Order V, rule 1 of the Code of Civil Procedure 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. Every such summons has to be signed by the Judge or such officer as he appoints, and has to bear the seal of the Court. It follows that the summons is meant to inform the defendant that a suit has been instituted against him which has been fixed for his appearance on a certain date of which intimation is being given to him by the summons. Rule 2 of Order V provides that every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement. The reading of these two rules together leads to the conclusion that a summons shall be deemed to have been duly served only if the summons along with the copy of the plaint or a concise statement thereof, if permitted, is served on the defendant or tendered to him. If only summons is tendered to him or is served on him, it cannot be said that there has been ‘due service’ of the summons on

the defendant. The service of the summons, by registered post, on the defendant is permissible under Order V, rule 10 of the Code of Civil Procedure, as amended by this Court and under Order V, rule 20A of the Code, the court is entitled to hold that the summons has been served if the defendant refuses to receive the postal envelope when tendered to him and the postal employee returns that envelope to the Court with the endorsement that it had been refused by the defendant when it was tendered to him. It is stated by the learned District Judge in his order that the learned counsel for the petitioners did not seek to challenge the findings of fact, recorded by the trial Court, that the registered cover sent to the defendant was, in fact, refused by him and that the petitioner knew that a suit had been filed against him by the plaintiff-respondent because he was approached by the plaintiff for compromise along with Shri Tirath Ram, who appeared as his witness before the learned trial Court. On the basis of these two facts, the learned trial Court as well as the learned District Judge have held that the petitioner had failed to make out any sufficient cause for setting aside the *ex parte* decree passed against him.

(4) It is really unfortunate that neither the learned trial Court nor the learned District Judge opened the registered envelope which had been sent to the petitioner for December 4, 1970, and which had been returned by the postman with the remark 'refused'. I have opened that envelope in the presence of the counsel for the parties and found that only summons was sent to the petitioner in that envelope without a copy of the plaint. Even if it is presumed that the petitioner has been served with the summons because of his refusal to accept the registered envelope, all that can be deemed is that he was served with the summons of the suit under Order V, rule 1, Civil Procedure Code, but without a copy of the plaint, which was necessary to be sent to him along with the summons under rule 2 of Order V, in order to constitute 'due service'. Mere service of the summons is not synonymous with 'due service' as used in Order IX, rule 13 of the Code of Civil Procedure. Merely because the defendant had been served with a summons of the suit without a copy of the plaint, the learned trial Court had no jurisdiction to proceed to decide it *ex parte*. That could be done only if the defendant had been "duly served", that is, he had been served with the summons along with a copy of the plaint. Refusal to take delivery of the notice sent by registered post can be deemed to be *prima facie* proof of service of the document sent in that registered envelope, but not of any other document which was required under the law to accompany

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that document but did not. No such finding was recorded by the learned trial Court before ordering *ex parte* proceedings. In the present case, it cannot be presumed or deemed that he was served with the copy of the plaint also along with the summons. In his order dated May 3, 1972, dismissing the application of the petitioner under Order 9, rule 13, Civil Procedure Code, the learned trial Court merely held that "the defendant has utterly failed to show that he was not served and that there is sufficient cause for setting aside the *ex parte* decree." No finding has been recorded that the summons had been duly served on the petitioner. The learned District Judge has also not recorded any such finding in his appellate order. Evidently, the attention of the Courts below was not drawn to the fact that 'mere service' is different from 'due service', as contemplated by Order IX, rule 13, Civil Procedure Code. The requirement of rule 2 of Order V of the Code that a copy of the plaint shall accompany the summons is meant to inform the defendant as to the nature of the suit filed against him so as to enable him to decide whether to defend the same or not. It is for this reason that 'mere service' of the summons is not considered to be 'due service' to empower a Court to take *ex parte* proceedings against the defendant.

(5) I accordingly accept this revision petition and set aside the orders of the learned trial Court and the learned District Judge. The *ex parte* proceedings taken against the petitioner are set aside and the learned trial Court is directed to restore the suit and decide it in accordance with law. In the circumstances of the case, I leave the parties to bear their own costs. The parties through their counsel have been directed to appear before the learned trial Court on April 8, 1974.

B.S.G.

INCOME TAX REFERENCE

Before D. K. Mahajan and C. G. Suri, JJ.

VIJAY KUMAR JAIN,—Applicant.

versus

THE COMMISSIONER OF INCOME TAX, PATIALA,—
Respondent.

I.T. Ref. No. 1 of 1973.

March 20, 1974.

*Income Tax Act (XLIII of 1961)—Sections 139, 147 and 148—
Valid return of income filed under section 139(4)—Income Tax Officer*