

On behalf of Subedar Kirpa Singh son of Jota Singh, respondent No. 14, it is contended that he has already been granted a Pacca Sanad under the Act with respect to a part of the land in question and the same cannot now be cancelled. Sanad of the entire land is also said to have been granted to the petitioner. Effect of the one or the other or that of the Sanad, if any has been granted to the respondents, on the allotment in favour of the petitioner are matters which are to be decided by the Rehabilitation authorities at the proper stage; no opinion thereon need be expressed in these proceedings.

Thakar Jaishi
Ram
and others
v.
The Chief Settlement Commissioner,
Jaisalmer
House, New
Delhi
and others
—
Chopra, J.

In the result, the petition is accepted and the order of the Chief Settlement Commissioner dated 15th September, 1956, quashed. The respondents Nos. 2—13 shall pay costs of the petition. Counsels' fee shall be Rs 50.

B.R.T.

APPELLATE CIVIL.

Before Chopra, J.

M. G. DUA (MADHO LAL DUA),—*Defendant-Appellant.*

versus

M/s. BALLI MAL-NAWAL KISHORE,—*Plaintiff-Respondents.*

First Appeal from Order No. 128 of 1956.

Code of Civil Procedure (V of 1908)—Order 9, Rule 6—Ex parte proceedings—When to be taken—Order 5, Rules 2 and 10—Due service—When can be deemed to have been effected—Summons served without copy of the plaint—Whether due service—Summons by registered post not sent in the first instance—Whether this mode of service can be resorted to later on—Punjab Proviso to Rule 10—Effect of—Order 9, Rule 13—Sufficient cause—Defendant acting on solicitors' advice—Whether sufficient cause.

Held, that ex parte proceedings under Order 9, Rule 6 of the Code of Civil Procedure can only be taken where

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the defendant does not appear when the suit is called for hearing, if it is proved that the summons was duly served. A summons cannot be regarded as duly served, unless it is accompanied by a copy of the plaint. Without a copy of the plaint, the defendant had no means of knowing as to what was the nature of the suit and deciding whether it was at all necessary for him to defend it.

Held further, that the Punjab Proviso added to Rule 10 of Order 5 of the Code of Civil Procedure lays down that the summons shall be sent by registered post only, in the first instance, if it is so wished by the plaintiff. If any other mode of service was tried in the first instance but failed to yield any fruitful result, it is not open to the Court, in view of the prohibition contained in the proviso, to endeavour to effect service on the defendant by registered post.

Held also, that where summons was received by the defendant without a copy of the plaint by registered post and he consulted his solicitors who wrote a letter of request to the Court for adjournment of the case and the defendant acted on the advice of his solicitors in not attending the court on the date of hearing, there was a sufficient cause for his non-appearance.

Mohan Lal Kajriwal v. Sundar Lal-Nand Lal Saraf and others (1), relied upon.

First appeal from the order of Shri Onkar Nath, Sub-Judge, 1st Class, Karnal, Camp at Panipat, dated 28th June, 1956, dismissing the application of M/s. Bali Mal-Nawal Kishore for setting aside the ex parte decree.

D. R. MANCHANDA, for Appellant.

H. L. SARIN and S. S. MAHAJAN, for Respondent.

JUDGMENT

Chopra, J.

CHOPRA, J.—This is an appeal from an order of Sub-Judge, First Class, Karnal (at Panipat), refusing to set aside an *ex parte* decree under Order 9, Rule 13, Civil Procedure Code. Messrs Balli Mal-Nawal Kishore, respondent, brought a suit in the Court of Sub-Judge, Panipat, for recovery of Rs. 8,000 on the basis of *bahi* accounts against

Messrs M. G. Dua of Bombay, the appellant. The suit was instituted on 2nd February, 1955. The defendants were directed to be summoned for 10th March, 1955. Since the presiding officer was to be on leave that day, the case was ordered to be put up on the 22nd March, 1955. On this later date the summonses had not been served. Summonses for appearance of the defendant on 26th April, 1955, were ordered to be sent by registered post. The defendant did not appear on 26th, though he had received the registered cover. *Ex parte* proceedings were, therefore, ordered. After recording some evidence of the plaintiff on the adjourned hearing viz. 29th April, 1955, the Court passed an *ex parte* decree for the full amount against the defendant. On 21st May, 1955, the defendant presented an application for setting aside the *ex parte* decree alleging that he was prevented by sufficient cause from appearing in Court on 26th April, 1955. In support of his application, the defendant gave his own statement on oath. He stated that the registered cover did not contain a copy of the plaint. He, therefore, contacted his solicitors. The solicitors wrote a letter to the Court and another to the plaintiff requesting that a copy of the plaint be supplied to the defendant and also praying for an adjournment in the case. On the advice given to him by the solicitors, the defendant did not deem it necessary to appear on the date fixed in the case at Panipat. He further stated that he had already filed a suit against the plaintiff in the Court of City Civil Judge, Bombay, on the same subject-matter, and he wanted to apply to the Court at Bombay for an order staying the suit instituted against him in Panipat. No evidence was given in rebuttal. The learned Sub-Judge did not consider the reasons to be sufficient and dismissed the application.

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Mr. Manchanda, learned counsel for the appellant, in the first instance, contends that the defendant had not been duly served and therefore *ex parte* proceedings under Order 9, Rule 6, Civil Procedure Code, could not be ordered. The contention is not without force. Section 27 of the Civil Procedure Code lays down that where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and it may be served in the manner prescribed. Order 5 of the First Schedule prescribes the manner in which service is to be effected. Rule 2 of Order 5 says—" * * * Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement." Evidently, no copy of the plaint was sent to the defendant along with the summons. It is so stated by the plaintiff and the fact was mentioned in the letters written by his solicitors to the Court and to the plaintiff. *Ex parte* proceedings under Order 9 Rule 6, Civil Procedure Code, can only be taken where the defendant does not appear when the suit is called for hearing, if it is proved that the summons was *duly served*. A summons cannot be regarded as duly served unless it is accompanied by a copy of the plaint. Without a copy of the plaint, the defendant had no means of knowing as to what was the nature of the suit and deciding whether it was at all necessary for him to defend it.

There is yet another reason for holding that the defendant was not duly served. The service, in the first instance, was directed to be made in the ordinary mode, by personal service on the defendant. It was only on the second or the third hearing that summonses were ordered to be sent by registered post. This contravened the proviso

added to Order 5, Rule 10, Civil Procedure Code, in this State. The proviso says:—

“Provided that in any case if the plaintiff so wishes, the Court may serve the summons in the first instance by registered post (acknowledgment due) instead of in the mode of service laid down in this rule.”

It means that the summons shall be sent by registered post only in the first instance, if it is so wished by the plaintiff. If any other mode of service was tried in the first instance and if it failed to yield any fruitful result, it is not open to the Court, in view of the prohibition contained in the proviso, to endeavour to effect service on the defendant by registered post (*Mohan Lal Kajriwal v. Sunder Lal Nand Lal Saraf and others* (1)).

I am, therefore, clearly of the opinion that the summons had not been duly served on the defendant. An *ex parte* decree shall be set aside under Order 9 Rule 13, if the defendant satisfies the Court that the summons was not duly served. The *ex parte* decree, therefore, ought to have been set aside on this ground alone.

On the second ground also, I think the defendant has shown sufficient reason for his non-appearance. He had already filed a suit against the plaintiff in Bombay. On receipt of the summons he approached his solicitor in Bombay for guidance and advice. The solicitors rightly or wrongly gave the impression that an order for stay of the suit at Panipat could be obtained on an application to the Bombay Court. Since the City Civil Court in Bombay was to close for vacation from 30th April to 20th June, 1955, the solicitors thought it fit to request the Court at Panipat

(1) A.I.R. 1949 E.P. 295.

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for adjourning the case to the month of July, 1955. On 13th April, 1955, the solicitors wrote a letter of request to the Court at Panipat, which was received on 15th of April, 1955. A similar letter was also written by the solicitors to the plaintiff. The defendant, according to his statement, acted on this advice of his solicitors and did not appear at Panipat on 26th April, 1955.

For all these reasons, I would accept this appeal and set aside the *ex parte* decree passed by the Sub-Judge. The case is remitted to the said Court for being proceeded with and decided in accordance with the law. The parties have been directed to appear before the Sub-Judge on 13th January, 1958. They shall bear their own costs in this appeal, but the defendant shall pay Rs. 150 to the plaintiff as costs for setting aside the *ex parte* decree, payment of which shall be condition precedent.

K.S.K.

SUPREME COURT

Before Sudhi Ranjan Das, C. J., T. L. Venkatarama
Aiyar, Sudhanshu Kumar Das, A. K. Sarkar and
Vivian Bose, JJ.

KHEM CHAND,—Appellant.

versus

THE UNION OF INDIA AND OTHERS,—Respondents.

Civil Appeal No. 353 of 1957.

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*Constitution of India (1950)—Articles 310 and 311—
Meaning, scope and ambit of—“Reasonable Opportunity”—
Meaning of—Opportunity to show cause against the pro-
posed punishment not given—Effect of.*

Held, that Article 310(1) no doubt provides that every person falling within it holds office during the pleasure of