



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT  
JODHPUR**

S.B. Civil Misc. Appeal No. 944/2016

Sajwar Khan, s/o Ismail Khan, age about 66 years, permanent Village Karakwal, Tehsil Merta, District Nagaur, residing at House No. E-28, Vivekanand Nagar, Shastri Nagar, Ajmer

----Appellant

Versus

Gaje Singh, s/o Shri Narayan Singh, respondent of Village Nimbola, Tehsil Jaitaran, District Pali.

----Respondent

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For Appellant(s) : Mr. Vishal Sharma  
For Respondent(s) : Mr. Ranjeet Joshi, Sr. Advocate,  
assisted by Mr. Abhijeet Joshi and  
Mr. Kapil Bissa

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**HON'BLE DR. JUSTICE NUPUR BHATI**

**Judgment / Order**

**Reserved on: 25/07/2024**

**Pronounced on: 01/08/2024**

1. The present civil misc. appeal has been filed under Section 104 read with Order 43 Rule 1 of the Code of Civil Procedure, 1908 ('CPC') assailing the order passed by learned District Judge, Merta in Civil Misc. Application No. 91/2011 whereby the application under Order 9 Rule 13 of CPC, filed by the appellant/applicant has been dismissed. The appellant has also prayed for allowing his application under Order 9 Rule 13 as well as his application for condonation. It is also prayed that the cost of the appeal and other damages be awarded from the respondents to the appellant/applicant. Certain other ancillary relief(s) have also been sought by the appellant/applicant.



2. Briefly stated, the facts of the case are that the respondent/plaintiff filed a suit (Annex.1) for recovery of Rs. 1,18,000/- along with interest against the appellant/defendant on account of the loan taken by the appellant and the promisory note signed thereto. After the learned Trial Court issued summons to the appellant/defendant to the suit, the appellant preferred an application under Order 7 Rule 11 of the CPC which was allowed on 14.12.2000 (Annex.2) and the suit (Annex.1) filed by the respondent/plaintiff stood abated. Thereafter, the respondent/plaintiff filed an application for restoration of the suit on 30.10.2004, which came to be allowed by the learned Trial Court vide on the same day, without issuing summons to the appellant/applicant.

3. Furthermore, learned Trial Court directed the respondent/plaintiff to file two sets of summons for service upon the appellant/applicant. The service of summons was not complete since the summons were returned on 04.12.2004, therefore, the learned Trial Court on 18.12.2004 again ordered for filing summons. Subsequently, on 07.01.2005, the summons were returned with a note that the appellant/defendant along with his family had started residing in Ajmer. Thus, the learned Trial Court directed the respondent/plaintiff to file summons to the fresh address of the respondent/plaintiff. The respondent/plaintiff, thereafter filed an application under Order 5 Rule 20 of the CPC for substituting service by publishing the summons in the news paper.

4. Thereafter, the respondent/plaintiff published summons in the newspaper, Dainik Navjyoti of District Nagaur edition on



05.02.2005, and on account of non-appearance of the appellant/defendant, ex-parte proceedings were initiated against the appellant/defendant on 17.05.2005, which culminated in the judgment and decree passed by the learned Trial Court vide order dated 18.02.2005 (Annex.3).

5. Subsequently, the appellant/defendant filed an application under Order 9 Rule 13 of CPC on 19.10.2011 (Annex.4) and a separate application on 13.05.2015 (Annex.5) under Section 5 of the Limitation Act, 1963 ('Limitation Act') for condoning the delay in filing the application under Order 9 Rule 13 of CPC. In response to the said application (Annex.4), the respondent/plaintiff filed a reply (Annex.6). After hearing the parties, the learned Tribunal dismissed the application filed by the appellant/defendant under Order 9 Rule 13 vide order dated 04.03.2016 (Annex.8).

6. Aggrieved of the order passed by the learned Trial Court vide order dated 04.03.2016 (Annex.8), the appellant/ defendant has preferred this appeal.

7. Learned counsel for the appellant submitted that the learned Trial Court has erred in dismissing the application filed by the appellant/applicant under Order 9 Rule 13 of CPC, since the respondent/plaintiff made no efforts for service of summons to the appellant/applicant. He submitted that admittedly, the fact that the appellant/applicant's change of residence from Village Karakwal to Ajmer was in the knowledge of the respondent/plaintiff and despite this fact the summons were published under Order 5 Rule 20 of the CPC, in the daily news paper, Dainik Navjyoti Nagaur edition, instead of Ajmer edition.



8. Learned counsel for the appellant/ defendant also submitted that Order 5 Rule 20(1-A) clearly stipulates the requirement of substituted service, and summons by way of advertisement in the newspaper which shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually resided. He further submitted that admittedly vide order-sheet dated 07.01.2005, it has come to the knowledge of the respondent/plaintiff that the appellant/ defendant is residing in Ajmer and thus there was no reason for publishing the summons in the daily newspaper, Nagaur edition. He thus submitted that despite non-compliance with the statutory requirements mentioned under Order 5 Rule 20 (1A) of CPC, the learned Trial Court initiated the proceedings ex-parte and therefore, the service of summons deserves to be set aside. Order 5 Rule 20 of CPC is reproduced as under:

**"ORDER V**

*Issue and service of summons*

**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 the 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 had 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.”

9. Learned counsel for the appellant/defendant further submitted that the learned Trial Court without recording its satisfaction under Order 5 Rule 20 of CPC, dismissed the application filed by the appellant/applicant under Order 9 Rule 13 of the CPC and thus, the impugned order dated 04.03.2016 (Annex.8) deserves to be set aside. He also submitted that the learned Trial Court erred in coming to the conclusion that the process server reported that the appellant/applicant had refused to accept the notice under Order 21 Rule 22 of the CPC is also not proper since, the appellant/defendant was not residing in the village and was residing at Ajmer.

10. Learned counsel for the appellant/applicant relied upon the judgment passed by the Coordinate Bench of this Court in the case of **Shaitan Singh v. UCO Bank** reported in **2004 (5) WLC 614**, wherein it has been categorically observed that the substituted service of summons by way of publishing in a newspaper has to be done in accordance with Order 5 Rule 20 (1A) of CPC and that, the newspaper shall be a daily newspaper, being circulated in the locality the defedant had last resided, carried on business or personally worked for gain. The relevant para is reproduced as under:

“8. Then coming to the question of special circumstances, without going into the other contentions, and factual aspect, suffice it to say that vide order dated 5.4.1991, the service of



the petitioner was ordered to be effected by substituted service, and a look at the provisions of Or. 4 Rule CPC shows that according to sub-rule (1-A), where the Court acting under sub-rule (1) 30 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. In the present case, summon has been published in the newspaper 'Janarndata' in its issue dated 1.5.1991, a copy whereof is available on record at page A49/1. A look at that paper shows that it is a fortnightly paper."



11. *Per contra*, learned counsel for the respondents submitted that while the appellant/applicant had changed his residence from village Karakwal to Ajmer, the same was not in the knowledge of the respondent/plaintiff and therefore under the given circumstances, the respondent/plaintiff in the natural course of service, would serve the said summons at a place where the appellant/defendant last resided, which was Village Karakwal in the present case. He thus submitted that the respondent/plaintiff had followed the due procedure under Order 5 Rule 20 of CPC by publishing the summons in the daily newspaper, Nagaur edition since the appellant/plaintiff had been last residing at Village Karawal, Merta, Nagaur.

12. Learned counsel for the respondent/plaintiff also submitted that the appellant/applicant, even after being present before the learned Trial Court, after his change of residence as averred by him, did not provide for the correct address at which he was then residing in Ajmer.

13. Learned counsel for the respondent/plaintiff further submitted that the said irregularity has occurred on the part of the



appellant/applicant and not the respondent/plaintiff and thus, the appellant/applicant cannot benefit from his own wrong. He also submitted that not only the application under Order 9 Rule 13 of CPC, but also the application under Section 5 of the Limitation Act has been filed with a delay of 4 years, and thus, the entire proceedings have been delayed by 19 years, without any sufficient cause proved by the appellant/applicant. He thus submitted that the said application filed by the respondent/plaintiff under Order 9 Rule 13 is beyond the period of limitation.

14. Heard learned counsel for the parties, perused material available on record and judgments cited at the Bar.

15. This Court finds that the learned Trial Court has rightly observed that that vide order-sheet dated 07.01.2005, it has come to the knowledge of respondent/plaintiff that the appellant/applicant has been residing in Ajmer, however, there was no address mentioned. It is also seen that even after appearing before the learned Trial Court, there was no information given by the respondent/plaintiff with respect to his new registered address and therefore, the respondent/plaintiff did not have the appellant/applicant's new address, except the address where the appellant/applicant last resided, i.e. in Village Karakwal, Merta, Naguar. It was thus, rightly observed by the learned Trial Court that the service of summons by way of substituted service through publishing in a newspaper, was complete when the respondent/plaintiff, published the summons in the daily newspaper, Dainik Navjyoti, Nagaur edition.

16. This Court further finds that the learned Trial Court has rightly observed that according to Section 123 of the Limitation



Act, the limitation period of 30 days is to be calculated from the date of receipt of the summons, which was duly completed vide substituted service. It is also seen that in the present case, when the learned Trial Court, passed the ex-parte decree, vide order dated 18.02.2005 (Annex.3), however the appellant/applicant chose to file an application under Order 9 Rule 13 of CPC on 19.10.2011 (Annex.4), i.e. after 6 years of the passing of the decree dated 18.02.2005 (Annex.3).

17. This Court also finds that with respect to the execution of the said decree in Case No. 87/2011 which is pending, notice of appearance under Order 21 Rule 22 has been sent to the appellant/applicant which were issued on 07-10-2010 and according to process server report dated 01.10.2010, when the said summons were tendered to the appellant/applicant, he refused to accept it after reading it. Thus, it is was rightly observed by the learned Trial Court from the said report that even on 01.10.2010, this decision was clearly and definitely known to the defendant and even then within 30 days, the application has not been presented and though reason for delay was stated in the application, however the same was not appropriate and sufficient. It was thus, rightly observed by the learned Trial Court that the application of Section 5 Limitation Act has also been submitted on the same grounds on 13-03-2015 (Annex.5), 4 years after presenting the original application.

18. Upon perusal of the record, this Court also finds that the application filed by the appellant/applicant under Order 9 Rule 13 of CPC on 19.10.2011 bears the address of Village Karakwal, Merta and not the new registered address of Ajmer, as submitted





by the appellant/applicant during the pleadings. Thus, this argument of the appellant/applicant that the summons had not been served duly under Order 5 Rule 20, even when the appellant/applicant was not residing in Village Karakwal, Merta, Nagaur, is devoid of merit since this merely appears as an afterthought. If the appellant/applicant has been pressing on the issue of the change of residence, then it is only plausible that the appellant/applicant filed the application under Order 9 Rule 13 of CPC, which was also filed after 6 years of the passing of the decree dated 18.02.2005 (Annex.3) with his changed and correct address of Ajmer.

19. Thus, upon perusal of the record, and the findings of the learned Trial Court, it is clear that the conduct of the defendant has been negligent and causing delay and the entire factual incident at least makes it clear that he has been delaying the case repeatedly and the original suit has been delayed for almost 19 years.

20. Therefore, in the light of the provisions, judgment cited and the record perused, this Court finds that the argument of the appellant/applicant that the summons had not been served duly on account of his change of address, for which he submitted various residential proofs, merely seems to be an afterthought, inasmuch as even after appearing once before the learned Trial Court on 07.01.2005, the appellant/applicant, did not provide the his changed registered address of Ajmer, nor has he mentioned his changed registered address in the application filed by him under Order 9 Rule 13 of the CPC, on 19.10.2011 (Annex.4).



21. The present misc. appeal is dismissed. All pending applications, including stay application also stand disposed of. Record of the Tribunal be sent back forthwith.

**(DR. NUPUR BHATI),J**

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