RAJASTHAN HIGH COURT

Mahadev Prasad

Vs.

Mansa Ram

Civil Revn. Petn. No.704 of 2003
(Narendra Kumar Jain, J.)

09.07.2008

ORDER

Narendra Kumar Jain, J.

1. Admit.

2. Heard learned counsel for the parties.

3. Briefly stated facts of the case are that non petitioner No. 1-Mansa Ram filed an application under Section 6 of the Rajasthan Agriculture Debt Relief Act, 1957 in the trial Court against petitioner Mahadev Prasad as well as Mangala Ram. The trial Court presumed the service of the application on the petitioner as sufficient and passed an ex-parte order and ultimately an *ex parte* decree was passed under Section 6 of the Act vide order dated 7th October, 1995. The petitioner filed an application under Order 9, Rule 13 for setting aside the ex-parte decree in April, 1996. The trial Court dismissed the application vide its order dated 2nd April, 1998 on the ground that the petitioner had knowledge about pendency of application under Section 6 of the Act. Being aggrieved with the same, an appeal was preferred but the same was also dismissed. Hence this revision petition before this Court.

4. The learned counsel for the petitioners contended that the summon of application under Section 6 of the Act, filed by Mansa Ram-non-petitioner No. 1, was never served upon him personally and the trial Court wrongly presumed the service of summon on the basis that petitioner had knowledge about pendency of the application, whereas the requirement of rule is that he should be served with a summon of the application for a particulate date, therefore, even if there was some knowledge of pendency of the application under Section 6 of the Act, the same could not have been

a ground for raising presumption of service of the application on the petitioner. He, therefore, contended that the trial Court as well as appellate Court both committed an illegality in rejecting the application of the petitioner under Order 9, Rule 13, Civil Procedure Code.

5. The learned counsel for the respondents defended the impugned orders and prayed for dismissal of revision petition.

6. I have heard the learned counsel for the parties and examined the impugned orders passed by both the Courts below.

7. As argued by learned counsel for the petitioners the petitioner filed a suit for recovery of a sum of Rs. 3,500/- on 24th July, 1986 against non- petitioner Mansa Ram which was decreed in his favor and on failure to make the payment of the said decretal amount, an application for execution of the decree bearing No. 5/1987 was filed by him. Only after passing of the decree in suit for recovery and after filing of the execution application, the present application under Section 6 of the Act was filed by debtor Mansa Ram on 3rd January, 1994. As per orders of both the Courts below, there is no dispute that summon of application under Section 6 of the Act was not served upon the petitioner personally. It has been observed in the order of the trial Court that the notice of petitioner was sent at Bagad and a report came on it to the effect that he does not live at Bagad but he lives at *Jaipur*. No notice was sent at *Jaipur* to petitioner. The learned trial Court presumed the service of summon on the petitioner on the ground that a copy of the application under Section 6 of the Act of 1957 was placed on record in execution application No. 5/1987 filed by petitioner, therefore, he had personal knowledge about pendency of the present application under Section 6 of the Act and due to non-appearance of the applicant-petitioner in the said application under Section 6 of the Act, passed an *ex parte* order and ultimately passed an *ex parte* decree on 7th October, 1995.

8. The Hon'ble Supreme Court in *Sushil Kumar Sabharwal v. Gurpreet Singh* [1] considered the second provision to Rule 13 of Order 9, Civil Procedure Code added by 1976 Amendment which provides that no Court shall set aside a decree passed 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 plaintiffs claim. The Hon'ble Apex Court held that it is the knowledge of the "date of hearing" and not the knowledge of "pendency of suit" which is relevant for the purpose of the proviso above said. Paras 11, 12 and 13 of the Sushil

Kumar Subharwal's case (supra) are reproduced as under:-

> "11. The High Court has overlooked the second proviso to Rule 13 of Order 9, Civil Procedure Code, added by the 1976 Amendment which 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 plaintiffs claim. It is the knowledge of the "date of hearing" and not the knowledge of "pendency of suit" which is relevant for the purpose of the proviso abovesaid. Then the present one is not a case of mere irregularity in service of summons; on the facts it is a case of non-service of summons. The appellant has appeared in the witness box and we have carefully perused his statement. There is no cross-examination directed towards discrediting the testimony on oath of the appellant, that is, to draw an inference that the appellant had in any manner a notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim which he did not avail and utilise.
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> 12. The provision contained in Order 9, Rule 6, Civil Procedure Code is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the Court depending on the given situation. The three situations are : (i) when summons duly served, (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard ex parte. The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being "proved" that the summons was duly served when and when alone, the Court is conferred with discretion to make an order that the suit be heard ex parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an *ex parte* decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the trial Court would have been conscious of its obligation cast on it by Order 9, Rule 6, Civil Procedure Code, the case would not have

proceed *ex parte* against the defendant-appellant and a wasteful period of over eight years would not have been added to the life of this litigation.

13. Be that as it may, we are satisfied that the summons was not served on the defendant-appellant. He did not have an opportunity of appearing in the trial Court and contesting the suit on merits. The trial Court and the High Court have committed a serious error of law resulting in failure of justice by refusing to set aside the *ex parte* decree."

9. The Hon'ble Apex Court specifically considered the second proviso appended to Rule 13 of Order 9, Civil Procedure Code and held that it is the knowledge of the "date of hearing" and not the knowledge of the "pendency of suit" which is relevant for the purpose of second proviso to Rule 13 of Order 9, Civil Procedure Code. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons.

10. So far as facts of the present case are concerned, there is no dispute in between the parties that no summon of application under Section 6 of the Act of 1957 for specific date was served upon the present petitioner. The trial Court presumed the service of petitioner only on the basis of knowledge of pendency of application under Section 6 of the Act as a copy of it was filed in execution application No. 5/1987 filed by petitioner for execution of the decree passed in his favor against non-petitioner Mansa Ram. Looking to the facts and circumstances of the present case, the above referred judgment of the Hon'ble Supreme Court is fully applicable because the petitioners had no knowledge of the date of hearing of the application under Section 6 of the Act but a presumption of service of summon upon him was drawn only on the basis of pendency of application under Section 6 of the Act. In these circumstances, I find that the orders passed by both the Courts below are contrary to second proviso to Rule 13 of Order 9, Civil Procedure Code as well as above referred judgment of the Hon'ble Supreme Court and both the orders cannot be allowed to be sustained.

11. Consequently, the revision petition is allowed. The orders passed by both the Courts below dated 9th December, 2002 and 2nd April, 1998 are set aside. The application filed by the petitioner under Order 9, Rule 13 read with Section 151, Civil Procedure Code is allowed. The *ex parte* decree dated 7th October, 1995 on an application under Section 6 of the Act of 1957 filed by Mansa Ram *qua* the petitioner is set aside. Both the parties are directed to appear before the Civil Judge (Senior Division), Jhunjhunu on 4th August, 2008 and the said Court is directed to afford an

opportunity to petitioner to file reply and proceed further in the matter in accordance with law.

12. There will be no order as to costs.

Revision allowed.

Cases Referred.

1. (2002) 5 SCC 377: (AIR 2002 SC 2370)