REVISIONAL CIVIL

Before Mr. Justice Radha Krishna Srivastava

1939 October, 4

ASHIQUE HUSAIN AND OTHERS (DEFENDANTS-APPLICANTS) *v.* LACHHMI NARAIN AND OTHERS (PLAINTIFFS-OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), order IX, rule 13, and order V, rule 20—Substituted service ordered by trial court—Appellate court can go into the question whether substituted service was properly ordered—Order V, rule XX, meaning of.

The appellate court in proceedings under order IX, rule 13, Civil Procedure Code, can go into the merits of the question whether substituted service had properly been ordered or not. The view of law that it is beyond its jurisdiction to question the trial court's order of substituted service is incorrect.

All that order V, rule 20, Civil Procedure Code, means is that the court hearing the case may proceed with the case after the substituted service as if the defendant had been personally served, but it does not preclude the defendant from coming forward later on and showing that the substituted service effected against him had been improperly ordered. The language of rule 13, of order IX, clearly shows that it is open to the defendant to show by offering evidence that the summons "was not duly served", which means that he can show that the substituted service was improperly obtained or was defective. It is not correct that the substituted service ordered by the court in the proceedings of the suit in respect of a defendant is binding on courts in proceedings under order IX, rule 13, as due service. *Doraiswami Ayyar* v. *Balasundaram Ayyar* (1), dissented from. *Ram Bharose* v. *Ganga Singh* (2), *Gyanammal* v. *Abdul Hussain Sahib* (3), *Kedar Mull Agarwalla* v. *Wazifunnessa* (4), and *Gajadhar* v. *Uma Dutta* (5), relied on.

Mr. *Mohammad Jafar Husain*, for the applicants.

Mr. *S. C. Das*, for the opposite-party.

RADHA KRISHNA, J.:—This is the defendants' application in revision.

*Section 115 Application No. 18 of 1937, for revision of the order of Pandit Bishwa Nath Hukku, Additional Civil Judge, Fyzabad, dated the 30th October, 1936.

(1) (1927) A.I.R., Madras, 507. (2) (1931) A.I.R., All., 727.
(3) (1931) A.I.R., Madras, 813. (4) (1934) A.I.R., Cal., 745.
(5) (1937) O.W.N., 1141.

The facts are that the opposite-parties obtained a preliminary decree for foreclosure against the defendants on the 30th September, 1933. After the expiry of the time allowed in the preliminary decree the plaintiffs-decree-holders applied for the final decree for foreclosure under order XXXIV, rule 3 of the Code of Civil Procedure. At the hearing of the application defendants Nos. 13 and 14 alone appeared and the rest being absent trial was ordered *ex parte* against them. The defendants Nos. 1 to 5, who are the applicants in this Court, could not be served and so substituted service under order V, rule 20 of the Code of Civil Procedure, was effected against them. On the 9th November, 1935, a final decree for foreclosure against all the defendants, including the present applicants, was passed.

The defendants Nos. 1 and 2 applied in the court of the learned Munsif on the 4th December, 1935, for reduction of interest and grant of instalments under sections 4, 5 and 30 of the United Provinces Agriculturists' Relief Act but the application was dismissed on the 15th January, 1936, on the ground that the application was not maintainable as a final decree for foreclosure had already been passed.

The defendants Nos. 1 to 5, i.e. the petitioners, then put in an application under order IX, rule 13, of the Code of Civil Procedure, for setting aside the final decree for foreclosure in the court of the Munsif of Fyzabad which had passed the decree. It is to be noted that the only allegations in the application were that the notices had not been served upon the applicants personally and that they had acquired knowledge of an *ex parte* decree having been passed against them on the 15th January, 1936. The learned Munsif disbelieved the statement of the defendant No. 1, who was produced as a witness, and held that the applicants-defendants had knowledge of the decree and their application for

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setting aside was barred by limitation as it had been made more than thirty days after the decree. The learned Munsif further held that substituted service had properly been ordered and effected. In the result he dismissed the application.

Radha Krishna, J.

The defendants-applicants appealed. The learned Civil Judge with reference to article 164 held that it was not open to him to question the validity or the legality of substituted service under order V, rule 20, and he was bound to take the service as having been duly effected and in that view the application having been made more than thirty days after the date of the decree was barred by time.

The defendants-applicants have come up in revision to this Court against the order of the learned Civil Judge in appeal. In view of the fact that the petitioners in their application had not raised a contention to the effect that substituted service was improperly ordered, the learned counsel for the opposite-party has urged that they should not have been allowed to raise the plea. As the point was fully discussed before the trial court and some evidence was allowed to be led on the point, I am not prepared to entertain the objection at this late stage. Order IX, rule 13 of the Code of Civil Procedure runs as follows:

> "13. 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 (in Oudh add 'notwithstanding due service of the summons') 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."

A further proviso has been added to this by the Oudh Chief Court and it is as follows:

> "Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim."

Due service is not the same thing as "personal service" and the question whether the summons was duly served or not is a question which has to be decided with reference to the provisions of the Civil Procedure Code bearing on the point. The question whether that substituted service was due service or not would depend upon whether the conditions under which substituted service could be ordered were complied with or not. The court of trial in the present case went into the question and held that the substituted service had been properly ordered. The learned Munsif further held as required by the proviso added by the Oudh Chief Court to order IX, rule 13 that the defendants had information of the date of hearing sufficient to enable them to appear and answer the plaintiffs' claim, and, therefore, dismissed the application. The lower appellate court did not go into any of the two questions mentioned above but held that the summons must be taken to have been duly served as it was beyond its jurisdiction to question the trial court's order for substituted service and dismissed the appeal. The view of law taken by the lower appellate court is based upon a decision of the Madras High Court reported in *Doraiswami Ayyar* v. *Balasundaram Ayyar* (1). In this case there were three defendants in the suit. The first defendant was served by substituted service and it was he who had applied under order IX, rule 13 of the Code of Civil Procedure. The trial court at the hearing of that application decided that there had been due service of summons within the meaning of order IX,

(1) (1927) A.I.R., Madras, 507.

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rule 13 of the Code of Civil Procedure and article 164 of the Indian Limitation Act. On appeal the learned Subordinate Judge differed and held that there had not been due service. In revision before the High Court the point at issue seems to have been as to whether the Subordinate Judge had erred in law or jurisdiction in differing from the learned trial court. If this judgment means that the question of due service cannot be reopened in proceedings under order IX, rule 13, or that the appellate court in those proceedings cannot go into the merits of the question whether substituted service had properly been ordered or not, then I most respectfully differ from that view.

Radha Krishna, J.

Order V, rule 20(2) of the Code of Civil Procedure lays down that service substituted by order of the court shall be as effectual as if it had been made on the defendant personally. In my opinion all that this clause means is that the court hearing the case may proceed with the case after the substituted service as if the defendant had been personally served, but it does not preclude the defendant from coming forward later on and showing that the substituted service effected against him had been improperly ordered. It would be open to him to show that the allegations on the basis of which an order of substituted service had been obtained were not true and that the service was ineffectual and he was not placed in a position to know that a suit was going on against him.

The language of rule 13 of order IX clearly shows that it is open to the defendant to show by offering evidence that the summons "was not duly served" which means that he can show that the substituted service was improperly obtained or was defective. To hold otherwise would be to make the provisions of rule 13 nugatory. I cannot subscribe to the proposition that the substituted service ordered by the court in the proceedings of the suit in respect of a defendant

is binding on courts in proceedings under order IX, rule 13 as due service. It may further be noted that the word "due" does not occur in order V, rule 20 of the Code of Civil Procedure at all. All that clause (2) of rule 20 says that such service should be as effective as personal service.

Radha Krishna, J.

In *Ram Bharose* v. *Ganga Singh* (1), it was held that substituted service is to be taken as effectual as personal service only means that the court hearing the case may proceed with the suit as if the summons had been personally served on the defendant, but it is open to the court when the defendant appears with an application under order IX, rule 13 of the Code of Civil Procedure to see whether there was due service or not, and for that purpose to consider all the circumstances of the case, e.g. the place where the defendant was when the summons had been issued to him and where and how the summons was served.

In *Gyanammal* v. *Abdul Hussain Sahib* (2), it was held that substituted service under order V, rule 20, only meant that the proceedings could go on after the date fixed in the summons so served, but it could not be said that it was necessarily due service, which could never be contested by the defendant at any later stage. In this case the earlier case of the same High Court was cited but not followed.

The same view of law has been taken in *Kedar Mull Agarwalla* v. *Wazifunnessa* (3).

In our own Court the late Mr. Justice SMITH in *Gajadhar* v. *Uma Dutta* (4), held as follows:

> "Order 5, rule 20(2), Civil Procedure Code, makes service substituted by order of the court as effectual as if it had been made on the defendant personally, but it does not follow that substituted service is necessarily due service, the adequacy of which can never be contested by the party concerned."

(1) (1931) A.I.R., All., 727.
(2) (1931) A.I.R., Madras, 813.
(3) (1934) A.I.R., Cal., 745.
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I, therefore, hold that the view of law taken by the court below that it was beyond its jurisdiction to question the trial court's order of substituted service was incorrect

Radha Krishna, J.

The learned counsel for the opposite-party has contended that the court below had upheld the finding of the trial court to the effect that the defendants had information of the date of hearing sufficient to enable them to appear and answer the plaintiff's claim. I have read the judgment of the court below very carefully and my reading of the judgment is that the court below summed up the contentions of the parties and the decision of the court of trial. It did not give its own finding on any of the questions of fact involved in the case but dismissed the appeal on the ground that it was not within its jurisdiction to consider whether the trial court's order for substituted service was on sufficient or insufficient grounds and as such the substituted service was service duly effected.

I, therefore, allow the application with costs and set aside the orders passed by the court below and remand the case to it for decision on merits.

Case remanded.