VISHWABANDHU

v.

SRI KRISHNA AND ANR.

(Civil Appeal Nos. 6094-6095 of 2021)

SEPTEMBER 29, 2021

[UDAY UMESH LALIT AND S. RAVINDRA BHAT, JJ.]

Code of Civil Procedure, 1908 – Or. IX, r.13; Or. V, r.9(5) – Respondent no.2 filed suit for recovery against respondent no.1 alleging that he failed to refund the money received by him towards part sale consideration for sale of property – Summons sent to respondent no.1, received back with postal endorsement of refusal – Eventually, suit decreed ex-parte *in favour of respondent no.2 – In execution, the property was directed to be auctioned wherein the appellant was the highest bidder – Respondent no.1 filed application u/Or. IX, r.13 for setting aside the* ex-parte *decree – Dismissed – Appeal by respondent no.1 – Allowed by High Court – Respondent no.2 filed application seeking recall thereof – Dismissed – Held: Respondent no.1 was not vigilant – Auction was allowed to be undertaken – Thus, disentitled from claiming any relief as was prayed for – Orders passed by High Court set aside – Application filed by respondent no.1, dismissed – General Clauses Act, 1897 – s.27.*

Allowing the appeals, the Court

HELD: The summons issued by registered post was received back with postal endorsement of refusal, as would be clear from the order dated 19.02.1997. Sub-Rule (5) of Order V Rule 9 of the Code states inter alia that if the defendant or his agent had refused to take delivery of the postal article containing the summons, the court issuing the summons shall declare that the summons had been duly served on the defendant. The order dated 19.02.1997 was thus completely in conformity with the legal requirements. Even after the passing of the ex-parte decree, the report filed by the process server on 04.04.2000 clearly indicated that notice was served upon Respondent No.1 which was duly acknowledged by him by putting signature on the copy of the notice. Despite such knowledge, Respondent No.1 allowed the property to be put to auction in the month of December, 2000. It

was only after the auction was so undertaken, that he preferred the application under Order IX Rule 13 of the Code. The High Court, therefore, rightly observed in its order dated 21.04.2006 that Respondent No.1 was not vigilant. Yet, the High Court proceeded to grant relief in favour of Respondent No.1. Thus, the fact that the auction was allowed to be undertaken, Respondent No. 1 was disentitled from claiming any relief as was prayed for. Further, after completion of proceedings in auction, sale certificate was also issued in favour of the Appellant. The orders dated 21.04.2006 and 18.10.2019 passed by the High Court are set aside and the application preferred by Respondent No.1 under Order IX Rule 13 of the Code is dismissed. [Paras 19-22][20-G-H; 21-A, E-H; 22-A-B]

C.C. Alavi Haji v. Palapetty Muhammed and Anr. **AIR 2007 SC (Supp) 1705 – relied on.**

Jagdish Singh v. Natthu Singh **AIR 1992 SC 1604;** *State of M.P. v. Hiralal & Ors.* **(1996) 7 SCC 523;** *V. Raja Kumari v. P. Subbarama Naidu & Anr.* **(2004) 8 SCC 774 : [2004] 5 Suppl. SCR 882 – referred to.**

Case Law Reference

[2004] 5 Suppl. SCR 882	**referred to**	**Para 19**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos.6094-6095 of 2021.

From the Judgment and Order dated 21.04.2006 of the High Court of Judicature at Allahabad in First Appeal From Order No.2473 of 2005 and order dated 18.10.2019 in Civil Misc. Recall Application No.107616 of 2009.

Gopal Sankaranarayanan, Sr. Adv., Kaushal Yadav, Nandlal Kumar Mishra, Shafik Ahmed, Ms. Yashoda Katiyar, Dr. Ajay Kumar, Advs. for the Appellant.

Pradeep Kumar Yadav, Vishal Thakre, Abhay Singh Yadav, Sanjeev Malhotra, Sandiv Kalia, Satbir Singh Pillania, Ms. Reena Rao, Nand Ram, Dr. Sushil Balwada, Advs. for the Respondents.

The Judgment of the Court was delivered by

UDAY UMESH LALIT, J.

1. Delay condoned.

2. Leave granted.

3. These appeals challenge:*(i)* the Judgment and order dated 21.04.2006 passed by the High Court[1] in FAFO (First Appeal From Order) No.2473 of 2005; and*(ii)* the Order dated 18.10.2019 passed by the High Court in CMRA (Civil Miscellaneous Recall Application) No. 107616 of 2009 preferred in said FAFO No. 2473 of 2005.

4. Respondent No.2 herein filed a Suit in the court of Civil Judge (Junior Division), Mainpuri, Uttar Pradesh, for recovery of money along with interest submitting *inter alia* that the defendant in the Suit i.e. Respondent No.1 herein had failed to refund Rs.22,400/- received by him towards part sale consideration for sale of property comprising of Gata No.1616/0.93 acres situated at Nangle Rate, Village Panchayat Mainpuri Rural, Tehsil and District Mainpuri. The Suit was filed on 25.05.1993 and as the summons sent to Respondent No.1 by registered post was received back with postal endorsement of 'refusal', the order dated 19.02.1997 passed by the Trial Court was :-

> "Case called out. On behalf of plaintiff her counsel is present. Nobody present on behalf of defendant. The registered notice which was sent to defendant, had received with remark refusal. Notice is deemed to be sufficient. No one is present on behalf of defendant, the defendant is being proceed ex-party accordingly. Put up for the ex-parte proceeding on 01.04.1997."

The matter was thereafter adjourned on few dates and finally on 16.09.1997 an ex-parte decree was passed in favour of Respondent No.2 in the sum of Rs.22,400/- along with interest @ 9%.

5. In the application filed by Respondent No.2 seeking execution of the decree dated 16.09.1997, the property admeasuring 0.93 acres which was subject matter of the agreement to sell, was sought to be attached vide notice of attachment dated 29.05.1999. Later, the property was attached vide order dated 04.12.1999 on the basis of a report filed by the *Ameen.* The report indicated that since the judgment debtor i.e.

[1] High Court of Judicature at Allahabad

A Respondent No.1 could not be found on search, drum beats were carried out at the place of residence of Respondent No.1.

6. On 29.01.2000 the following order was passed by the trial court:-

"Case presented today. Case called out. Decree Holder with her counsel present. The report of attachment of property is filed. The decree holder shall take steps for notice under O XXI Rule 66 within 15 days."

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7. On 04.04.2000 a report was filed by the Process Server to the following effect:-

C "Today 02.04.2000 I came to Nagla Rate district Mainpuri, and searched Sri Krishna, and served a notice on him and the receipt of the same have been duly acknowledged by him by putting him signature on the copy of notice."

8. In the aforesaid circumstances, the executing court issued warrant of sale of property on 06.12.2000 whereunder the property was directed to be auctioned on 16.12.2000 and the warrant was to be returned on or before 23.12.2000, duly executed. Accordingly, on 16.12.2000 the property was put to auction in which the present appellant as the highest bidder with a bid of Rs.1,25,000/-. In accordance with the prescribed procedure, 1/4th of the amount was deposited by the appellant.

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9. On 19.12.2000 Respondent No.1, for the first time, appeared before the court and filed an application under Order IX Rule 13 of Code of Civil Procedure ('the Code', for short) praying that the ex-parte decree dated 16.09.1997 be set aside.

In the application it was asserted:-

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"…The applicant executed an agreement to sale in favour of plaintiff, and the applicant was always ready to execute the same till today. Applicant have no money. That the plaintiff by misleading the court and got passed an ex-parte judgment on 16.09.1997 in her favour and an execution petition filed before the Hon'ble Court. That no summon or notice issued from this executing court. That the plaintiff get the execution proceeding transferred to the court of Civil Judge (Senior Division) Mainpuri, which is pending there, by which the applicant facing the irreparable loss and the applicant had not defaulted intentionally and applicant have no knowledge about suit as well as execution proceeding. Due to ex-parte

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Judgment the applicant facing irreparable loss and injury. In the interest of justice the judgment and decree dated 16.09.1997 to be set aside. The applicant got the knowledge of the suit and execution proceeding from the information given by plaintiff's husband on 16.12.2000, so this application is within time."

10. The aforesaid application was dismissed on 05.07.2005 by the Additional District Judge, Mainpuri with following observations:-

"It is also noted that after passing the ex-parte judgment and decree the respondent initiated the execution proceeding which was registered as 04/1998. In this execution proceeding the summons were sufficiently served on applicant. In spite of this the applicant filed a restoration application on 19.12.2000. From the knowledge of execution proceedings on 02.04.2000, the present application is filed after more than 8 months from the knowledge about the pendency of the execution proceedings, indicates that in spite of having specific knowledge of the same he has filed this application after the period of limitation and the reason which was shown in applications is totally false, frivolous and baseless. That no evidence is produced to deny the report of the process server dated 04.04.2000 in which he stated that on 02.04.2000 the summons was duly served on applicant, nor the said report is to be manipulated."

11. Respondent No.1, being aggrieved, filed FAFO No. 2473 of 2005 in the High Court challenging the order dated 05.07.2005. During the pendency of said FAFO, sale certificate was issued in favour of the Appellant on 30.03.2006 by virtue of order dated 10.01.2006 passed by the concerned court in Execution No.4 of 1998.

12. On 21.04.2006 FAFO No. 2473 of 2005 was allowed by the High Court with following observations:-

"In the instant case, the appellant appears not to be vigilant as he ought to have been, yet the conduct does not on the whole warrant to castigate him as an irresponsible litigant. Further, the inconvenience caused to the plaintiff respondent on account of the absence of appellant may be compensated by warding appropriate cost. In the interest of justice and under the peculiar circumstances of the case, I set aside the impugned judgment and decree.

A In the result of this appeal is allowed with the costs of Rs.1000/-. The trial court is directed to decide the case on merits after affording opportunities to the parties."

13. Thereafter, Respondent No.2 filed CMRA No. 107616 of 2009 seeking recall *inter alia* on the ground that Respondent No.1 had full B knowledge of the proceedings since 17.02.1997 and had intentionally and deliberately avoided to appear and contest the matter. The application was, however, dismissed by the High Court by its order dated 18.10.2019 observing that after the order dated 21.04.2006 passed by the High Court, the Suit was restored to the file and the issues were already framed.

C 14. These two orders dated 21.04.2006 and 18.10.2019 are presently under challenge.

15. While issuing notice in the instant appeals, by Order dated 20.02.2020 passed by this Court,further proceedings were stayed.

16. We heard Mr. Gopal Sankaranarayanan, learned Senior D Advocate for the appellant and Mr. Pradeep Kumar Yadav, learned Advocate for Respondent No.1.

17. It was submitted by Mr. Sankaranarayanan, learned Senior Advocate that Respondent No.1 was always aware of the proceedings and had deliberately avoided to appear and contest the matter; that his E stand in the application under Order IX Rule 13 of the Code itself indicated that he was ready to execute sale deed in favour of the original plaintiff and that he had no money to repay the amount received by him way of part consideration. It was submitted that as an auction purchaser the Appellant had complied with all the legal requirements and sale certificate was also issued in his favour.

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18. On the other hand, Mr. Pradeep Kumar Yadav, learned Advocate submitted that the orders passed by the High Court did not call for any interference and that the Suit having been restored to the file, the matter be allowed to be taken to the logical conclusion.

G 19. The summons issued by registered post was received back with postal endorsement of refusal, as would be clear from the order dated 19.02.1997. Sub-Rule (5) of Order V Rule 9 of the Code states *inter alia* that if the defendant or his agent had refused to take delivery of the postal article containing the summons, the court issuing the summons shall declare that the summons had been duly served on the

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defendant. The order dated 19.02.1997 was thus completely in conformity with the legal requirements. In a slightly different context, while considering the effect of Section 27 of the General Clauses Act, 1897, a Bench of three Judges of this Court in *C.C. Alavi Haji vs. Palapetty Muhammed and Anr*[2] made following observations:-

> "14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. [Vide *Jagdish Singh v. Natthu Singh*[3]: *State of M.P. vs. Hiralal & Ors.*[4] and *V. Raja Kumari vs. P. Subbarama Naidu & Anr.*[5]]. … …."

20. Even after the passing of the ex-parte decree, the report filed by the process server on 04.04.2000 clearly indicated that notice was served upon Respondent No.1 which was duly acknowledged by him by putting signature on the copy of the notice. Despite such knowledge, Respondent No.1 allowed the property to be put to auction in the month of December, 2000. It was only after the auction was so undertaken, that he preferred the application under Order IX Rule 13 of the Code. The High Court, therefore, rightly observed in its order dated 21.04.2006 that Respondent No.1 was not vigilant. Yet, the High Court proceeded to grant relief in favour of Respondent No.1.

21. In the light of the features indicated above and the fact that the auction was allowed to be undertaken, Respondent No. 1 was

[2] AIR 2007 SC (Supp) 1705
[3] AIR 1992 SC 1604
[4] (1996) 7 SCC 523
[5] (2004) 8 SCC 774

A disentitled from claiming any relief as was prayed for. Further, after completion of proceedings in auction, sale certificate was also issued in favour of the Appellant.

22. We, therefore, allow these Appeals, set aside the orders dated 21.04.2006 and 18.10.2019 passed by the High Court and dismiss the
B application preferred by Respondent No.1 under Order IX Rule 13 of the Code. No costs.

Divya Pandey Appeals allowed.