CASE NO.:
Appeal (civil) 438 of 2007

PETITIONER:
Indu Bhushan \005..Appellant

RESPONDENT:
Munna Lal and Anr. \005.Respondents

DATE OF JUDGMENT: 02/02/2007

BENCH:
Dr. ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
J U D G M E N T
(Arising out of S.L.P. (C) No. 25636 of 2004)

Dr. ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the judgment rendered by a learned Single Judge of the Allahabad High Court dismissing the appeal filed by the appellant. In the said appeal the order passed by 11th Additional District & Sessions Judge, Varanasi, rejecting the application filed by the appellant for restoration of the appeal in terms of Order XLI Rule 21 of the Code of Civil Procedure, 1908 (for short 'CPC') was rejected.

Background facts in a nutshell are as follows:

Respondent No.1-Munna Lal instituted a suit for specific performance of the contract dated 6th March, 1992. The agreement was allegedly executed by Smt. Krishna Devi, mother of the appellant and respondent no.2 who were the appellants before the High Court. The said Smt. Krishna Devi expired during the pendency of the suit before the Trial Court. According to the plaintiff, out of the total sale consideration of Rupees one lakh, Rs.25,000/- was given on 2nd March, 1992 and another sum of Rs.15,000/- was given on 6th March, 1992. It was stipulated in the agreement that the sale deed shall be executed by the Vendor after she obtained permission from the authorities under the Urban Land Ceiling Act, 1976 (in short 'ULC Act'). As Vendor failed to execute the sale deed the suit for specific performance was filed. The suit was dismissed by the Trial Court on 3rd August, 2002. The judgment and decree were challenged by respondent no.1 by filing Civil Appeal no.109/2002. The said appeal was allowed as ex-parte on 11th July, 2003 by the First Appellate Court. An application was filed by the present appellant and the respondent no.2 to set aside the ex-parte decree passed by the Courts below. The said application was filed in terms of Order XLI Rule 21 CPC which was rejected by the First Appellate Court.

The only ground which was urged in support of the appeal/application as the case may be before the First Appellate Court and the High Court was that there was no service of notice through process server or by registered post.

It was contended that the information regarding decision of the appeal came to knowledge of the appellant before the High Court on 28th July, 2003 when the notice of caveat application filed before the High Court by respondent no.1 was received. It was averred that the reports of the process server were not correct. The notice by registered post was not served. In fact, there was no refusal as was made out by the plaintiff-respondent no.1. The postman who was examined clearly stated that there was no refusal by the appellant and the present respondent no.2.

The First Appellate Court analysed the factual position and placing reliance on the decision of this Court in State of M.P. v. Hiralal and Ors. (1996 (7) SCC 523), held that there was valid service of the notice sent by registered post. Further the evidence of the process server clearly established that notice has been served. The High Court dismissed the appeal finding that there was valid service of the notice regarding hearing of the appeal before First Appellate Court.

In support of the appeal, learned counsel for the appellant submitted that the First Appellate Court and the High Court clearly proceeded on erroneous presumption that the appellant and respondent no.2 had refused to receive the notice. The postman's evidence was not to the effect of any refusal. In fact, the evidence clearly established that at no point of time postman met the appellant. The High Court relied on decision which related to refusal and those decisions were not clearly applicable to the facts of the present case.

The learned counsel for the appellant further submitted that the decision in Hiralal's case (supra) has no application to a case where there is no definite material of refusal. The decision in the said case was on the basis of the office report indicating that the noticee was avoiding to receive the notice. In that context this Court held that the notice has to be treated as sufficient. Further the decision relied upon by the High Court i.e. Hiralal's case (supra) and Gujarat Electricity Board v. Atma Ram (AIR 1989 SC 1433) have no application to the facts of the present case. It was held by this Court that there is presumption of service of letters sent by registered cover if the same is returned by postal endorsement that the addressee refused to accept the same, the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption by saying that the address mentioned on the cover was incorrect or that the postal authorities never tendered registered letter to him or that there was no occasion for him to refuse the same. The onus lies on the party challenging the factum of service.

In response, learned counsel for the respondent no.1 submitted that the First Appellate Court and the High Court found that the process server's reports clearly indicated the service of the notice and about the knowledge of the appellant and respondent no.2 about the pendency of the appeal. It was, therefore, submitted that the High Court's judgment does not warrant interference.

In the instant case, the postal endorsement is not to the effect that the addressee has refused to accept the letter tendered. Similarly, in M/s Madan and Company v. Wazir Jaivir Chandra (AIR 1989 SC 630) the effect of endorsements such as "not found", "not in station" or "addressee has left" was considered. The service of notice of appeal is required to

be done under Order XLI Rule 14 CPC. The same reads as follows:

""Publication and service of notice of day for hearing appeal- (1) Notice of the day faxed under rule 12 shall be affixed in the Appellate Court house and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

(2) Appellate Court may itself cause notice to be served- Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to.

(3) The notice to be served on the respondent shall be accompanied by a copy of the memorandum of appeal.

(4) Notwithstanding anything to the contrary contained in sub-rule (1), it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent other than a person impleaded for the first time in the Appellate Court, unless he has appeared and filed an address for the service in the Court of first instance or has appeared in the appeal.

(5) Nothing in sub-rule (4) shall bar the respondent referred to in the appeal from defending it."

Order V Rule 9 of CPC refers to service of summons. The said provision reads as follows:
"9. Delivery of summons by Court. \026 (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him in such manner as the Court may direct.

(3) The services of summons may be made by

delivering or transmitting a copy thereof by registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court :

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

(4) Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgment due), the provisions of rule 21 shall not apply.

(5) When an acknowledgement or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorized by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislead, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of courier agencies for the purposes of sub-rule (1)."

A bare perusal of Order V Rule 9 clearly shows that service through process of Court is mandatory. This position is clear from the use of the word "may" in the provision. In the instant case not one but several process servers have given notice relating to service and their endorsements were sufficient to show service of the notice relating to the appeal. Though it was contended by learned counsel for the appellant that the reports were not correct, the same is not acceptable.

No material was placed before the Trial Court or the High Court to show that the endorsements made by the process servers were false or erroneous.

Above being the position, the conclusions arrived at by the First Appellate Court as affirmed by the High Court do not suffer from any infirmity to warrant interference.

The appeal fails and is thus dismissed. There will be no order as to costs.