

CASE NO.:
Appeal (civil) 1123 of 2001

PETITIONER:
SRI NARESH CHANDRA AGARWAL

Vs.

RESPONDENT:
BANK OF BARODA & ORS.

DATE OF JUDGMENT: 08/02/2001

BENCH:
CJI, R.C. Lahoti, & N. Santosh Hegde.

JUDGMENT:

SANTOSH HEGDE, J.
L...I...T.....T.....T.....T.....T.....T.....T..J

Leave granted.

This appeal arises out of an application filed by the appellant under Order 9 Rule 13 read with Section 151 of the Code of Civil Procedure (CPC) before an Additional District Judge/Special Judge/Special Judge (S.C. & S.T. Act), Pilibhit, wherein the appellant had prayed for setting aside the ex-parte judgment and decree dated 9.5.1995 made in O.S. No.107/84. The said application of the appellant came to be dismissed and an appeal filed against the said dismissal of the application also came to be dismissed by the High Court, hence, this appeal before us.

The case of the appellant is that the plaintiff-Bank had filed a suit against a partnership firm by name M/s. Ashok Khad Agency for the recovery of certain sums of money advanced to it by the plaintiff-Bank. It is stated in the original suit defendants 2 & 3 who are the brothers of the appellant were partners of the 1st defendant firm which was the debtor to the bank and along with them defendants 4 to 8 were the guarantors to the loan advanced by the Bank to the said firm. It is also stated that during the pendency of the said suit Defendant No.8 who was the father of the appellant died, hence, an application to bring his legal representatives was made in which appellant was sought to be included as one of the legal representatives of the deceased 8th defendant. It is also alleged that the notice of the said application so far as the appellant is concerned was addressed to 91, Mohalla Dalchand, Pilibhit and the said notice issued by the Court was returned back with an endorsement as refused. The trial court without being satisfied as to the correctness of the service of notice, mechanically held the service as sufficient and allowed the substitution application of the plaintiff-Bank and proceeded to decree the suit ex parte.

When the appellant came to know of the ex parte decree

he filed the above-mentioned application for setting aside the said decree on the ground that at the time when the notice of substitution was issued by the trial court to him he was working as an officer at Balrampur Chini Mills Ltd., Bahabhan, Distt. Gonda., therefore, he could not have been served with the said notice at Pilibhit and the refusal endorsement made in the notice was obviously an incorrect endorsement. In the said application for setting aside the ex parte decree the appellant had also contended that during the life time of his father he had filed a written statement contending that he had been released by the bank as a guarantor and he had no legal obligation to discharge the loan or amounts due from the first defendant partnership firm. It was further contended by the appellant in view of the said pleadings of his father an issue No.9 to the following effect was framed by the trial court:

9. Are defendants Nos. 4 to 8 never stood sureties as alleged in paras 28, 31 and 33 of the W.S.

and that this issue was not at all decided by the trial court in the judgment which led to the decree. He also alleged that there was sufficient material on record to show that the bank earlier to the filing of the suit itself had discharged the original 8th defendant i.e. his father as a guarantor. He also contended that it is only after he came back to Mohalla Dalchand on a permanent basis he came to know of the ex parte decree and immediately he made necessary inquiries and found out that the application filed by the plaintiff-Bank to bring the legal representatives of his deceased father, so far as he is concerned, was addressed to an incorrect address, hence, he had no knowledge of the impleadment application and since he has inherited a portion of his fathers estate same cannot be made a subject matter for satisfaction of the decree without he being heard in the suit.

The respondent-Bank in its affidavit filed in opposition to the application of the appellant did not dispute the fact that at the relevant point of time the appellant was working in Gonda District but its main contention in opposition was that the estate of the deceased 8th respondent was sufficiently represented through his other children and after the passing of the decree none had preferred any appeal against the said decree which has become final and further the interest of the appellant in the estate of the deceased 8th defendant was very limited and remote, hence, he is not prejudiced in any manner.

The trial court rejected the application of the appellant for setting aside the ex parte decree primarily on the ground that the appellant had not made any allegation of collusion between his two brothers the original defendants 2 and 3 and the plaintiff-Bank and as per proviso to Rule 13 of Order 9 an ex parte decree cannot be set aside merely on the ground of irregularity in service of summons.

On appeal High Court also proceeded on a tangent without deciding the question of service of notice. The High Court was influenced more by the fact that the estate of the deceased was sufficiently represented and what was inherited by the appellant was only a limited share. Further, none of the defendants who were parties in the suit had appealed against the original decree.

Learned counsel for the appellant contended before us that both the courts below failed in not properly appreciating the case of the appellant inasmuch as it was his primary ground that he was impleaded as a party to the suit without being served with the notice of application for substitution and any decree passed without notice to him will not be binding on him, therefore, in law he was obliged to make an application to set aside the decree so far as it affected his right in the estate inherited by him after the death of his father. He also contended that the original decree against his father could not have been passed since he was not a guarantor to the loan advanced to the first defendant partnership firm and he had no liability to discharge any loan due from the said firm. Consequently, the estate of 8th defendant was not liable to be burdened with the liability to discharge the loan due from the first respondent firm. He also contended that the Court gravely erred in not deciding the issue No.9 which has caused grave prejudice to the estate of the deceased defendant NO.8.

Per contra, the counsel for Bank submitted that the application of the appellant is only an attempt to frustrate and delay the decree obtained by the bank and he submitted the findings of the courts below that the appellant in reality has not been prejudiced in any manner was correct and the estate of 8th defendant was sufficiently represented before the trial court by other legal representatives who never chose to contest the decree. Therefore, this type of delaying tactics should not be encouraged.

From the facts narrated herein above, it is clear that the appellant is one of the legal heirs of deceased 8th defendant and an application to bring him on record was made. Having made such application, it was the bounden duty of the plaintiff as also that of the court to see that all the legal heirs the proposed legal representatives (including the appellant) were duly served. It is not in dispute that at the relevant point of time when the notice of application was issued by the trial court, the appellant was serving in Gonda District and was not in Pilibhit to which address the notice of substitution was sent. It is not even the case of the plaintiff that at the time of service of notice the appellant in fact was present in the address to which the notice was sent even on a visiting basis. Therefore, it is reasonable to presume that the appellant was not served with the notice of substitution and the endorsement made therein as to the refusal of the service cannot be attributed to any act of the appellant. When a party is sought to be impleaded in a legal proceedings service of notice on such party cannot be a mere formality but should, in fact, be a reality. In the instant case, neither the trial court nor the High Court gave any definite finding as to the service of notice on the appellant. The mere fact that when the appellant made an application for setting aside the ex parte decree, he happened to give his permanent residential addresses which incidentally happened to be the address to which notice of substitution was sent by the Court will not ipso facto lead to the conclusion that the notice of substitution was in fact served on the appellant. No inquiry or attempt was made by the trial court to find out the truth of the fact whether the notice of substitution was in fact served on the appellant. Even the plaintiff in its affidavit filed in opposition to the appellants application did not deny the fact that the appellant was working in Gonda Distt. at the

relevant time.

The trial court proceeded to reject the appellants application on twin reasoning: that, it was a case of irregularity in service of summons, and that, the other two brothers of the appellant having participated in the proceedings in the suit, there was no material prejudice to the appellant. This, in our opinion, was not a correct approach. Firstly, the present one is a case of non-service of notice on the appellant and not a case of mere irregularity in the service of summons. Secondly, a plea was raised in the suit that the guarantee given by late Satish Chandra Agarwal stood discharged on account of another guarantee in supersession of or in lieu of the guarantee given by late Satish Chandra Agarwal having been accepted by the petitioner. On such pleadings, issue Nos.9 and 12 were framed but were not decided. In the peculiar facts and circumstances of this case failure to determine the issue as to the guarantee furnished by late Satish Chandra Agarwal having been discharged and consequently the liability of late Satish Chandra Agarwal and his legal heirs having come to an end did spell out prejudice to the interest of the appellant on account of opportunity to defend having not been afforded to him. Be that as it may, we are satisfied that since the appellants share in the estate of his father is bound to be affected by the execution of the decree, the appellant ought to have been served with the notice of the application for substitution which having not been done, the application filed by him was entitled to be granted.

We are of the opinion that the interest of justice requires that the application of the appellant for setting aside the decree be allowed and the suit be disposed of after hearing the appellant on merits. We, however, make it clear that we have not expressed any opinion in regard to the other contentions of the appellant as to the discharge of original 8th defendant as a guarantor by the Bank or the effect of not deciding issue Nos.9 and 12 in the original suit by the trial court.

For the reasons stated above, the appeal is allowed, the impugned judgments of the High Court and the trial court are set aside. The application under Order 9 Rule 13 read with Section 151 of the C.P.C. filed by the appellant on 25.3.1996 shall stand allowed. The appellant shall be afforded opportunity of contesting the suit in accordance with law. No order as to costs.