

1992 SCC OnLine Gau 30 : (1992) 2 Gau LR 455 : AIR 1993 Gau 48

In the High Court of Gauhati
(BEFORE D.N. BARUAH, J.)

Sushil Kumar Saha ... Petitioner;
Versus

Juran Chandra Saha ... Opp. Party.

Civil Revision No. 114 of 1987
Decided on August 6, 1992

Civil Procedure Code, 1908, O. 5, Rr. 12, 17 & 19 — Mode of service of the summons — Court should be cautious in accepting the summons by hanging — Suit filed on 25.11.82 fixing next date on 22.12.82 — Process server served the summons after two days i.e. on 27.11.82 by affixing a copy of the summons at the residence of the opposite party — Return of summons not verified by the affidavit of the serving officer — No attempt made by the Court to examine the serving officer or to ascertain whether the summon was duly served — No attempt made by the Court to ascertain whether the fact of the refusal to accept the summon was correct or not — Suit decreed exparte — Petition for setting aside the exparte decree rejected — On revision, held that the



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Courts below failed to exercise the jurisdiction vested in them for not accepting the petition for exparte decree.

Advocates who appeared in this case:

Mr. A.C. Sarma, for the Petitioner.

None appears, for the Opp. party.

JUDGMENT AND ORDER

This revision is directed against the appellate judgment dated 23.2.87 passed by the Assistant District Judge. Dhubri in Misc. Appeal No. 12 of 1986, dismissing the appeal and affirming the judgment dated 24.2.86 passed by the First Munsiff. Dhubri in Misc. (J) Case No. 76 of 1984 arising out of Title Suit No. 689 of 1982.

2. The opposite party a filed suit for declaration of right, title and interest over the suit land and for recovery of khas possession. In usual coarse summons was issued to the petitioner. The suit was filed on 25.11.82 and the summons was served on 27.11.82 by hanging. The Process Server served summons as identified by the wife of the opposite party and when the summons was tendered to the petitioner he refused to accept the same, accordingly, he affixed a copy of the summons on the main door of his house. A copy of the summons was returned by the process server with his report. As per the said report, the petitioner refused to accept the same. No independent and disinterested witness was present at the time of service of summons by hanging. After such service of summons the case was put up on 22.12.82 as fixed earlier and the Munsiff on the basis of the said report accepted the summons and ordered to proceed exparte. Thereafter the suit was decreed exparte. On coming to know about the exparte decree, the petitioner filed a petition under order IX Rule 13 of CPC for setting aide the exparte decree on the ground that the summons was not served on him, in fact, the petitioner was not at his residence at that time, and no person resided along with him in his residence.

3. The opposite party examined four witness, viz.; his wife, the process server and two others. The petitioner examined himself and an another witness. After appreciating the evidence, the Munsiff disbelieved the case of the petitioner and rejected the petition for setting aside the exparte decree. An appeal was preferred before the Asstt District Judge and the Asstt District Judge also affirmed the judgment holding that the petitioner failed to establish his case that the


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summons was not duly served on him. The Appellate Court after appreciating the evidence held that the story told by the opposite party is correct and, therefore, it cannot be said that the summons was not served.

4. Order V of CPC prescribes various mode for service of summons. Under order V Rule 12 of CPC "wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient". Again under Rule 17 prescribes the procedure when defendant refuses to accept service, or cannot be found. Order V Rule 17 runs thus:—

"Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there it no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was indentified and in whose presence the copy was affixed."

5. After service of summons in the manner prescribed under Rule 17 of Order V, the Serving Officer is required to make an endorsement in the original summons a return stating the time when and the manner in which the summons was served. Rule 19 of the said order requires that where the summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving Officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare

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that the summons has been duly served or order such service as it thinks fit.

6. The aforesaid Rules are meant to safe guard against the unscrupulous plaintiff from getting a decree in a short cut way. Instances are not rare where the plaintiffs in collusion with the Serving Officer make false endorsement and get order for exparte hearing. In such case, the Court should be cautious in accepting the summons by hanging.

7. I have perused the order sheets. The suit was filed on 25.11.82 fixing the next date as 22.12.82, Curiously enough, the Process Server served the summons immediately after two days i.e. 27.11.82, that too, affixing a copy of the summons at the residence of the opposite party. From the records it appears that the return has not been verified by the affidavit of the Serving Officer or the Court made any attempt to examine the Serving Officer to ascertain whether the summons was duly served or not. Besides, the Court has not made attempt to ascertain whether the fact of refusal was a correct story or not.

8. The Process Server claimed to have served the summons on the petitioner as he was identified by the wife of the opposite party. The two other witnesses, who were present; one was a close relation of the opposite party and other one against whom a case was pending. The trial court accepted the service of summons immediately on the next day without ascertaining all these facts, even ignoring the provisions of law the Court is required to follow. I am dazed to see the manner in which the summons were served. Immediately after two days of filing the suit, the process server served the summons and the Court accepted it without further enquiry. These facts cannot be said to be beyond suspicion. The Trial Court should not have accepted the summons the manner in which it was done. The Appellate Court also over looked all these facts and the provisions of law and rejected the petition for restoration of the suit. The Courts below thus failed to exercise the jurisdiction vested in them for not accepting the petition for setting aside the exparte decree.

9. Under Rule 64(1) of the Civil Rules and Orders (Vol-I) also requires the service of summons in presence of at least two independent local witnesses. In Form No. (P) 1-A of Civil Rules and Orders (Vol-II), page 258, Note 3 mentions that such service must be in presence of at least two independent local witnesses. These were not at all considered by the Courts below.



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In view of the above, I find full force in the submission of Mr. A.C. Sarma, learned counsel for the petitioner. Accordingly, I allow the petition and set aside the exparte decree. As the petitioner has already come to know about the suit, no fresh notice is acquired to serve on him. The parties herein shall appear before the First Munsiff, Dhubri, on 7th September, 1992 to take a date.

In the result, the petition is allowed. No costs.

Send down the case records immediately.