



HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Civil Writ Petition No. 3789/2021

Ram Kishan Adopted Son Kirodi (S/o Kiranta), aged about 81 Years, Resident of Lahchora Kala, Tehsil - Bayana, District Bharatpur, (Raj.)

----Petitioner

Versus

1. Ram Dai W/o Ram Singh (Died), Resident of Lahchora Kala, Tehsil - Bayana, District Bharatpur, (Raj.)
- 1/1. Archana Kumari D/o Ramesh Chand, Resident of Village Harnagar, Tehsil Bayana, District Bharatpur. (Raj)
2. Vedprakash S/o Bhagwan Singh, Resident of Lahchora Kala, Tehsil - Bayana, District Bharatpur, (Raj.)

----Respondents

For Petitioner(s)	:	Mr. Dinesh Khandelwal Ms. Gauri Meena
For Respondent(s)	:	Mr. Amit Kuri with Mr. Dharma Ram Ms. Nandini Mirdha Mr. Harshvardhan Shekhawat Mr. Rajesh Kumar Bairwa for Mr. Aatish Jain

JUSTICE ANOOP KUMAR DHAND
Order

22/07/2025

Reportable

For convenience of exposition, this order is divided in the following parts: -

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The Challenge:-

1. By way of filing this writ petition, a challenge has been led to the impugned judgment and decree dated 21.07.2004 passed by the Revenue Appellate Authority (for short, 'the RAA') by which the appeal filed by the petitioner against the ex-parte judgment and decree dated 09.05.2002 passed by the Assistant Collector, Bayana has been rejected, and the aforesaid ex-parte judgment and decree has been upheld.

2. Aggrieved by the judgment dated 21.07.2004 passed by the RAA, the petitioner submitted a second appeal under Section 224 of the Rajasthan Tenancy Act, 1955 (for short, 'the Act of 1955') before the Board of Revenue (for short, 'the Board'), however, the same was also rejected vide impugned judgment and decree dated 22.09.2020.

Submissions by the Petitioner:-

3. Counsel for the petitioner submits that a suit for declaration and permanent injunction under Sections 88-89 and 188 of the Act of 1955 was submitted by the respondent-plaintiff (hereinafter referred to as "respondent") against the petitioner-defendant (hereinafter referred to as the "petitioner") before the Assistant Collector, wherein after service, the petitioner submitted a written statement. Counsel submits that the suit was dismissed in default on 19.07.1999 for non-appearance of the respondent. However, the said suit was restored back on 22.12.1999. Counsel submits that once again the suit was dismissed on 30.03.2000 for non-payment of cost and failure to produce any evidence by the respondent. Counsel submits that an appeal was preferred by the



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respondent, against the order dated 30.03.2000 before the RAA. Counsel submits that the RAA vide its order dated 23.11.2001 quashed and set aside the order dated 30.03.2000 passed by the Assistant Collector and remanded the matter back to the Assistant Collector for deciding the suit on its merit, after providing due opportunity of hearing to the parties. Counsel submits that after the matter was remanded by the RAA, notices were issued to the petitioner. However, the notices were allegedly affixed at the conspicuous place of his house, however, the Process Server did not obtain signature of any witness, who identified the house of the petitioner. Consequently, there was no compliance of the provisions contained under Order 5 Rule 17 CPC. Subsequently, on 08.04.2002, the Assistant Collector initiated ex-parte proceedings and allowed the suit for declaration and permanent injunction vide the impugned judgment and decree dated 09.05.2002. Counsel submits that the petitioner submitted an appeal under Section 96(2) CPC before the RAA to set aside the ex-parte decree and to remand the matter to the Assistant Collector for fresh adjudication of the suit, after affording due opportunity of hearing to the parties. However, the said appeal was rejected vide order dated 21.07.2004 both on merit as well as on technical count. Counsel submits that the technical count on which the appeal submitted by the petitioner was rejected was that, after remand of the matter by the RAA vide order dated 23.11.2001, the petitioner neither submitted any written statement nor any issues were framed. Hence, the order passed by the Assistant Collector was upheld. Counsel submits that against the aforesaid judgment and decree dated 21.07.2004, the petitioner preferred second appeal before





the Board which was also rejected vide impugned judgment and decree dated 22.09.2020. Counsel submits that the present case involves an important question of right, title and interest of the petitioner, which requires to be adjudicated by the trial Court. Therefore, the judgments passed by the RAA and the Board are liable to be quashed and set aside and the matter be remitted to the Assistant Collector to decide the suit afresh in accordance with law, after hearing the petitioner's contentions.

Submissions by the Rival Side:-

4. Per contra, counsel for the respondents opposed the arguments raised by counsel for the petitioner and submitted that the appeal submitted by the petitioner under Section 96 (2)CPC was not at all maintainable before the RAA, as the petitioner never assailed the ex parte judgment and decree dated 09.05.2002 on its merits. The sole relief sought by the petitioner in the memo of appeal is to remand the matter to the Assistant Collector. Counsel submits that it is settled proposition of law that the appeal under Section 96 CPC is maintainable only when the judgment and decree in question is assailed on its merits. Counsel submits that under these circumstances, both the RAA and the Board have not committed any error in rejecting First and Second appeals submitted by the petitioner. The judgments passed by the First Appellate Court and Second Appellate Court are just and proper, which require no interference of this Court and the present writ petition is liable to be rejected. In support of his contentions, he has placed reliance upon the judgment passed by the Hon'ble



Apex Court in the case of **N. Mohan Vs. R. Madhu** reported in **AIR 2020 SC 41.**

Analysis, Discussions and Findings:-

5. Heard and considered the submissions made at Bar and perused the material available on record.

6. When an ex-parte decree is passed, the defendant has two remedies – (a) Either to file an application under Order 9 Rule 13 CPC to set aside the ex-parte decree by satisfying the court that the summons was not served or if served, the defendant was prevented by “sufficient cause” from appearing in the court when the suit was called for hearing; (b) to file a regular appeal from the original decree to the first appellate court in terms of Section 96(2) CPC and challenge the ex-parte decree on merits.

7. Right to file an appeal under Section 96(2) CPC is a statutory remedy. The right to appeal is not a mere matter of procedure; but is a substantive right. Right to appeal under Section 96(2) CPC challenging the original decree passed ex-parte, being a statutory right, the defendant cannot be deprived of the statutory right merely on the ground that he did not file any application under Order 9 Rule 13 CPC.

8. Perusal of the record and the judgments passed by the three Courts i.e. the Assistant Collector, the RAA and the Board reveal that a suit for declaration and permanent injunction was filed by the respondent against the petitioner under the provisions contained under the Act of 1955. This fact is not in dispute that after service of summons, the petitioner submitted written statement, however, the said suit was dismissed in default on



19.07.1999. Subsequently, the suit was restored on 22.12.1999, and was again dismissed in default on 30.03.2000 on account of failure to pay costs and for want of evidence on the part of the respondent. The respondent assailed the aforesaid order dated 30.03.2000 before the RAA by way of filing an appeal which was allowed and the matter was remanded to the Assistant Collector for adjudication of the suit on its merits. Thereafter, notices were again issued to the petitioner and as per the Process Server's report, the petitioner was not found at his residence, therefore, the notices were affixed at a conspicuous place of his house. It is not the case of the Process Server that the petitioner refused to accept the notices rather he has mentioned in his report that the petitioner was not found at his residence. Order 5 Rule 17 CPC deals with such like situation when the defendant has refused to accept notice or cannot be found.

9. For ready reference the provision contained under Order 5 Rule 17 CPC is reproduced as under:-

"Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, 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 is 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 do, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."



10. A bare perusal of the aforesaid provision indicates that when the Process Server, in the absence of the defendant, affixes a copy of the summons on the outer door or at any conspicuous place of the house, where the defendant ordinarily resides or carries on business, he shall return the original notice to the Court with a report endorsed thereupon. However, the Process Server is also supposed to obtain signature of the witness, identifying the house where the defendant resides. But herein the instant case, the Process Server failed to secure the signature of witness, residing in the same vicinity, in the report of service of summons. It appears that on the basis of the aforesaid report of the Process Server, proceedings as well as ex-parte judgment and decree was passed against the petitioner. Without verifying the address of the petitioner through an independent witness by obtaining his signature, the Process Server has affixed the notices at a house said to be of the petitioner and the report was sent by him stating therein that the premises of the petitioner was found to be closed. On the basis of such unverified report, the Trial Court treated the service as complete. In the absence of verification of the address of a party, through a witness, the service of summon cannot be



treated as complete. In the instant case, the summon cannot be treated as served and consequently, the ex-parte proceedings, against the petitioner, ought not to have been drawn by the Trial Court.

11. Feeling aggrieved by the aforesaid ex-parte judgment and decree, the petitioner preferred an appeal under Section 96(2) CPC, which was rejected on its merits, ignoring the prayer for quashing the ex-parte decree by remanding the matter to the trial Court for granting opportunity to the petitioner to lead his evidence. It appears that instead of deciding the matter on the issue of service of summon, the appeal submitted by the petitioner was rejected on a technical Count that no written statement was submitted, hence, no issues were framed and such finding of the Appellate Court is contrary to the record. The record reveals that the written statement was already filed by the petitioner and the same was available on record. It appears that before passing the impugned judgment, these facts were not verified and straightaway the judgment and decree impugned was passed. However, this fact was appreciated by the Second Appellate Court where the defendant submitted second appeal.

12. This Court finds no merit and substance in the arguments raised by counsel for the respondents that the petitioner has not challenged the impugned judgment on its merit, but the same has been challenged for a limited purpose of setting aside the ex parte decree and remanding the matter to the Trial Court.

13. Perusal of the memo of appeal especially para Nos. 2 and 3 thereof, indicate that the ex parte judgment was assailed on its merits as well, hence under these circumstances, the appeal



submitted by the petitioner before the RAA was maintainable, in terms of the 96(2) CPC. But in the instant case, the petitioner was not served properly, hence, he could not appear before the trial Court for submitting his stand/case. Therefore, the petitioner has made a prima facie case in his favour that he was not served with any kind of notice and the so-called affixation of summons at his home is doubtful in terms of the provisions contained under Order 5 Rule 17 CPC. The petitioner was presented by 'sufficient cause' of not having knowledge about filing of suit by the respondent. Hence, the ex-parte decree passed against him is not sustainable in the eyes of law.

14. It is settled proposition of law and as per the principles of natural justice as well that before passing any adverse order against a person an opportunity of hearing is required to be given to him but in the instant case, the petitioner has been deprived of this opportunity, hence, the ex-parte judgment passed by the trial court amounts to a violation of the principles of natural justice.

Conclusion and Directions:-

15. In view of the above, all the three impugned judgments passed by the three Courts below dated 09.05.2002, 21.07.2004 and 22.09.2020 stand quashed and set aside and the matter is remitted to the Assistant Collector for deciding the suit afresh, after framing the issues and after granting opportunity of hearing to both the sides, by way of filing their evidence. It is expected from the Trial Court to decide the suit expeditiously preferably within a period of two years from the date of receipt of the



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certified copy of this order. The reasons for issuing such direction is that the matter pertains to the year 1999.

16. Accordingly, the present writ petition stands disposed of. Stay application and all pending application(s), if any, also stand disposed of.

(ANOOP KUMAR DHAND),J

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