



**IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR  
BEFORE  
HON'BLE SHRI JUSTICE DEEPAK KHOT  
ON THE 23rd OF JULY, 2025  
MISC. APPEAL No. 637 of 2017  
SMT. FARRUKH JAHAN BEGAM (DEAD) THROUGH LRS. SYED  
MOHAMMAD ALI AND OTHERS  
Versus  
MOHD. MAHFOOZ AND OTHERS**

**Appearance:**

*Shri Sanjay Agrawal Senior Advocate with Ms. Neerja Agrawal and Shri Yash Soni – Advocate for the appellant.*

*Ms. June Choudhary Senior Advocate with Ms. Jayalakshmi Iyer, Shri Shikar Jat and Shri Ratnesh Kumar Yadav – Advocates for the respondent No.1.*

*Shri Amit Vikram Pandey – Panel Lawyer and Shri Aditya Choubey – Government Advocate for respondent/State.*

*Shri Shafiqullah – Advocate for the respondent No.14.*

**ORDER**

The present Misc. Appeal has been filed under Order 43 Rule (1)(i) (d) of the Code of Civil Procedure, 1908 (for brevity 'CPC') against the order dated 04.02.2017 passed in MJC No.431/2009 by 14<sup>th</sup> Additional District Judge, Bhopal; whereby, appellants' application under Order 9 Rule 13 CPC for setting aside ex-parte judgment and decree dated 28.06.2007 passed in Civil Suit No.517-A/2006 has been dismissed.



2. The short facts giving rise to the present appeal are that the respondent/plaintiff filed a suit for specific performance and permanent injunction in regard to land in question bearing survey No.109, details of which are mentioned in paragraph 01 of the judgment dated 28.06.2007 passed in original Civil Suit No.517-A/2006.

3. The suit was filed on the basis of a sale agreement dated 12.10.1999 (Exhibit-P/2) and a receipt dated 20.06.2002 executed by one Smt. Rais Jahan. It is averred in the plaint that the agreement was executed by Smt. Rais Jahan which was acknowledged by her legal representatives namely Iqbal Mohd., Sikander Mohd., Iftikhar Mohd., Farid Mohd., Farrukh Jahan, Mahar Parwar Jahan, Shah Parawar Jahan and Taj Parwar Jahan and given consent by making signatures over the agreement. Prior to filing of the suit, Smt. Rais Jahan had expired on 17.04.2003. The suit was filed on 18.12.2006. It is the case of the appellant that the appellant was declared ex-parte on 22.12.2006 for not marking her presence before the Court despite service of summon issued by the Civil Court. The summon has been filed alongwith the appeal as Annexure A/6 at page 46 which was issued for appearance of the appellant/defendant on 22.12.2006 before the civil court. The over leaf of the said summon endorses statement of the process server to the effect that the service has been effected to the appellant/defendant on 20.12.2006 with her signatures.

4. Learned senior counsel for the appellant/defendant submitted that the said service as shown to be effected on appellant/defendant is not in accordance with law as the signatures over the summon is not of the appellant/defendant and the same has been denied before the court below. It is further submitted that the process server namely Dol Bahadur Thapa



(NAW-1) has been examined before the court below whose statement is at page 68 of the appeal. Dol Bahadur Thapa in his cross-examination has stated that the signature over the summon said to be of appellant/defendant has not been signed in front of him. It has further been stated that a boy had come out of the house and he had taken the summon inside and got it signed and gave it to him. It has also been submitted that the boy who had received the summon, the process server could not give his name. It has further been submitted that such service of notice is not in accordance with the provisions of CPC as well as the Madhya Pradesh Civil Courts Rules, (for brevity “the Rules”).

5. Learned senior counsel has invited attention of this Court towards Rule 9 of Order 5 of CPC wherein it is provided that service of summon is to be effected on a person against whom it is issued in a manner prescribed in sub-Rule (3) of Rule 9 of Order 5 of CPC. It has further been submitted that as per Rule 12 CPC the person who has received the summon was not an agent and nowhere in the matter before the court below any fact or evidence has been led that person receiving the summon in any manner was connected to the person against whom the summons was issued. It has also been submitted that day to day functions of the Civil Court in respect of procedure is based on the Civil Court Rules which also provides for service on the party in the manner prescribed therein.

6. Emphasis has been laid on Rule 51 and 53 of the Rules to state that the service is to be effected on a person against whom it has been issued, whenever it is practicable and Court ought not to proceed ex-parte upon anything short of personal service, save when substituted service has been ordered or effected. In Rule 53, it is provided that a process shall be served



by delivering a copy of it to the person addressed and if the person is literate signatures has to be obtained on the summon and if the person is illiterate then thumb-impression is required to be obtained on the original process. It is further submitted by the learned counsel that the learned Court below had allowed the application under Section 5 of the limitation Act on the same set of facts, however, rejected the application under Order 9 Rule 13 CPC. It is further submitted that though the appellant had submitted the handwriting expert's report alongwith the application in support of the contention that the summon does not bear the signatures of the appellant/defendant but the same has not been relied by the Court below. It is further submitted that reply was submitted by the respondent/plaintiff and due opportunity was granted. The respondent/plaintiff had also filed an application for getting the signatures examined by the expert through the State Examiner of Questioned Documents, Police Head Quarters, Bhopal. He invited attention of this Court towards the order sheets of the learned Court below where the application was allowed and opportunities were given to the respondent/plaintiff to submit the admitted signatures of the appellant/defendant for the purpose of examination, the same was submitted but vide order dated 08.10.2012, the said proceedings for examination have been dropped by the Court because such admitted signatures were not available.

7. However, the appellant has submitted that he is not pressing the case on the basis of the expert opinion of the handwriting expert but only on the question of procedural irregularity which has been committed by the learned Court below in accepting service of appellant/defendant and not accepting application under Order 9 Rule 13 CPC despite proving that the



service of summon was not in accordance with the provisions of CPC as well as the Rules.

**8.** No other ground has been advanced during course of arguments.

**9.** Per contra, learned senior counsel appearing for the respondent/plaintiff has submitted that the suit was filed for specific performance. The appellant was spectator to it being a person living in the same house where all the other defendants were living and after the decree was passed, with intention to defeat such decree, such application for setting aside the ex-parte decree was filed belatedly. It has further been submitted that the learned court below while dealing with the issue of specific performance has categorically given findings in regard to proof of the agreement and the equitable relief of execution of sale deed. It is submitted that pursuant to the decree, the sale deed has been executed on 14.07.2009. It has also been submitted that after the decree was issued by the Court below on 28.06.2007, the execution was submitted on 14.01.2008. It has also been submitted that in the cross-examination of other brothers and sisters of the appellant/defendant, the signatures of the appellant over the agreement has been accepted/recognized.

**10.** It is further submitted that even, if chance is given to the appellant to prosecute the case it is not going to give any benefit to the appellant because the agreement has been found to be proved by the court below on the basis of the evidence led by the brothers and sisters. It has further been submitted that the best possible witness who was the boy who received the summon has not been called before the court below for examination which could have thrown light over the service of the notice and as such witness was not called, adverse inference ought to have been drawn against the



appellant that the best possible witness has been hidden from the Court to come to the conclusion in respect of service of notice to the appellant/defendant. It is further submitted that no useful purpose would be served if the matter is remanded back as in the execution, the sale deed has already been executed 19 years back and according to the findings of the court below full consideration has been paid. No other ground has been advanced during the course of arguments.

**11.** Heard learned counsel for the parties and perused the record.

**12.** The uncontroverted facts of the case are that a suit (Civil Suit No.517-A/2016) was filed on 18.12.2006 for specific performance and permanent injunction. Prior to filing of suit Smt. Rais Jahan had expired on 17.04.2006. The suit was filed on the basis of a sale agreement dated 12.10.1999 (Exhibit-P/2) and a receipt dated 20.06.2002 executed by one Smt. Rais Jahan. The appellant was declared ex-parte on 22.12.2006 for not marking her presence before the Court despite service of summon issued by the Civil Court. The summon has been filed alongwith the appeal as Annexure A/6 at page 46 which was issued for appearance of the appellant/defendant on 22.12.2006 before the civil court.

**13.** The suit filed by respondent/plaintiff was decreed on 28.06.2007. The appellant/defendant remained ex-parte from 22.12.2006 i.e. from the first date of appearance of appellant/defendant. Much emphasis has been given by the counsel for the respondent on the merits of the case that the agreement dated 12.10.1999 was proved before the Civil Court. The other defendants have accepted/recognized the signatures of the appellant/defendant being consenter and on the basis of such findings, the suit was decreed. The defendants, including the appellant, were directed to



execute the sale deed within two months in respect of the land in question and in case such sale deed is not executed within time, then the respondent/plaintiff would be entitled to get that executed from the Court. However, the question before this Court is not about the merits of the case but the question is whether the appellant/defendant was declared ex-parte in consonance with the provision of law ?

**14.** The Code of Civil Procedure, 1908 prescribes the method for setting aside ex-parte decree against defendants. The law provides that the person against whom an ex-parte decree has been passed can file an application for setting aside such an ex-parte decree on the ground that the summon was not duly served on him/her and he/she was prevented by sufficient cause from appearing before the court, when the suit was called on for hearing. The Court may on such terms, as the Court thinks fit, may allow such application and shall fix a day for proceeding with the suit.

**15.** The basic principle to set-aside the ex-parte decree is (i) summon to the party was not duly served and (ii) the party was prevented by sufficient cause from appearing when the suit was called on for hearing.

**16.** Hon'ble Apex Court in the case of *Union of India vs. Ramcharan AIR 1964 SC 215* has held that "sufficient cause" should be interpreted liberally so as to advance sufficient justice.

**17.** In the present case in hand, this Court has not to see merits of the case but to see whether the party applying for setting aside the ex-parte decree was served in accordance with law and if served whether such party was prevented by sufficient cause from appearing whenever the matter was called on.



**18.** When the said principles have been analyzed on the basis of the material and evidence produced before the Court, it is found that though the summon (Annexure A/6) which was issued against the appellant/defendant bears signatures said to be of appellant/defendant. However, as per the statement of the process server, Dol Bahadur Thapa, signature on the summon has not been done by the party in front of him. He has further stated that a boy had come out of the house and he had taken the summon inside and got it signed and gave it to him. He has also stated that he does not know the name of the boy who had received the summon and got it signed. It is clear from the statement of process server that the summon of the suit of the first date of the appearance has not been effected on the party as per procedure envisaged in Order 5 of CPC and Rule 51 and 53 of the Rules for service of summon.

**19.** The procedure for delivering the summon by the Court is provided under Rule 9 of Order 5 CPC. As per sub-Rule (3) of Rule 9 of Order 5 CPC, the service on the party through summon is effected by the modes provided in the Rules. For ready reference sub-Rule (3) of Rule 9 of Order 5 CPC is extracted hereinbelow :

***“9. Delivery or transmission of summons for service—***

*(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 to the proper officer to be served by him or one of his subordinates.*

*(3) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment 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.*

**20.** Further, Rule 10, 11, 12, 16 and 18 of Order 5 CPC, being relevant are reproduced hereinbelow :

*10. **Mode of service** — Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.*

*11. **Service on several defendants**— Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.*

*12. **Service to be on defendant on person when practicable, or on his agent**— 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.*

*16. **Person served to sign acknowledgement**— Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.*

*18. **Endorsement of time and manner of service**— The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.*



**21.** In addition, the Rules which govern the field are the Rules framed exercising power under Madhya Pradesh Civil Court Act, 1958. Rule 51 provides for personal service on the litigant/defendant whenever it is practicable and the Court should not proceed ex-parte except when substituted service has been ordered.

**22.** Rule 53 provides the acknowledgment of the service either by signature by a literate person or thumb impression by an illiterate person on the original process/summon. Rule 12 of Order 5 CPC provides for service on defendant in person. Rule 16 of Order 5 CPC provides signature of a person to whom such copy of summon is delivered.

**23.** In the present case in hand, the summon though bears signature of person alleged to be Smt. Farrukh Jahan (appellant/defendant) but same is neither supported and corroborated by the statement of process server who is said to have effected the service, nor of witnesses who has seen delivery of summon. Therefore, in the considered opinion of this Court, the service of summon on the appellant/defendant has not been effected as per law. Now it is to be seen that the second requisite of the provision of Rule 9 Order 13 CPC is met out in regard to sufficient cause which prevented the appellant from appearing on the date of hearing.

**24.** The Hon'ble Apex Court in the case of *Parimal v. Veena (2011) 3 SCC 545* has held that the test which is to be applied for deciding application under Order 9 Rule 13 CPC is to see whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing and did his best to do so and the sufficient cause is for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the Court has to exercise its discretion in the varied and



special circumstances in the case at hand. There cannot be a straitjacket formula of universal application. The extract of the law laid down by the Hon'ble Apex Court is hereinbelow :

*“15. While deciding whether there is sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide State of Bihar v. Kameshwar Prasad Singh [(2000) 9 SCC 94 : 2000 SCC (L&S) 845 : AIR 2000 SC 2306] , Madanlal v. Shyamlal [(2002) 1 SCC 535 : AIR 2002 SC 100] , Davinder Pal Sehgal v. Partap Steel Rolling Mills (P) Ltd. [(2002) 3 SCC 156 : AIR 2002 SC 451] , Ram Nath Sao v. Gobardhan Sao [(2002) 3 SCC 195 : AIR 2002 SC 1201] , Kaushalya Devi v. Prem Chand [(2005) 10 SCC 127] , Srei International Finance Ltd. v. Fairgrowth Financial Services Ltd. [(2005) 13 SCC 95] and Reena Sadh v. Anjana Enterprises [(2008) 12 SCC 589 : AIR 2008 SC 2054] .)*

*16. In order to determine the application under Order 9 Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straitjacket formula of universal application.”*

**25.** When the present case in hand is adjudged on the anvil of the principle of law laid down by the Hon'ble Apex court, it is evident that service of summon of the suit has not been effected on the



appellant/defendant in accordance with law and procedure, therefore, the appellant/defendant was prevented by sufficient cause from appearing on the date for which it was issued.

**26.** As regards the contention of learned counsel for the respondent/plaintiff that the boy who received the summon has not been examined by the appellant/defendant would draw adverse inference against the appellant/defendant is not in accordance with the principles of Evidence Act. The boy whose name has not been disclosed by the process server in his statement, then by no stretch of imagination, the appellant/defendant had any source or occasion to know that boy. The adverse inference would have been drawn against the appellant/defendant in case process server had disclosed the name of the boy and despite that boy had not been called in the witness box by the appellant/defendant.

**27.** When the fact of non-service of summon has been duly proved by the process server, then the appellant/defendant is not required to lead any further evidence in that regard. Once it is proved by process server then the onus was on the respondent/plaintiff to call for that boy or other witnesses to rebut the same that such boy was living in the same house or was related to the appellant/defendant and he got the signature of the appellant/defendant over the summon. In absence of such evidence, the court cannot come to the conclusion that service through an unknown boy was effected on the appellant/defendant.

**28.** The learned court below in the impugned order has opined that once the signature on the summon has been obtained then it would be presumed that the service has been effected and it was not required for the process server to name the person on the service report through whom service has



been effected. It has further been observed by the Court below that the address on which the summon has been issued is the address which has been mentioned in the suit and in the Vakalatnama and presumed that when such address was mentioned in the summon, it must have been served on the said address.

**29.** The question of service is not on the house rather it is on the person, as per the legislative intent. Service is not effected on the house in fact on the party, therefore, even if the address mentioned on the document and application submitted by the applicant is same but that cannot conclude that the service has been effected when the evidence of the process server is contrary.

**30.** The service through relative and agent is provided under Order 5 CPC. Rule 12 provides for service through agent but for that purpose, the proof of appointment of agent is required. Rule 11 Order 5 CPC provides manner of service on several defendants, which is extracted hereinbelow :

*“11. **Service on several defendants.**—Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.*

*12. **Service to be on defendant in person when practicable, or on his agent.** — 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.”*

**31.** As per the said provision, if the defendants are more than one, then service is to be effected on each of the defendants. So, the ground of the respondent/plaintiff that other brother and sisters were served cannot be a ground for presuming service on the appellant/defendant.



**32.** Rule 15 of Order 5 CPC provides where the defendant is absent from the residence, the service can be effected on an adult male or female member residing with him but in the present case, service on appellant/defendant has not been purported to be effected on such adult male or female member, in fact it was served in the light of Rule 11 of Order 5 CPC on the appellant/defendant.

**33.** On the basis of above analysis, it has come crystal clear that the appellant/defendant was not served in accordance with the provisions of CPC and Civil Court Rules, therefore this court is of the considered opinion that the appellant was prevented by sufficient cause from appearing on the date when the matter was called on for hearing.

**34.** Consequently, the appeal succeeds and is allowed. The ex-parte decree dated 28.06.2007 passed in Civil Suit No.517A/2006 against the appellant is hereby set-aside. The matter is remitted back to the Court below to adjudicate the suit from the stage when the appellant/defendant was declared ex-parte.

**35.** Parties are directed to remain present before the Court below on **01.09.2025**. The appellant is directed not to seek any unnecessary adjournments as the matter is old and has been pending since 2006. The trial Court is directed to decide the suit as expeditiously as possible.

**36.** Record of the Court below be sent back henceforth alongwith copy of this order.

**(DEEPAK KHOT)**  
**JUDGE**