



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR**

S.B. Civil Miscellaneous Appeal No. 2623/2024
CNR: RJHC010728772024 | URN: CMA / 6608U / 2024



1. Kanta Devi W/o Late Shri Vinod Kumar, Aged About 59 Years, R/o Mehrasar Upadhiyan Earlier Residing At Chidawa, Dit. Jhunjhunu, Presently Residing At Plot No. 11, Shanker Vihar, Murlipura, Dist. Jaipur
2. Himanshu S/o Late Shri Vinod Kumar, Aged About 40 Years, R/o Mehrasar Upadhiyan Earlier Residing At Chidawa, Dit. Jhunjhunu, Presently Residing At Plot No. 11, Shanker Vihar, Murlipura, Dist. Jaipur
3. Deepanshu S/o Late Shri Vinod Kumar, Aged About 33 Years, R/o Mehrasar Upadhiyan Earlier Residing At Chidawa, Dit. Jhunjhunu, Presently Residing At Plot No. 11, Shanker Vihar, Murlipura, Dist. Jaipur
4. Preksha D/o Late Shri Vinod Kumar, Aged About 34 Years, R/o Mehrasar Upadhiyan Earlier Residing At Chidawa, Dit. Jhunjhunu, Presently Residing At Plot No. 11, Shanker Vihar, Murlipura, Dist. Jaipur

-----Appellants

Versus

1. Parsaram S/o Shri Hariram, R/o Village Sahwa, Tehsil Taranagar, Dist. Churu
2. State Of Rajasthan-State, Through Sub-Registrar, Registration Office, Bhanipura, Tehsil Sardarshahar, Dist. Churu

-----Respondents

For Appellant(s) : Mr. Narendra Thanvi
Mr. Mahendra Thanvi
Mr. Chetan Singh Bhati

For Respondent(s) : Mr. Muktesh Maheshwari
Mr. Gaurav Choudhary

HON'BLE MR. JUSTICE FARJAND ALI



Reportable-

DATE OF CONCLUSION OF ARGUMENTS	13/07/2026
DATE ON WHICH ORDER IS RESERVED	13/07/2026
FULL ORDER OR OPERATIVE PART	Full Order
DATE OF PRONOUNCEMENT	17/09/2026

BY THE COURT:-

1. The instant civil miscellaneous appeal is directed against the order dated 29.08.2024 passed by the learned District Judge, Churu in Civil Misc. Restoration Case No.18/2013, *Kanta Devi & Ors. v. Parsaram & Anr.*, whereby the application preferred by the appellants under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure, 1908 (for short, "the CPC"), seeking setting aside of the ex parte judgment and decree, has been dismissed.
2. The controversy lies within a narrow compass. The appellants-defendants contend that they were never duly served with the summons of the suit and that the learned trial Court, without recording the satisfaction required in law for resorting to substituted service, proceeded to direct publication of the summons in a newspaper and thereafter proceeded against them ex parte. Their case is that they acquired knowledge of the decree only when proceedings for its execution were initiated. The question, therefore, is whether the mode of service adopted by the learned trial Court was sufficient in law to constitute due service and, consequently, whether the ex parte decree could legitimately be allowed to stand.



2.1. The relevant facts, in brief, are that respondent-plaintiff Parsaram instituted Civil Regular Suit No.116/2013 before the learned District Judge seeking specific performance of an agreement to sell in respect of agricultural land situated at Village Mehrasar Upadhiyan against the present appellants and respondent No.2.

2.2. Vide order dated 11.10.2013, the learned trial Court directed issuance of summons to the defendants and fixed 01.11.2013 for their appearance. Summons were accordingly issued to defendant Nos.1 to 4. The summons, however, were returned unserved. The report of the process server recorded that the defendants were not residing at Chirawa and that the house was found locked. Upon inquiry, the process server was informed that defendant Kanta Devi was residing somewhere in Jaipur, though she occasionally visited the village. The report further contained the information that she was residing in Shankar Vihar Colony, Jaipur, but that her complete address was not available.

2.3. Upon receipt of the summons with the aforesaid report, the learned trial Court again directed issuance of summons vide order dated 01.11.2013. On 16.11.2013, the order-sheet recorded the non-receipt of duly served summons and the matter was adjourned to 06.12.2013. On 06.12.2013, it was again recorded that the summons had returned unserved and that the defendants had gone to Jaipur.



2.4. At this juncture, learned counsel for the plaintiff moved an application seeking substituted service through publication in a daily newspaper. The application was allowed and the learned trial Court directed publication of notice. The subsequent order-sheet records publication of the notice and receipt of a copy of the newspaper on the record. Thereafter, when the matter was taken up, none appeared on behalf of defendant Nos.1 to 4 and, after calls were made, they were proceeded against ex parte. Ex parte evidence was subsequently recorded.

2.5. The suit was contested by defendant No.5, stated to be the concerned Sub-Registrar/Registrar. Ultimately, the suit came to be decreed in favour of the plaintiff. By the decree, the plaintiff was held entitled to obtain execution of the sale deed upon payment of the remaining sale consideration to defendant Nos.1 to 4 within the stipulated period. Provision was also made for deposit of the balance consideration before the trial Court in the event of failure on the part of the defendants to execute the sale deed. A decree of perpetual injunction was further granted restraining the defendants from interfering with the plaintiff's possession and cultivation over the suit property and from transferring or alienating the same.

2.6. It was thereafter, upon receiving notice in the execution proceedings, that the appellants claim to have learnt of the judgment and decree. They promptly moved an application under Order IX Rule 13 read with Section 151 CPC, asserting that no



valid service had ever been effected upon them and that they had consequently been deprived of an opportunity to contest the suit. The application was dismissed by the learned Court below, leading to the present appeal.

3. I have heard the counsel for the parties and the record, including the order impugned, has been carefully examined.

4. Order IX Rule 13 CPC furnishes a specific remedy to a defendant against whom an ex parte decree has been passed. The provision enables such defendant to approach the Court which passed the decree and seek its setting aside upon establishing either that the summons was not duly served upon him or that, notwithstanding due service, he was prevented by sufficient cause from appearing when the suit was called on for hearing.

4.1. The two contingencies contemplated by the provision operate independently. Thus, where the Court finds that the summons were not duly served, the defendant is not required additionally to establish a separate sufficient cause for his non-appearance. Conversely, even where service is found to be duly effected, an ex parte decree may still be interfered with where the defendant establishes sufficient cause for his absence.

4.2. The provision has to be understood in the context of the fundamental requirement of a fair opportunity of hearing. A civil proceeding may certainly be determined ex parte where a defendant, despite due service and adequate opportunity, chooses not to appear. But the consequence is materially different where



the defendant has not been brought before the Court through a legally sufficient mode of service. The requirement of service is intended to ensure that the party against whom relief is sought is made aware not merely of the existence of the litigation, but also of the necessity to appear and answer the claim.

4.3. The second proviso to Order IX Rule 13 CPC introduces an equally important qualification. An ex parte decree is not to be set aside merely because there has been an irregularity in service if the Court is satisfied that the defendant had notice of the date of hearing and sufficient time to appear and answer the plaintiff's claim.

4.4. The statutory inquiry, therefore, is ultimately directed towards the substance of the opportunity afforded to the defendant. A minor procedural irregularity, which has caused no prejudice because the defendant had actual or otherwise sufficient notice and adequate time to contest, cannot be permitted to unsettle a decree. At the same time, the proviso cannot be employed to sustain a decree where the material itself fails to establish that the defendant knew of the proceedings and had a reasonable opportunity to participate.

4.5. In the present case, this aspect has to be examined in conjunction with the manner in which substituted service was ordered. The ordinary mode of service is the normal means by which a defendant is brought before the Court. Substituted service under Order V Rule 20 CPC is an exception to that ordinary



course. It is consequently not enough that an attempt at ordinary service has failed. The Court must examine the circumstances which resulted in such failure and must satisfy itself that the statutory conditions for adopting substituted service exist.

4.6. A returned summons may give rise to several situations. The defendant may have refused service; he may have deliberately kept himself away; he may have shifted his residence; the address supplied may be incomplete or incorrect; or the defendant may genuinely be residing elsewhere. These situations cannot be treated alike. A locked house, without anything further, does not establish deliberate evasion. Likewise, an incomplete address does not justify dispensing with further efforts to ascertain the defendant's correct address when the material before the Court itself furnishes a clue to his whereabouts.

4.7. It is in this background that the process server's report assumes decisive significance. The report in the present matter did not state that Kanta Devi had refused to accept the summons or had deliberately concealed herself to frustrate service. What it recorded was that the house was locked and that inquiry revealed that she was residing in Jaipur and was stated to be residing in Shankar Vihar Colony. The report thus did not close the avenue of ordinary service; rather, it furnished the Court with a specific lead which could have been pursued.

4.8. The appropriate course in such circumstances was to require the plaintiff to furnish the complete address of the defendant and



to make further efforts for ordinary service. Before directing substituted service, the Court was required to consider whether the available material disclosed a conscious attempt on the part of the defendant to evade service or whether, despite reasonable diligence, ordinary service had become impracticable.

4.9. The significance of this requirement is heightened by the consequences which followed. The suit was one for specific performance of an agreement concerning immovable property. The proceedings ultimately resulted not merely in a money decree but in a direction for execution of a sale deed and a decree of perpetual injunction affecting the appellants' rights in the suit property. In such circumstances, the Court ought to have exercised particular care before treating an unsuccessful attempt at service as sufficient to proceed ex parte. The order dated 06.12.2013 is therefore of central importance. It is the order from which the subsequent course of substituted service emanated. The said order reads as under:

"वकील प्रार्थी उपस्थित।

अप्रार्थी संख्या 05 की तरफ राजकीय अभिभाषक उपस्थित।

अप्रार्थी संख्या 01 ता 04 के सम्मन अदम तामील आये है उन पर पक्षकारान के जयपुर जाने की सूचना अंकित की है। वकील प्रार्थी ने एक प्रार्थना पत्र पेश कर प्रतिवादीगण पर नोटिस तामील दैनिक समाचार पत्र में प्रदर्शित करवाये जाने हेतु प्रार्थना की है। प्रार्थना पत्र स्वीकार किया जाता है। अखबार साया नोटिस पेश होने पर जारी हो। पत्रावली वास्ते तलवी पक्षकारान हेतु दिनांक 15.01.2014 को पेश हो।"



The order has to be read in the light of the material that was already before the learned trial Court. By that stage, the Court was aware that the summons had not been served; that the premises at the earlier address were found locked; and, significantly, that information had been received that Kanta Devi was residing in Jaipur, at Shankar Vihar Colony. Despite this, the order does not disclose a clear satisfaction that the appellants were deliberately keeping out of the way in order to evade service.

4.10. Nor does the order demonstrate that the Court considered it necessary to obtain the appellants' complete address before adopting substituted service. The fact that the defendants were stated to have gone to Jaipur could not, by itself, furnish a rational basis for concluding that they were deliberately avoiding the process of the Court. The two concepts are materially distinct: absence from a particular address is not equivalent to evasion of service.

5. The statutory requirement of satisfaction preceding substituted service is intended to prevent precisely such a situation. The Court must apply its mind to the process server's report and the surrounding circumstances and arrive at an informed conclusion that ordinary service cannot reasonably be effected. Such satisfaction may, depending upon the language and circumstances, be inferred from the order itself and need not invariably be expressed in any particular formula. But the record must nevertheless disclose the existence of the judicial



satisfaction which the statute requires. The requirement is not a matter of mere procedural formality, nor is the power to direct substituted service an unstructured or absolute discretion vested in the trial Court. Substituted service under Order V Rule 20 CPC is an exceptional mode of service, and its invocation is conditioned upon the Court first satisfying itself, on the basis of the material available on record, as to the existence of the circumstances contemplated by the provision. In substance, the Court is required to address and record its satisfaction on three distinct aspects: first, whether there is reason to believe that the defendant is deliberately avoiding service or is keeping out of the way for the purpose of evading service; secondly, whether, for any other reason, the summons cannot reasonably be served upon the defendant in the ordinary manner; and thirdly, whether the ordinary and personal mode of service has in fact been attempted with reasonable diligence and has proved impracticable or unfeasible before resort is made to the exceptional mode of substituted service. These requirements are intended to ensure that substituted service is not employed merely because an earlier attempt at service has failed, but only after the Court has judicially examined why ordinary service has failed and whether the circumstances justify departing from the normal rule of personal service.

5.1. In the present case, such satisfaction is not discernible. On the contrary, the material available before the learned trial Court suggested that the whereabouts of Kanta Devi were not wholly





unknown. Her residence in Jaipur and even the locality of Shankar Vihar Colony had been disclosed. The appropriate response was, therefore, further inquiry and not immediate substitution of ordinary service by newspaper publication. Indeed, the manner in which the order dated 06.12.2013 came to be passed demonstrates the absence of the requisite judicial exercise. The learned trial Court, after noticing the application moved by the plaintiff for publication, has, in substance, merely recorded that such an application was presented and thereafter proceeded to allow the same. There is no discernible consideration as to whether the defendants were avoiding service or keeping themselves out of the way; no finding that the summons could not, for any other reason, be served in the ordinary manner; and no satisfaction that reasonable attempts at normal personal service had first been made and had genuinely proved unfeasible. Such an approach cannot be countenanced where the consequence of the order is to replace the ordinary mode of service by an exceptional mode which may ultimately culminate in the defendant being proceeded against ex parte. The Court, before passing such an order, is required to undertake a judicial exercise and to record its satisfaction as to why the ordinary mode of service has become impracticable and why the particular mode of substituted service proposed is appropriate in the facts and circumstances of the case. The adoption of substituted service, therefore, cannot be permitted in an unscrupulous, cavalier or routine manner, for what the law requires is not a mechanical



endorsement of an application but a conscious judicial determination founded upon the material available before the Court. The order must disclose, either expressly or by necessary implication, that the statutory conditions precedent for invoking substituted service have been examined and found to exist.

5.2. The choice to employ newspaper publication also required the Court to consider whether that mode was reasonably capable of bringing the proceedings to the knowledge of the defendants. Publication is not an end in itself. Its purpose is communication. The newspaper selected should consequently have a meaningful circulation in the locality where the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain. The relevance of the newspaper's circulation, its local reach and the connection of the defendant with the locality cannot be treated as matters of no consequence.

5.3. The Court, while directing publication, would ordinarily be expected to consider the defendant's last known residence, the locality in which he is stated to be residing, the nature and extent of circulation of the newspaper, the language in which it is published, the particulars to be incorporated in the notice and the time to be afforded to the defendant thereafter. These considerations become particularly important where the Court proposes to proceed ex parte on the strength of such publication.

5.4. A copy of the newspaper subsequently placed on the record establishes the fact that publication was made. It does not,



standing alone, establish that the publication constituted effective substituted service. There is a distinction between the occurrence of publication and the legal efficacy of that publication as service. The latter depends upon whether the statutory requirements preceding the publication were satisfied and whether the chosen mode was reasonably calculated to bring the proceedings to the defendant's notice.

5.5. The record does not disclose that the learned trial Court undertook this exercise. There is no apparent consideration of whether the newspaper selected had sufficient circulation in the locality in which the appellants were residing or were reasonably believed to be residing. Nor is there any material demonstrating that the Court first exhausted the reasonable possibility of effecting ordinary service at the Jaipur address indicated in the process server's report.

5.6. The evidence subsequently brought on record also does not materially alter the position. The process server, when examined, stood by the substance of his report and stated that Kanta Devi was residing in Jaipur. The evidence of AW-2 also referred to the premises being found locked. An affidavit on behalf of Kanta Devi was placed on record on 13.11.2013. The cumulative effect of this material does not support an inference of deliberate avoidance of service.

5.7. What emerges from the record is thus not a case of a defendant who was fully aware of the proceedings and consciously



chose to remain absent. It is a case in which the defendants' presence at the address furnished for service could not be secured, while the process server simultaneously brought to the Court's notice an alternative place of residence. The distinction is substantial and cannot be lost sight of merely because newspaper publication was subsequently carried out.

5.8. The second proviso to Order IX Rule 13 CPC also does not assist the respondent in the circumstances of the present case. For its application, the Court must be satisfied that the defendant had notice of the date of hearing and sufficient time to appear and answer the claim. Such notice cannot be presumed merely because a publication appeared in a newspaper. The material must reasonably support the conclusion that the defendant was afforded an effective opportunity to participate.

5.9. Here, there is no convincing material demonstrating that the appellants had knowledge of the pendency of the suit or of the date on which they were required to appear. There is equally no material from which it can safely be concluded that the newspaper publication was made in a newspaper having such circulation in the locality of their residence as would reasonably bring the proceedings to their notice.

5.10. The matter cannot, therefore, be characterised as one involving a mere irregularity in service. The defect goes to the root of the question whether the appellants were ever afforded the opportunity contemplated by law. The subsequent ex parte



proceedings, including recording of evidence and passing of a decree affecting valuable rights in immovable property, consequently cannot be sustained on the footing that the appellants had waived their right to contest.

6. The learned Court below, while considering the application under Order IX Rule 13 CPC, was required to examine these circumstances in their entirety. Instead, the effect of the publication appears to have been treated as sufficient to conclude that service had been duly effected. In doing so, the distinction between a formal act of publication and legally effective substituted service has not been adequately appreciated.

6.1. This Court is conscious that an application under Order IX Rule 13 CPC cannot be allowed merely because a defendant subsequently chooses to allege non-service. Finality of litigation is undoubtedly an important consideration, and a defendant who, despite due notice and sufficient opportunity, remains absent cannot ordinarily be permitted to reopen the proceedings on technical grounds. But that principle has no application where the record itself raises a serious and substantial doubt regarding the very service through which the defendant was supposed to have been brought before the Court.

6.2. The present case falls within the latter category. The process server did not report deliberate avoidance. The defendants' whereabouts were not entirely unknown. A possible address at Jaipur was indicated. The complete address was not sought from



the plaintiff. No satisfactory reason for dispensing with further ordinary service is reflected. Nor does the record demonstrate that the newspaper chosen for publication was selected with due regard to the locality and circulation relevant to the defendants.

6.3. In these circumstances, the publication cannot be regarded as having cured the failure of ordinary service. The ex parte proceedings which followed were, therefore, founded upon a mode of service which did not satisfy the requirements of law.

6.4. Once the Court reaches the conclusion that the summons were not duly served and that the defendants were thereby deprived of an opportunity to appear and contest the suit, the application under Order IX Rule 13 CPC deserves to be allowed. The restoration of the suit in such circumstances does not amount to adjudication in favour of the defendants on the merits. It merely restores to them the opportunity which the law intended them to have in the first place.

6.5. It is also clarified that nothing stated herein shall be construed as an expression of opinion on the merits of the plaintiff's claim for specific performance, the validity or otherwise of the agreement relied upon by him, or the defence which may be available to the appellants. Those questions remain open for consideration by the learned trial Court in accordance with law.

7. For the reasons aforesaid, the appeal is allowed. The order dated 29.08.2024 passed by the learned District Judge, Churu in Civil Misc. Restoration Case No.18/2013 is quashed and set aside.



Consequently, the ex parte judgment and decree dated 23.08.2017 passed in Civil Regular Suit No.116/2013 are also set aside. The suit shall stand restored to its original number and to the stage at which it stood on 16.11.2013.

7.1. The appellants-defendants shall appear before the learned trial Court and shall file their written statement within a period of 60 days from the date of their appearance. Thereafter, the learned trial Court shall proceed with the suit in accordance with law and afford due opportunity of hearing to all concerned.

7.2. The learned trial Court shall decide the suit uninfluenced by any observation made in the present judgment, particularly those touching upon the merits of the substantive dispute.

8. All pending applications, including stay applications, if any, stand disposed of.

(FARJAND ALI),J

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