

A.F.R.

Judgment reserved on. 30.01.2026

Judgment delivered on. 11.02.2026

Neutral Citation No. - 2026:AHC:30175

Court No. - 38

Case :- FIRST APPEAL FROM ORDER No: - 1370 of 2024

Appellant :- Subhashchandra Gupta

Respondent :- Ajay Kumar Sharma And 5 Others

Counsel for Appellant :- Syed Fahim Ahmed

Counsel for Respondent :- Devid Kumar Singh, Prateek Rai

Hon'ble Sandeep Jain,J.

1. The instant appeal under Order 43 Rule 1(t) read with Section 104 CPC has been preferred by the defendant against the impugned order dated 23.5.2024 passed by Indu Dwivedi, Additional District Judge, Court No.6, Ghaziabad in Miscellaneous Case No. 71 of 2019 Subash Chand Gupta vs. Ajay Kumar Sharma and others whereby, the defendants application no.4-C under Order 41 Rule 21 CPC for recalling the ex-parte judgment in Civil Appeal no.146 of 2011, and to rehear the appeal on merits, has been rejected.

2. Appeal is admitted.

3. Factual matrix is that the plaintiff -respondents no. 1 to 3 filed O.S. no. 544 of 1997 against the defendant-appellant and co-defendant /respondent Phool Singh(died during pendency of suit) for the relief of permanent injunction and possession, which was dismissed on merits by Additional Civil Judge (Senior Division) Court No.2 Ghaziabad on 18.8.2011, which was challenged by the plaintiffs by filing Civil Appeal no. 146 of 2011 Ajay Kumar Sharma and others vs. Gangaram and others in the Court of District Judge, Ghaziabad, which was subsequently after admission, transferred to the Additional District Judge, Court no.6, Ghaziabad.

Relevant chronology of C.A. no.146 of 2011

4. Civil Appeal no.146 of 2011 was admitted for hearing on 16.9.2011 and thereafter, notices were issued on the respondents fixing 15.11.2011 for disposal of stay application and the appellants were directed to take steps within 7 days. On 28.11.2011 the appellants moved an application 17-C2 for effecting service of summons through registered post, alongwith application 19-C2 for effecting

service through publication in newspaper, and the court fixed 30.11.2011 for disposal of the above applications. On 30.11.2011, the plaintiff-appellants submitted before the court that during the pendency of the suit the disputed property has been sold to the defendant-respondent no.4 Subash Chand Gupta, as such none is taking interest on behalf of respondents no.1 to 3 and respondent no. 4 was deliberately not appearing before the court whereas, he was aware of the appeal. It was further submitted that the respondent was in a hurry to sell the disputed property, because no injunction has been granted. On this ground, it was prayed by the appellants that they be permitted to effect service on respondents through publication, which was supported by an affidavit of appellant Ajay Kumar Sharma(paper no. 20-C).

5. The appellate court recorded a finding that previously also notices were sent on the respondents but service could not be effected on them, hence, in the interest of justice, the court on 30.11.2011 permitted the appellants to effect service through publication on their expenses, and to take steps within 4 days. The appellants application 19-C2 was accordingly disposed and the appellate court fixed 21.12.2011 for hearing.

6. The appellate court on 16.2.2012 recorded that the service on respondents was sufficient by publication in newspaper 21-C2, but none of them was present as such, the court proceeded ex-parte against the defendant/respondents and fixed 29.2.2012 for hearing ex-parte arguments of the plaintiff-appellants.

7. The appellate court on 19.4.2012 recorded that the acknowledgement due(AD) of the registered notices, which were sent to the respondents was not available on the record. Besides that, there was no proof that notice was sufficient on the learned counsel of the respondents, who was appearing in the lower court. The court also noted that the plaintiff 's suit was dismissed on merits, which has been challenged in the appeal. In view of the above facts, the court concluded that it was expedient that notices of hearing of appeal be sent to the learned counsel of the defendant/ respondents appearing in the trial court, in order to hear the appeal on merits and for this, the appellants were directed to take steps within a week.

8. The appellate Court on 23.7.2012 recorded that notices have been again sent to the respondents, but they are not present. The court fixed 13.8.2012 for ex-parte hearing of the appeal. Ultimately, the appellate court heard the arguments of the appellants on 6.7.2019 and fixed 17.7.2019 for pronouncement of judgment. On 17.7.2019, the Civil Appeal was allowed ex-parte and consequently, the decree passed in O.S. no. 544 of 1997 was set aside and the plaintiff 's suit

was decreed. The defendant/respondents were directed to handover the possession of the disputed property within 3 months to the appellants, failing which, the appellants were held entitled to get it in accordance with law, through court.

Proceedings of Miscellaneous Case no. 71 of 2019

9. This case was instituted by the defendant-appellant Subash Chand Gupta under Order 41 Rule 21 read with Section 151 CPC for recalling ex-parte judgment dated 17.7.2019 in C.A. 146 of 2011 on 14.8.2019, with the averments that on 2.8.2019 he received an envelope at his residence, but at that time, he was in Dehradun for some necessary work, as such, he was not able to see the envelope but after returning on 8.8.2019, when he opened the envelope, then he came to know that the plaintiff/ appellants had filed a caveat under Section 148-A CPC in the High Court, Allahabad. It was further averred that by going through the contents of the envelope he became aware that in C.A. 146 of 2011 some order has been passed regarding which, the plaintiff has filed a caveat in the High Court. It was further submitted that on 9.8.2019 he contacted his Advocate Braham Prakash Nirbhya and showed him the envelope, then his Advocate inspected the record of the appeal on 13.8.2019 and then he became aware that the above appeal has been ex-parte decided. He further averred that from the inspection of the above file, he became aware that no registered notices or summons were ever served on him and service was deemed sufficient on him through publication in a newspaper, which was not read by him, as such, he never became aware about the appeal. It was further submitted that there was also no notice of the appeal on the learned counsel, who was appearing for him in the trial court. It was further submitted that due to the ex-parte hearing of the appeal, he has suffered severe loss and as such, the order dated 17.7.2019 passed in the appeal be recalled and the appeal be heard and decided on merits, after hearing him. An affidavit of defendant Subash Chand Gupta, was submitted with the above application.

10. The above application of the appellant was opposed by the plaintiffs, on the ground that even in the O.S. 544 of 1997 after filing his written statement, the defendant/ appellant Subash Chand Gupta remained absent in order to delay the disposal of the suit, which was also mentioned in the judgment of the trial court. It was submitted by the plaintiffs, that the defendant/appellant deliberately failed to appear in the appeal whereas, he was fully aware of the appeal. It was admitted that service was effected on the defendant's through publication in the local newspaper, which was paper no. 21-C on the record of the appeal. It was further submitted that since the defendant was fully aware about the appeal as such, the application was not

legally maintainable, which was liable to be dismissed. An affidavit of plaintiff Ajay Kumar Sharma was filed in support of the objection.

11. The appellate court by impugned order dated 23.5.2024 has rejected the defendant/appellants application no.4-C under Order 41 Rule 21 CPC on the ground that it is not the case of the defendant that summons and notices were sent on his wrong address because the address mentioned by the defendant in his application was the same, as was mentioned in the plaint and memo of the appeal. It was further concluded by the court that it can be presumed that notices and summons sent to the defendant were duly served on him. Besides that, publication in the newspaper was also effected. The court was of the opinion that since the defendant has not filed the copy of the caveat, his assertion of knowledge through caveat was not reliable. Ultimately, the court on the basis of conduct of the defendant presumed, that he was having notice of the appeal through summon and publication, but he deliberately failed to appear before the appellate court, but immediately after the passing of the ex-parte decree, has appeared before the court within a month, which shows that he was having full knowledge of the appeal, but he deliberately failed to appear. Aggrieved against the rejection of the above application, the defendant has filed this instant appeal under Order 43 Rule 1(t) CPC.

Submissions of learned counsel of the parties

12. Shri Pramod Jain learned senior counsel for the defendant/appellant submitted that there is no documentary proof on record to presume that registered notices were ever sent to the defendant/ appellant, which were refused to be accepted by him; that summons sent through process server were ever refused to be accepted by the appellant; the appellant was avoiding service of summon sent through process server or registered post, as such, without the above evidence, the appellate court could not have ordered the service to be effected on the appellant through publication in local newspaper. Learned counsel submitted that substituted service through publication in a newspaper can only be effected if, the court is of the opinion that the defendant is deliberately avoiding service through normal mode. Learned counsel further submitted that ordinarily at least twice or thrice registered notices or summons through process server are sent on the defendant/respondent, and when it becomes evident that the defendant was trying to avoid the service, only then, it is ordered that the substituted service be effected through publication in the local newspaper.

13. Learned counsel further submitted that in this case the defendant/appellant was resident of Delhi, but the newspaper in

which summons were published, was having no circulation in Delhi, which was not read by the appellant, as such, even after publication, the appellant remained unaware about the appeal and hence, could not appear before the court. Learned counsel submitted that the appellate court even tried to effect service on the counsel of the appellant, who appeared in the trial court, but there is no evidence that notice was duly served on the counsel. Learned counsel submitted that since there was no service of notice or summon on either the appellant or his counsel in the trial court, as such, no one could appear before the appellate court during the hearing of the appeal, but still, the appellate court has presumed from the conduct of the appellant that he was fully aware of the proceedings of the appeal and he deliberately did not appear before the appellate court, which is a perverse finding. It was further submitted that without following the mandatory provisions of Order V CPC, service has been presumed sufficient on the defendant's, which is illegal. Learned counsel in support of his contention has relied upon the case law of :-

(1)Om Prakash vs. Prakash Chand and ors. Neutral Citation 2004 AHC 106(DB).

(2)K. Raja vs.V.Prabhakar, Neutral Citation 2024 KHC 49086 (Karnataka).

(3)Teharoon Chand vs. Surajmull Nagarmull AIR 1984 Cal 82(DB).

(4)Mrs.Payal Ashok Kumar Jindal vs. Capt. Ashok Kumar Jindal (1992)3 SCC 116.

(5)Smt.Yallawwa vs.Smt.Shantavva (1997)11 SCC 159.

14. Per contra, learned counsel for the plaintiff-respondents submitted that the defendant/appellant was well aware of the proceedings of the appeal, who deliberately did not appear before the appellate court in order to delay the disposal of the appeal, as such, the appellate court has rightly rejected his recall application. Learned counsel further submitted that notices and summons were duly sent to the appellant, and substituted service was also effected on him through publication in local newspaper, which was in accordance with the relevant provisions of Order V CPC, as such, no illegality was committed by the appellate court in hearing and deciding the appeal ex-parte. It was further submitted that the appellate court has rightly noted the conduct of the appellant, who deliberately avoided appearing before the appellate court during the pendency of the appeal. It was further submitted that notice was also served on the learned counsel of the defendant, who was appearing in the original suit before the trial court, but even the counsel deliberately failed to appear before the appellate court. With these submissions, it was prayed that the appeal is meritless and it be dismissed.

15. I have heard the learned counsel of both the sides and perused the impugned order, as well as, the record of the lower court.

16. On the basis of the submissions of the learned counsel of the parties and the perusal of the record, the following questions arise for determination in this appeal:-

(i) Whether the first appellate court was justified in allowing the plaintiff-appellants application for effecting substituted service on the defendant-respondents?

(ii) Whether there was sufficient material on record to arrive at a conclusion that the defendants-respondents were avoiding service and they were deliberately not appearing in the appeal?

(iii) Whether the first appellate court was justified in hearing the appeal ex-parte without affording the defendants-respondents due opportunity of hearing?

Relevant Statutory Provisions

17. For appreciating the controversy in issue, it will be appropriate that the relevant provisions of Order V CPC are considered. The relevant provisions as mentioned in Order V Rule 9,12,15,17,19,20,21 CPC read as under:-

9. Delivery of summons by Court.—(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 either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.*

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him in such manner as the Court may direct.

(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:

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

(4) Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgment due), the provisions of rule 21 shall not apply.

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an

endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of courier agencies for the purposes of sub-rule (1).

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.

15. Where service may be on an adult member of defendant's family.—Where in any suit the defendant is absent from his residence at the time when the service of summons 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 he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him.

Explanation.—A servant is not a member of the family within the meaning of this rule.

17. Procedure when defendant refuses to accept service, or cannot be found.—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 so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

19. Examination of serving officer.—*Where a 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 that the summons has been duly served or order such service as it thinks fit.*

20. Substituted service.—*(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.*

(1A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

(2) Effect of substituted service.—Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed.—Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

21. Service of summons where defendant resides within jurisdiction

of another Court.—A summons may be sent by the Court by which it is issued, whether within or without the State, either by one of its officers [or by post or by such courier service as may be approved by the High Court, by fax message or by Electronic Mail service or by any other means as may be provided by the rules made by the High Court] to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

Case law referred and considered

18. A Division Bench of this Court in ***Om Prakash*** (supra) after considering Order V Rule 20 CPC held as under:-

“ that substituted service is permissible, provided the courts record the reasons after being fully satisfied that the service cannot be effected in an ordinary manner and it cannot be taken as a matter of right. Party cannot ask the court that it wants to serve the defendant/respondent by substituted service. The courts have deprecated the practice of filing such an application and categorically held that substituted service is not permissible unless the court records the reasons reaching the conclusion that it is not possible to serve the defendant/respondent in an ordinary manner.”

19. A Division Bench of the Calcutta High Court in ***Teharoonchand*** (supra), while considering service of summons under Order V Rule 20 CPC held as under:-

“Before issuing summons under Order V, Rule 20 of the Code, the court is to be satisfied that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason summons cannot be served in the ordinary way. Before such satisfaction, the court has to consider the case carefully having regard to the nature of the earlier attempts made for the service of summons. Mere assertion of the plaintiff in this respect to attract the provisions of Order V, Rule 20 of the Code will not be enough. Only when the court is satisfied from the materials on record that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason summons cannot be served in the ordinary way, the court will be entitled to order service of summons under Order V, Rule 20 of the Code.”

20. A Single Judge Bench of the High Court of Karnataka in the case of ***K. Raja*** (supra) has held that the provisions of Order V Rule 17 and Order V Rule 20 of the Code, are to be read conjointly. It was

held that without following the mandatory procedure prescribed in Order V Rule 17, provisions of Order V Rule 20 of the Code cannot be invoked.

21. Similarly, a Single Judge Bench of the High Court of Madhya Pradesh in the case of ***Virendra Kumar Sondhi vs Sudesh Kumar Suri and others*** 2022 SCC OnLine MP 1304, held as under:-

“14. However, the substituted service cannot be ordered in a routine manner. Before resorting to the provision of Order 5 Rule 20 of C.P.C., it is obligatory for the Court to record its satisfaction that the defendant was keeping out of the way for the purpose of avoiding service and the summons could not be served in ordinary manner.”

22. The Apex Court in the case of ***Mrs. Payal Ashok Kumar Jindal*** (supra), where in the matrimonial petition filed by the respondent husband for divorce, registered notices sent to the appellant were returned with the postal endorsement that she could not be found on the given addresses, has held that :-

“.....there is no material on the record to reach a conclusion that the appellant refused to receive the notices. After the notices sent by registered post were received back, the Family Court did not make any attempt to serve the appellant through the process of the Court. Under the circumstances, resort to the substitute service by way of publication in the newspaper was not justified. We are, therefore, of the view that there was sufficient cause for the non-appearance of the appellant in the matrimonial petition before the Family Court.”

23. The Apex Court in the case of ***Smt. Yallawwa*** (supra), while upholding the order of the High Court setting aside the ex-parte decree of divorce passed against the respondent wife, was considering whether in the matrimonial proceeding, service was sufficient on the wife, held as under:-

“The learned counsel for the respondent was also justified in submitting that the trial court could not have almost automatically granted the application for substituted service without taking steps for serving the respondent by ordinary procedure as laid down by Order V Rules 12,15 and 17 CPC. It must be kept in view that substituted service has to be resorted as the last resort when the defendant cannot be served in the ordinary way and the court is satisfied that there is reason to believe that the defendant is keeping out of

the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way. In the present case, it appears that almost automatically the procedure of substituted service was resorted to.”

24. The Apex Court in the case of ***Smruti Pahariya vs. Sanjay Pahariya (2009) 13 SCC 338 (by 3 Judges)***, while upholding the judgment of the High Court setting aside the ex-parte divorce decree granted to the appellant wife, held as under:-

“12..... Looking at the service return, the Court found that service was not a proper one and the Court was also not satisfied with the endorsement of the courier. Under such circumstances, the Courts direction on the prayer of the appellant-wife, for substituted service under Order 5 Rule 20 of the CPC is not a proper one. Direction for substituted service under Order 5 Rule 20 can be passed only when Court is satisfied "that there is reason to believe that the defendant is keeping out of the way for the purpose of evading service, or that for any other reason the summons cannot be served in the ordinary way.”

13. In the facts of this case, the Court did not, and rather could not, have any such satisfaction as the Court found that the service was not proper. If the service is not proper, the Court should have directed another service in the normal manner and should not have accepted the plea of the appellant-wife for effecting substituted service. From wife's affidavit asking for substituted service, it is clear that the servant of the respondent-husband intimated her advocate's clerk that respondent-husband was out of Bombay and will be away for about two weeks. However, the appellant-wife asserted that the respondent-husband was in town and was evading. But the Court on seeing the service return did not come to the conclusion that the husband was evading service. Therefore, the Court cannot, in absence of its own satisfaction that the husband is evading service, direct substituted service under Order 5 Rule 20 of the Code.”

25. The Apex Court in the case of ***Messers Neerja Realtors Private Limited vs. Janglu (Dead) through LR's (2018) 2 SCC 649 (by 3 Judges)***, while upholding the judgment of the High Court setting aside the ex-parte decree of specific performance granted in favour of the appellant, held as under:-

“16.Evidently as the report of the bailiff indicates, he was unable to find the defendant at the address which was mentioned in the summons. The report of the bailiff does not indicate that the summons were affixed on a conspicuous part of the house, at the address mentioned in the summons. There was a breach of the provisions of Order V Rule 17. When the application for substituted service was filed before the Trial Court under Order V Rule 20, a cryptic order was passed on 2 September 2011. Order V Rule 20 requires the Court to be satisfied either that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason, the summons cannot be served in the ordinary way. Substituted service is an exception to the normal mode of service. The Court must apply its mind to the requirements of Order V Rule 20 and its order must indicate due consideration of the provisions contained in it. Evidently the Trial Court failed to apply its mind to the requirements of Order V Rule 20 and passed a mechanical order. Besides this, as observed by the learned Single Judge of the High Court, the Trial Judge ignored the provisions contained in Chapter III of the Civil Manual issued by the High Court on its appellate site for the guidance of civil courts and officers subordinate to it.....

17.The submission that under Order V Rule 20, it was not necessary to affix a copy of the summons at the court house and at the house where the defendant is known to have last resided, once the Court had directed service by publication in the newspaper really begs the question. There was a clear breach of the procedure prescribed in Order V Rule 17 even antecedent thereto. Besides, the order of the Court does not indicate due application of mind to the requirement of the satisfaction prescribed in the provision. The High Court was, in these circumstances, justified in coming to the conclusion that the ex-parte judgment and order in the suit for specific performance was liable to be set aside.”

Conclusion by this Court

26. From the above law laid down by the Apex Court and High Courts, it is evident that substituted service under Order V Rule 20 of the Code, is an exception to the normal mode of service and it can only be ordered by the Court if, it is of the belief, on the basis of material on record, that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason, the

summons cannot be served in the ordinary manner. It is further evident that the Court has to apply its mind to the facts and circumstances of the case and then it has to record its satisfaction that service on the defendant is not possible by normal mode and only then, the plaintiff/appellant can be permitted to effect substituted service by publication in local newspaper.

27. It is further evident that the Court has also to consider having regard to the nature of the earlier attempts made for the service of summons and only when the Court is satisfied from the material on record, that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason, summons cannot be served in the ordinary way, the Court will be entitled to order service of summons under Order V Rule 20 of the Code.

28. It is further evident that from the evidence on record it is to be considered by the Court how many times registered post acknowledgement due (AD) notices were sent on the defendant /respondent; what was the postal endorsement made on those undelivered notices; whether acknowledgement due (AD) was received or not; whether process server went at the residence /establishment of the defendant / respondent to serve the summon; how many times the process server went to the residence /establishment of the defendant/respondent; who was present at the residence/establishment of the defendant/respondent; whether the defendant/respondent was personally present who refused to receive the summons or whether his/her family members/servants/employees were present, who in his/her absence refused to receive the summons; whether 2 witnesses of such refusal were noted and their signed statement was duly recorded by the process server in his report to substantiate his version that he went to the residence/establishment of the defendant/respondent but he/she was not present or he/she was present but he/she deliberately failed to receive the summon.

29. It is further evident that when the defendant/respondent resides outside the local jurisdiction of the Court then, service can also be effected on him, through the Court, in whose jurisdiction he /she resides/carries on business, in accordance with Order V Rule 21 CPC.

30. It is further evident that as per Order V Rule 17 CPC, if the defendant/respondent is not found at his residence/establishment or refuses to accept the summons, the process server shall affix the copy of the summons on the outer door or some other conspicuous part of the house in which he/she ordinarily resides or carries on business or personally works for gain, and shall then return the original summon to the issuing Court, with his report that he has so affixed the copy

and the circumstances under which he did so, and the name and address of the persons (if any) by whom the house was identified and in whose presence the copy was affixed.

31. From the perusal of the record of the Appellate Court it is evident that there is no documentary evidence on record as to how many times and when registered notices with AD or summons through process server were sent to the defendant/ appellant Subash Chand Gupta; what was their fate; whether they were delivered or not; whether they were refused to be accepted; there is no report of the process server that he went to the residence of the appellant who was not found present or he refused to accept the summons; there is no evidence on record to prove that registered AD notices sent to him were returned undelivered; there is no postal AD available on record; no postal registration receipt is available on record to prove that registered notices were ever sent to the defendant/appellant. There is no documentary evidence to prove that the process server went to the house of the appellant and since summons were not served or refused, he affixed the copy of the summon on the outer door or conspicuous part of his house, along with the name and address of witnesses, who identified his house and in whose presence, the copy of summon was affixed. It is apparent that, in fact, there is no compliance of the mandatory provisions of Order V Rule 17 CPC.

32. It is further apparent that the defendant/appellant Subash Chand Gupta resides in Shahdara, Delhi, which is outside the local jurisdiction of the Ghaziabad Court, where the Appellate Court was situated, as such, the Ghaziabad Court could have sent the summons to the competent Delhi Court, for effecting service through Court in accordance with Order V Rule 21 CPC but this procedure was not adopted by the Appellate Court, which is very surprising.

33. From the perusal of the record, it is evident that C.A. no.146 of 2011 was admitted for hearing on 16.9.2011 by the District Judge Ghaziabad, and the appellants were directed to take steps within 7 days and the next date fixed was 15.11.2011. On 15.11.2011, the appeal was transferred to the ADJ Court No. 13, Ghaziabad for hearing and the next date fixed was 28.11.2011. On 28.11.2011, the appellants moved an application 17-C2 for effecting service through registered post AD along with application 19-C2 for effecting service through publication. It is apparent that both the applications were moved simultaneously by the appellants.

34. The record discloses that on 30.11.2011, the appellate court after hearing the learned counsel for the plaintiff-appellants and considering the submission that during the pendency of the suit the disputed property has been sold by the respondents no.1-3 to

respondent no.4, hence the respondents no.1 – 3 have lost interest, the respondent no.4 was deliberately not appearing in the appeal whereas, it was asserted, that he was having knowledge of the appeal, who was in a hurry to sell the disputed property, the appellate court believing the affidavit (paper no.20-C) of appellant Ajay Kumar Sharma, allowed application 19-C2 and permitted substituted service on all the respondents, through publication in local newspaper. The appellate court also concluded that previously notices were sent to the respondents, which remained unserved, hence, permitted the appellants to effect substituted service. It is evident that the appellate court did not pass any order on plaintiff-appellants application 17-C2 for permission to effect service through registered post AD.

35. It is apparent from the record that prior to 30.11.2011 and even subsequent thereto, during the pendency of the Civil Appeal, notices through registered post AD was never sent to the respondents, what to say about their service and refusal. Even during the pendency of the appeal, no summons through process server were ever sent to the respondents to effect service on them. No report of process server is available on the record. No undelivered registered letter or registered postal receipt is available on the record. The appellants moved application 17-C2 before the appellate court seeking permission to effect service on the respondents through registered post AD, which was never disposed by the appellate court, itself proves that, this mode was never adopted by the appellants for effecting service on the respondents. There was no documentary evidence on record to prove that registered notices sent to the respondents were returned undelivered, which were deliberately not received by them, or the summons sent through process server were deliberately not received by them, but still, the appellate court concluded in order dated 30.11.2011, that notices sent earlier to the respondents remained unserved, whereas, there was no documentary evidence on record to arrive at that conclusion.

36. It is apparent that the appellate court before allowing substituted service under Order V Rule 20 CPC, has failed to consider that no registered notice or summon through process server, was ever sent to the respondents in the appeal as such, in the first place, substituted service on respondents should never have been permitted. There was no material on record to prove that the respondents were avoiding service or service cannot be effected through normal mode and they were aware of the pendency of the appeal. The mandatory provisions of Order V Rule 17 CPC have not been complied with by the appellants. In these circumstances, the appellate court certainly could not have permitted the plaintiff-appellants to effect substituted service on the defendant -respondents in the Civil Appeal.

37. The appellate court in the above circumstances concluded that service by publication on the respondents was sufficient, who were not present, hence proceeded to hear the Civil Appeal ex-parte on 16.2.2012 and consequently, the record of O.S. No. 544 of 1997 was summoned from the record room.

38. It is evident from the record that the appellate court on 19.4.2012 noted with concern, that service on respondents was deemed sufficient by publication but on the record, no acknowledgement due(AD) was available. It was further noted that there was also no proof that a notice has been served on the learned counsel, who was representing the defendant/respondents in the trial court. In these circumstances, the appellate Court was of the opinion that for hearing the appeal on merits, it was necessary that notices be issued to the learned counsel of the defendant/respondents and for this, 7 days time was afforded to the appellants to take steps and the office was directed to issue process. On 23.7.2012, the appellate court notes that notices have already been sent on the respondents, but, the record does not disclose that any notice was served on the learned counsel of the defendant/respondents, who was appearing for them before the trial court.

39. It is apparent that the appellate court has failed to record its satisfaction, that service was sufficient on the learned counsel of the defendant/respondents, who was earlier representing them in the proceedings of the original suit before the trial court. In the absence of any documentary proof, it cannot be presumed that the learned counsel of the defendant/respondents was aware of the appellate proceedings, who deliberately failed to appear before the appellate court.

40. The appellate court while dismissing the defendant/appellants application 4-C under Order 41 Rule 21 CPC by impugned order, has concluded that notices and summons were sent several times on the defendant, since the address was not wrong, it was presumed that they were duly served on the defendant. It was also presumed that the copy of the newspaper in which substituted service was effected on the defendant, would also have been received by the defendant. The appellate court further concluded that from the conduct of the defendant it was apparent that, no sooner the appellate court passed ex-parte decree than he appeared within 30 days of the decree, which proved that the defendant/appellant always remained aware of the proceedings of the appellate court but he deliberately did not appear before it.

41. The above reasoning of the appellate court is not supported by any documentary evidence on record, which is a figment of

imagination, which is legally unsustainable. It is apparent that the above finding is perverse, which requires to be set aside by this Court in exercise of its appellate jurisdiction. It is proved that there was no basis for the appellate court to permit substituted service on the respondents and to hear the appeal ex-parte. There was sufficient cause for the defendant/appellant for not appearing before the appellate court since service of summons was not sufficient on him. It is pertinent to mention here that the original suit of the plaintiffs was dismissed on merits, which has been illegally allowed ex-parte by the appellate court, without affording an opportunity to the defendants to contest the appeal on merits.

42. **For the aforesaid reasons, the instant appeal is allowed.** The impugned order dated 23.5.2024 passed in Miscellaneous Case no. 71 of 2019 is set aside. The defendant/ appellants application 4-C and Miscellaneous Case No. 71 of 2019, stands allowed. Consequently, the ex-parte judgment and decree dated 17.7.2019 passed in Civil Appeal no. 146 of 2011 is set-aside and the Civil Appeal is restored to its original number.

43. The first appellate court is directed to rehear and decide the Civil Appeal no. 146 of 2011 afresh on merits, after hearing both the parties, in accordance with law, within a period of **four months**, from the date a certified copy of this order is produced before it, without affording any unnecessary adjournment to either of the parties.

44. The parties are directed to maintain status quo regarding the disputed property till the disposal of the appeal on merits.

Order Date:- 11.02.2026

Jitendra/Himanshu/Mayank

(Sandeep Jain, J.)