

**IN THE COURT OF DISTRICT JUDGE-02
SOUTH-EAST DISTRICT, SAKET: NEW DELHI**

Misc. DJ No.332/2024

Isamuddeen

.....Plaintiff

versus

Mohd. Munazir Saifi

.....Defendants

ORDER
16.03.2026

This order shall decide an application under Order 9 Rule 13 read with Section 151 CPC filed by the defendant for setting-aside ex-parte order dated 14.09.2022 and ex-parte judgment and decree dated 11.09.2023.

2. One application under Section 5 of Limitation Act was also filed by the defendant.

3. Plaintiff filed reply to the application under Order 9 Rule 13 CPC, however no reply to application under Section 5 of Limitation Act was filed by the plaintiff.

4. Main case file was summoned.

5. I heard the arguments advanced by Sh. Nizamuddin, learned counsel for defendant and Sh. Kunal Madan, learned counsel for plaintiff.

6. As per the record, plaintiff filed a suit for specific performance and/or recovery of Rs.12,00,000/- alongwith interest against the defendant on 07.12.2019.

7. After filing of the suit, summons were sent to the defendant. Vide order dated 07.04.2022, the defendant was served with summons on 06.04.2021. Thereafter, vide order dated 14.09.2022, the defendant was proceeded ex-parte.

8. Plaintiff led evidence and vide order dated 11.09.2023, plaintiff's evidence was closed, final arguments were heard and impugned judgment and decree was passed in favour of the plaintiff for the alternative relief of decree for a sum of Rs.12,00,000/- alongwith interest @ 9% per annum w.e.f. 09.01.2019.

9. As per the application under Order 9 Rule 13 CPC, on 30.03.2024, the bailiff appointed by the Court, visited the residence of the defendant to execute the Warrant of Attachment. The said bailiff informed the defendant to appear on 30.04.2024 before the Court. The defendant engaged an advocate who inspected the judicial file on 05.04.2024, when he came to know about the order dated 14.09.2022 whereby defendant was proceeded ex-parte and the impugned judgment and decree dated 11.09.2023.

10. Further, the defendant applied for certified copies of entire judicial file of suit bearing CS DJ No.1091/2019 and filed the present application within 30 days from the date of knowledge i.e. 30.03.2024 of passing of ex-parte order/impugned judgment and decree.

11. The ground taken by the defendant for setting-aside the ex-parte order/judgment and decree is that the process server served the summons upon one Shaheen on 06.04.2021 who is not

the family member of the defendant and as such, there is no due and proper service of summons upon the defendant. Further, no alternative proof of service, order of affixation, pasting of summons on the property of defendant was filed on judicial record. The defendant had gone to attend function of one of his relatives on 04.04.2021 and returned to Delhi after 4 or 5 days as the marriage of his relative was on 05.04.2021.

12. Further, the bailiff had filed false and manipulated report in connivance and collusion with the plaintiff without citing any witness on the report of the summons. Defendant is residing in densely populated area and it is surprising why no witness was found by the process server at the time of service of summons. The process server concerned also failed to place any photograph of such pasting of summons on the wall. Even the process server did not file his affidavit qua proof of service of summons upon the defendant.

13. In reply, the averments of the aforesaid application were denied by the plaintiff stating inter-alia that the said application has been filed after delay of more than 277 days. Further, the defendant was duly served with summons vide order dated 06.04.2021 and after giving opportunity to defendant to appear in the Court, which he did not avail, the defendant was proceeded ex-parte vide order dated 14.09.2022.

14. Further, as per the process server report, the summons were served upon the defendant's niece (brother's daughter) namely Shaheen and therefore, the defendant was aware about the proceedings before the Court.

15. Further, the application under Order 9 Rule 13 CPC without an application under Section 5 of Limitation Act cannot be allowed as the limitation for setting-aside an ex-parte decree starts from the date of decree when the summons have been served. The defendant has failed to mention any sufficient cause which prevented him from appearing before the Court and he deliberately did not attend the case in order to delay the decree. The defendant was not vigilant towards his own rights and cannot take benefit of his own wrongs and laches. All other averments of the application were denied.

16. Rejoinder to the reply to the aforesaid application was also filed by the defendant stating inter-alia that at the relevant time, he had gone to attend marriage of his real nephew on 05.04.2021 at Noorpur, District Bijnor, U.P. after leaving relatives to look after the house. Defendant also filed the marriage card and other documents. A photocopy of marriage card, *Nikahnama* and marriage photographs were also filed by the defendant alongwith the rejoinder.

17. Having heard the submissions and perused the record, I find substance in the contentions of learned counsel for defendant.

18. As far as the service of summons of a suit is concerned, as per Order 5 Rule 9 CPC, service of summons is to be made by delivering summons addressed to the defendant which is to be received back by the Court after an acknowledgment or any other receipt purporting to be signed by the defendant.

19. Further, Rule 12 of Order 5 CPC stipulates that wherever practicable service shall be made on the defendant in person.

20. Furthermore, as per Rule 15, where defendant is absent from his residence at the time when the summons of 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, service may be made on any adult member of the family residing with him.

21. Rule 17 also assumes significance which stipulates the procedure when defendant refuses to accept service or cannot be found. In such eventuality, the servicing officer shall affix a copy of the summons on the outer door of some other conspicuous part of the house in which the defendant ordinarily resides and shall return the original to the Court with a report 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 by whom the house was identified and in whose presence the copy was affixed.

22. Rule 19 further provides about the examination of serving officer where a summons is returned under Rule 17 CPC.

23. As per the record, vide order dated 17.12.2019, the summons of the suit were directed to be issued to the defendant on filing process fee, registered cover, speed post, approved courier as well as through e-mail. It was simultaneously directed that the process server will affix the process in case of refusal and

non-availability of the defendant and shall also take two photographs.

24. The record would show that the plaintiff did not take steps for service of summons upon the defendant. Vide order dated 12.03.2020, one more opportunity was granted to the plaintiff to take steps in terms of order dated 17.12.2019, which again, were not taken by the plaintiff and consequently vide order dated 26.10.2020, one last and final opportunity was granted to the plaintiff to take steps subject to costs of Rs.5,000/- to serve the defendant through all means of communication as per CPC including WhatsApp/sms/e-mail.

25. Thereafter, no substantial proceedings could take place due to COVID-19 pandemic and again plaintiff was granted opportunities to take steps for service of defendant through all means of communication as per CPC including WhatsApp/sms/e-mail.

26. Subsequently, vide order dated 11.02.2021, it was recorded that as per the report of speed post, no person by the name of defendant was found residing at the premises in question. However, vide order dated 07.04.2022, it was observed that the defendant was served upon 06.04.2021.

27. As per the service report on summons returnable on 03.06.2021, the process server served the summons upon one Shaheen, niece of the defendant. However, process server did not mention the age of said Shaheen and accordingly, it is not clear whether she was a child or an adult on the date of service of summons. Even otherwise, said Shaheen admittedly is niece of

the defendant who cannot be said to be a member of his family. As per the report of process server concerned, no affixation etc. in terms of Rule 17 of Order 5 of CPC were taken recourse to while serving summons due to non-availability of defendant.

28. In the afore-discussed facts and circumstances, it is clear that the service of summons of the suit upon said Shaheen cannot be termed as due service upon the defendant.

29. As far as the limitation in filing the application under Order 9 Rule 13 of CPC is concerned, as per Article 123 of the Limitation Act, 1963, the prescribed period of limitation for setting-aside a decree passed ex-parte is 30 days and the time from which such period begins to run is from the date of decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

30. As pleaded by the defendant, he came to know about the Warrant of Attachment on 30.03.2024, consequent upon which, he engaged an advocate who inspected the judicial file on 05.04.2024 when he came to know about the ex-parte order dated 14.09.2022 and ex-parte judgment and decree dated 11.09.2023.

31. The present application under Order 9 Rule 13 CPC, filed on 25.04.2024, is accordingly within the period of limitation.

32. No material to the contrary could be filed on record by the plaintiff. It be noted that in para no.6 of the application under Order 9 Rule 13 CPC, it was pleaded by the defendant that the application has been filed within 30 days from the date of knowledge on 30.03.2024, yet the learned counsel for defendant

chose to file application under Section 5 of Limitation Act seeking condonation of delay of about 990 days which appears to have been computed from the date of ex-parte order dated 14.09.2022.

33. It suffices to say that the learned counsel in his own wisdom chose to file the application under Section 5 of Limitation Act seeking condonation of such enormous delay, which otherwise, was not necessary.

34. In view of the afore-discussed facts and circumstances, the application under Order 9 Rule 13 CPC filed by defendant is allowed and ex-parte order dated 14.09.2022 and ex-parte judgment and decree dated 11.09.2023 are set-aside.

35. The suit is restored to its original number.

36. Defendant is directed to file written statement within four weeks with advance copy thereof to the opposite side.

37. Present miscellaneous application file be tagged with the main case file.

[Kuldeep Narayan]
District Judge – 02
South-East District,
Saket Courts, Delhi
16.03.2026/SK