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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 11.05.2026

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**FAO 156/2026**

SUNIL RUSTAGI

.....Appellant

Through: Mr. Sanjay Dewan, Sr. Advocate with  
Ms. Garima Verma, Mr. Nikhil Goel,  
Ms. Arshia, Mr. Ujjwal and Mr.  
Vijay, Advocates.

Versus

SIDDHARHT JAIN AND ORS.

.....Respondents

Through: Mr. Harshit Vashisht, Mr. Shivdeep  
Kr., Ms. Bhavini Kapoor, and Mr.  
Shartak Tagra, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI**

**JUDGEMNT (ORAL)**

**CM APPL. 31534/2026 (exemption)**

1. Allowed, subject to all just exceptions.
2. The present application is disposed of.

**CM APPL. 31532/2026 (delay)**

1. By way of the present application, the applicant/appellant seeks condonation of delay of 50 days in refiling the accompanying appeal.
2. For the reasons stated in the application, the same is allowed and the delay of 50 days in refiling the appeal is condoned.
3. Accordingly, the present application is disposed of.



**FAO 156/2026 & CM APPL. 31533/2026**

1. Being aggrieved by the order dated 01.12.2025 passed by the learned DJ-04, North District, *Rohini Courts, Delhi* in Misc. DJ No. 314/2024, whereby his application under Order IX Rule 13 CPC was dismissed, the appellant/defendant no. 4 has preferred this appeal seeking the setting aside of the same.
2. It is contended that the impugned order fails to take into account that the appellant was never served in the underlying suit, and that the Trial Court misapplied the provisions of Order V Rule 20 CPC inasmuch as no affixation was carried out at the appellant's premises.
3. On the other hand, learned counsel for the respondents seeks dismissal of the present appeal by contending that the Trial Court committed no error when it reached to the conclusion that the appellant could not be served and was rather avoiding service, pursuant to which substituted service by way of publication in a local newspaper was duly carried out. Further, it is contended that the appellant has not categorically stated as to how and when he became aware of the passing of the *ex-parte* judgment, which bars the filing of the subject application under Order IX Rule 13 CPC.
4. For the sake of convenience, the parties are being referred to as per their status before the Trial Court.
5. The plaintiff had filed a suit for specific performance under Section 10 of the Specific Relief Act, 1963 and prayed for the concerned Agreement to Sell/*Bayana* to be declared valid and enforceable. He further sought a direction to the defendants to execute the sale documents in respect of the suit property as well as to hand over the possession of the same to the plaintiff. Additionally, the relief of permanent injunction was also sought to



the extent that the defendants be directed to not create any third-party rights.

6. It was averred that defendant no. 6, who had been known to the plaintiff for a long time, approached him in the month of December 2007, stating that his relative, i.e. defendant no. 1, owned a plot measuring 60 meters bearing no. 328, *Pocket-9, Sector 21, Rohini, Delhi – 110085*, which he intended to sell. Since defendant no. 1 was residing in *Kolkata*, the plaintiff spoke to him telephonically, whereupon defendant no. 1 agreed to sell the said plot. He further informed the plaintiff that he jointly owned the plot with his late wife, *Smt. Vidya Devi*, and that all his four sons had relinquished their shares in his favour. He further informed that he had also executed a Power of Attorney in favour of defendant no. 6.

7. Notably, on 16.12.2007, defendant no. 6, on behalf of defendant no. 1, executed the Agreement to Sell/*Bayana* and received a sum of Rs.1,50,000/- from the plaintiff towards earnest money. The total negotiated amount was Rs.41,21,000/-.

8. In the aforesaid backdrop of facts, the plaintiff filed the suit seeking reliefs of specific performance, declaration, and permanent injunction before this Court. However, later on the suit was transferred to the Trial Court concerned on account of a change in pecuniary jurisdiction. A perusal of the proceedings of the Trial Court would show that initially, when the suit was filed, defendant no. 4 was shown to be residing in *Kolkata*. However, subsequently, an amended memo of parties was filed, as per which defendant no. 4 had shifted to *Mumbai*, whereafter summons were stated to have been sent to his *Mumbai* address. In the proceedings dated 31.03.2010, the Court noted the statement of the Process Server, which reads as follows:

“Un served Deft, No. 4 on 31.3.10



*I went to serve a copy of notice with copy of application on the Deft.No.4 at Flat No. 2003 'B' Wing "Eldora" Hiranandani Garden, near Hiranandani Hospital, Powai, Bombay-76. On 31.3.10 at 9.35 AM, but he was not present, on my enquiry with present lady who refused to give her name and stated that said Deft. No.4 has left the premises long time, and present where about not known, then made enquiry with watchman Shri Oza, he also stated that said Deft No.4 has left the premises and present where about not known, hence, I came back."*

*S. B. Jadhav*

*Sd/-  
31.3.10"*

9. Thereafter, on 21.09.2011, the Trial Court noted the following service report:

*"For publication ordered for signature  
Pl  
Sd/-  
6/5/11*

*Signed issue  
Sd/-  
6/5/11*

*For 23/9/2011*

*Notice received back with the following report -  
By Ordinary Regd. AD Post  
D-4- Unserved Unserved (Intimated)  
Comes late, and  
goes early stated  
by Priyanka Patel.*

*Other modes and citations report still awaited*

*Sd/-  
21/9/2011*

*Citation taken on record as per order of Ld. JR. dt.23/9/11  
Sd/-  
Reader to JR"*

10. In this backdrop, the Trial Court directed substituted service by way of publication, which was carried out in the Times of India and *Jansatta*, *Mumbai* editions.

11. In his application filed under Order IX Rule 13 CPC, defendant no. 4



has candidly stated that he was not on speaking terms with his brothers and, therefore, never became aware of the institution and pendency of the suit proceedings. When the *ex-parte* decree came to be passed, the wife of one of his brothers disclosed the same.

12. While considering an application under Order IX Rule 13 CPC, the Court needs to be satisfied either that the summons were not duly served upon the applicant, or that the applicant was prevented by some sufficient cause from appearing when the suit was called on for hearing. The present case falls within the former category, as defendant no. 4 has claimed non-service.

13. As noted above, a perusal of the orders of the Trial Court would show that, while on 31.03.2010 it was recorded that defendant no. 4 had left the premises when service was attempted, subsequently on 21.09.2011, the Trial Court noted the process server's reporting that defendant no. 4 was residing at the same premises, but was not found available as he was coming late and going early. The process server's report does not disclose as to how many attempts were made to serve defendant no. 4. Further, the report is silent as to whether the summons were affixed on a conspicuous part of the house, i.e., the address mentioned in the summons.

14. Order V Rule 17 CPC prescribes the procedure to be followed when the defendant either refuses to accept service or cannot be found when service is sought to be effected on him. The said provision reads as under:

*“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.”*

15. This Court is of the considered opinion that, in the facts and circumstances of the present case, there has been a breach of the procedure under Order V Rule 17 CPC.

16. Substituted service is an exception to the normal mode of service. The Court, while considering an application under Order V Rule 20 CPC, needs to be satisfied that there is reason to believe either 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. Only thereafter can the Court 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.

17. A gainful reference may be made to the decision of the Supreme Court in Neerja Realtors Private Limited Vs. Janglu (Dead) Through Legal Representatives<sup>1</sup>, wherein it was observed that substituted service under Order V Rule 20 CPC cannot be directed in a mechanical fashion. The relevant observations are as under:



“15. 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.”

18. Even in Yallawwa (Smt.) Vs. Shantavva (Smt.)<sup>2</sup>, the Supreme Court cautioned that substituted service is a last resort, to be resorted to only when the defendant cannot be served in the ordinary mode 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. The proceedings in the present case, however, show that the procedure for substituted service was resorted to without considering the provisions of Order V Rule 17 CPC.

19. Learned counsel for the plaintiff has relied on the *proviso* to Order IX Rule 13 CPC, which provides that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. However, as observed by the Supreme Court in Sushil Kumar Sabharwal Vs. Gurpreet Singh and Others<sup>3</sup>, it is the knowledge of the 'date of hearing' and not the knowledge of the 'pendency of the suit' which is relevant for the purpose of the aforesaid *proviso*. In the present case, the issue is not one of

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<sup>1</sup> (2018) 2 SCC 649

<sup>2</sup> (1997) 11 SCC 159

<sup>3</sup> (2002) 5 SCC 377



mere irregularity in the service of summons; rather, on the facts of the case, it is a case of complete non-service of summons.

20. Consequently, the appeal is allowed, and the *ex-parte* judgment and decree *qua* the appellant is set aside.

21. The same is, however, subject to the payment of costs of Rs.25,000/- by the appellant/defendant no. 4, to be deposited with the Delhi State Legal Services Authority (A/c No. 18580110053263, UCO Bank, Branch: Rouse Avenue, IFSC: UCBA0003364) within a period of four weeks from today. The amount so deposited shall be utilized by the DSLSA for providing counselling/psychological support to POCSO victims requiring such assistance.

22. The suit is directed to be listed before the Trial Court on 22.05.2026 at the first instance for directions.

23. In view of the above, the present appeal is disposed of along with the pending application.

24. A copy of this judgment be communicated to the Trial Court concerned.

**MANOJ KUMAR OHRI, J**

**MAY 11, 2026**

*pmc*