

Rajendra Mahadik Vs. Devendra Mahadik

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Court : Madhya Pradesh

Decided On : Jul-22-2014

Judge : Sujoy Paul

Appeal No. : Writ Petition No. 1448 of 2014

Appellant : Rajendra Mahadik

Respondent : Devendra Mahadik

Advocate for Def. : Shri. Avinash Karpe

Advocate for Pet/Ap. : Shri. N.K. Gupta

Judgement :

Sujoy Paul, J:

1. The petitioner/defendant No. 3 is aggrieved by order dated 18.2.2014 passed in Case No. 73A/2009 Civil Suit by Fourth Additional District Judge, Gwalior, whereby his application under Order 9 Rule 7 Civil Procedure Code dated 3.1.2014 is rejected.

2. The plaintiff filed a suit for partition and permanent injunction (Annexure P-2) on 1.4.2009. The notices were issued to the other side. The acknowledgments of notices issued by the court for defendant No. 3 were not received back by the court.

3. The court below on 22.4.2009 passed a detailed order recording that an effort was made to serve the petitioner/defendant No. 3 by sending notice by registered post. The envelope is received back with the endorsement that "at the time of distribution, the petitioner was not found". The court below after perusal of that endorsement opined that the petitioner's shop is situated just in front of the court where he can be served in 15 minutes. Resultantly, the court below directed the District Nazir to serve the defendant No. 3 and submit its report at 3.00 p.m. The matter was taken up at 3.00 p.m. On perusal of the report of the process server, the court below opined that the special summon sent through process server must be treated as served. Thus, the court below proceeded against the petitioner/defendant No. 3 ex parte . The court below considered the report of the process server (Annexure P/4) while passing the aforesaid order. The petitioner preferred application under Order 9 Rule 7 Civil Procedure Code on 3.1.2014. It is urged that the notices were never served on him. He overheard the discussion between plaintiff and other defendants and then came to know that some matter is pending in the court. After enquiring about the matter, he came to know that the instant civil suit is pending and he has been treated as served. Since the petitioner is not served and he was not aware about the proceedings, the order be recalled and he be permitted to put forth his case.

4. The prayer was opposed by the plaintiff by filing reply, Annexure P/7, on 29.1.2014. The court below heard the parties on 18.2.2014 and rejected the application of the petitioner.

5. Shri N.K. Gupta, learned counsel for the petitioner submits that the notices are required to be served in consonance with Order 5 Rules 17, 18 and 19 of Civil Procedure Code. He also relied on Rules 56 and 71 of the Civil Court Rules. He submits that the court below has erred in passing the order dated 22.4.2009 on the basis of the report of process server. The process server's report is not in conformity and requirement of aforesaid provision of Civil Procedure Code and Civil Court Rules. He further submits that the suit was filed on 1.4.2009 and during the same month the court proceeded ex parte. There was no material on record to show that the petitioner was either avoiding service or he was served with the notices. Apart from this, he submits that at best, the court below could have closed

the right of filing written statement, but the court could not have proceeded ex parte. To elaborate, Shri N.K. Gupta submits that as per Order 17 Rule 2 Civil Procedure Code, the ex parte order can be passed when the matter is posted for hearing, if it is for taking up of evidence or hearing of arguments, the court can proceed ex parte. In the instant case, when the court proceeded ex parte, even trial had not begun and, therefore, the order is bad in law. Shri N.K. Gupta, learned counsel for the petitioner relied on certain judgments.

6. Shri V.K. Bharadwaj, learned senior counsel and Shri Avinash Karpe, learned counsel for the respondents, supported the order passed by the court below. Shri Bharadwaj, learned senior counsel submits that there is no infirmity in the report of process server. The court below has not committed any legal error in passing the impugned order. By placing reliance on Order 9 Rule 6(1)(a), it is contended that if it is proved that the summon is duly served, the court is entitled to decide the suit ex parte. He further submits that the averments of Annexure P/5 makes it clear that the story narrated by the petitioner is not trustworthy. It is further submitted that application under O.9 R.7 Civil Procedure Code was filed on 3.1.2014, whereas the affidavit in support thereto contains a date of 14.2.2014. He relied on 1988 JLJ 152 (Pushpendra Singh v. Commercial Automobiles),, 2012(2) MPLJ 147 (Agrawal Medical Agencies v. Govind Prasad),, 2014 AIR CC 395 (RAJ) (Jarnel Singh v. Kailashchand), 2006(3) MPWN-SN-95 (Rakesh Kumar v. Munnalal Agarwal and others), AIR 1964 SC 993 Arjun Singh v. Mohindra Kumar and others.

7. Shri Karpe borrowed the same argument.

8. I have heard learned counsel for the parties and perused the record.

9. In the opinion of this Court, it will be appropriate to quote the relevant provisions before dealing with the rival contentions of the parties. The provisions read as under:-

"Order 5, 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 of affixed.

Order 5, Rule 18-Endorsement of time and manner of service-The serving officer shall, in all cases in which the summons has been served under R. 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

Order 5, Rule 19--Examination of serving officer- Where a summons is returned under R.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."

Rules 56 and 71 of Civil Court Rules reads as under:-

"56. If the person addressed is absent from his residence at the time of attempted service and there is no likelihood of returning there within a reasonable time and there is no agent empowered to accept service on his behalf, nor any other person on whom service can be made, service should be effected in the manner directed in Order 5 Rule 17. It should be proved according to the circumstances of the case

by the declaration of the serving officer and, if necessary, by the affidavit or solemn declaration of some other person or persons (if any), acquainted with the facts that the person was absent from his residence at the time of attempted service and that there was no likelihood of his returning within reasonable time and that there was no agent empowered to accept the service, nor any other person on whom service could be made; and in any case that the house or the outer door or some other conspicuous part of which a copy of the process was affixed, was the ordinary residence or place of business or the person addressed at the time when it was so affixed. The court may also proceed under Order 5, Rule 19.

71. (1) In determining whether the service is good or sufficient, the attention of the court is drawn to the necessity of strictly following the requirements of law in the Civil Procedure Code.

(2) Whenever process is returned under Order 5, Rule 17, and the return is not verified by the affidavit of the serving officer, it is incumbent upon the court to make an enquiry under Order 5, Rule 19, and to record a distinct declaration of due service, if satisfied, or to order such service, as it thinks fit."

10. Shri Bharadwaj has placed heavy reliance on Order 9 Rule 6(1)(a) of Civil Procedure Code. The heading of sub-rule (a) is " when summons duly served".

11. The pivotal question in the present case is whether summons are duly served. If the conditions of proper summoning are satisfied, Order 9 Rule 6(1)(a) may have some application. Order 5 R. 17 makes it clear that if summons could not be served on defendant or his agent despite due and reasonable diligence or defendant refuses to sign the acknowledgment or cannot be found because of absence or otherwise, the serving officer shall affix copy of summons on the outer door or some other conspicuous part of the house in which defendant ordinarily resides or carries on business. The process server shall return the original to the court from which it was issued with a report endorsed thereon or annexed thereto that he has so affixed the copy. He shall narrate the circumstances under which he did so. Order 5 R. 18 makes it obligatory on the serving officer to state the time when and the manner in which the summon was served and the name and address of the person identifying the person served and witnessing the delivery or

tendering the summons. Order 5 R. 19 in no uncertain terms makes it clear that where a summon is returned under Rule 17, the court shall, if the return has not been verified by the affidavit of serving officer, examine the serving officer on oath or cause him to be so examined by another court. The court then needs to declare that summons have been duly served. The question is whether this requirement is fulfilled. Annexure P/4 is the report of process server. In the first portion, the plaintiff who accompanied the process server recorded as under:-

"esjs lkius jktsUnz egkfMd o mldh iRuh lkS0 e/kqfydk egkfMd us ysus ls badkj fd;kA"

(R.C. Mahadik)

22 April, 2009

Time 14:30 hrs.

In the bottom of this document, the process server gave following report:-

"Jheku th]

eSa jkefd'ku vk0 okgd 'kiFk iwoZd IR; dFku djrk gwWa fd fnukad 22and4and2009 dks fMdzH /kkjh vkj0lh0 egkfMd ds fu'kkunsgH esa -----'vifBr'----- tkdj jktsUnz egkfMd s/o LoxhZ; pUnzlsu egkfMd dks ryk'k fd;k ekSds ij ekStwn feys iwtk djrs gq,A rhl feuV bartkj djus ij Hkh iwtk ds LFkku ls ugha mBsA ekSds ij jktsUnz egkfMd dh iRuh e/kqifydk egkfMd ekStwn Fkh buls rkfeY ysus dks dgk rks bUgksaus Hkh badkj dj fn;kA ekSds dh fjiKs VZ Isok esa is'k g SA"

12. Admittedly, no independent witness has signed this report of process server. It is pregnant with the endorsement of the plaintiff. Admittedly, no affidavit of process server is filed nor he was examined in the court. The Apex Court in, (2002) 5 SCC 377 (Sushil Kumar Sabharwal v. Gurpreet Singh and others) opined as under:-

"8. We find several infirmities and lapses on the part of the process server. Firstly, on the alleged refusal by the defendant either he did not affix a copy of the summons and the plaint on the wall of the shop or if he claims to have done so, then the endorsement made by him on the back of the summons does not support

him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy of the plaint on the wall should have been witnessed by persons who identified the defendant and his shop and witnessed such procedure. The endorsement shows that there were no witnesses available on the spot. The correctness of such endorsement is difficult to believe even prima facie. The tenant runs a shoe shop in the suit premises. Apparently, the shop will be situated in a locality where there are other shops and houses. One can understand refusal by unwilling persons requested by the process wherever to witness the proceedings and be a party to the procedure of the service of summons but to say that there were no witnesses available on the spot is a statement which can be accepted only with a pinch of salt. Incidentally, we may state that though the date of appearance was 23rd February, 1993 the summons is said to have been tendered on 22nd February, 1993, i.e., just a day before the date of hearing."

A bare perusal of record shows that the process server has not affixed the copy of summon and the plaint on the wall of the shop. Although as per M.P. Amendment to Order 5 Rule 17, it is not necessary to affix a copy of summon at defendant's residence/shop, other conditions need to be strictly followed. In the present case, the process server has not recorded statement of any independent witness. It only carries signature of the plaintiff. Thus, a serious doubt is created and it cannot be treated as proper service on the petitioner. More so, when process server has neither filed the affidavit nor his statement was recorded by court below. Thus, service in the instant case cannot be treated in consonance with the requirement of Civil Procedure Code r/w Civil Court Rules.

13. In, 2002(3) MPLJ 420 (Vishnoo Kant Awasthi v. Jagdeesh Prasad) this Court opined as under:-

"11. The above statement of the process-server being inconsistent with his report is not believable. Moreover, service of summons, as above cannot be accepted and treated as proper service, in view of the specific provisions under Order 5 Rule 17 of Civil Procedure Code, which provides that in case of refusal by the defendant/respondent to accept the summons, 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 originally resides or carries on business, or personally works for gain and shall return the original with the report endorsed or annexed thereto; stating 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.

12. It is, therefore, clear that service of summons in case of refusal has to be made in accordance with the above procedure laid down under Rule 17 of Order 5 of the Civil Procedure Code, and that the service cannot be effected in any other manner. As noticed earlier though the serving officer Guru Prasad (A.W. 5) had stated in the report appended to the summons that he had served the summons in the above manner by affixture, but he could not stand the test of cross-examination and when he was faced with the difficulty of the factual aspect, that in fact there was no door in the shop of the defendant/respondent; has resiled from his report, and tried to justify service of summons by stating that he had served the summons by throwing it. Obviously such a statement was only a face saving device on the part of process-server Guru Prasad (A.W. 5). The statement as above, certainly did not deserve to be believed."

14. This aspect is again dealt with by this Court in a recent judgment reported in, ILR (2013) MP 424 (Ram Kripal v. Veerbhadra and others). This Court considered the various judgments of High Court and Supreme Court holding the field. After considering those judgments, it is opined as under:-

"16. From a perusal of the record of the present case it is clear that the serving officer sought to serve the summon of the suit on the defendant on 18-9-1985 on which date he has made an endorsement that the defendant was not available and, therefore, his wife who was residing with him, was sought to be served with the notice but she refused to accept the notice and, therefore, a copy of the notice was affixed on his house. However, though the name of one witness Ramsiya has been mentioned in the said notice, his address has not been stated therein nor has it been stated that the house was verified and identified by the witness. From the record it is further clear that the officer serving the notice did not file any

affidavit as required by Order 5 Rule 19 of the Code of Civil Procedure nor was he examined by the trial Court which was necessary in the absence of such an affidavit. It is further apparent from a perusal of order sheets of the trial Court that the Court has not complied with the requirements of Order 5 Rule 19 of the Code of Civil Procedure by declaring that the same has been duly served or examining as to whether some other mode of service was required to be adopted, but has simply stated that the notice was served in spite of which the defendant has not appeared and has thereafter proceeded ex parte against the defendant. Apparently, there is noncompliance of the provisions of Order 5 Rules 17 and 19 of the Code of Civil Procedure and in such circumstances the ex parte judgment and decree passed by the Court below and affirmed by the lower appellate Court deserve to be set aside."

15. In Ram Kripal (supra) the defendant was not found and, therefore, notices were sought to be served on his wife. She allegedly refused to receive the summons. The notice was affixed on the house of Ram Kripal. Name of one witness was mentioned but his address was not shown. The court found that the officer serving the notice did not file any affidavit as required under Order 5 Rule 19 Civil Procedure Code. The process server was also not examined by the trial court, which was necessary in the absence of such an affidavit. Thus, the court found that Order 5 Rule 19 Civil Procedure Code is not complied with.

16. In the present case also, neither the affidavit of process server was filed nor he was examined in the court. Thus, the present case is squarely covered by the judgment of Ram Kripal (supra). In the present case, process server has not mentioned the name of any independent witness in his report.

17. Shri Bharadwaj, learned senior counsel has relied on Pushpendra Singh (supra). The said judgment is arising out of a proceeding under Arbitration Act, 1940. The factual backdrop of the said matter is totally different and, therefore, the said judgment is of no assistance to the other side. The judgment of Jarnel Singh (supra) is also based on a different fact situation and, therefore, has no applicability in the present matter. The judgment of Rakesh Kumar (supra) deals with the right of defence to participate in further proceedings after the ex parte

order is passed by the court below. This judgment has no application in the present case. Similarly, the judgment of Supreme Court in Arjun Singh (supra) is of no assistance. It deals with test of "good cause and sufficient cause". In the present matter, this Court is concerned whether the summons are duly served and whether the court below has passed the order in accordance with law as per the governing provisions.

18. In the impugned order dated 18.2.2014, the court below opined that the order dated 22.4.2009 is correct and notices were duly served through special process. The court found it to be a case of "due service" of summons and, therefore, rejected the application preferred under Order 9 Rule 7 Civil Procedure Code.

19. As analyzed above, the proper procedure, as mandated in Order 5 Rules 17 to 19, Civil Procedure Code, was not followed. Therefore, it cannot be said that defendant No. 3 was properly served. The court below has given a bald finding in order dated 18.2.2014 that as per the facts available in the matter, the defendant No. 3 was aware of pendency of instant suit since beginning. In the opinion of this Court, the court below has not assigned any reason on which this conclusion is based. The court below further opined that affidavit contains a later date of 14.2.2014 whereas the application is of an early date.

20. In the opinion of this Court, the fact remains that the application (Annexure P/5) is supported by an affidavit. The procedural law is made to secure the ends of justice and not to strangle the litigant on hyper technicalities. Considering the aforesaid, in the opinion of this Court, the court below has erred in rejecting the application, Annexure P/5. In the result, the order dated 18.2.2014 is set aside. The application of petitioner, Annexure P/5, is allowed.

21. Resultantly, the ex parte proceedings by order dated 22.4.2009 are also set aside. The petitioner and respondents shall appear before the court below on 6.8.2014.

22. Petition is allowed to the extent indicated above. No cost.

Petition Allowed.

