

Kunja Vs. Lalaram and ors.

Kunja Vs. Lalaram and ors.

SooperKanoon Citation : sooperkanoon.com/500577

Court : Madhya Pradesh

Decided On : Feb-11-1986

Reported in : 1987MPLJ746; AIR 1987 MP 252

Judge : T.N. Singh, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 5, Rule 19

Appeal No. : Misc. Appeal No. 105 of 1974

Appellant : Kunja

Respondent : Lalaram and ors.

Advocate for Def. : Gupta, Adv.

Advocate for Pet/Ap. : Dubey, Adv.

Disposition : Appeal allowed

Judgement :

ORDER

T.N. Singh, J.

1. Injustice is not law. Justice is law. Shri K.N. Gupta, submits that the Court will not go door to door to deliver justice. But I told him, litigants coming to Court must not see the doors of the Court shut and no Court shall shut its door to the litigants.

2. It is another unfortunate case whose number is running into legion. After 12 years this matter has seen the light of the day though it had to be disposed of only by a very short order as a single and simple point of law merely is involved in the case. This appeal is against an order passed by the lower Appellate Court refusing to restore the appeal for rehearing after setting aside ex parte decree passed against the respondents.

3. Shri Dubey has made a very short submission founded on violation of Rule 19 of Order 5, C.P.C. and I have no doubt that the contention of learned counsel for the appellant must prevail despite the forceful arguments of Shri Gupta, who appears for the respondents in this case. Shri Dubey has drawn my attention to the lower appellate Court's order dated 19-11-1971 to submit that the appeal could not have heard ex parte without compliance of the provisions of Rule 19, Order 5, C.P.C. and the fact that there was non-compliance of the said provision is writ large on the face of the order. The crucial fact which is not disputed on either side is that the respondents in the Court below were not served personally. Shri Gupta has indeed contended that the service was rather 'duly effected' in the manner prescribed by Rule 17 of Order 5, C.P.C. But the moot point is, whether such a service ipso facto becomes effective or there has to be a judicial order accepting the service under Rule 19, Order 5 C.P.C. I quote in extenso appellate Court's order dated 19-11-1971 to appreciate rival contentions :

^&' vihyk UV Jh dUgS;kykyxqlrk vfHkHkk'kd lfgr jsLiksUMVI ckotwn rkehy ds mifLFkr ugha g SA vr%jsLiksUMsV ds fo:) ,d i{kh; fd;k tkrk gSaA

4. Shri Gupta lays stress on the word ^ckotwn rkehy** to submit that there was due compliance with the provisions of Rule 19 of Order 5 C.P.C., which contention I find very difficult to accept though repeated and hammered times without number by Shri Gupta. The only reasonable interpretation of the term, according to me, would be 'despite service', and by no stretch of imagination it can be said that service was accepted by the Court under Rule 19 aforesaid by directing its attention to the facts and circumstances of the case namely the fact that the service was effected in the substituted manner under Rule 17, Order 5, C.P.C. Shri Gupta laboured hard and did his best to convince me that I must look at

Exhibits D-1 and D-2 which are summons and the report of the process server. I refused to oblige him for valid reasons which I must disclose at once in this order. Admittedly, these two documents were proved later, in the course of the inquiry conducted subsequently, on the application filed by the respondents for restoration. The : order afore-extracted does not manifest on its face that Court had at any time directed its attention to these documents which it was its duty to do to comply with the mandate of Rule 19 aforesaid, which also I feel tempted to extract -

'Order 5, Rule 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'.

5. I have no hesitation to take the view 'that the provisions of Rule 19 aforequoted are mandatory in real sense of the term and that it casts a duty on the Court to make a judicial order while accepting service effected in the manner prescribed under Rule 17 of Order 5, C.P.C. I say so because the legislature requires the Court that it 'shall either declare that the summons has been duly served or order such service as it thinks fit.' Because also, the legislature vests jurisdiction in the Court to examine the serving officer even when his report is supported by an affidavit. That the discretion has been duly and judicially exercised even to refuse to examine the serving officer in such a case must be manifested in the order passed under Rule 19 of Order 5, C.P.C., accepting service thereunder. Any other view, I have no hesitation to say at once, will cause serious injustice to moneyless and numberless litigants in this poor country where justice has to be purchased at a very high price. I must heed the mandate of Article 39A of the Constitution to so declare emphatically in unambiguous terms despite my attention being drawn to a decision of a single Judge in Chandansingh, 1969 MPLJ (Notes) 21. With due respect, I humbly beg to differ as the view taken by his Lordship does not accord with the constitutional mandate. I find it difficult to accept the proposition that the

report (endorsement or the affidavit) of the process server is sacrosanct. If that had been the position, the legislature would not have invested the Court to exercise discretion in the matter of examining the process server by which a valuable right has been created in the aggrieved person to contest validity of service; because his vital right to be heard in the case could be impaired immeasurably with this object it has made the provision. In any case, his Lordship was not called upon to expound on the ambit and scope of Rule 19, directly in issue in this case, though he spoke of Rule 18. The decision, therefore, is distinguishable on facts.

6. As earlier observed, in the instant case, on facts it being established beyond doubt that Rule 19 of Order 5, C.P.C. has been violated. I have no doubt at all that failure by the appellate court to restore the appeal for rehearing resulted in travesty of justice. Such an order cannot, in any view of law or of facts, be allowed to stand for a moment as it cannot stand judicial scrutiny even for a fraction of a moment. The impugned order is accordingly set aside. The lower appellate Court is directed to take back the appeal on file and after hearing parties dispose of the same on merits. Counsel agree to appear in the Court below on 7th March 1986 to take a date of hearing from that Court. Within a month the appeal must be disposed of after hearing parties.

7. In the result, the appeal succeeds and is allowed. This is one of those cases which deserves exemplary cost to be saddled on the unsuccessful respondent in this appeal. He has not only outmanoeuvred the respondents in the Court below, his misadventure has proved very costly also to the process of justice as a result of this matter stagnating here for the last 12 years. The appeal in the Court below was filed in the year 1971 which is going to be reheard now, after 15 years. Had there been no unholy opposition by the appellant (herein respondent) to the prayer for restoration of appeal, the present situation would not have arisen. Still, I award cost, moderately, to the appellant which I assess at Rs. 250/-.

8. Let the records of the case go down to the Court below with utmost expedition.