

Sitaram Vs Kalawati**Civil Revision Petition No. 363 of 1985**

Court: Madhya Pradesh High Court (Indore Bench)**Date of Decision:** Dec. 3, 1985**Acts Referred:**

Madhya Pradesh/Chhattisgarh Accommodation Control Act, 1961 " Section 35, 50

Citation: (1986) MPLJ 67**Hon'ble Judges:** K.L. Shrivastava, J**Bench:** Single Bench**Advocate:** M.L. Sharma, for the Appellant; M. Dalal, for the Respondent**Final Decision:** Allowed

Judgement

@JUDGMENTTAG-ORDER

K.L. Shrivastava, J.

This revision petition by the tenant under Sec. 23E of the Madhya Pradesh Accommodation Control Act, 1961 (for short "the Act") is directed

against the order dated 5-8-1985 passed by the Rent Controlling Authority, Indore (for short "the R.C.A.") in Case No.109/90-A(7) 1984-85

whereby his application for setting aside the ex parte order of eviction dated 7-5-85 passed against him has been dismissed.

Facts relevant for the purposes of this revision petition are these. The non-applicant on 15-11-84 filed an application under Sec. 23A of the Act

for eviction of the petitioner from the non-residential accommodation (shop) in question. Notice was ordered to be issued to the petitioner and the

case was fixed for 3-1-85. On that date it was adjourned to 17-1-85 and then to 19-2-85.

The first notice dated 10-12-1984 issued at the shop address was returned unserved with the report dated 13-12-1984 by the serving officer that

he visited the shop on several occasions but it was locked and, therefore, service could not be effected. Thereafter it was on 19.12.1984 that the

non-applicant in the circumstances aforesaid filed an application under Order 5, Rule 20 CPC for substituted service by affixture. This application

does not find mention in the order-sheet and there is no order on this application. However, it is found that fresh notice dated 20-12-1984 was

issued and the report dated 22-12-1984 of the serving officer is that the notice was affixed on the given address. On 19-2-85 the learned R.C.A.

held that service had been effected. The order-sheet is silent as to the presence or absence of the present petitioner. After some adjournments the

order of eviction was passed on 7-5-1985.

During the execution of the order of eviction dated 7-5-85 as provided under Sec. 35 of the Act the petitioner on 26-3-85 filed an application

under Order 9, Rule 13 CPC for setting aside the said order on the ground that he was not at all served with the summons of the case and that

prior to the date of the application under Order 9, Rule 13 CPC he had no knowledge about it.

The learned R.C.A. directed delivery of a copy of the application to the N. A. for reply and ordered the case to be fixed for arguments on 30-7-

1985 and on which date reply was filed. After hearing arguments the impugned order was passed the same day. The order-sheet dt. 30-7-1985 is

silent regarding the question of evidence.

The question for consideration is whether the impugned order deserves to be set aside.

I shall first advert to the procedure adopted by the learned R.C.A. in disposing of the application for setting aside the order of eviction passed ex

parte.

In exercise of the powers under Sec. 50 of the Act the State Government has made the M.P. Accommodation Control Rules, 1967 (for short "the

Rules"). Regarding procedure, rule 16 is relevant. It reads thus:-

Rule 16:- CPC to be generally followed:

In deciding any question relating to procedure not specifically provided by the Act and these rules the Rent Controlling Authority shall as far as

possible be guided by the provisions contained in the Code of Civil Procedure, 1968.

From the foregoing discussion it follows that the application for setting aside the ex parte order for eviction had to be disposed of in the manner

provided under Order 9, Rule 13 Civil Procedure Code.

There are High Court amendments in Order 9, Rule 13 CPC and according to the amended provision where the defendant satisfies the Court that

summons was not duly served or that there was sufficient cause for his failure to appear when the suit was called on for the hearing the Court shall

make an order setting aside the ex parte decree as against him. It is one of the basic principles of natural justice that no body should be condemned

unheard and in the event of controversy the satisfaction of the Court as contemplated under Order 9, Rule 13 CPC can only be on the material to

be placed on record. Order 9, Rule 13 CPC does postulate an opportunity of due hearing to the parties. In the decision in Anand Swaroop's case

1971 MPLR Note 240 it has been pointed out that an application under Order 9, Rule 13 CPC is an application of a substantive nature and not an

interlocutory application and unless the Court passes an order under Order 19, Rule 1 CPC permitting a party to prove certain points by affidavit,

the party concerned has no option but to prove his case by legal evidence. It appears that the question of proof escaped attention of the learned

R.C.A. and the parties.

In the instant case, looking to the petitioner's application under Order 9, Rule 13 CPC and the non-applicant's reply dated 30-7-85 to the same it

is clear that the disposal of the said application involved factual controversies and proof. The decision in Balkrishna's 1982 MPWN 412 case is

clearly distinguishable on facts.

Proof may be by affidavit or by evidence tendered before the Court. Order 19, Rule 1 CPC empowers the Court to order, for sufficient reason

that any particular fact or facts may be proved by affidavit. There is nothing in the order-sheet to indicate that the learned R.C.A. had afforded the

petitioner any opportunity to prove his contentions or that he had consented to the disposal of the application under Order 9, Rule 13 CPC merely

on arguments on the basis of the material available on record. In the petitioner's affidavit dated 26-3-85 filed before the R.C.A. it has expressly

been stated that it is in support of the application under Sec. 151 CPC for stay of execution proceedings. There is no affidavit in support of the

application under Order 9, Rule 13 CPC and, therefore, in the circumstances of the present case the applicability of the ratio of the decision in

Sajan Finance & Trading Co.'s case (1984 MPWN 471) is not attracted. Therein it has been held that where counter affidavit is not filed by the

N. A. there is tacit consent for getting the application under Order 9, Rule 13 CPC decided on affidavit and no further evidence is necessary. It

may be observed that it is only proper that where the parties do not want to file affidavit or to adduce evidence the fact is expressly stated in the

order-sheet so that the higher Courts know the stand taken by them during the trial. On a careful consideration it has to be held that the learned

R.C.A. acted illegally in proceeding to decide the application under Order 9, Rule 13 CPC merely on the basis of arguments and did commit

jurisdictional error.

Proviso to order 9, Rule 13 CPC relating to ex parte decree may also be adverted to. It is by amendments to Order 9, Rule 13 CPC that the High

Court had added the proviso which reads thus:-

Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons if the Court is satisfied that the

defendant knew or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the

plaintiffs claim.

It may be pointed out that a similar proviso has also been added by the CPC Amendment Act, 1976.

The decision in Priti Kumar's case (1971 J.L.J. N. 137) makes an illuminating reading touching the proviso. There in view of the words employed in

the proviso it was held that any distinction as to illegality and irregularity in the service of summons could not be permitted to prevail and where on

defendant's refusal to acknowledge service of summons the process server not affixing it as required by law had left it in front of him the object

behind affixture being to enable the defendant to know if he is so minded the date of hearing by noticing summons was achieved by the summons

being so left. The proviso it was pointed out embraces within its purview such irregularities in the service of summons which do not prejudice the

defendant in getting knowledge of the date of hearing in sufficient time to enable him to answer the plaintiffs claim.

There is no credible material on record to hold that the case in hand can be held to fall within the coverage of the proviso. It is the non-applicant's

own case that the shop used to remain locked. Therefore there could be no occasion for the petitioner to come to know about the notice which

was affixed on 22-12-1984 and to appear on 19-2-1985. There is no reliable material to hold that he came to know about the case even

subsequently so as to enable him to contest prior to 26-7-85. It is not the report of the serving officer that the petitioner ever refused to

acknowledge service of the notice and it was, therefore, affixed.

The decisions in Nanakchand's case 1979 (1) MPWN 223 and Sushil's case 1985 MPWN 293 on which reliance was placed by the learned

counsel for the non-applicant are clearly distinguishable.

The question of validity of service by affixture resorted to in this case may also be examined in the light of the relevant provisions.

Regarding the procedure to be followed by the R.C.A. in relation to an application under Sec. 23A of the Act, provision has been made in Sec.

23B, *ibid*. According to its relevant portion the R.C.A. has to issue summons in the prescribed form in relation to every application under Sec.

23A and save as otherwise provided in the Act the provisions of Order V Schedule to the CPC 1908 (V of 1908) regarding issue and service of

any summons to a defendant shall apply *mutatis mutandis* to issue and service of any summons to a tenant or opposite party in an inquiry or

proceeding under chapter III-A.

It is with a view to ensure that the defendant may have his say touching the suit that by it Order 5, Rule 12 CPC provides that wherever it is

practicable service shall be on the defendant in person. Therefore in the first instance service has to be personal. The other modes of service are to

be resorted to only when personal service is not possible.

In the instant case as already stated there is no order by the R.C.A. on the application under Order 5 Rule 20 Civil Procedure Code. Before

service could be effected under this provision an order from the Court for such service is necessary as is clear from a plain perusal of the provision.

Thus it cannot be held that there was valid service under Order 5 Rule 20 Civil Procedure Code.

Now as to whether it could be held that there was the due service under Order 5, Rule 17 Civil Procedure Code.

At this stage reference to the provision embodied under Order 5, Rule 17 CPC is pertinent. It reads thus:-

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.

(emphasis supplied)

It is pertinent to point out that under this provision, unlike the requirement under Order 5, Rule 20 CPC the serving officer can resort to affixture

without any order from the Court. It is clear from the provisions under Order 5, Rule 17 CPC that the affixture will constitute valid service only

when conditions therein mentioned did in fact exist.

In relation to service under Order 5, Rule 17 CPC we have the further provision embodied in Order 5, Rule 19 Civil Procedure Code, it reads

thus:-

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.

It is clear from the aforesaid provisions that before acting on the report of the serving officer where he has not verified his report by affidavit the

law makes it obligatory on the Court to examine the serving officer or to get him examined by another Court touching his proceedings. The Court is

also empowered to make such further enquiry in the matter as it thinks fit and it is specifically required that the Court shall then declare that

summons has been duly served. Import of the expression "duly served" is that service is in a manner as to give the defendant information of the

proceedings against him. Before holding that there has been due service the Court must be satisfied that the provisions of order 5, Rule 17 CPC

were really complied with.

In the instant case, service by affixture could not be held as constituting due service in the absence of the affidavit of the serving officer or his

examination as contemplated by law.

As a result of the foregoing discussion the revision petition is allowed. The impugned order disposing of the application under Order 9, Rule 13

CPC being illegal is set aside. The case is remanded to the R.C.A., Indore for deciding the, application afresh with due advertence to the proviso

after affording the parties an opportunity to file affidavits or to lead evidence. In case the parties do not choose to add any material on record the

ex parte order of eviction may in the light of the observations made above be set aside on the ground that the notice was not duly served.

It is directed that the Rent Controlling Authority, Indore shall attempt at a very expeditious disposal of the case at all its stages. The parties shall

appear before the R.C.A. on 9-12-1985.

In the circumstances of the case, it is ordered that the parties shall bear their own costs as incurred. Counsel's fee Rs. 50/- only if certified.