

HIGH COURT OF MADHYA PRADESH  
BENCH AT INDORE

**Miscellaneous Appeal No.2911/2010**

**M/s. Indore Holding Private Limited and others**  
**Vs.**  
**Chimanlal and others**

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Shri B.I.Mehta, Sr. Advocate assisted by Shri J.B.Mehta, Advocate for the appellants.

Shri G.S.Yadav, Advocate for the respondents No.1, 3 and 4.

Shri V.K.Jain, Sr. Advocate assisted by Shri Abhishay Jain, Advocate for the respondent No.2.

Shri Pushyamitra Bharava, Advocate for the respondent No.5.

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Whether approved for reporting: **Yes**

**Order 5 CPC Contemplates service of summons**

Resort to substituted mode of service through *chaspa*/paper publication under Order 5 rule 20 CPC, is subject to recourse of Order 5 rule 17 CPC where the defendant refuses to accept the summons or cannot found. Upon failure to serve, if the Court satisfies that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or for any other reason, the summons cannot be served in the ordinary waym, to conclude service of notice, recourse to paper publication or *chaspa*, under Order 5 rule 20 CPC can be taken..

Relevant paragraphs: 6 to 15.

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**Reserved on 29/11/2018:**

**ORDER**  
**(25/01/2019)**

**Rohit Arya, J**

This miscellaneous appeal by defendants No.4 to 9 under Order 43 rule 1 CPC is directed against the order dated 18/08/2010 passed in Civil Miscellaneous Case No.71/09 dismissing the application filed under Order 9 rule 13 CPC by the Fifth Additional District Judge, Indore .

2. Facts necessary and relevant for the purpose of disposal of this appeal lie in narrow compass: A civil suit No.83A/1989 was filed by the respondents No.1 to 5 – the plaintiffs for declaration and permanent injunction on 30/08/1988.as regards the land admeasuring 1.290 Acrs situated in Village Khajarana, tehsil and district Indore (for short 'the

suit land') against the present appellants and the State of Madhya Pradesh, The Tehsildar, Indore as well as defendant No.3 Chaturbhuji *inter alia* contending that defendant No.3 has leased out the suit land on 31/03/1975 to the plaintiffs for five years at the annual rent of Rs.1,000/- and delivered possession of the suit land. Therefore, by force of the provisions under section 190 of the Madhya Pradesh Land Revenue Code, 1959 (for short, 'the Code'), the plaintiffs have acquired the *bhumi swami* rights. Hence, the sale deed executed by the defendant No.3 in favour of the defendants No.4 to 9 in respect of the suit land to be declared as *null* and *void*. It is further prayed for permanent injunction restraining the defendants not to interfere with the possession of the plaintiffs over the suit land be issued.

3. Defendants No.3 and Defendants No.4 to 9 (appellants) filed separate written statements.

4. Defendant No.3 denied the plaint allegations and supported the sale deed dated 10/03/1988 with further contention that the suit is barred by the principles of *res judicata* as on similar facts and grounds earlier suit filed by the plaintiffs has been dismissed.

5. Defendants No.4 to 9 also denied the plaint allegations and contends that the plaint averments since are not only inconsistent but, also mutually destructive, viz., plea of rights on the basis of the agreement over the suit land, tenant, by operation of law and by adverse possession cannot go together for the relief claimed therein. Hence, the suit deserves to be dismissed.

6. The suit was dismissed in default on 27/07/1999 in the presence of counsel for the appellants. Thereafter, the plaintiffs have filed an application under Order 9 rule 9 CPC for restoration of the suit to its original number. The case was registered as MJC No.21/1999 and the same was allowed on 09/10/2003 but, without notice to the defendants. Neither the defendants No.4 to 9 nor the legal heirs of the defendant No.3 were noticed after restoration of the suit. Thereafter, the case was fixed on various dates but, the process fee was not filed by the respondents No.1 to 5 (the plaintiffs). On 29/01/2004, the process fee was paid for notice to the appellants and the same was issued on their registered office situated at 19/2, South Tukoganj, Indore fixing the date for appearance on 08/03/2004. The sole attempt made

by the process server to serve notice upon the defendants No.4 to 9 did not culminate into service of notice instead, the process server submitted two mutually conflicting reports, viz., (i) at the given address, the defendant – company was not found; (ii) there was a *chowkidar* who said that the owners of the company were out of station and said that unless, the owners permit him to take notice, he cannot accept the notice. The process server made an endorsement on the notice dated 29-01-2004 issued to RMG Holding Pvt. Ltd. Office: 19/2 South Tukoganj, Indore:

“रिपोर्ट 17/2/04

श्रीमान जी शपथ पर रिपोर्ट करता हूँ की नोटिस के लिखे पते पर तलाश किया वहा इस नाम से कोई कम्पनी नहीं है। चौकीदार ने मौखिक जाहीर किया अपने मालिक से फोन पर बात करने के बाद मौके पर गवाह की तामिली वाद नोटिस श्रीमानजी की सेवा में वापस पेश है।”

As regards the notice of even date issued to M/s Tekdiwal Investment Pvt. Ltd. Office: 19/2 South Tukoganj, Indore; following endorsement was made:

“रिपोर्ट 17/2/04

श्रीमान जी शपथ पर रिपोर्ट करता हूँ की नोटिस के लिखे पते पर तलाश किया चौकीदार हाजीर मिला उसने बताया की हमारे मालिक बाहर है और मैं यह नोटिस नहीं ले सकता मालिक से फोन पर बात की वे आयेगे वही लेंगे नोटिस, वाद नोटिस श्रीमानजी की सेवा में वापस पेश है।”

The case was fixed on 27/03/2004, 19/04/2004, 07/05/2004 and 01/07/2004, however, no process fee was paid on these dates nor any application was filed for effecting substituted service by way of affixture or otherwise. It was only on 13/07/2004, the plaintiffs have filed an application under Order 5 rule 20 CPC for effecting service of summons on the appellants by affixture. As such, there was no prayer made for service by news paper publication.

7. Relevant order sheets dated 03/08/2004 and 25/08/2004 are quoted below:

“03/08/2004

वादी तर्फे श्री विनय सराफ एड. प्रतिवादी 1-2 पूर्व से एकपक्षीय, प्रतिवादी क्र. 3 पूर्व से मृत। प्रतिवादी क्र. 3 के वारिसान पूर्व से एकपक्षीय।

प्रतिवादी क्र. 4 से 9 अनिर्वाहित अनुपस्थित।

वादी अभिभाषक के आवेदन पत्र आदेश 5 नियम 20 सी.पी.सी. पर सुना गया। प्रकरण का एवं नोटिस रिपोर्ट का अवलोकन किया गया नोटिस पर रिपोर्ट है कि प्रतिवादीगण लिखे पते पर रहते नहीं है।

वादी अभिभाषक ने आवेदन पत्र से चस्पे के द्वारा नोटिस तामिली द्वारा चाही गयी है।

वादी अभिभाषक ने प्रतिवादी क्र. 4 से 9 को सूचना पत्र प्रकाशन का कार्यवाही हेतु समय चाहा दिया गया। प्रकरण प्रकाशन कार्यवाही हेतु पेशी 25.08.2004.”

“25/08/2004

वादी तर्फे श्री विनय सराफ एड. प्रतिवादी क्र. 1-2 पूर्व से एकपक्षीय प्रतिवादीगण 3 पूर्व मृत। प्रतिवादी क्र. 4-9 अनर्वाहित अनुपस्थित। वादी अभिभाषक ने फेहरिस्त अनुसार प्रतिवादी क्र. 4 से 9 के पंजीकृत कार्यवाही के संबंध में जानकारी पेश की गई। वादी अभिभाषक ने प्रतिवादी क्र. 4 से 9 के सूचना पत्र के प्रकाशन के संबंध में वादी अभिभाषक को सुना गया। विचार उपरांत आवेदन पत्र स्वीकार किया जाकर आदेश दिया जाता है कि प्रतिवादी क्र. 4 से 9 के सूचना पत्र “नवभारत पेपर” में प्रकाशन हेतु जारी हो इस हेतु वादी तलवाना व नकल देवे प्रकरण प्रतिवादीगण क्र. 4 से 9 की उप. वादोत्तर हेतु प्रकरण 05.10.2004.

A bare perusal of the aforesaid orders do suggest that the trial Court has ordered for paper publication of notice without complying with the provisions of Order 5 rule 17 CPC, particularly; in the context of recording justifiable reason that the defendants are keeping out of the way for the purpose of avoiding service, or that for any other reason summons cannot be served in the ordinary way and in a mechanical manner ordered that the summons to be published in daily news paper 'Navbharat' and the summons were published on 24/09/2004. On 13/10/2004, defendants were proceeded *ex parte* and thereafter, on 08/04/2005, *ex parte* judgment and decree was passed without their knowledge and behind their back, on the basis of sole witness Chimanlal. Against the aforesaid judgment and decree, the defendants/appellants have filed F.A.No.280/2007 alongwith an application under Order 9 rule 13 CPC together with an application under section 5 of the Limitation Act.

In the aforesaid application, the defendants/appellants *inter alia* pleaded that neither notice was served in respect of MJC No.21/1999 nor with the summons after restoration of the suit to its original number. The appellants have acquired knowledge of the *ex parte* judgment and decree only on 14/05/2007 when an attempt was made by Chimanlal and other plaintiffs to dispossess the defendants No.4 to 9 (appellants). With the aforesaid, prayer was made for setting aside *ex parte* judgment and decree.

In support of the application, the appellants led evidence of one Rajendra (A.W.1) and Sunil (A.W.2).

The trial Court though on the one hand allowed the

application for condonation of delay but, dismissed the application filed under Order 9 rule 13 CPC on 18/08/2010 holding that the appellants had knowledge of passing the *ex parte* judgment and decree.

In the aforesaid backdrop, the instant appeal has been filed on 20/09/2010.

8. In the background of the facts and circumstances, the following questions of law arise:

(i) Whether on facts and in the circumstances of the case, resort to news paper publication of summons under Order 5 rule 20 CPC vide order dated 25/08/2004 by the trial Court can be said to be *bona fide* and in conformity with the statutory requirement thereunder to declare service of summons on defendants No.4 to 9 as complete?

(ii) Whether, mutually inconsistent reports of the process server; viz., (a) at the given address, the defendant – company was not found; (b) there was a chowkidar who said that the owners of the company were out of station and said that unless, the owners permit him to take notice, he cannot accept the notice, can be construed as willful refusal or avoidance of service by defendants No.4 to 9 to justify service of summons through paper publication under Order 5 rule 20 CPC;? and

(iii) Whether the trial Court did not fall in error ordering for publication of notice in news paper under Order 5 rule 20 CPC without adhering to the procedure of service of notice under Order 5 rule 17 CPC? And/also in absence of any prayer for paper publication in the application dated 13/07/2004?

9. The learned senior counsel for the appellants relying upon the following judgments:

(a) **Jomu Kurian Vs. Siby and another, AIR 1998 Kerala 360**

(b) **Teharoonchand Vs. Messrs. Surajmull Nagarmull, 1984 Calcutta 82**

(c) **Kodai Ram Vs. Ram Sunder Tewari, 1973 Allahabad 58**

(d) **National Aluminum Company Ltd., Vs. Lyong Heung Tradiing Co., Ltd., and others (2000) 9 SCC 251**

(e) **Yallowwa (Smt.) Vs. Shantavva (Smt.) (1997) 11 SCC 159**

(f) **M/s Neeraj Realtors Pvt. Ltd., Vs. Janglu (Dead) through legal heirs, AIR 2018 SC 753**

(g) **Neeraj Vs. Janglu (2018) 2 SCC 649**

(h) **Smurti Vs. Sanjay (2009) 13 SCC 338**

(i) **Satish Construction Company Vs. Allahabad Bank, 1999(1) MPLJ 329**

(j) **M.K.Prasad Vs. P. Arumugam, 2001(6) SCC 176**

(k) **Anil Vs. Solmita Tar Products and others 2006(1) JLJ 119**

contends that the trial Court has committed grave error of law and fact while disallowing the application under Order 9 rule 13 CPC, purportedly; on the ground that the appellants had full knowledge of passing the decree whereas the trial Court has condoned the delay in filing the said application under Order 9 rule 13 CPC. Even the publication of notice in the daily news paper 'Navbarat' had no circulation in the area. The trial Court also failed to appreciate the fact that Chimnlal (Non applilcant No.1) in paragraph 17 of the statement that the appellants had acquired knowledge of the *ex parte* judgment and decree only on 14/05/2007.

10. A careful perusal of the report of the process server quoted

above do suggest that neither there was refusal nor willful avoidance of the service of summons by defendants No.4 to 9, therefore, in all fairness, the trial Court ought to have directed the plaintiffs to pay the fresh process fee for service of notice. That was not done. Further, even otherwise, the remarks on the process server reports suggests that the trial Court ought to have resorted to service through affixture under Order 5 rule 17 CPC directing the plaintiffs to pay process fee in that behalf. That was also not done. The trial Court on 25/08/2004 while dealing with the application under Order 5 rule 20 CPC praying for service by *chaspā* / affixture only but, it has passed an order in hot haste and slip shod manner ordering for paper publication of the summons under Order 5 rule 20 CPC. Such exercise of power is contrary to the law as contemplated under Order 5 CPC; particularly, the rule 17 and rule 20 as interpreted by the Hon'ble Supreme Court in the case of **Yallawwa (Smt.) (supra)** wherein it has been ruled as under:

“....The trial court could not have almost automatically granted the application for substituted service without taking steps for serving the respondent by ordinary procedure as laid down by Order 5 Rules 12, 15 and 17 CPC. Substituted service has to be resorted to as the last resort when the defendant cannot be served in the ordinary way 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 trial Court did not at all apply its mind and recorded reasons as contemplated under Order 5 rule 20 CPC to justify publication of notice in the news paper as well evident from the order sheet dated 25/08/2004. In fact, a direction for substituted service could only have been directed if the Court is satisfied that “there is a 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.” No such exercise was done. Under the circumstances, the trial Court had fallen in error while ordering for substituted service through paper publication in the obtaining facts and circumstances and the defendants No.4 to 9 had no knowledge of the said paper publication.

11. *Per contra*, Shri Jain, learned senior counsel for the contesting respondent supports the order impugned with the contention that the trial Court has rightly ordered for paper publication of notice in the news paper under Order 5 rule 20 CPC instead of adopting the alternate mode of affixture/*chaspa*, in the obtaining facts and circumstances, the defendants No.4 to 9 though had knowledge of the proceedings before the trial Court but, deliberately avoided the service of notice. Hence, no illegality can be found in passing the *ex parte* judgment and decree dated 08/04/2005.

12. Heard.

13. Before adverting to the rival contentions, it is considered apposite to quote the relevant parts of Order 5 rule 17 and rule 20 CPC:

“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.”

20. Substituted service.—(1) Where 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 Court shall 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.”

14. The report of the process server explicitly suggests mutually conflicting reports, viz., (i) at the given address, the defendant – company was not found; (ii) there was a *chowkidar* who said that the owners of the company were out of station and said that unless, the owners permit him to take notice, he cannot accept the notice. There was no compliance of Order 5 rule 17 CPC as neither did he affix the notice nor submitted the report in the context of the said provision to complete the service of summons. Under the circumstances, the defendants admittedly were not available at the given address, therefore, it could not have been construed to be a case of refusal or deliberate avoidance of notice. In fact, it ought to have been held that there was no compliance of Order 5 rule 17 CPC. The trial Court, therefore, in all fairness, ought to have ordered for payment of fresh process to serve upon the defendants or if for any reason it was found that the defendants cannot be found at the residence should have ordered for service of notice through affixture under Order 5 rule 17 CPC. That was not done. Before ordering for substituted service through publication under Order 5 rule 20 CPC, the trial Court was under statutory obligation to record reasons germane for justification of compliance of rule 20 CPC. The order dated 25/08/2004 does not suggest application of mind in the aforesaid context. The trial Court has straight-a-way ordered for substituted service without taking steps for service of summons by ordinary way as contemplated under Order 5, rules 12, 15 and 17 CPC. As held by the Hon'ble Supreme Court in the case of **Yallawwa (Smt.) (supra)**, substituted service has to be resorted as a last resort where the defendant cannot be served in the ordinary way and the Court is justified 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.

In view of the above, the impugned order dated 25/08/2004 is found to have been passed in hot haste and slip shod manner contrary to the law laid by the Hon'ble Apex Court and High

Courts in *catena* of decisions as relied upon by the learned senior counsel for the appellants.

15. It is also queer fact that on the one hand, the trial Court has allowed the application for condonation of delay in filing the application under Order 9 rule 13 CPC and on the other hand, the trial Court justified the *ex parte* judgment and decree attributing knowledge thereof to the appellants. Be that as it may, this Court is of the view that service of summons on defendants/appellants No.4 to 9 were not complete. Hence, the *ex parte* judgment and decree dated 08/04/2005 passed in civil suit No.83A/1989 by the trial Court is prejudicial and detrimental to the rights and interest of the defendants/appellants No.4 to 9. Resultantly, the same is set aside. The parties before this Court shall appear before the trial Court on 25/02/2019 and the trial Court is directed to restore the suit to its original number. Thereafter, the trial Court shall proceed to decide the suit after hearing all the parties, in accordance with law.

16. Accordingly, questions are answered.

17. Appeal stands allowed and disposed of. No order as to cost.

(Rohit Arya)  
Judge  
25- 01-2019

b/-