

HIGH COURT OF MADHYA PRADESH : JABALPUR.

(Single Bench: Hon'ble Shri Justice H.P.Singh, J.)

CIVIL REVISION NO.59/2011

Raghuveer

Vs.

Hari Prasad & others.

Mr. Ishteyaq Hussain, learned counsel for the applicant.
Shri R.P. Khare, learned counsel for the respondents.

ORDER
(27.09.2016)

This Civil Revision under Section 115 of the Code of Civil Procedure, has been filed by the applicant/defendant No.2 assailing the order dated 26.10.2010, passed in Misc. Civil Appeal No.22/2009 (Raghuveer Vs. Hari Prasad and others), by II Additional District Judge to the Court of I Additional District Judge, Bhopal, arising out of order dated 23.7.2009, passed in Misc. Judicial Case No.1/2005 (Kunjilal and others Vs. Hari Prasad & another), by Civil Judge Class-I, Berasiya, District Bhopal (M.P.), thereby the application filed by the applicant/defendant No.2 under Order 9 Rule 13 of Civil Procedure Code (hereinafter referred to as the Code for short), for setting aside ex-parte judgment and decree passed in Civil Suit No.63-A/2000 (Hari Prasad Vs. Kunjilal and others), has been dismissed, treating that the same was filed beyond the period of limitation.

2. Facts of the case in nutshell is that the respondent No.1/plaintiff is the son of respondent No.3/defendant No.1, filed a Civil Suit claiming declaration of his share and permanent injunction in the suit

property bearing No.137/1 Ward No.14, earlier Ward No.11, situated at Shantikunj Road, Sherpura, Berasiya, District Bhopal, against the defendant/applicant as well as other defendants/respondents. It is alleged that defendants are in exclusive possession of other ancestral property and they are trying to oust the applicant forcefully with the help of defendant No.2. It is alleged that defendant No.3 with the help of defendant No.1 had tried to oust them from the suit property, abused, threatened them and subjected the plaintiff/respondent No.1 his wife as well as children to Marpeet and he also tried to do away the household articles from the house during scuffle.

3. In the suit, defendant No.4/respondent No.2 herein, has submitted his written statement and supported the statement of plaintiff/respondent No.1 wherein it is stated that suit property is ancestral property and he is also entitled to his share in the same. He submitted that defendant No.1 being a labour, was not in a position to purchase such property at Berasiya and ousting of the plaintiff from the suit property is not proper. The learned trial Court due to absence of other defendants proceeded ex-parte against them.

4. Learned trial Court after going through the factual aspects, framed the issues. On the basis of supportive evidence adduced by Banshilal, Prem Narayan, Mukundilal and Kaniram, learned trial Court came to the conclusion that plaintiff is in possession of the suit property being co-sharer and, therefore, granted permanent injunction in favour of appellants, by the impugned judgment and decree. It is further held by the learned trial Court that without partition, the defendants are directed not to oust the plaintiff from the suit property. The defendant No.2/applicant being aggrieved by the aforesaid judgment and decree preferred an application under Order 9 Rule 13 of the Code of Civil Procedure before the learned trial Court for quashment of the impugned judgment and decree, alleging that the same has been passed ex-parte without giving him notice, which has also been dismissed on the ground that the same

is barred by limitation. Assailing the order passed on the aforesaid application, the defendant No.2 preferred the appeal before the lower appellate Court, which has also been dismissed, treating as if the application itself is barred by period of one year.

5. Learned counsel for the applicant submitted that the order passed by the appellate Court as well as by the learned trial Court both are illegal and liable to be set aside. He further submitted that applicant came to know about the impugned judgment and decree only when for the first time on 26.3.2005 in the Holi Festival. He further submitted that notices were not properly served upon the defendants. Learned counsel for the applicant further submitted that as per law signatures of the witnesses must be obtained on the notices, if any of the noticee refuses to accept the same. But, here in the present case no such legal procedure was adopted. Therefore, service cannot be said to be legal and no ex-parte proceedings could be drawn by the Courts below. He prayed that impugned orders as well as judgment and decree both, be set aside by allowing his application under Order 9 Rule 13 of the Code of Civil Procedure.

6. Learned counsel for the applicant submitted that in the absence of such, service cannot be held to be valid, it is contrary to the provisions of Rules 17, 19 of Order 5 of Code. This Court in the case of **Baijnath Vs. Harishankar [2001(2) MPLJ 142]** has considered this question and held :-

“19. In *Kunja Vs. Lalaram and others*, 1987 MPLJ 746, it has been laid down that the provisions of Rule 19 of Order 5 of the Code are mandatory and cast a duty on the Court to make a judicial order while accepting service effected in the manner prescribed under Rule 17 of Order 5 of the Code. It has further been observed that non-compliance of Order 5, Rule 19 will cause serious injustice to the defendant. Bombay High Court in *Baburao Soma Bhoi Vs. Abdul Raheman Abdul Rajjak Khatik*, 2000(1) Mh.L.J. 481 =(1991) All India High Court Cases 3725, has observed that the return of summon should be accompanied by the affidavit of the process server, which is in Form 11 of the First Schedule of the Appendix “B” of the code. If

the return report of the process server is without an affidavit, the Court has to record the statement of process server and after making further enquiry, the Court should hold that the summons has been duly served or not.”

20. In the instant case as noticed above, the trial Court without examining the process server, directed that the appellant/ defendant No.1 be proceeded against ex-parte; even though the report of the process server was not accompanied with his affidavit. Obviously such a course was not permissible.

21. In the instant case, since the trial Court has not made any enquiry regarding the service of summons on the appellant as also regarding the refusal of summons reported by serving officer, the mandatory requirements of Order 5 Rule 19 of the Code have not been duly complied with. The approach of the trial Court during trial as also while holding the enquiry on the application of the appellant under Order 9 Rule 13, Civil Procedure Code, for setting aside ex-parte judgment and decree passed against him, appears to be rather casual and negligent, as has been pointed out above. Moreover, the cause of delay shown by the appellant is belated filing of the said application under Order 9 Rule 13 read with Section 151 of the Code also deserves acceptance.”

7. Learned counsel for the applicant further submits that, several infirmities and lapses on the part of the process-server as he did not affix a copy of the summons and the plaint on the wall of the shop. In this context, learned counsel relied on a decision of the Apex Court in the case of **Sushil Kumar Sabharwal V. Gurpreet Singh and others (AIR 2002 SC 2370)**, in paras 8 & 12 as follows :-

“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 process-server 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.”

12. The provision contained in Order 9 Rule 6 of C.P.C. is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the Court depending on the given situation. The three situations are : (i) when summons duly served; (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard ex-parte. The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being 'proved' that the summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard ex-parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or causal approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the trial Court would have been conscious of its obligation cast on it by Order 9 Rule 6 of the C.P.C., the case would not have proceeded ex-parte against the defendant-appellant and a wasteful period of over eight years would not have been added to the life of this litigation.”

8. Learned counsel for the respondents submits that summons were duly served on applicants. Since respondent No.2-Patiram , being family member was served with the summon and he had appeared on 12.8.200 before the Court below and application under Order 6 Rule 17 was filed, it cannot be said that applicants were unaware about the suit. They were absent in the trial Court deliberately. The applicants were well aware in respect of pendency of the suit and in view of second proviso of Order 9 Rule 13, merely on the ground of irregularity in the service of summon the ex-parte

decree cannot be set aside. The application was also barred by time. The applicant, having knowledge of the ex-parte decree, ought to have filed an application for setting aside ex-parte decree within 30 days. There was no necessity to await for the certified copy of the judgment and decree. The application can be filed without certified copy of the decree, but since it was not filed within time, the same was barred by time. Learned counsel for respondents further submits that both the Courts below have rightly passed the order after going through the material aspects. He fairly contended that the notices were properly issued, but the applicant had refused to accept the same and because of which ex-parte order was passed against the applicant.

9. Heard learned counsel for the parties at length and perused the record.

10. From perusal of records and submissions put forth by learned counsel for the parties, it reveals that the process server tried to serve the summons on the applicant, but the same was allegedly returned unserved on account of rain fall. No witness had signed on the report of the Process Server. It is trite law that if summons was not served on the party concerned, the same should have been affixed on the house. Apart from this, when the service was seriously disputed by the defendant/applicant in the trial Court, it was obligatory on the part of respondents to examine process server who has affected the service. Learned trial Court on the basis of enquiry report made by Sale Ameen dated 20.7.2000, which was found to be proper on which applicant had put the signatures, has passed the ex-parte judgment and decree against the applicant.

10. In view of the foregoing discussions, I deem it appropriate to afford an opportunity to the applicant to contest the matter in the trial Court, in the interest of justice, so that valuable right of a person, like applicant to participate in the hearing may not be deprived.

11. Accordingly, the revision is **allowed**. The impugned order

dated 26.10.2010, passed in Misc. Civil Appeal No.22/2009 (Raghuveer Vs. Hari Prasad and others), by II Additional District Judge to the Court of I Additional District Judge, Bhopal, arising out of order dated 23.7.2009, passed in Misc. Judicial Case No.1/2005 (Kunjilal and others Vs. Hari Prasad & another), by Civil Judge Class-I, Berasiya, District Bhopal (M.P.), is set aside. The application filed by the defendant/applicant under Order 9 Rule 13 of Civil Procedure Code for setting aside ex-parte judgment and decree passed in Civil Suit No.63-A/2000 (Hari Prasad Vs. Kunjilal and others) is hereby allowed. The applicant is permitted to appear before the trial Court concerned on **07.11.2016** and to produce his witnesses and material evidence, subject to payment of cost of **Rs.2000/- (Rupees Two Thousand)**. Learned trial Court is, hereby, directed to consider and decide the case of the defendant/applicant afresh on merits, after affording opportunity of hearing to the party concerned, in accordance with law. It is also directed that defendant/applicant be given only two working days in general circumstances to produce his evidence and material documents before the learned trial Court.

12. With the aforesaid, the revision stands allowed.

(H.P. SINGH)
JUDGE

A.Praj.