

**IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR**

**BEFORE**

**HON'BLE SHRI JUSTICE DEEPAK KHOT**

**ON THE 17<sup>th</sup> OF JUNE, 2025**

**MISC. APPEAL No. 5969 of 2024**

***SHRI SHIVA ALIAS LUCKY SEN***

*Versus*

***SMT. ANITA TANK***

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**Appearance:**

Shri Siddharth Narula - Advocate for the appellant.

Shri Hemant Kumar Namdeo, learned counsel for the respondent No.1.

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**ORDER**

1. This Misc. Appeal has been filed under section 43 Rule 1(r) of C.P.C. against the impugned order dated 19.7.2024 passed by the court of Principal District Judge, Bhopal in M.J.C.No.228/2024.
2. Brief facts of the case in narrow compass are that a civil suit was filed by the respondent/plaintiff for eviction, arrears of rent and mesne profits, which was registered as R.C.S.No.223-A/2019. The trial court vide impugned judgment and decree dated 7.5.2022 dismissed the suit ex-parte. Being aggrieved by the said judgment and decree, the respondent/plaintiff preferred regular First R.C.A.No.80/2022 before the Principal District Judge, Bhopal on 23.6.2022.
3. Learned counsel for the appellant submitted that the appellate court had issued notices/summons to the appellant on 20.2.2023 for appearance on 13.4.2023. It is submitted that on 13.4.2023, the appellate court has proceeded ex-parte against respondent/defendant with an observation that despite of notice by affixation, no one appeared on behalf of the respondent. Consequently, the appellate court has pronounced ex-parte judgment and decree dated 23.6.2023 reversing the judgment and decree pronounced by the civil court, granting decree in favour of respondent/ plaintiff against the

appellant/ defendant for eviction in R.C.A.No.80/2022. It is further submitted that pursuant to said judgment and decree, the respondent/plaintiff attempted to dispossess the appellant from the leasehold property. On such event of dispossession, the appellant gathered the knowledge of ex-parte judgment and decree in Civil Appeal and, therefore, filed an application under Order 41 Rule 21 C.P.C. on 28/5/2024 along with an application under Section 5 of the Limitation Act.

4. It is submitted by counsel for the appellant that as the appellant was not aware of the fact of ex-parte decree passed by the appellate court against him, therefore, prayed for condonation of delay in filing the application under Order 41 rule 21 CPC. It is submitted in the application under Section 5 that for the first time the appellant came to know about the said ex-parte judgment and decree on 21.5.2024 when the respondent plaintiff came to disputed property with process server for his dispossession and, accordingly, filed the application under Order 41 Rule 21 CPC along with Section 5 of Limitation Act on 28.5.2024.
5. Learned counsel for the appellant has submitted that as per Article 123 of the Limitation Act, the limitation to file such an application is 30 days. As the judgment and decree was passed on 23/6/2023, the application for re-hearing under Order 41 Rule 21 C.P.C. was filed on 28.5.2024 along with an application for condonation of delay under Section 5 of the Limitation Act, the learned appellate Court vide order dated 19/7/2024 has rejected the said application on the ground of delay as well as on merits. It is further submitted that the said order is against the record and settled principle of law hence deserves to be set aside by granting an opportunity to the appellant to put forth his submission before the appellate court. To buttress his contention counsel for the appellant has placed reliance upon the judgment of the Apex Court in the case of **Kunja Vs. Lalaram and others, reported in 1986 SCC**

**online MP 12, Baijnath Mishrilal Kachhi Vs. Hari Shankar, s/o Mishri Lal and others, reported in 2000 SCC Online MP 346 and in the case of Shashi and others Vs. Mohanlal Tiwari and others, reported in 2024 SCC online MP 4235.**

6. Per Contra, counsel for respondents has refuted the submissions made by counsel for the appellant and submitted that the learned appellate court while deciding the said applications has categorically held in para 9 of the order dated 29/7/2024 that the appellant was properly served as per the provisions of CPC and thereafter proceeded ex parte. Thus, on the said ground prayed that no interference is called for by this court in the present appeal and the order passed by the appellate court by the court below deserves to be affirmed.
7. Heard the learned counsel for the parties and perused the record.
8. A coordinate Bench of this Court in the case of **Kunja (supra)** has held in para 5 as under :-

5. I have no hesitation to take the view that the provisions of R. 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 O. 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 Art. 39-A 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 R. 18. The decision, therefore, is distinguishable on facts.

9. A coordinate Bench of this Court in the case of **Bajinath Mishrilal Kachhi** (*supra*) has held as under :-

**18.** Thus, it is clear that neither the service was effected properly, nor the trial Court observed the necessary requirements of law under Order 5, Rule 19 of the Code mandating recording of satisfaction, after examining the serving officer on the question of service of summons, on the appellant.

**19.** In *Kunja v. Lalaram* (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 v. Abdul Raheman Abdul Razzak Khatik* 2000 (1) Mh. L.J. 481 : (1999) All India High Court Cases 3725), has observed that the return of summons 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 foregoing circumstances, it is clear that there was no proper service of summons on the appellant. The appellant stated that the summons was never tendered to him and that he never refused to accept the summons. His statement in the face of the infirmity in the evidence led by the plaintiffs/respondents in the above regard has to be accepted. Plaintiffs/respondents having failed to prove that there was due service

of summons of the suit on the defendant/appellant, appellant's application under Order 9, Rule 13 of Civil Procedure Code, deserved to be allowed and *ex parte* proceedings against him deserves to be set aside.

10. A coordinate Bench of this Court in the case of Shahsi (*supra*) has held as under :-

**15.** It reveals from the record of the original civil suit that learned trial Court did not follow the provisions enumerated under Order V Rules 19 of CPC despite the fact that the alleged service report does not contain the name, address and signature of the witnesses before whom ancestors of appellant-Mridul Brahman/defendant No. 6 has refused to accept the notice. There is no material available on record that service on defendant No. 6 was properly performed.

**16.** Article 123 of the Limitation Act, 1963 provides the period of limitation for application to setting aside the *ex-parte* judgment and decree. As per Article 123 of the Limitation Act, 1963 limitation for filing the application for setting aside *ex-parte* judgment and decree period is 30 days from the date of decree and if summon/notice was not duly served, then the time begins from the date of knowledge of the decree.

**17.** As discussed above, in civil suit No. 13-A/2003 summon of the civil suit was not duly served on the defendant No. 6, therefore, the period of limitation began from the date of knowledge of the decree.

11. Order 5 Rule 19 CPC provides examination of serving officer in case of service which has been affected under Order 5 Rule 17 CPC. For ready reference the provision is reproduced hereinbelow :-

**"Order V Issue and service of summons.**

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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 was affixed."

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**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.

12. From bare perusal of aforesaid enunciation of law and the statutory provision, it is clear that when summons is returned under rule 17, if not verified by the affidavit of the serving officer, on examination of serving officer on oath or cause him to be so examined by another Court, touching his proceedings, and by making such further enquiry in the matter as Court thinks fit, declare that the summons has been duly served or order such service as it thinks fit.
13. From perusal of the order-sheet declaring the appellant ex-parte by the appellate court does not reflect that such procedure has been adopted by the court below. As such declaring the appellant ex-parte itself was illegal which vitiates the entire proceedings taken on after declaring the appellant ex-parte. Thus, this Court finds that the learned appellate court has not processed the case in consonance with the provisions of Order V rule 17 and 19 CPC and thus the declaration of appellant ex-parte is absolutely illegal.

14. The appellate Court while dealing with the application under Order 41 Rule 21 CPC has lost sight of the aforesaid fact and provisions of law and only on theoretical grounds of service has opined that service has been affected in accordance with law and, therefore, the application under Order 41 Rule 21 CPC read with section 5 of the Limitation Act has been dismissed.
15. **As per Article 123 of Limitation Act, 1963, thirty days time has been prescribed to file an application to set aside a decree passed ex parte or to rehear an appeal decreed or heard ex-parte from the date of decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.**
16. It is seen from the record that as the service was not affected in accordance with law there was no reason for the appellant to know that such proceeding has been initiated against the appellant. Therefore his statement to the effect that he came to know in regard to ex-parte decree on service of summons of dispossession seems to be bonafide. Thus, the learned court below has erred in dismissing the application under section 5 of the Limitation Act.
17. Reliance placed by the respondent in the order passed in the case of **Mst. Bhabia Devi Vs. Permanand PD. Yadav reported in (1997) AIR (SC) 1919** is misplaced. The facts of the said case are distinguishable on the facts that in that case the evidence of process server was relied to come to the conclusion that the petitioner in that case refused to sign and put his thumb while dealing with the issue of ex-parte decree.
18. Thus, from the aforesaid analysis of the fact and enunciation of law in the case of **Kunja (supra), Baijnath Mishrilal Kachhi (supra) and Shashi (supra)**, the appeal of the appellant succeeds and is hereby **allowed**. The impugned order dated 19.7.2024 passed by Principal District Judge Bhopal in M.J.C.No.228/2024 is hereby **set aside**. The matter is remanded back to the Court of Principal District Judge, Bhopal for rehearing the matter by giving

due opportunity of hearing to the appellant/defendant. Both the parties are directed to appear before the appellate court 28.7.2025.

19. Record of the court below be returned back for further adjudication.
20. No order as to cost.

**(DEEPAK KHOT)**  
**JUDGE**

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