
(1992) 06 MP CK 0007
In the Madhya Pradesh High Court
Case No : C.R. No. 213 of 1991

Agrawal Transport Corporation

APPELLANT

Vs

Girjabai Sharma

RESPONDENT

Date of Decision : 19-06-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 10, Order 5 Rule 11, Order 5 Rule 12, Order 5 Rule 13, Order 5 Rule 14
Madhya Pradesh Accommodation Control Rules, 1966 — Rule 15
Madhya Pradesh/Chhattisgarh Accommodation Control Act, 1961 — Section 23A, 23E

Citation : (1993) 2 MPJR 87 : (1993) 38 MPLJ 623 : (1993) MPLJ 623

Hon'ble Judges : A.G. Qureshi, J

Bench : Single Bench

Advocate : R.G. Waghmare and N.K. Dave, for the Appellant; A.K. Sethi, for the Respondent

Final Decision : Allowed

Judgement

A.G. Qureshi, J.

This revision petition has been filed u/s 23-E of the M.P. Accommodation Control Act, 1961 against the ex parte order of eviction dated 7-3-1991 passed by the Rent Controlling Authority, Indore in eviction case No. A90(7)56/90.

The facts leading to this revision petition, in short are that the petitioner was the tenant of the respondent in a shop comprising of two rooms in the building situated at 10(old) and 12(new) Nasia Road, Indore. The tenancy was for non-residential purpose. The respondents filed an application on 3-12-1990 before the Rent Controlling Authority, Indore against the petitioner u/s 23A(b) of the Accommodation Control Act, 1961 as a widow. On the same date an order for issuance of notice of the eviction application was passed by the Rent Controlling Authority directing the tenant to appear before the Court on 27-12-1990. On 27-12-1990 the Court found that the bailiff had given a report of non-service of notice on the ground that the premises of the petitioner was locked. Thereafter

the case was ordered to be put up on 28-12-1990. The Court on 28-12-1990 directed the notice to be served by affixation and finally on 11-1-1991 the Court found that although the notice has been served by affixation, still none is present. Therefore, an order for proceeding ex parte against the tenant was made and the case was fixed for 22-1-1991 and thereupon an ex parte decree of eviction was passed which has been challenged in this revision petition.

The learned counsel for the petitioner has drawn my attention to the fact that the petitioner has suppressed the fact that there is an office of the petitioner in another building also and that address was not shown before the Court. Furthermore the order dated 27-12-1990 clearly shows that the notice of the eviction application could not be served because the premises was locked. But the Court has erred in directing substituted service despite the fact that the notice was sent only once to the shop of the applicant but the process server has wrongly reported that the shop is always locked, which led the Court to order the affixation of the notice by way of substituted service. As such the order on the application of the landlord was passed for substituted service without making any serious attempt to serve the notice on the present petitioner and the Process Server never attempted to serve the notice of the eviction application for more than once. From the report of the Process Server the Court could not hold that repeated attempts to serve the notice were made by the Process Server and, therefore, the provisions of Order 5, Rule 20, CPC could not be invoked. As such the application of the non-applicant under Order 5, Rule 20, CPC was not maintainable and the affidavit sworn by the landlord in support of the application is also of no avail.

On the other hand the learned counsel for the non-applicant Shri Sethi argues that as no application under Order 9, Rule 13, CPC has been filed, the present revision petition is not tenable. On merits Shri Sethi argues that the lower Court has not erred in any way in acting on the report of the bailiff. In reply Shri Waghmare states that an application under Order 9, Rule 13, CPC was not necessary because the order impugned is a nullity because the service was not effected in accordance with law.

As regards the objection about the tenability of this revision petition, in absence of an application under Order 9, Rule 13, CPC having been filed before the lower Tribunal itself, I am of the opinion that the Division Bench of this Court in the case of Nagar Palika Nigam, Gwalior Vs. Motilal Munnalal, has concluded this point. In the aforesaid D.B. Judgment following the principles enunciated by this Court in Ramlal v. Rewa Coal Fields Ltd. 1966 MPLJ, 507, the Court was of the opinion that an error, defect or irregularity which has affected the decision of the case may be challenged in an appeal against, the decree whether ex parte or otherwise. But an appeal against the ex parte decree u/s 96(2), CPC cannot be converted into proceedings for setting aside the decree with the concomitant duty of affording to the parties an opportunity of adducing evidence for and against any ground that may be raised in support thereof under Order 9, Rule

13, Civil Procedure Code, nor can such an appeal be converted into an appeal under Order 43, Rule 1(d), Civil Procedure Code. The reason is that when a particular remedy is provided for setting aside an ex parte decree and there is by way of appeal another special remedy against an order refusing to set aside, these remedies and none other must be followed. As such this Court in absence of an application under Order 9, Rule 13, CPC cannot pass an order in respect of the sufficient grounds for the absence of a party against whom an ex parte order is passed. However, from the discussion in para 5 of the aforesaid judgment it is also manifest that the appellant is free to show that in the order, proceeding ex parte against him there is an error, defect or irregularity which has affected the decision of the case.

In *Bhaiyalal (Singhai) and Ors. v. Rikhilal Jain* 1968 MPLJ 118 : 1968 JLJ 333, this Court has taken a view that if an order of the Rent Controlling Authority is without jurisdiction, then the order is not final and is to be ignored. In *Shantilal v. James Pitter* 1987 MPRCJ 178, this Court has taken the view that even during an execution proceeding it is open to the judgment-debtor to take the defence of absence of notice and in case the objection sustains, the decree becomes a nullity and inexecutable. In this very case it has also been held that even in absence of an application under Order 9, Rule 13, CPC a relief can be granted on an application filed u/s 47, Civil Procedure Code.

As such, in view of the aforesaid decisions of this Court, it is manifest that this Court while hearing a revision u/s 23-E of the M.P. Accommodation Control Act (as no appeal has been provided against the order of the Rent Controlling Authority under the Act) can look into the grievance of the petitioner as to the defect, error or irregularity affecting the decision of this Case.

Now, as regards the error and defect of the order of proceeding ex parte, on perusal of the record, I find that the notice of the eviction application was issued against the present petitioner by the Court, vide order dated 3-12-1990 and the case was fixed for 27-12-1990. The notice was issued on 4-12-1990 and the report of the bailiff dated 8-12-1990 is as under :--

^^uksfVI ckcr fn;s x;s irs ij x;kA ij edku ij ges"kk rkyk yxk jgrk gSA blfy, uksfVI rkehy u gks ik;k uksfVI vne rkehy is"KA

This report does not say as to how many attempts were made by the bailiff to get the notice served at the given address. The report is only of 8-12-1990 when the notice itself was signed on 4-12-1990. As such it is not clear as to on what dates the bailiff had gone to the address of the non-applicant and found the premises locked.

Now, the provisions of directing the substituted service under Order 5, Rule 20, CPC provides that the Court should be satisfied that there is reason to believe that the defendant is avoiding the service or that for any other reason the summons cannot be served in the ordinary way and upon such satisfaction the Court shall order the summons to be served by affixing a copy of the summons

in some conspicuous part of the house 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. Along with the aforesaid provision Rule 19A of Order 5 has also to be taken into consideration wherein it has been provided that the Court shall in addition to and simultaneously with the issue of summons for service in the manner provided in Rule 9 to 19 (both inclusive) also direct the summons to be served by registered post acknowledgment due addressed to the defendant or his Agent empowered to accept the service at the place where the defendant or his Agent actually and voluntarily resides or carries on business or personally works for gain. This mandatory clause of issuance of summons is, however, subject to the discretion of the Court in the matter and the Court can always, looking to the circumstances of issuance of summons by post in addition to the personal service, if the Court decides that such a simultaneous service is unnecessary in the circumstances of the case, then the Court has to record the reasons for the departure from the mode of simultaneous service. But if without recording any reason for not issuing the summons by post simultaneously, the Court does not issue the summons by registered post simultaneously as provided under Rule 19A or Order 5, Civil Procedure Code, then the service of summons cannot be held to be valid.

As regards the cases governed by the M.P. Accommodation Control Act, 1961, the State has framed the M.P. Accommodation Control Rules, 1966. Rule 15, of the aforesaid Rules, provides for the procedure for service of notice wherein it has been provided that unless otherwise provided by the Act, any notice or intimation required or authorised by the Act to be served on any person shall be served either by delivering it to the person or by forwarding it to the person by registered post with acknowledgment due. As such the notice in the instant suit should have been sent by registered post in the event of the failure of the delivery of the notice to the tenant which has not been done in the instant case. As such there is apparently non-compliance of Rule 15 framed under the M.P. Accommodation Control Act. As such on both the aforesaid grounds the order of the Rent Controlling Authority of proceeding ex parte against the petitioner has to be held to be against the law.

In the result the mode of service of summons in the instant case being contrary to the provisions of law, the ex parte (impugned) order of eviction having been passed holding that the non-applicant tenant was legally served with the notice of the case, is illegal. Consequently the revision petition is allowed with costs. The order impugned is quashed. Counsel's fee be taxed as per schedule. The case shall be decided by the lower authority after hearing both the parties.