
(2000) 10 MP CK 0007

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 581 of 1997

Bajinath Mishrilal Kachhi

APPELLANT

Vs

Harishanker and Others

RESPONDENT

Date of Decision : 09-10-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151

Citation : (2000) 10 MP CK 0007

Hon'ble Judges : V.K. Agarwal, J

Bench : Single Bench

Advocate : Sanjay K. Agrawal, for the Appellant; R.P. Agrawal, for the Respondent

Final Decision : Allowed

Judgement

V.K. Agarwal, J.—This appeal is directed against the order dated 12.2.1997 in M.J.C. No. 22/1994, by Second Additional District Judge, Bilaspur, dismissing the application of the appellant under Order IX, Rule 13 read with Section 151, Civil Procedure Code, for setting aside ex parte judgment and decree.

2. Undisputedly the plaintiff/respondent No. I Harishankar filed a suit registered as Civil Suit No. I I-A, 1992, against the defendant No. 1/appellant and defendants/ respondents No. 2 to 4 for partition, possession etc. It appears from the record of the said Civil Suit that on 10.7.1992, the plaintiff/respondent No. 1 was permitted to sue as an indigent person and the summons to the defendants for settlement of issues were directed to be issued, and the case was fixed for 14.8.1992. The order sheet dated 14.8.1992 in the suit discloses that the defendants were absent on that day. It was reported that defendants Nos.2 and 4 were duly served with summons; while defendants No. 1 and 3 had refused to receive summons. In view of the absence of the defendants, the Trial Court ordered that the case shall proceed against them ex parte. After recording evidence, judgment was delivered in the suit on 9.7.1993.

3. The defendant No. 1/appellant on 6.8.1994, filed an application under Order IX, Rule 13 read with Section 151, Civil Procedure Code, in the Trial Court, which was registered as M.J.C. No. 22/1994. In the said application, it was stated by the defendant No. 1/appellant that though the process server reported that he had refused to accept service of summons, but in fact the process server never attempted service on the defendant No. I/appellant, and that he never went to the residence of the defendant No. I/appellant on 6.8.1992 for service of summons and that the latter did not refuse to take summons. It was further stated in the application that the defendant No. 1 /appellant had no knowledge about the pendency of the suit, nor about the passing of the ex pane judgment and decree. It was further averred in the application that defendant No. 1/ appellant came to know about the ex parte judgment and decree only on 17.7.1994, when Jagdish-respondent No. 2, came along with the Commissioner for measurement and informed the appellant Baijnath that they had obtained a decree in the suit. The defendant No. 1 then made enquiries about the said suit, it was further averred by defendant No. 1/ appellant that full information about the said suit could be gathered by him on 6.8.1994. Thereafter, he contacted his Counsel and filed application under order IX, Rule 13, Civil Procedure Code, for setting aside the said ex parte judgment and decree dated 9.7.1993.

4. The said application was resisted by plaintiff/respondent No. 1 Harishankar. He denied the averments made in the above application. According to him, the process server had attempted service of summons which was refused by the appellant. Therefore, the service of summons was made by affixture of a copy of the summons on the house of the appellant. The report of the process server was accordingly appended. The Trial Court therefore, justifiable proceeded ex parte against the defendant No. 1, Baijnath.

5. The learned Trial Court after recording evidence of the parties, held by the impugned order that the summons for the date of hearing in the suit. i.e. for 14.8.1992 was refused by defendant No, 1/appellant, Baijnath, hence service of summons on him was held to be proper. Accordingly, the appellant's contentions regarding non-service of summons on him were rejected. Consequently his application under Order IX, Rule 13, Civil Procedure Code, praying that ex parte judgment and decree in Civil Suit No. 11 -A/ 1992 be set aside, was rejected.

6. The Learned Counsel for the appellant has submitted that the learned Trial Court did not properly appreciate the contentions raised by the defendant/appellant Baijnath. It has been contended that the record of the Trial Court as well as M.J.C. did not disclose that service of summons was attempted on him. It has further been submitted that the process server Chhotelal did not attempt service of summons for the date of hearing on 14.8.1992 on the defendant No. I / appellant. He also did not swear any affidavit in support of his report, as is required under Order V, Rules 17 and 18, Civil Procedure Code, that the defendant/appellant refused to accept summons. It was further contended that the Trial Court neither examined the process server nor did it record an order

that the service of summons on the defendant/appellant was proper. Thus, the Trial Court also failed to verify and record its satisfaction regarding due service of summons, as is the mandate of law. It was, therefore, urged that as the mandatory provisions regarding service of summons were not duly complied with, the ex parte judgment and decree deserved to be set aside.

7. As against this, the Learned Counsel for the plaintiff/respondent No. 1 Harishankar has urged that as the defendant/appellant has refused service of summons far the date of hearing on 14.8.1992, as was the report of the process server Chhotelal date 6.8.1992; the Trial Court Was justified in proceeding ex parte against the appellant. He has thus supported the impugned order dismissing the application under Order IX, Rule 13 read with Section 151 of C.P.C. by the Trial Court.

8. In the instant case, the question that arises for consideration is as: to whether the Trial Court was justified in proceeding ex parte against the defendant/appellant? In order to decide the said question, it has to be considered as to whether it was established that the defendant/appellant was duly served with summons for the date of hearing on 14.8.1992?

9. It may be stated at the outset that the Trial Court handled the proceedings regarding the appellant's application under Order IX, Rule 13 read with Section 151, Civil Procedure Code, registered as M.J.C. No. 12/1994 in a rather casual manner. It is noticed that documents exhibited while recording evidence, have been incorrectly described and marked and are not actually found on the record of the Trial Court.

10. It may be noticed in the above reference, that Harishankar (NAW/1), has stated that he filed the certified copy of the judgment and decree which are Ex. N A/I and Ex. N A/2. However, in the record of the said M.J.C. Ex. N A/1 is the copy of the order sheet dated 2.11.1993 while Ex. NA/2 is the copy of a list of documents. Moreover while in the statement of Chootelal (NAW/2) some other documents/i.e. summons and "Hukmnama" have again been described and marked as Ex. NA/1 and Ex. NA/2 by the Trial Court. Further none of these documents are found to be mentioned in the list of documents of respondents prepared by the Trial Court. The certified copy of the judgment and decree mentioned by Harishankar (NAW/1) in his statement are not on record of the M.J.C. Again, while a copy of the notice for the appellant Baijnath is marked and filed in the record as Ex. A/1, but no witness appears to have been made a statement regarding the said document Ex. A/1. It appears that the statement of process server Chhotelal (NA W/ 2) relates to this document Ex. A/1, though the Trial Court has wrongly mentioned the same as Ex. NA/1 while recording his statement. Document "Hukmnama" marked as Ex. NA/ 2 in the statement of Chhotelal, however, is also not found on the record of MJ.C.

11. Now, I shall proceed to examine as to whether the present defendant No I appellant Baijnath was duly served with summons of the suit. It appears that the

Trial Court in Civil Suit No. 11-A/1992 directed by order sheet dated 14.8.1992 that since the appellant/defendant No. 1 Bajinath has refused to take service of summons, he should be proceeded against ex parte. Copy of summons Ex. A/1 (stated to be Ex. NA/1 by process server Chhotelal (NA W/2) bears the report dated 1.2.1992 appended by another process server Malik Road.-Therefore, the service report on summons Ex. A/1 and the statement of witness, in regard thereto are not relevant. If further appears that though summons for the appellant Bajinath for the date of hearing i.e. 14.8.1992 is not placed on record of the proceedings in M.J.C. No. 22/1994, registered on the application under Order IX, Rule 13, Civil Procedure Code, filed by the appellant, but the summons for that date of hearing is available on the record of the Civil Suit, which has been perused by me. It would appear from the report dated 6.8.1992 by the process server that the appellant Bajinath refused to accept service of the said summons. Process server Chhotelal (NA W/ 2) also stated to the same effect and has stated that on refusal by Bajinath and another defendant Sukru, he had affixed the copy of summons on the door of their house and had written, his report along with affidavit. However, Chhotelal (NAW/2) in his cross-examination in para 3 has admitted that signatures of the witnesses Mohan Singh and Pancham Singh in the original summons of Bajinath, were in the handwriting of the same person. That would mean that two witnesses alleged to be Mohan Singh and Pancham Singh are not two different persons but, their signatures as above were appended by a single person. This clearly falsifies the statement of process server Chhotelal (N AW/7), and thus due service of summons on defendant No. 1 /appellant Bajinath is rendered highly doubtful.

12. It may also be noticed that in summons for Bajinath marked as Ex. A/1 in the M.J.C, in his address he was shown to be residing at Tifra, while process server Chhotelal (NAW/2) states that he had gone for service of summons on Bajinath at Chantideeh. Appellant Bajinath (NAW/1) in his statement has categorically states that he does not reside at Tifra. Therefore, from the above, it is clear that the service of summons of the suit was not effected properly by process server Chhotelal (NAW/2). His statement is inconsistent and self contradictory, which renders it suspicious and untrustworthy.

13. It may be noted that Order V of CPC (hereinafter referred to as Code for short) provides for the procedure for issuance and service of summons. Rule 10 of Order V of the Code, provides that the service of summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer, as he appoints in this behalf, and sealed with the seal of the Court. Rule 12 of Order V of the Code provides that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent, shall be sufficient. Therefore, normally the attempt of the process server should be to serve the summons personally to notice, in accordance with the aforesaid provisions.

14. Order V, Rule 17 of the Code lays down the procedure when defendant

refuses to accept service, or cannot be found. It is laid down therein that when the serving officer, after using all due and reasonable diligence, cannot find the defendant and there is no agent empowered to accept service of summons on his behalf, nor any other person to whom service can be made, the serving officer shall affix a copy of 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, issuing it, with a report stating that he has so affixed the copy of 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. Further, Rule 19 of Order V of the Code provides, that where a summons is returned under Rule 17 as above, 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, touching his proceedings and may make such further enquiry in the matter as it thinks fit. Only thereafter the Court shall declare that the summons has been duly served or otherwise order such service as it thinks fit.

15. It is therefore, clear that in case of refusal of service of summons, the same has to be affixed in the presence of the witnesses and a report has to be endorsed by the process server in that regard. It has also to be reported by the process server as to who identified the house of the defendant and he should also mention the names of persons in whose presence the copy of summons was affixed, on the refusal to receive the summons by the defendant.

16. In the instant case, none of the requirements as above, appear to have been complied with. In the proceedings in M.J.C. No. 22/1994 before the Trial Court, the plaintiffs/respondents did not place adequate material to show that summons was duly tendered to the appellant/defendant Baijnath or that he refused to take it, and that the copy of the same was affixed on the door of the house of the appellate/defendant Baijnath.

17. As noticed earlier, the statement of process server Chhotelal (NAW/2), recorded by the Trial Court is inconsistent, self contradictory and untrustworthy. He has also admitted that one and the same person put two different names as witnesses, to the service report endorsed by him, on the summons issued on 14.8.1992-for the appellant Baijnath. The report endorsed on the said summons does not appear to be supported by any affidavit. As noticed earlier, the "Hukmnama" has not been placed on record of the Trial Court in the M.J.C. proceedings. "Hukmnama" is found on the record of the Civil Suit. Even that "Hukmnama" does not disclose that affidavit was sworn by process server Chhotelal (NAW/2). The record of the Civil Suit also does not disclose that Chhotelal was examined by the Trial Court in order to record its satisfaction regarding refusal of summons, as is mandated under Order V, Rule 19 of the Code. Further it does not appear from the order sheet dated 14.8.1992 of the Trial Court, that the Trial Court duly considered the service report of the process

server, to record its satisfaction that service of summons on the defendant was proper.

18. Thus, it is clear that neither the service was effected properly, nor the Trial Court observed the necessary requirements of law under Order V, 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 Vs. Lalaram and Others*, , it has been laid down that the provisions of Rule 19 Order V 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 V of the Code. It has further been observed that non-compliance of Order V, Rule 19 will cause serious injustice to the defendant. Bombay High Court in *Baburao Soma Bhoi Vs. Abdul Raheman Abdul Rajjack Khatik*, , 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 fact 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 IX, Rule 13 of CPC deserved to be allowed and ex parte proceedings against him deserves to be set aside.

22. It may further be noticed that the defendant/appellant had stated in his application that he came to know about the ex parte judgment and decree on 17.7.1994 when the Commissioner for the first time started proceedings of partition, in pursuance of the ex parte judgment and decree as above. The above statement has to be accepted in view of non-service of summons on the defendant/appellant. His application for condonation of delay therefore, deserves to be allowed. Reference in the above connection may be made to *N. Balakrishnan Vs. M. Krishnamurthy*, and *State of Bihar and Others v. Kameshwar Prasad Singh and Another*, JT 2000 (5) 389, wherein it has been held that the condonation of delay is a matter of discretion of the Court, In case of delay even if, there is some lapse on the part of the litigant concerned, that alone would not

be enough to turn down his plea and to shut the drop against him. If the explanation of delay does not smack of mala fides or it is not put forth as part of a dilatory strategy, the Court must show utmost consideration to the suitor.

23. In *G.P. Srivastava v. R.K. Raizada and Others*, (2000)3 SCC 34, it has been laid down that the word "sufficient" must be construed as an elastic expression and no hard and fast guidelines in that regard can be prescribed. The Courts have a wide discretion in deciding sufficiently of cause, keeping in view the peculiar facts and circumstances of each case. In *Shila Nath Mallik and Others Vs. Balabhadra Sutradhar and Others*, , while discussing the scope and object behind Rules 17 and 19 of Order V of the Code, it was observed that the above provisions have been made to safeguard the interest of the defendants, who do not make appearance before the Court. It has further been laid down therein that the Trial Court must ensure that the defendants have willfully remained absent in spite of knowledge of the suit and that has to be done by examining the process server and other witnesses as it thinks fit before deciding to hear the suit ex parte.

24. 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 V, 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 IX, 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 IX, Rule 13 read with Section 151 of the Code also deserves acceptance.

25. Therefore, the appeal is allowed. The impugned order is set aside. The application of the defendant/appellant under Order IX, Rule 13 read with Section 151 of the Code is allowed. Ex parte judgment and decree passed against him in C.S. No. 11-A/ 1992, is set aside. The Trial Court is directed to proceed with the trial of the suit again.