
(1970) 02 DEL CK 0007

In the Delhi High Court

Case No : Civil Miscellaneous (Main) Appeal No. 112 of 1969

Rameshwar Dayal

APPELLANT

Vs

Ram Avtar etc.

RESPONDENT

Date of Decision : 12-02-1970

Acts Referred:

Citation : (1970) ILR Delhi 694

Hon'ble Judges : V.S. Deshpande, J

Bench : Single Bench

Advocate : V.B. Andley and K.N. Topa, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) The respondents 1 and 2 are the landlords and the petitioner is a tenant of the premises-house No. 1232, Chowk Shah Mubarak, Delhi. The landlords applied to Respondent No. 3 Competent authority u/s 19 of the Slum Areas (Improvement and Clearance) Act, 1956 as amended in 1964 for permission to evict the tenant from the premises, inter alia, on the ground that the tenant is not living in the premises for over six months prior to the filling of the application and that he has acquired vacant possession of another residence, house No. 2372, Gali Ghanta Kakwan, Farash Khana, Delhi. On 24-9-1968, the Competent authority directed notice of the application to be sent to the tenant by registered post. The registered envelop containing the notice was returned to the Competent authority by the post-office with the following remarks, namely:- (a) Not met 10-10-68, 11-10-68, 12-10-68, 14-10-68 and 15-10-1968; and (b) A. D. Refused 16-10-1968.

(2) On 22-11-1968, the Competent authority observed that the registered envelop had been returned with the remark that it was refused and, Therefore, passed an order for publication as well as affixation of the notice on the spot. Accordingly, we find a copy of the notice on the record of the Competent authority containing report of service by affixation attested by two witnesses. We

also find that a copy of the news-paper containing the publication of the notice was sent to the tenant under certificate of posting. The Certificate of posting is also on record. On 16-1-1969, the Competent authority held that the notice had been published and also had been affixed on the spot and, Therefore, proceeded ex-parte against the tenant. The Competent authority granted permission to the landlord to evict the tenant by the order dated 25-3-1969, a certified copy of which is at Annexure F to the writ petition.

(3) The tenant subsequently made an application to the Competent authority, copy of which is at Annexure A to the writ petition, slating that the reports on the registered envelop were false and that he had never refused to accept service of the notice. He, Therefore, prayed that the ex-parte order passed against him and also the permission granted to the landlords on 26th March 1969 be set aside and the tenant be given an opportunity to contest the petition. The Competent authority rejected this application for setting aside the ex-parte order on 25-8-1969 by an order, a copy of which is at Annexure C to the writ petition. The appeal of the tenant against this order was also dismissed by the Judicial Secretary, Delhi Administration, as per Annexure E to the writ petition.

(4) In this Civil Miscellaneous (Main) Petition filed under Article 227 of the Constitution by the tenant, it is contended that the order of the Competent authority dated 25-8-1969 and that of the Judicial Secretary dated 27-9-1969 affirming the order of the Competent authority are had inasmuch as the tenant was entitled to show that he had actually not refused the notice. The respondents landlords resist the petition under Article 227, on the ground that the Competent authority was justified in proceeding ex- parte against the tenant and the ex-parte order cannot, therefore be said to have been without jurisdiction.

(5) The only question for decision, Therefore, is whether the tenant was entitled to show to the Competent authority that he had not refused service of the notice and, Therefore, the ex-parte proceedings against him were liable to be set aside.

(6) u/s 19(3) of the Slum Areas (Improvement and Clearance) Act, 1956 before as well as after the amendment of 1964, the Competent authority was bound to give an opportunity to the parties of being heard before it could grant the landlord the permission to evict the tenant. Therefore , under the Slum Areas (Improvement and Clearance) Rules, 1957, it is stated in rule 7(4) that on receipt of an application u/s 19, the Competent Authority shall cause a notice fixing a date of hearing to be issued to the tenant giving him an opportunity of making his objections to such application. It is significant, however, that rule 7 which is the only rule concerned with the implementation of section 19 of the Act does not prescribe any form of notice to be issued to the tenant under rule 7 (4). Section 19 itself does not refer to the issue of any notice as such. It is true that an opportunity to be heard which is to be granted u/s 19(3) to the tenant would in practice be granted only by the issue of a notice to the tenant. But it is because section 19(3) is silent as to the procedure by which the hearing is to be

granted to the tenant that the procedure of issuing a notice had to be laid down by rule 7(4).

(7) It is also significant that rule 3 prescribes the forms of notices to be issued "under the Act" and appends these forms as Forms A, B, C, D, E and F to the Rules. Section 31 of the Act provides for the service of a notice, order or direction issued "under the Act". Section 32 of the Act provides for imposition of penalties on persons who disobey a notice, order or direction issued under the Act. Section 30 of the Act provides for appeals by persons aggrieved by any notice, order or direction issued or given by the Competent Authority under the Act. It is clear, Therefore, that the "notice" referred to in section 31 of the Act is not a notice prescribed by rule 7(4) of the Rules. For, there can be no appeal against a notice issued under rule 7(4) nor can there be any penalties imposed on persons for refusal to obey such a notice. On the contrary, the forms A to F prescribed by rule 3 show that the notices referred to in section 31(1) are those which are issued u/s 4,7, 12,27 and 33 of the Act. Therefore, the procedure laid down in section 31 for the service of notices is not applicable to the service of notice issued under rule 7(4) of the Rules.

(8) In the absence of any specific procedure prescribed for the service of a notice under rule 7(4), the sufficiency of such a notice is to be judged on general principles of justice, equity and good conscience. The principles underlying Order 5 of the CPC may be taken as a guide to know when one can say that the notice under rule 7(4) has been served. The relevant principle is the one underlying rule 17 of Order 5, Civil Procedure Code. Under rule 17, there are two contingencies on the happening of which service of notice by affixation and by publication may be ordered. The first contingency is that the person on whom the notice is to be served refuses to sign the acknowledgment of the notice. The second contingency is that the serving officer, after using all due and reasonable diligence, cannot find the person on whom the notice is to be served. In the present case, the petition under Article 227 of the Constitution does not make any pleading that the postman entrusted with the service of the notice on the tenant by the Competent authority did not use due and reasonable diligence to find the tenant. For, the Competent authority did not order service of notice by affixation and publication on that ground. The only ground on which the Competent authority ordered the service of notice by publication and affixation was that the tenant had refused service of notice. This is why in the petition under Article 227 before me the tenant has averred that he never refused to accept the notice and that his application to the Competent authority to show that he had not refused the notice should not have been dismissed by the Competent authority as incompetent.

(9) In *Shri Ram Krishan v. The Competent Authority* (Civil Writ 837 of 1969 decided on 20-11-1969) I had occasion to observe as follows :

"IT is the ordinary principle of law (embodied in Order IX of the Civil Procedure Code) that an adverse order cannot be passed against a person to the prejudice

of his valuable rights of property etc. without his having had an opportunity to show cause against it. All that the tenant wants is that he should have an opportunity to convince the Competent authority that he had not in fact been served and, Therefore, the ex-parte order passed should be set aside. If in fact the tenant was not served, the ex-parte order would be without jurisdiction being contrary to the audi alteram partem rule of natural justice. The Competent Authority is a quasi-judicial authority and has, Therefore, inherent jurisdiction to correct a grave and palpable error which may have been committed by him or his predecessor "in making an ex-parte order against the tenant when he was in fact not served. (Shivdeo Singh and Others Vs. State of Punjab and Others, . This jurisdiction is analogous to the power of a civil Court under sections 151 and 152 of the Civil Procedure Code". Let us examine this case in the light of the above observation.

(10) The learned Competent authority in its order dated 25-8-1969, gave two reasons for holding that the application for setting side the ex-parte order preferred by the tenant was untenable. The first reason was that substituted service was as good as personal service. This proposition is true but is based on another proposition that the Competent Authority could order the notice to be served by substituted service only if the previous notice sent to the tenant was either refused by the tenant or could not be served on him by the serving officer after using all due and reasonable diligence. The substituted service was ordered by the Competent authority on the ground that the tenant had refused to accept the previous notice. Whether the tenant refused to accept the notice or not was entirely a question of fact. Under Order 5 rule 19 C.P.C., where a notice 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, and may make such further inquiry 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. In the present case, the report of the postman that the addressee had refused to accept the notice was not verified. The Competent authority did not make any inquiry into the truth of the report of the postman. It could not, Therefore, be said that the Competent authority was justified in ordering service of the summons by publication and/or affixation. However, under rule 20A(2) of Order 5 CPC ., an endorsement by the postal employee that the addressee had refused to take delivery may be deemed by the Court issuing the summons to be prima fade proof of service. But this presumption that the addressee of the notice has refused to accept service and is, Therefore, served is not an irrebutable presumption. The result of the above discussion is two-fold, namely:-

(A) That the Competent authority was not justified in ordering that the service on the tenant should be effected by affixation and by publication; and (b) That though the endorsement of the refusal of the notice could be deemed to be prima fade service of the notice, the tenant could not be precluded thereby from offering to prove that he had not actually refused the service. of the notice.

(11) The same remarks would apply to the copy of the notice sent to the tenant under certificate of posting by the newspaper and a copy of the notice affixed to the tenant's house by the serving officer. These facts raise a presumption that the tenant must have come to know of the notice but they do not conclusively prove that he was actually served. It could not be said, Therefore, as a rigid legal proposition that the tenant had been conclusively served and that he was not entitled to show that in fact he had not been served. It is only if the principle underlying rule 17 and rule 19 of Order 5 CPC had been satisfied by the Competent authority acting on the affidavit of the serving officer or by making an inquiry itself as to whether the notice was refused, that the Competent authority would have been justified in ordering substituted service. Such substituted service would have been as good as actual service and the question of the tenant applying to set aside the ex-parte order passed thereon would not have arisen.

(12) The second reason given by the Competent authority for rejecting the application to set aside the ex-parte order was that the final order granting permission to the landlords had already been passed and it could not now be reviewed by the Competent authority. This reason is also not tenable. For, the validity of the final order depends on the proper compliance with the rules of natural justice requiring a notice to the tenant. If the tenant avers that he had not been served because he had not refused to accept notice then the tenant cannot be shut out from saying so. He has to be heard by the Competent authority which may decide either that he had refused to accept the notice and was, Therefore, served on the principle underlying rule 20A(2) of Order 5 CPC . or that he had not actually refused to accept the notice and, Therefore, the order that he should be served by affixation and publication of the notice was not justified. If he comes to the latter conclusion, then the final order granting permission to evict the tenant would automatically have to be reviewed by him. As already stated .above, he has an inherent power of such review to correct a grave and palpable error and to prevent an abuse of the process of Court.

(13) The same remarks apply to the order dated 27-9-1969 passed in appeal by the learned Judicial Secretary. it is to be noted that the order dated 26-3-1969 granting the permission is not open to challenge on merits in as much as the basis of the grant of permission is that the tenant had ceased to reside in the premises No. 1232, Chowk Shah Mubarak, and, Therefore, the question whether he was in a position to find alternative accommodation within his means did not arise for consideration.

(14) I, Therefore, set aside the impugned orders dated 25-8-1969 and 27-9-1969 passed by the Competent authority and the learned Judicial Secretary with the following directions :

THE Competent authority shall entertain the application of the tenant verified on 19th April 1969 and inquire into the following, namely :- (a) whether the tenant had refused to accept the notice sent by registered A. D. If the Competent authority holds that the tenant had so refused to accept the notice, then the

order for the issue of the substituted service was valid and the presumption according to the principle embodied in Order 5 rule 20A(2) CPC was also justified. The Competent authority will then be able to reject the application of the tenant for setting aside the ex-parte order. If, on the other hand, the Competent authority comes to the conclusion that the tenant did not refuse to accept the service then it shall inquire as follows :- (b) It shall find out if the postman used due and reasonable diligence and yet could not find the tenant at the premises in dispute according to the principle underlying the second part of Order 5 rule 17 CPC. If its finding is in the affirmative, then the substituted service which had been ordered by it would be justified. If the finding is in the negative, then the substituted service would not be justified .

(15) The Competent authority would have to review its final order dated 26-3-1969 only if it finds that either the tenant had not refused to accept service or that the postman had not used due and reasonable diligence to find the tenant to effect service on him. This petition under Article 227 of the Constitution is allowed in the above terms but without any order as to costs.