
(2019) 02 MP CK 0090

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 136 Of 2018

Upendra Kumar & Others

APPELLANT

Vs

Kamruddin & Others

RESPONDENT

Date of Decision : 26-02-2019

Acts Referred:

Constitution of India, 1950 — Article 227
Code of Civil Procedure, 1908 — Order 5 Rule 1, Order 5 Rule 2, Order 8 Rule 10,
Order 5 Rule 20

Citation : (2019) 02 MP CK 0090

Hon'ble Judges : G.S. Ahluwalia, J

Bench : Single Bench

Advocate : NK Gupta, Raja Girraj Sharma, SD Singh, Awadh Sharma

Final Decision : Disposed Off

Judgement

This petition under Article 227 of the Constitution of India has been filed against the order dated 12-10-2017 passed by the Board of Revenue in Revision No.2324-PBR/2015, by which the orders of mutation dated 19/03/1991, 14/12/1992, 27/01/1993 and 07/03/2005 passed by Revenue Authorities have been set aside.

It is the contention of the petitioners that on the strength of sale deed dated 26/07/1990, one Hasina Begum got her name mutated in the revenue records by order dated 19-03-1991. This order was challenged by filing an appeal before the SDO, which was allowed by order dated 14/12/1992 and the matter was remanded back. Thereafter, the said Hasina Begum challenged the order of the SDO, before the Court of Collector, which was dismissed by order dated 27-01-1993 and the second revision filed by Hasina Begum was also dismissed by Additional Commissioner, Gwalior Division, Gwalior by order dated 07-03-2005. Thereafter, the Naib Tahsildar on the basis of sale deed dated 26/07/1990, mutated the names of the petitioners by order dated 25/01/2007. This order was passed after granting opportunity of hearing to Hasina Begum.

Thereafter, the appeal was dismissed by SDO by order dated 15/02/2012. The said order was put to challenge in second appeal before the Court of Additional Commissioner, Chambal Division, Morena, which too has been dismissed by order dated 24/06/2015. Against this order, a revision was filed by the respondents No.1 to 5. Notices were issued and later on, an order was passed by the Board of Revenue to issue fresh notice on the correct address of the petitioners. However, from the order sheets, it appears that neither the correct address was given nor fresh process fee was paid and abruptly on one day, an oral prayer was made for substituted service by publication which was accepted by the Board of Revenue by order dated 08/03/2017 and thereafter, on 13/04/2017. However, the Board of Revenue without deciding that whether the notices were duly published or not, proceeded further with the matter and passed an ex parte order against the petitioners, thereby setting aside all the orders passed by the Courts below.

Challenging the order passed by the Board of Revenue, it is submitted by learned Senior Counsel for the petitioners that the substituted service by way of publication can be directed only when if the Court comes to a conclusion that the defendant is keeping out of the way for the purpose of avoiding service or for any other reasons summons cannot be served in the ordinary way. In the present case, there is nothing on record to suggest that the respondents No.1 to 5 had ever tried to serve the petitioners by giving their correct address. However, there is nothing on record to show that the petitioners were, in any manner, keeping out of the way for the purpose of service of notice and even it is nowhere mentioned that how the summons cannot be served in the ordinary way.

It is further submitted that the findings given by Board of Revenue to the effect that respondents No.1 to 5 were not heard, are erroneous and contrary to record. It is further submitted that the findings given by the Board of Revenue that the land was sold to the petitioners on the strength of Power of Attorney executed by Fakiruddin, however neither Fakiruddin was ever summoned nor he was called, are incorrect and, therefore, the order in question was passed without any proper enquiry.

Per contra, it is submitted by the counsel for the respondents No. 1 to 5 that the petitioners were avoiding the service of notice, therefore, a verbal prayer was made for substituted service which was accepted and after due publication the petitioners were proceeded ex parte as they failed to appear before the Board of Revenue. It is further submitted that Board of Revenue has not committed any mistake by remanding the matter back.

Heard the learned counsel for the parties.

From the order sheets of the Board of Revenue, it is clear that the respondents No.1 to 5 had filed the revision which was taken up for hearing on the question of admission on 07/09/2015. The revision was admitted by order dated 08/10/2015 and notices were issued to the petitioners. By order dated 01/12/2015, 03/02/2016, 12/04/2016, it was directed that the petitioner be

informed. On 25/07/2016, 2/11/2016, 16/01/2017, 25/02/2017, a direction was given to the respondents No.1 to 5 to give the correct address of the petitioners. On 08/03/2017, a prayer was made for service by substituted service of publication and the said prayer was accepted. On 13/04/2017, it is mentioned that the application filed by the respondents No.1 to 5 is accepted and the petitioners be served through publication. On 07/06/2017, it was mentioned that in spite of publication none appears for the petitioners, therefore, they were proceeded ex parte and on 12/06/2017, final arguments were heard and the impugned order was passed on 12/10/2017. Thus, from the order sheets of the Board of Revenue, it is clear that there is nothing on record to show that at any point of time the respondents no.1 to 5 had given the correct address of the petitioners. There is nothing on record to show that the petitioners were trying to keep away out of the way for the purpose of avoiding the service. There is nothing on record to suggest that the summons could not have been served in the ordinary way because of any reason.

The Division Bench of this Court in the case of Satish Constructions Company, Bhilai vs. Allahabad Bank, Durg, reported in 1999(1) MPLJ 329 has held as under:-

"5. The provisions are two fold. According to sub-rule (1) the Court has to record its satisfaction that there were reasons to believe that the defendant was keeping out of the way for the purpose of avoiding service or in the alternative, the Court is required to record its satisfaction that for any other reasons the summons could not be served in the ordinary way. Proceedings dated 19-04-1989 recorded in the suit only read that the plaintiff moved an application under Order 5, Rule 20, Civil Procedure Code with an affidavit for effecting service by publication. The Court without recording its satisfaction allowed the application. It also directed that the summons be published in daily newspaper "Desh Bandhu". The Court below has failed to record its satisfaction though it was mandatory for its under the law. Unless, the Court is satisfied that there were reasons to believe that the defendant was keeping out of the way for the purpose of avoiding service or that for any other reasons the summons cannot be served in the ordinary way, it could not order service by any other mode. Not only this, according to Rule 20 of Order 5 the Court is duty bound to order that summons be served by affixing a copy thereof in some conspicuous place in the Court-house and by publication of the same in some daily newspaper. The proceedings dated 19-4-1989 do not show that the Court ever ordered affixure of copy of the summons at some conspicuous place in the Court-house. The records of Civil Suit do not show that the summons sent for the publication in the newspaper were ever affixed in some conspicuous place in the Court-house. The trial Court committed breach of the mandatory provisions of Order 5, Rule 20 in directing publication of the notice. Firstly, because it did not record its satisfaction and secondly because it did not order affixure of the copy of summons in conspicuous place in the Court-house. It is trite law that service would be deemed to be valid if the order preceding the service is in accordance with law. It is not, only the service which

is required to be proved but the party relying upon the substituted service has to prove that the order directing substituted service was also in accordance with law. The trial Court, in the opinion of this Court, was not justified in rejecting the application for setting aside ex parte decree. The appeal deserves to and is accordingly allowed. The trial Court is directed to restore the suit to its original number. As both the parties are present before this Court they are directed to appear before the trial Court on 16-3-1998. No further notice to the defendant would be necessary. Within three weeks from the date of appearance, the defendant shall file his written-statement. If he fails to file the written-statement, the trial Court shall be free to close his rights and deliver a judgment under Rule 10 of Order 8, Civil Procedure Code. As the suit was instituted in the year 1987, it is directed that from the date of appearance of the parties, the trial Court shall dispose of the suit within a period of six months. The Registry is directed to remit the record back to the trial Court so as to reach the said Court on or before the date of hearing."

Thus, this Court is of the considered opinion that the service of notice, in the manner, provided under Order 5 Rule 1 & 2 of CPC is a regular mode of serving the defendant. However, in order to meet out the eventuality where the defendant tries to avoid service, provision of Order 5 Rule 20 CPC has been made, which provides for substituted service. Thus, it is clear that the substituted service cannot be treated as an alternative mode of regular mode of issuing summons. Until and unless, a finding is given that the defendant is trying to keep out of the way for the purpose of avoiding service or because of any reason the summons cannot be served in the ordinary way, only then the applicant/plaintiff can be permitted to serve the defendant by substituted service. Furthermore, in the present case, there is nothing in the order sheet to indicate that the Board of Revenue had ever treated the publication as due compliance of substituted service.

Accordingly, in the light of the judgment passed by the Division Bench of this Court in the case of Satish Construction Company, Bhilai (supra), this Court is of the considered opinion that the Board of Revenue has committed a material illegality by proceeding ex parte against the petitioners.

It is further submitted by the learned Senior Counsel for the petitioners that even otherwise, the findings given by the Board of Revenue are erroneous.

Considered the submissions made by learned Senior Counsel for the petitioners.

Once the petitioners have decided to challenge the correctness of the impugned order on the ground of non-service of notice, and this Court has come to a conclusion that the Board of Revenue has committed material illegality by proceedings ex parte against the petitioners, then it is not necessary for this Court to adjudicate upon the merits of the case. Once it is held that the petitioners were not served or principles of natural justice have been violated, then this Court is left with no other option but to set aside the impugned order in

its entirety by remanding the matter back to the Board of Revenue for decision afresh after hearing both the parties.

Accordingly, order dated 12-10-2017 passed by the Board of Revenue in Revision No.2324-PBR/2015 is hereby set aside. The matter is remanded back to Board of the Revenue for adjudication of the revision afresh after hearing both the parties.

The parties are directed to appear before the Board of the Revenue on 18th March, 2019 and no further notice will be required to be issued to any of the parties to the revision filed before the Board of Revenue.

With the aforesaid observation, this miscellaneous petition is finally disposed of.