

HIGH COURT OF CHHATTISGARH, BILASPURCriminal Revision No.419 of 2015

Hitesh Mishra, S/o Shri Chandrika Prasad, aged about 32 years, R/o Kranti Nagar, Tarbahar, Tahsil and District Bilaspur (CG), presently at Nehru Nagar, Police Station Civil Lines, Tahsil & District Bilaspur (CG), Civil & Revenue District Bilaspur.

---- Petitioner

Versus

Smt. Pushpa Mishra, wife of Shri Hitesh Mishra, aged about 29 years, R/o Near Tarbahar Masjid, through Ramprasad Choudhary, Police Station Tarbahar, Tahsil and District Bilaspur (CG)

---- Respondent

For Petitioner: Mr. Vivek Shrivastava, Advocate.
For Respondent: Mr. Dharmesh Shrivastava, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

30/09/2015

1. Smt. Pushpa Mishra, wife of the petitioner – the respondent herein, filed an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short 'the PWDV Act') claiming relief as provided under Sections 17 to 23 of the said Act. The said application was filed on 26-8-2013 before the Court having jurisdiction to try that application and on the same day, the learned trial Magistrate directed for issuance of notice to the present petitioner through the Protection Officer. The Protection Officer submitted a report on 31-10-2013 that the present petitioner and four others have refused to accept the notice issued by the Court and, therefore, by order dated 8-11-2013, the trial Court proceeded ex parte and by order dated 28-11-2013, finally, the application filed by the respondent was

allowed granting certain reliefs to her. Feeling aggrieved and dissatisfied against the order granting reliefs to the respondent herein, the present petitioner preferred Cr.A.No.114/2014 before the Court of Session and the learned Sessions Court by its impugned order affirmed the order of the trial Magistrate holding that the petitioner was duly served and as such, the order of the Magistrate is unassailable and dismissed the appeal.

2. Invoking the jurisdiction of this Court under Section 397 read with Section 401 of the CrPC, the petitioner herein has filed this revision petition questioning the impugned order affirming the order of the trial Magistrate proceeding ex parte and granting reliefs to the respondent wife.
3. Mr. Vivek Shrivastava, learned counsel appearing for the petitioner – husband, would submit that the trial Magistrate has committed a manifest illegality in proceeding ex parte against the petitioner on 8-11-2013 and the learned Sessions Judge has perpetuated the illegality by rejecting the appeal preferred under Section 29 of the PWDV Act. Elaborating his submissions, he would further submit that the notice of Section 12 application has to be served in the manner prescribed under Section 13 of the PWDV Act. Referring to Section 13 (2) of the PWDV Act, he would also submit that according to Section 13 (2) of the PWDV Act, declaration of service of notice made by the Protection Officer shall be proof that such notice was served upon the respondent. He would lastly submit that the Protection of Women from Domestic Violence Rules, 2006 have

been framed. Rule 12 of the said Rules provides means of service of notices and as such, Order 5 of the Code of Civil Procedure, 1908 would be applicable. Order 5 Rule 17 of the CPC which requires affidavit of the serving officer has neither been filed nor he has been examined to prove the impugned refusal by the present petitioner and, therefore, the order impugned is unsustainable and bad in law.

4. Per contra, Mr. Dharmesh Shrivastava, learned counsel appearing for the respondent – wife, would submit that the Protection Officer has submitted report to the concerned Magistrate that the present petitioner has refused to accept notice on 31-10-2013 and as such, there is sufficient compliance of the provisions of the PWDV Act as well as the Rules framed thereunder and, therefore, the revision petition deserves to be dismissed.
5. I have heard learned counsel appearing for the parties and considered the rival submissions made therein and also perused the original record.
6. The short question emanating for consideration would be whether the present petitioner was duly served in a proceeding under Section 12 of the PWDV Act.
7. In order to consider the plea raised at the Bar, it would be appropriate to set out the relevant provision governing the service of notice to the opposite party against whom the relief is sought. Section 13 of the PWDV Act provides for service of notice. It reads as follows: -

“13. Service of notice.-(1) A notice of the date of

hearing fixed under section 12 shall be given the Magistrate to the Protection Officer, who shall get it served by such means as may be prescribed on the respondent, and on any other person, as directed by the Magistrate within a maximum period of two days or such further reasonable time as may be allowed by the Magistrate from the date of its receipt.

(2) A declaration of service of notice made by the Protection Officer in such form as may be prescribed shall be the proof that such notice was served upon the respondent and on any other person as directed by the Magistrate unless the contrary is proved.”

8. In exercise of the powers conferred by Section 37 of the PWDV Act, the Central Government has framed rules known as the Protection of Women from Domestic Violence Rules, 2006 (for short 'the PWDV Rules'). Rule 12 of the PWDV Rules provides for means of service of notices. Sub-rule (2) of Rule 12 provides for the manner of service of notices to the opposite party which states as under: -

“(2) The service of notices shall be made in the following manner, namely:-

(a) The notices in respect of the proceedings under the Act shall be served by the Protection Officer or any other person directed by him to serve the notice, on behalf of the Protection Officer, at the address where the respondent is stated to be ordinarily residing in India by the complainant or aggrieved person or where the respondent is stated to be gainfully employed by the complainant or aggrieved person, as the case may be.

(b) The notice shall be delivered to any person in

charge of such place at the moment and in case of such delivery not being possible it shall be pasted at a conspicuous place on the premises.

(c) For serving the notices under section 13 or any other provision of the Act, the provisions under Order V of the Civil Procedure Code, 1908 (5 of 1908) or the provisions under Chapter VI of the Code of Criminal Procedure, 1973 (2 of 1974) as far as practicable may be adopted.

(d) Any order passed for such service of notices shall entail the same consequences, as an order passed under Order V of the Civil Procedure Code, 1908 (5 of 1908) or Chapter VI of the Code of Criminal Procedure, 1973 (2 of 1974) respectively, depending upon the procedure found efficacious for making an order for such service under section 13 or any other provision of the Act and in addition to the procedure prescribed under the Order V or Chapter VI, the court may direct any other steps necessary with a view to expediting the proceedings to adhere to the time limit provided in the Act.”

Sub-rule (3) of Rule 12 states as follows: -

“(3) On a statement on the date fixed for appearance of the respondent, or a report of the person authorized to serve the notices under the Act, that service has been effected appropriate orders shall be passed by the court on any pending application for interim relief, after hearing the complainant or the respondent, or both.”

9. A careful reading of the provisions of Rule 12 (2) (c), it would be apparent that for serving notice under Section 13 of the PWDV Act, the provisions of Order 5 of the Code of Civil Procedure, 1908 or the provisions of Chapter VI of the Code of Criminal

Procedure, 1973 would be applicable, as far as practicable may be.

10. At this stage, it is apposite to notice the provisions contained in Order 5 Rule 17 of the Code of Civil Procedure, 1908. Rule 17 of Order 5 of the said Code states as follows: -

“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.”

11. A careful perusal of Order 5 Rule 17 of the Code obliges the process server to submit 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, where the defendant or his agent or such other person refuses to sign the acknowledgment or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, 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.

12. Order 5 Rule 19 of the Code provides for examination of serving officer. Rule 19 of Order 5 of the Code states as follows: -

“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.”

13. Thus, by virtue of Order 5 Rule 19 of the Code, 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.

14. In the matter of **Ashok Kumar Sahu v. Madhusudan**¹ in similar situation where the provisions of Order 5 Rule 17 of the Code were not complied with while submitting report by the process server, the ex parte decree was set aside by this Court and it has been held in paragraph 7 as under: -

“7. Having considered the rival submissions, I have perused the record of Civil Suit No.44-B/2003 and also the record of Misc. Judicial Case No.17/2004, the testimony of the Process Server Kewal Das and the summons of the defendant issued for 15-11-2004 and the report of service by affixture written by Process Server Kewal Das. The report of Process Server on the summons does not give any detail as to the person who identified the house of the defendant and his wife Kuleshwari and also does not reveal the name of the lady who refused service of notice. The report of Process Server also shows that it has been signed by a witness namely Surendra, who was not examined by the plaintiff/respondent. Process Server Kewal Das, in his testimony in paragraph 3, stated that the name of the person who was present at the time of service by affixture was perhaps Deepak Kumar. Paragraph 4 of the testimony of the Process Server also shows that once neighbouring lady had identified the wife of the defendant. However, the name of that lady was not mentioned by the process server in his report as mandated by O. V, R. 18, C.P.C. In paragraph 5, the process server also deposed

¹ 2007 (1) CGLJ 314

that he came with the plaintiff-decree-holder to the Court and had snacks with him in the hotel. He also admitted that he did not make any payment for the snacks.”

15. Similarly, in the matter of **Kunja v. Lalaram and others**², it was held that where the summons was held to be not duly served and no judicial order was passed, Order 5 Rule 19 of the Code is mandatory. Paragraph 5 of the order states 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 R. 17 of O. 5, Civil Procedure Code. 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 R. 19 of O. 5, Civil Procedure Code, 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 (Note) 21. With due respect, I humbly beg to differ as the view taken

2 1987 MPLJ 746 : AIR 1987 MP 252

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 R. 19, directly in issue in this case, though he spoke of R. 18. The decision, therefore, is distinguishable on facts.”

16. Similarly, in the matter of **Bajnath Mishrilal Kachhi v.**

Harishanker s/o. Mishrilal and others³, the provisions of Order 5 Rules 17 and 19 of the Code have been held to be mandatory. These provisions of Order 5 Rule 19 of the Code are mandatory in nature and it casts a duty on the Court to pass judicial order in the manner provided in Rules 17 and 19 of Order 5 of the Code, as the said provisions require the Court to declare the summons as duly served or if it is not duly served to make further orders on the service of notice.

17. This Court in the matter of **Moti Chand Jain (died) through**

LRs v. Mahesh Chand Pal⁴, following the law laid down in the aforesaid case has held that Order 5 Rules 17 and 19 of the Code are mandatory in nature. Relevant portion reads as follows: -

³ 2001 (2) MPLJ 142

⁴ AIR 2014 Chhattisgarh 26

“16. The provisions of O. 5, R. 19, CPC are mandatory in real sense of the terms and it casts a duty on the Court to pass a judicial order in the manner provided in Rr. 17 and 19 of O. 5 of the CPC because the legislature has required the Court that it shall either declare that the summons has been duly served or the order of service as it thinks fit.”

18. This brings me to the facts of the case in which though report has been submitted by the Protection Officer on 6-11-2013 before the trial Court that the petitioner has refused to accept notice issued by the Court, but no details of the requirement provided in Rule 17 of Order 5 of the Code that the petitioner was absent from his residence at the time when service is sought to be effected upon him at his residence, there was no likelihood of his being found at the residence within a reasonable time and there was no agent empowered to accept service of notice on his behalf and that the said Protection Officer has affixed a copy of the same on the outer door or some other conspicuous part of the house of the petitioner. Not only this, neither there is an affidavit given by the Protection Officer before the trial Magistrate nor the Protection Officer / serving officer was examined before the trial Magistrate to hold that the petitioner herein refused to accept notice issued by that Court, on 8-11-2013 while proceeding against the petitioner. For ready reference, the order dated 8-11-2013 is quoted herein-below: -

“प्रकरण [उप./जवाब](#) हेतु नियत है। अनावेदकगण को जारी नोटिस लेने से इंकार इस टिप के साथ वापस प्राप्त। अनावेदकगण के विरुद्ध एकपक्षीय कार्यवाही किया जाना है।

प्रकरण आवेदिका साक्ष्य हेतु नियत किया जाना है।”

19. A bare perusal of the aforesaid order would show that on receipt of report by serving officer / Protection Officer, the trial Court has accepted the same as it is and did not seek affidavit of serving officer / Protection Officer as required under Order 5 Rule 19 of the Code, but has also not taken care to get the Protection Officer examined to hold that the petitioner had refused to accept notice and thereby he was duly served. Even otherwise, the trial Court has failed to perform its duty mandated under Order 5 Rule 19 of the Code to declare finally that the petitioner was duly served. Merely accepting report as it is and proceeding ex parte against the petitioner is not the proper way to comply the mandatory provisions contained in Order 5 Rule 19 of the Code, as such it is held that the petitioner was not duly served in a proceeding initiated by the respondent under Section 12 of the PWDV Act and the trial Magistrate was absolutely unjustified in proceeding ex parte and passing ex parte order against the petitioner.

20. In appeal preferred by the petitioner under Section 29 of the PWDV Act, it was incumbent upon the appellate Court to find out as to whether the petitioner was duly served or not, but the appellate Court has performed its duty in perfunctory manner by holding that the petitioner's address given in summons and the address given by the petitioner in appeal tallies and, therefore, he was duly served and there is no ground to interfere with the order passed by the trial Magistrate. As such, the order of the Court of Session affirming the order of the trial Court cannot be upheld.

21. As a fall out and consequence of the aforesaid discussion, the order dated 8-11-2013 proceeding ex parte against the petitioner and consequently, the final order passed by the said Court on 28-11-2013 are liable to be and are hereby set aside.
22. Resultantly, the order passed by the appellate Court impugned herein is also set aside. The application filed by the respondent – wife under Section 12 of the PWDV Act is restored to its original number in the Court of Judicial Magistrate First Class, Bilaspur for hearing and disposal in accordance with law. Parties are directed to appear before the said Court on 20-10-2015. Since the application was filed by the respondent on 26-8-2013, the trial Magistrate would do well to decide the application expeditiously and preferably within a period of three months from the date of production of certified copy of this order by either of the parties.
23. The revision petition is allowed to the extent indicated herein above.

Sd/-
(Sanjay K. Agrawal)
Judge