

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Civil Revision No.120 of 2014**

Balkeshwar Gupta, S/o. Late Baijnath Gupta, aged about 70 years, Retired General Manager, Jila Sah Krishi aur Gramin Vikas Bank, Ambikapur, R/o. Behind Amar Petrol Pump, Namnakala, Ambikapur, P.S., Post & Tahsil Ambikapur, Civil & Revenue District – Surguja (C.G.)
....Defendant

--- Applicant**Versus**

Madhav Prasad Sharma, S/o. late Ganga Prasad Sharma, aged about 59 years, Occupation R/o. Jila Sah Krishi Aur Gramin Vikas Bank, Ambikapur, P.S., Post & Tahsil, Ambikapur, Civil & Revenue District-Surguja (C.G.)..Plaintiff

--- Respondent

For Applicant : Ms. Priyanka Mehta, Advocate.

For Respondent : None

Hon'ble Shri Justice Sanjay K. Agrawal**Order on Board****14/07/2016**

(1) Invoking revisional jurisdiction of this Court under Section 115 of the Code of Civil Procedure (henceforth 'CPC'), this revision has been filed by the applicant/defendant against the order dated 21.07.2014 by which Lower Appellate Court has affirmed the order of trial Court dated 07.03.2014 rejecting the

application filed under Order 9 Rule 13 of the CPC.

(2) Revelant facts necessary for disposal of this revision are as under:-

(i) Civil suit No.1-B/2006 was filed for recovery of compensation to the tune of Rs. 30,000/- by plaintiff Madhav Prasad Sharma against the applicant Balkeshwar Gupta, in which summons/notice issued to defendant-Balkeshwar Gupta was received with the note that he has refused to receive the summons stating that his designation is not correct.

(ii) The trial Court, on 24.03.2006 declared him to be duly served and proceeded ex-parte and ultimately on 30.10.2006 money decree was passed against the applicant/defendant granting compensation of Rs. 30,000/- alongwith interest @ 6 percent interest per annum from the date of judgment and decree till its realisation.

(iii) On 25.08.2007, the applicant/defendant filed an application under Order 9 Rule 13 of the CPC alongwith application under Section 5 of the Indian Limitation Act for setting aside ex-parte judgment & decree dated 30.10.2006. The said application was opposed by respondent/plaintiff and ultimately rejected by the trial

Court on 07.03.2014. Appeal preferred there-against under Order 43 Rule 1(d) of the CPC was also dismissed by the impugned Order by the Lower Appellate Court, against which instant civil revision has been filed.

(3) Miss. Priyanka Mehta, learned counsel appearing for the applicant/defendant submit that the provisions of Order 5 Rule 17 and Order 5 Rule 19 of the CPC are mandatory in nature. She further submits that the process server ought to have been examined by the trial Court to hold that the present applicant/defendant has refused to accept notice as provided in Order 5 Rule 19 of the CPC. She would further submit that the Lower Appellate Court has failed to consider the application in its proper perspective and rejected it by the Order which is perverse to the record and therefore, impugned order be set aside and the application filed under Order 9 Rule 13 CPC be allowed and the suit be restored to its original number for hearing and disposal in accordance with law.

(4) No one has appeared, though the notice of this revision was served to the respondent/plaintiff.

(5) The applicant/defendant was proceeded ex parte on 24.03.2006 holding that he has refused to receive notice/summons issued by the Court and further decleared

that he is duly served with the notice of the trial Court.

(6) The High Court of Madhya Pradesh in the matters of **Ashok Kumar Sahu Vs. Madhusudan¹** and **Kunja v. Lalaram and others²** has held that Order 5 Rule 17 CPC is mandatory in nature and if the provisions of Order 5 Rule 17 CPC has not been complied with while submitting report by the process server, decree is bad and it has been set aside.

(7) In **Baijnath Mishrilal Kachhi v. Harishanker, s/o Mishrilal and others³** High Court of Madhya Pradesh while dealing with the identical issue has held as under:-

“**15.** It is therefore, clear that in case of refusal of service of summons, the same has to be affixed in the presence of witnesses and a report has to be endorsed 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.”

(8) The Order 5, Rule 19 provides for 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

¹ 2007 (1) CGLJ 314

² 1987 MPLJ 746

³ 2001 (2) MPLJ 142

affidavit of the serving officer and 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.

(9) Thus, in the instant case, no affidavit was filed by the process server before the Court regarding service of summons on the appellant/defendant and refusal of the summons as indicated in Order 5, Rule 17 of CPC and hence the mandatory requirement of Order 5, Rule 17 of CPC was required to be complied with by the trial Court and, therefore, in the opinion of this Court the trial Court has committed legal error in proceeding ex parte against the applicant/defendant on the basis of report submitted by the process server; and further committed legal error in passing the judgment & decree against the applicant/defendant.

(10) This Court in the matter of **Moti Chand Jain (dead) through Smt. Bhouri Bai Jain Vs. Mahesh Chand Pal, 2013 (3) CGLRW 83** has held the same proposition of law.

(11) Applicant-defendant has clearly stated in his application filed under Section 5 of the Indian Limitation Act that when he

received notice of execution i.e. on 26.06.2007, he came to know about the passing of the *ex parte* decree and after obtaining the certified copy of the same on 9.8.2007, he preferred application for setting aside *ex parte* order on 25.08.2007, in the considered opinion of this Court that applicant has shown sufficient cause for condoning the delay in filing the said application.

(12) As a consequence of the aforesaid discussion, impugned order is set aside, the application of the applicant/defendant under Order 9, Rule 13, CPC is allowed, *ex parte* judgment and decree is set aside and the Civil Suit No.1B/2006 is retored to the file of the trial Court for hearing and disposal in accordance with law. No order as to costs.

(13) In the result, the civil revision is allowed to the extent indicated hereinabove.

Sd/-

(Sanjay K.Agrawal)
Judge

D/-