

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WP227 No. 43 of 2016

- Purusottam Lal Sahu S/o Late Sarju Sahu, Aged About 56 Years R/o Risali Sector Bhilai Steel Plant Bhilai, Department N.W.P.NO 142686, Token No. 12111 Thana Bhilai Bhatti, Bhilai Ispat Sanyatra, District Durg (Chhattisgarh).....Defendent.

---- Petitioner

Versus

- Hari Mitra Dhir S/o Amarnath Dhir, Aged About 68 Years R/o Block 219A Risali Sector Bhilai, Thana Newai Tahsil And District Durg (Chhattisgarh).....Plaintiff.

---- Respondent

For Petitioner
For Respondent

Shri Arvind Dubey, Advocate
Shri Shrawan Agrawal, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra

Order On Board

31/08/2016

1. The challenge in this petition is to the order passed by the Appellate Court, whereby petitioner's appeal has been dismissed, which in turn was preferred to challenge the order passed by the trial Court on 13.02.2014 dismissing his application under Order 9 Rule 13 CPC.
2. The respondent/plaintiff's suit for recovery of Rs.40,800/- was decreed *ex parte* on 31.01.2011, against which the petitioner moved an application under Order 9 Rule 13 CPC for setting aside the *ex parte* decree. The application was rejected on

13.02.2014 on the ground that the petitioner refused to accept the notice, therefore, it was deemed to be valid service on the petitioner. The Appellate Court has affirmed the finding recorded by the trial Court.

3. This Court had summoned the record of the trial Court to ascertain the correctness of the findings in respect of service of notice on the petitioner. The process server's report available in the record would indicate that the process server went to the petitioner's office in the Bhilai Steel Plant on 25.11.2009 and tried to serve the notice on the clerk available in the office. The clerk read the notice and thereafter refused to receive the notice. The process server thereafter informed the petitioner's office clerk about the date of hearing and returned the notice to the Court with endorsement that the office clerk has refused to accept the notice. It is this refusal which has been treated by the trial Court to be a refusal by the petitioner and, therefore, it is a deemed service on the petitioner.
4. Perusal of the process server's report would clearly indicate that the notice was never tried to be served upon the petitioner. The process server never met the petitioner neither there is endorsement that it is the petitioner who refused to accept the notice. Effort to serve the notice on office clerk and refusal by him would not be treated as refusal by the petitioner himself. It is not the report of the process server that the petitioner was available and on his instructions, the notice was tried to be served on the office clerk.

5. In view of the above, the findings recorded by the courts below that the notice was duly served on the petitioner is perverse being contrary to the record. There is palpable error in the order passed by the courts below, which deserves to be corrected in exercise of jurisdiction under Article 227 of the Constitution of India, otherwise it would occasion failure of justice, as the petitioner would be made to suffer an *ex parte* decree without giving any opportunity of hearing to him.
6. For the forgoing, the writ petition is allowed. The impugned orders are set aside and the matter is remitted back to the trial Court for deciding the suit on merits, at the earliest, preferably within a period of 9 months from the date of appearance.
7. Let the parties appear before the trial Court on 26.09.2016. The record of the trial Court be sent back forthwith.

Sd/-

JUDGE

PRASHANT KUMAR MISHRA

Nirala