

\$~6

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Pronounced on:*** 10.10.2017

+ CM(M) 1274/2012 & C.M. Nos.19770/2012, 16384-16385/2015

DEV BHUSHAN SINCE DECEASED THR LRS Petitioner

Through: Mr. Kirti Uppal, Senior Advocate with
Mr. Nittin Bhatia, Ms. Sahiba Pantel &
Mr. Rijul Taneja, Advocates.

versus

PRADEEP KUMAR Respondent

Through: Mr. S.S. Jain & Ms. Veena Rupana,
Advocates.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. Present petition is filed under Article 227 of the Constitution of India seeking to impugn the order dated 11.10.2012 passed by the Rent Control Tribunal(*hereinafter referred to as 'the RCT'*).
2. By the impugned order, the RCT *set aside* the order of the Additional Rent Controller (*in short 'the ARC'*) whereby the ARC had dismissed the application under Order 9 Rule 13 CPC and upheld that the service has been duly affected on the respondent while passing the *ex-parte* eviction order dated 15.10.2005.
3. The case of the petitioner is that the respondent is a tenant in respect of the shop bearing No.1 in property No.RZ-184, Khasra No.487/3, Peera Garhi, New Delhi under one Sh.Rai Singh. After the demise of Sh.Rai Singh, through his LRs one Sh.Dev Bhushan who is the predecessor-in-

interest of the petitioner (petitioner being the L.R of Shri Dev Bhushan who died on 16.5.2010) purchased the said property vide Sale Deed dated 03.12.2001. Sh.Dev Bhushan being aggrieved by the acts of the respondent in not making payment of the rent, after service of a legal notice, filed an eviction petition under Section 14(1)(a) of the Delhi Rent Control Act, 1958 (*hereinafter referred to as 'the DRC Act'*). Three attempts were made to serve the respondent. On each occasion, the respondent is said to have refused the summons. The respondent was proceeded *ex-parte*. On 06.07.2005, the ARC granted one month time to the respondent to pay the arrears of rent by giving the benefit under Section 14(2) of the DRC Act. Again a process server is said to have gone to the premises to serve the court notice on the respondent and again the respondent refused to accept the said summons. Thereafter, the ARC passed an *ex-parte* eviction order dated 15.10.2005.

4. Thereafter, it is urged that the bailiff appointed by the court went to the premises and handed over the possession of the premises to the petitioner on 14.12.2005. The respondent is said to have filed an application under Order 9 Rule 13 CPC for setting aside the eviction order dated 15.10.2005. The ARC dismissed the said application under Order 9 Rule 13 CPC vide its order dated 05.05.2012. Thereafter, an appeal was filed before the RCT. The RCT vide its judgment dated 11.10.2012 has allowed the appeal of the respondent and has set aside the *ex-parte* eviction order dated 15.10.2005.

5. The learned counsel for the petitioner has sought to argue that the sale deed dated 03.12.2001 that was executed by LRs of late Sh.Rai Singh in favour of Sh.Dev Bhushan describes the property with address No.RZ-184,

Village Peera Garhi, Rohtak Road, Delhi. It is urged that in the eviction petition, the address of the property has been rightly described as above and the impugned order wrongly holds that the address RZ-184 cannot be termed the appropriate address of the property and hence comes to the conclusion that the respondent has not been served properly/correctly.

6. The learned counsel for the respondent has reiterated that no summons were sent by registered AD to the respondent which was mandatory. He also relies upon the suit filed for specific performance by the respondent where also he submits that the correct address has been shown, namely, Khasra No.487/3, Peera Garhi Chowk, Delhi.

7. There is some other litigation going on between the parties which is not very material for adjudication of the present petition. The dispute between the parties in this case is as to whether the respondent was duly served in the eviction petition.

8. A perusal of the impugned order would show that the appellate court has noted the reports of the process server on the various dates when attempts were made to serve the respondent. Notice for the first time was directed to be sent on filing PF (process fees) and RC (registered cover) for 19.01.2005. The notice sent by ordinary process was received back with the report that one person met the process server who refused to receive the notice or tell his name. The report is witnessed by Ajay Kumar, an employee of the petitioner.

9. On 19.01.2005 the petitioner was directed to serve fresh notice by PF and RC and by affixation for 24.02.2005. The report on summons for that date states that the person present at spot refused to tell about the respondent. No affixation was done. The ARC was on leave and the matter

was adjourned for 30.03.2005 for which fresh service was ordered. There was no order of affixation for 30.03.2005. It was reported that notice was affixed in presence of Sh.Sunil an employee of the petitioner. There was no report of refusal to receive notice. The ARC on 30.3.2005 held that the respondent is served. The respondent was proceeded ex-parte.

10. The RCT in the impugned order noted that the process server was never examined. The impugned order also rejected the submission of the petitioner that RZ-184 is the Municipal Number of the shop corresponding to aforesaid Khasra No.487/3. The impugned order also notes that there is no document on record to substantiate this argument, and the petitioner has failed to place on record any mutation letter in his favour regarding the same. The impugned order accordingly held that the respondent was not served with the summons in the eviction petition. The eviction order was set aside and the matter was remanded back to the ARC to decide the same on merits after giving an opportunity as per law.

11. A perusal of the record would show that on 06.12.2004 notice was issued to the respondent by ordinary process and registered AD cover, returnable for 19.01.2005. The notice sent by ordinary process is said to have been received back with the report that one person met the process server who has refused to accept the summons and also did not tell his name. The report is witnessed by Ajay Kumar, an employee of the respondent. Thereafter, on 19.01.2005 the order of the ARC records that the respondent is not served. Fresh summons were issued including by affixation for 24.02.2005. The service report for the said date was that the person present at spot refused to tell about the respondent. No affixation was done. The ARC was on leave and the matter was adjourned for 30.03.2005. On

30.03.2005 the court records that the respondent has refused to accept the summons as per report of the process server and affixation has been carried out and he is deemed to have served under Order 5 Rule 17 CPC.

12. The orders of the ARC also show that there is no report about the registered covers which were to be sent as per direction of the ARC for 19.01.2005 and 24.02.2005. Even the postal receipt alongwith postal cover was not available.

13. It is quite clear that the report of the process server is not that the respondent has refused to accept the summons. The first report states that one person who met the process server has refused to accept the summons. The next report is also somewhat similar. There is no attempt made to examine the process server. Another noteworthy feature is that despite the fact that on the three dates, the order passed by the ARC was for service of summons on the respondent through registered AD cover also, there is no report about service through registered AD. There is no receipt available to show that registered AD cover was dispatched to the respondent. No postal cover which might have been returned is also on record.

14. The Supreme Court in the case of *Sushil Kumar Sabharwal v. Gurpreet Singh & Ors.*, (2002) 5 SCC 377/(MANU/SC/0409/2002), held as follows:

“8. We find several infirmities and lapses on the part of the process server. Firstly, on the alleged refusal by the defendant either he did not affix a copy of the summons and the plaint on the wall of the shop or if he claims to have done so, then the endorsement made by him on the back of the summons does not support him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy of the plaint on the wall should have been witnessed by

persons who identified the defendant and his shop and witnessed such procedure. The endorsement shows that there were no witnesses available on the spot. The correctness of such endorsement is difficult to believe even prima facie. The tenant runs a shoe shop in the suit premises. Apparently, the shop will be situated in a locality where there are other shops and houses. One can understand refusal by unwilling persons requested by the process server to witness the proceedings and be a party to the procedure of the service of summons but to say that there were no witnesses available on the spot is a statement which can be accepted only with a pinch of salt. Incidentally, we may state that though the date of appearance was 23rd February, 1993 the summons is said to have been tendered on 22nd February, 1993, i.e., just a day before the date of hearing.

XXXXXXXXXXXXXXXXXX

12. The provision contained in Order 9 Rule 6 of the C.P.C. is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three course to be followed by the Court depending on the given situation. The three situations are: (i) when summons duly served, (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard ex-parte. The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being 'proved' that the summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard ex-parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant

suffering an ex-parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the Trial Court would have been conscious of its obligation cast on it by Order 9 Rule 6 of the C.P.C., the case would not have proceeded ex-parte against the defendant-appellant and a wasteful period of over eight years would not have been added to the life of this litigation.”

15. In the present case, the impugned order has rightly held that the alleged refusal by the respondent is not witnessed by an appropriate witness who has identified the respondent. In the absence of proper procedure, having been followed the respondent could not have been deemed to have been served.

16. I may also note another controversy i.e whether the petitioner has given the correct address in the eviction petition. According to the eviction petition, the address of the respondent is given as RZ-184, Village Peera Garhi, Rotak Road, Delhi. It is urged that in the Sale Deed executed in favour of Sh.Dev Bhushan, this is the address of the shop given. Hence, the eviction rightly describes the above address of the tenanted premises. I may note that in Sale Deed relied upon by the petitioner dated 03.12.2001 in favour of Sh.Dev Bhushan, the shop is described as RZ-184, plot of land out of Khasra No.487/3, Village Peera Garhi, Rohtak Road, Delhi. The petitioner has very conveniently struck out the description of Khasra No.487/3 in the eviction petition. The learned counsel for the respondent has rightly pointed to various documents including the suit filed by the respondent for specific performance against the petitioner and the LRs of Sh.Rai Singh where the property has been described as a shop having property No.1, being part of Khasra No.487/3, Peera Garhi Chowk, Delhi.

Various other documents including communication from MTNL and Telephone bills have been placed on record by the respondent to show that the shop was always described as being shop No.1, being part of Khasra No.487/3, Peera Garhi Chowk, Delhi. It appears that the petitioner has wrongly given the address of the respondent as RZ-184, whereas the correct address is Khasra No. 487/3 village Peera Garhi, Delhi.

17. Keeping in view the above facts, in my opinion, the conclusion in the impugned order that the respondent was not served is a plausible conclusion. There are no reasons for this court to exercise powers under Article 227 of the Constitution of India to modify the said order. There is no merit in the present petition and the same is dismissed.

18. The trial court record be sent back. Interim order stands vacated.

JAYANT NATH, J.

OCTOBER 10, 2017/v