

**IN THE HIGH COURT OF MADHYA PRADESH**

**AT INDORE**

**BEFORE**

**HON'BLE SHRI JUSTICE SUBODH ABHYANKAR**

**ON THE 27<sup>th</sup> OF APRIL, 2023**

**CIVIL REVISION No. 27 of 2013**

**BETWEEN:-**

**GAJRAJ SINGH**

**.....PETITIONER**

***(BY SHRI PANKAJ SOHANI, ADVOCATE)***

**AND**

**1. HEERA SINGH AND**

**2. ANITA W/O HEERA SINGH,**

**3. MOHHABBAT SINGH**

**4. NAVNEET S/O MOHHABAT SINGH,**

**PRADESH)**

**5. NAAN SINGH**

**6. COLLECTOR, KHARGONE THE STATE OF M.P.  
(MADHYA PRADESH)**

**.....RESPONDENTS**

**(BY SHRI D. S. KALE, ADVOCATE)**

.....  
*This revision coming on for orders this day, the court passed  
the following:*

**ORDER**

Heard finally with the consent of the parties.

2] This civil revision has been filed by the petitioner under Section 115 of Code of Civil Procedure, 1908 against the order dated 08.01.2013, passed by the learned IInd Additional District Judge, Khargone, District-Khargone (M.P.) in Miscellaneous Appeal No.35/2012, whereby the learned Judge of the District Appellate Court has reversed the order dated 07.09.2012 passed in MJC No.6/2012 by IIIrd Civil Judge Class-II whereby, the application filed by the defendant Nos.3 and 4 under Order 9 Rule 13 of CPC was rejected. Through the impugned order dated 08.01.2013, the District Appellate Court has allowed the appeal and remanded the matter back to the Trial Court by restoring the civil suit.

3] In brief, the fact of the case are that the civil suit was filed by the petitioner/plaintiff for declaration, possession and *mesne* profit against the respondents/defendants in respect of land situated at Khasra No.36 at Village- Amba, District- Khargone (M.P.). In the aforesaid suit, the notices were issued to the defendants, however, only the defendant Nos.3 and 4/ the respondent Nos. 1 and 2 of the revision filed the written statement and contested the matter whereas, the defendant Nos.1 and 2, who are the respondent Nos.3 & 4 in the revision, remained *ex-parte*. The decree was passed on 05.05.2011, and put in execution, and again, when the notices were served on the defendant Nos.3 and 4, they came to know about *ex-parte* decree and filed an application under Order 9 Rule 13 of CPC for setting aside the *ex-parte* decree, which was rejected by the Trial Court vide order dated 07.09.2012, holding that the defendant Nos.3 and 4 were properly served and despite service of notice, they refused to mark their appearance before the Court. Thus, the application to set aside the *ex-parte* order was rejected against which the defendant Nos.3 and 4 preferred the appeal No.35/2012 before the IInd Additional District Judge, Khargone, who has reversed the order passed by the Trial Court, holding that the defendant Nos.3 and 4 were not properly served.

4] Counsel for the petitioner/plaintiff has submitted that the learned Judge of the District Appellate Court has erred in not appreciating the second proviso to Rule 13 of Order 9 of CPC, which provides that no Court shall set aside a decree passed *ex-*

*parte* merely on the ground that there has been an irregularity in the service of summons, if it is not satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer plaintiff's claim.

5] In support of his submissions, Shri Sohani, learned counsel for the appellant has relied upon a decision rendered by the Supreme Court in the case of **Mst. Bhabia Devi Vs. Permanand Pd. Yadav** reported as **AIR 1997 SC 1919**.

6] The prayer is opposed by Shri D. S. Kale, learned counsel appearing for the respondent/defendant Nos.3 and 4, and it is submitted that no illegality has been committed by the District Appellate Court in holding that the respondent Nos.3 and 4 were not properly served. In support of his submissions, Shri Kale has also relied upon another decision rendered by the Supreme Court in the case of **Sushil Kumar Sabharwal Vs. Gurpreet Singh** reported as **(2002) 5 SCC 377**.

7] Shri Kale has also submitted that, admittedly, in the present case, the notices were tried to be served by the process server however, when the process server DW-1 went to the house of defendant Nos.3 and 4, he found that only Hira Singh, the defendant No.3 the husband of defendant no.4 Anita was present in the house, and defendant No.4 Anita was not present, thus, he tried to serve the summon on Hira Singh only, but he refused to accept it, and in such scenario, it was incumbent upon the process server to affix the notice as provided under Order 5 Rule 17 of CPC, and in the

absence of such affixture of notice on the house of defendant Nos.3 and 4, it has to be presumed that they were not served at all. It is also submitted that the Supreme Court in the aforesaid case of **Sushil Kumar (supra)** has clearly held that if the affixture is not made by the process server, it should be treated as non-service of notice and not merely an irregularity, as the notices were not at all served, hence, it is submitted that this revision being devoid of merits, be dismissed.

8] Counsel has also submitted that the scope of revision is very limited and thus, no interference is called for.

9] So far as the decision rendered by the Supreme Court in the case of **Sushil Kumar (supra)** is concerned, the relevant paras of the same read as under:-

“7. Rules 17 and 18 of Order 5 CPC which lay down the procedure of service when the defendant refuses to accept service and the endorsement to be made by the serving officer, read thus:

“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.

18. *Endorsement of time and manner of service.*—The serving officer shall, in all cases in which the summons has been served under Rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.”

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 23-2-1993 the summons is said to have been tendered on 22-2-1993 i.e. just a day before the date of hearing.

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11. The High Court has overlooked the second proviso to Rule 13 of Order 9 CPC, added by the 1976 Amendment which provides that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. It is the knowledge of the "date of hearing" and not the knowledge of "pendency of suit" which is relevant for the purpose of the proviso abovesaid. Then the present one is not a case of mere irregularity in service of summons; **on the facts it is a case of non-service of summons.** The appellant has appeared in the witness box and we have carefully perused his statement. There is no cross-examination directed towards discrediting the testimony on oath of the appellant, that is, to draw an inference that the appellant had in any manner a notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim which he did not avail and utilize."

*(emphasis supplied)*

10] On due consideration of submissions and on perusal of the record, testing the facts of the case on hand on the anvil of the aforesaid dictum of the Supreme Court, this Court finds that so far as the service of notice on the defendant Nos.3 and 4 is concerned, admittedly, the process server has tried to serve them through Ex.D/7 and D/9, which clearly reveal that process server has not tried to affix the notice as provided under Order 5 Rule 17 of CPC, which cannot be said to be an irregularity, and in fact, it should be deemed to be an illegality, and as has been held by the Supreme Court that in the absence of affixture of notice, the service of summons on the defendant should be treated as non-service, this

Court is of the opinion that learned Judge of the District Appellate Court has committed no illegality or jurisdictional error in reversing the order passed by the Civil Judge and remanding the matter back, and thus, no interference is called for.

**11]** Resultantly, the petition being devoid of merits is hereby **dismissed**. Since the civil suit has also been stayed by this Court on 01.12.2014, the same stands vacated and the learned Judge of the Civil Court is directed to expedite the matter and conclude the same as expeditiously as possible.

**12]** Parties are also directed to remain present before the Civil Court on 26.06.2023. Office is also directed to remit the original record of the civil suit to the concerned Court.

**(SUBODH ABHYANKAR)**  
**JUDGE**

**Bahar**