

Kuldip Rai v. Sharan Singh and others (G. R. Majithia, J.)

wife and daughter are working in the shop. Thus, the main controversy between the parties in the present case is as to whether the tenant Darshan Kumar ceased to occupy the premises for a continuous period of four months without any sufficient cause.

(8) It is in evidence and is no more contested that Darshan Kumar was of unsound mind; Though the stand taken by the wife of the tenant was that her husband had left the house on August 6, 1980, for which even the report was lodged with the police, yet the fact remains that he was of an unsound mind much prior thereto. That being so, even if it be assumed that the shop remained closed for some period, it could not be successfully argued that the tenant ceased to occupy the same without any sufficient cause. Of course, the case set up by the wife was that she was occupying the shop, in dispute, with her husband till he disappeared on August 6, 1980, in a state of unsoundness of his mind and that she was still carrying on business, after he had left, in the demised premises, but that will not make any difference because in the facts and circumstances of this case, it is amply proved that the tenant was not of sound mind. That being so, it becomes relevant that the landlords should have mentioned the particular period for which the tenant ceased to occupy the premises so that it could be shown that the tenant had failed to occupy the same for a sufficient cause for a particular period. In these circumstances, the view taken by the Rent Controller was perfectly valid and the same has been up set in appeal illegally and on surmises and conjectures.

(9) Consequently, this revision petition succeeds and is allowed. The order of the Appellate Authority is set aside and that of the Rent Controller is restored with no order as to costs.

S.C.K.

Before G. R. Majithia, J.

KULDIP RAI,—*Petitioner.*

versus

SHARAN SINGH AND OTHERS,—*Respondents.*

Civil Revision No. 893 of 1984.

February 15, 1989.

Code of Civil Procedure (V of 1908)— O. 5, Rl. 20—Substituted service—Order for such service—Basis for passing such order.

Held, that before ordering substituted service the Court should be satisfied that the conditions on which alone it can be ordered exist, namely that the defendant is keeping out of the way to avoid service or that for any other reason service cannot be effected in the ordinary way. It is obligatory for the Court to record its satisfaction as enjoined under the statute. The substituted service cannot be ordered in the routine manner. (Para 7).

Petition under section 15(5) of the East Punjab urban Rent Restriction Act for the revision against the order of the Court of Shri K. L. Chopra, PCS Sub Judge 1st Class, Samrala, dated 26th November, 1983 dismissing the application filed by the applicant Kuldip Rai dated 31st March, 1981, leaving the parties to bear their own costs.

Amarjit Markan, Advocate, for the petitioner.

Som Nath Saini, Advocate, for the respondents.

JUDGMENT

G. R. Majithia, J.—

(1) This revision petition is directed against the order of the Rent Controller refusing to set aside the *ex-parte* ejectment order passed in rent application No. 51 of 1978, decided on January 31, 1983.

(2) Sharan Singh and his son Jaswant Singh filed an application for eviction on the ground that the demised premises were let out to H.V. Oils Mills, Khanna, through its partner Hukumat Rai for a period of five years and after the expiry of the contractual period, Respondent Nos. 1 to 4 continued in possession of the premises but as statutory tenants. They are in arrears of rent since November 1, 1974, till the date of filing of the application and have sublet the premises to Kuldip Singh.

(3) The respondents other than Respondent No. 5 were proceeded *ex parte* on March 20, 1979. They were served through substituted service by an insertion in "The Daily Samaj Ludhiana." Respondent No. 5 claimed that he was in possession of the premises in pursuance of an agreement of sale executed in his favour by the landlords. He denied that relationship of landlord-tenant existed between the parties.

(4) The Rent Controller negatived the plea taken by the contesting respondent and ordered ejectment of the respondents.

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(5) Application for setting aside the *ex parte* ejectment order was moved on August 1, 1981. It was stated in the application that the applicant acquired knowledge of the *ex parte* ejectment order on March 29, 1981. The learned Rent Controller, after appraisal of the entire evidence, came to the conclusion that the application for setting aside the *ex parte* order was barred by time and that the applicant had failed to show sufficient cause for setting aside the *ex parte* order passed against him.

(6) I have heard the learned counsel for the parties. It has been submitted by Mr. Markan, learned counsel for the petitioner, that before ordering substituted service on the applicants, it was obligatory for the learned Rent Controller to record a finding that on the basis of the material on the file he was satisfied that the respondent was keeping out of the way for the purpose of avoiding service and that summons could not be served in the ordinary way. It will be useful to reproduce the interim orders passed in the file before ordering substituted service on the petitioner:

“22.7.1978. Present counsel for the petitioner. It be registered. Respondents be summoned for 8th September, 1978 on P.F. & R.C.”

8.9.78. Present counsel for the petitioner. Presiding Officer has left the charge. To come on 18th September, 1978.

18.9.78. Present counsel for petitioner. Presiding Officer has left the charge To come up on 3rd October, 1978.

3.10.78. Present counsel for the petitioner. Respondent be served for 23rd October, 1978 on P.F.

23.10.78. Present counsel for petitioner. Respondents not served. They be again served for 20th November, 1978 on P.F. & R.C.

20.11.78. Present counsel for the petitioner. Respondent not served. They be again served through publication in Samaj Ludhiana on depositing publication fee and P.F. for 23rd December, 1978.

23.12.78. Present counsel for petitioner. Presiding Officer is on leave. To come up on 8th January, 1979.

- 8.1.79. Present counsel for the petitioner. Respondents are not present. Fresh publication in Samaj Ludhiana be again issued for 29th January, 1979 on depositing publication fee and P.F.
- 29.1.79. Present counsel for the petitioner. Shri S. K. Khanna counsel for Respondent No. 5. Publication not received back. Reminder be issued for 14th February, 1979. No tender has been made.
- 14.2.79. Present counsel for petitioner. Shri Passey counsel for Respondent No. 5. Publication not served. Be again issued for 20th March, 1979 on old P.F.
- 20.3.79. Present counsel for petitioner. Counsel for Respondent No. 5. Others are not present. Publication was issued for 23rd December, 1978 and 29th February, 1979, but none for Respondents 1 to 4 & 6. So they are proceeded against *ex parte*. For W.S. to come up on 30th March, 1979."

(7) Before ordering substituted service the Court should be satisfied that the conditions on which alone it can be ordered exist, namely, that the defendant is keeping out of the way to avoid service or that for any other reason service cannot be effected in the ordinary way. The interim orders reproduced supra do not indicate that there was any material before the Court on the basis of which it could record its satisfaction that the respondents were keeping out of the way to avoid service or that for any other reason service cannot be effected in the ordinary way. Before resorting to the provisions of Order 20, rule 5 of the Code of Civil Procedure (for short "the Code", it is obligatory for the Court to record its satisfaction as enjoined under the statute. The substituted service cannot be ordered in the routine manner. The perusal of the interim orders does not justify issuance of order for substituted service. It indicates lack of applicability of judicial mind to the facts of the case. Moreover, it was obligatory for the respondent-landlord to prove that the newspaper through which substituted service was ordered was in daily circulation in the locality in which the petitioner was last known to have actually and voluntarily resided, carried on business or personally worked for again. Once it is disputed that there was no valid service, it is for the respondent to establish that the petitioner was validly served and valid

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service presupposes service in accordance with the procedure prescribed by law. The landlord failed to establish the prerequisites enjoined by clause 1-A of Rule 20 of Order 5 of the Code. The following observations in *S.V.P. Chockalingam Chettiar v. V. C. Rajarathnam and others*, (1) can be usefully referred to:—

“Rule 20 of O. 5, Civil P.C. provides for substituted service, the main purpose of it is to bring it to the notice of the person to whom it is intended. Substituted service cannot be regarded as an idle formality to be gone through. The Code intends it as a substitute to actual personal service. Unfortunately the learned Subordinate Judge appears to have thought that as substituted service had been ordered by the Court and effected, the question of the sufficiency of it will no longer arise. That, however, is not the correct way of approaching the question. A valid substituted service of a notice should conform to the conditions prescribed in O. 5, R. 20 Civil P.C. If it does not conform to that rule, service will have to be regarded as not in accordance with law and therefore not sufficient.”

Accordingly, I hold that the petitioner-applicant was not validly served and the order directing that *ex parte* proceedings be taken against him is bad at law.

(8) There is another aspect which deserves to be mentioned. In the original agreement of lease, it is specifically recited that the tenant can create a sub-lease. The applicants are sub-tenants having been inducted in the premises by the tenant with the consent in writing of the landlord. The tenancy right is a valuable right in the property. They were the only interested and necessary parties to the petition. The other tenants having parted possession to them ceased to have any subsisting interest in the property and it cannot be believed that after having acquired the knowledge that eviction application had been filed against them they would desist from putting in appearance in Court. Their *bona fides* are further established when in pursuance to the order passed by the Motion Bench they deposited the arrears of rent amounting to Rs. 9,000 on October 12, 1988, and thereafter have been depositing the rent regularly. This action of theirs speaks volumes for their *bona fides*

(1) AIR 1964 Mad. 415,

and good conduct and I am not willing to believe that if they had been validly served, they would not have appeared in Court to contest the application more particularly when the eviction had been sought on the ground, namely, non-payment of arrears of rent and creation of sub-tenancy by the tenants. The sub-tenancy was created with the consent of the landlord and that ground is apparently non-subsistent. The other ground ceased to exist when the arrears of rent upto date were deposited in the Court. The sub-tenants had good grounds to contest the eviction application.

(9) The other aspect which requires consideration is, whether the applicants acquired knowledge of the proceedings on the date pleaded by them or any anterior date. They have to furnish a good cause and they have so shown and I am satisfied, on the basis of the evidence on record, that they acquired the knowledge on the date pleaded by them and the application is, thus, within limitation.

(10) For the reasons, recorded supra, this revision is allowed. The *ex parte* order passed in rent case No. 51 dated July, 1978 decided on January, 31, 1983, is set aside. The case is remitted to the Rent Controller, Khanna, for *de novo* trial from the date when the applicants were proceeded *ex parte*. However, this order is subject to payment of conditional costs of Rs. 2,500, which have been paid and accepted in Court by Mr. Saini, learned counsel for the respondent. The parties will, however, bear their own costs of this petition.

(11) The parties, through their counsel, are directed to appear before the Rent Controller on April 21, 1989, on which date the Rent Controller will assess the costs and interest payable by the applicants and the applicant will pay or deposit the same on the same date.

S.C.K.

Before J. V. Gupta, J.

M. L. GUPTA AND BROS. AND OTHERS,—Petitioners.

versus

UNION OF INDIA,—Respondent.

Civil Revision No. 637 of 1985

February 28, 1989.

Arbitration Act (X of 1940)—S. 37(5)—Limitation Act (XXXVI of 1963)—Art. 137—Application for making a reference to the Arbitrator—Limitation for making such application—Commencement of such