

S U P R E M E

C O U R T O F

I N D I A

RECORD OF PROCEEDINGS

BEFORE THE REGISTRAR S.G. SHAH

Petition(s) for Special Leave to Appeal (Civil) No. (s) 24765/2004

(From the judgment and order dated 13/04/2004

In LPA No. 342/1995 of the HIGH COURT OF PATNA)

BHIKHARI MAHTO

... Petitioner

(s)

Versus

CHITRANJAN PRASAD SINGH & ORS.

..Respondent(s)

(With Office Report)

With SLP@.....No.1295 of 2005

(With office report)

Date: 16/03/2007.

This matter was called on for hearing today

For the Petitioner (s)

:

Mr. Rameshwar Prasad Goyal, Adv.

For Respondent(s)

:

Mr. Akhilesh Kumar Pandey, Adv.

Mr. Sudhanshu Saran, Adv.

Ms. Shefali Jain, Adv.

UPON hearing counsel the Court made the following

O R D E R

1. Hon'ble Court has passed an order to issue notice on 22.11.2004.

Since then matter is pending for service to some of the respondents.

Matter was listed on 27.11.06 before this Court (Registrars' Court

No. 2) when necessary direction was given to the petitioner to serve

the copy of the interim application to all the concerned and to verify

the record to see that there should not be any defect in interi

m

application and there must be some proper prayer.

2. Thereafter matter was listed on 6th February, 2007 advocate for the

petitioner has stated that some of the respondents have refused to

accept Dasti Notice and therefore notice to such respondents may

be considered as deemed service. Upon specific query regarding

provision of law for such consideration, he seeks 4 weeks time to

verify the provisions and to confirm whether it can be treated as

deemed service or not. Time was granted till 1.3.2007.

3. Heard Learned Advocate for the petitioner at length, who is

pressing to consider the un-served respondents, who have refused

to accept the notice, to be considered as deemed served because of

their refusal to accept notice during process of Dasti service by the

petitioner.

4. It is the say of the petitioner that they have served several respondents by Dasti service and so far as service to Respondent No.5 - Rajender Singh, Respondent No. 24 Shyamji Singh and respondent Nos. 6, 7 and 8 being Joint Director of Consolidation, Dy. Director of Consolidation and the Consolidation Officer (of State of Bihar) respectively are concerned, Court should accept and consider them duly served in view of the statement by the petitioner Bikhari Mahto in his affidavit of service dated 18.11.05 that they have refused to accept the notice. It is submitted that notices to such respondents be consider as deemed service since all such respondents have refused to accept the notice when petitioner Bikhari Mahto had tried to serve them as details given in his affidavit.

5. It is contended by the learned Advocate for the petitioner that Order V Rule 17 of the Code of Civil Procedure, 1908 (the Code in short) provides that refusal to accept notice shall be considered as deemed service, once the person who has tried to serve the notice has filed an affidavit of such refusal. He has also referred Order V Rule 9 (A) and Form No. 11 in Appendix B, with reference to Order V Rule 18 under the Code.

6. It would be appropriate to reproduce the text of Order V Rule 17; before discussing the contentions of the petitioner; which reads as

under:-

"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 acknowledgement, or where the service 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 originally 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."

7. If we peruse the above provision carefully, it becomes clear that

the later part of the provision regarding affixing a copy of the summons or notice on the outer door or some other conspicuous part of the house is not related only to the case of non service by the Serving Officer after using all due and reasonable diligence and if Service Officer could not found defendant at the given address, and there is no likelihood of his being found at such address within reasonable time and that such person has not empowered any agent to accept service of summons on his behalf; but applies to both the options i.e. in case of refusal and in above mention position.

8. However, it is contended by the Advocate for the petitioner that the first sentence of such Rule, wherein the option of refusal is described is separate from the later part and later part does not concern or apply in case of refusal of notice by the defendant.

9. Such argument is misconceived for the simple reason that the word used between two possibilities of non service; one refusal and second non availability of defendant for effecting service at his residence at the given point of time; is not separated by the word "and" but the word "or" is used between both options; that means in either of the case the condition in later part of the provision; regarding affixing the notice on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides etc. and shall then return the original to the Court from which it was received, with a report endorsed thereon and annexed

thereto stating that he has affixed the copy, the circumstances under which he did so and the name and address of the persons (if any) by whom the house was identified and in whose presence the copy was affixed; applies and hence in absence of compliance of such condition it can not be said that the notice is properly served upon defendant/respondent.

10. The learned Advocate for the petitioner had tried to emphasize that affixing of copy of summons is necessary only if defendant / respondent could not be found at the given address, even after using all due and reasonable diligence etc. and it is not necessary if defendant refuses to accept the notice. On specific question regarding difference between the "Serving Officer" and the "litigant party" for effecting the service, it is emphasized that when Court has allowed Dasti service to the party litigant, he becomes the Serving Officer and therefore there may not be any difference in interpretation or consideration of the provision of such Rule. Learned Advocate for the petitioner has relied upon a Full Bench judgment of Madras High Court, reported in AIR 1970 271 and referred para 12 on page 276.

11. For better consideration of the provision of Rule 17 of the Order V, the same is require to be read with following dissection, where the rule is reproduced as such, but relevant text is bold, underlined and printing in steps is selected for proper consideration.

"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 acknowledgement,

or

where the service 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 originally 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."

12. On careful perusal of the Rule, it becomes clear that provision regarding affixing of the notice is applicable to both the options of non service to defendant, namely refusal by the defendant and when defendant cannot be found with two proviso regarding likelihood of defendant being not found in reasonable time and non availability of empowered agent or other person to accept the notice on behalf of the defendant.

13. The provision is also clear so far as action to be taken by the serving officer in above condition of non service. It is specifically provided that the Serving officer has to

- 1) affix the notice at the conspicuous part of the house in which defendant originally resides or carries on business or personally works for gain,
- 2) return the original (notice) to the Court from which it was issued,
- 3) with a report stating that he has so affixed the copy

- (i) the circumstances under which he did so, and
- (ii) the name and address of the person (if any) by whom the house was identified and
- (iii) in whose presence the copy was affixed.

14. Thus it is clear, when rule confirms that the serving officer has to file an affidavit with a report stating the circumstances under which he affix the notice, that affixing of the notice is applicable in both cases - refusal and non availability of the defendant, and serving officer has to file an affidavit stating that he has affixing due to refusal or due to non availability of the defendant at the address with the name and address of the person (if any) by whom the house was identified or if he himself is certain about the address, which is an option prescribed in Form 11 in Appendix B of the Code - which is referred here after, and in whose presence the copy was affixed. So mere disclosure about refusal is not enough for considering the service as deemed served.

15. Though there is no specific clarification or definition of the "Serving Officer" in the Code or in the judgment referred by the petitioner, same can be confirmed from the Performa of the Affidavit as form No. 11 in Appendix B of the Code which is also relied upon and cited by the petitioner (Text of entire Form is reproduce as an endnote to this order, relevant text is **underline** / **underline** for easy referencel), wherein para 1 specifically

states/provide for the person who has to file an affidavit, to state

that :-

"I am a process-server of this Court".

16. The provision of the Rule 9 and 19 of the Code make it clear

that the serving officer is officer of the court, though reference to the word "serving officer" is not there in Rule 9, the reference of "proper officer" in sub rule (2) denotes the "serving officer" as referred in other rules and "process -server" as referred in Form 11 in Appendix B.

17. Rule 9 and Rule 19 reads as under (relevant portion is bold and underlined for ease in consideration of the relevant provision):

9 Delivery of Summons by Court

(1) Where the defendant resides within the jurisdiction of the court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and where he is such an officer, the summons may be sent to

him in such manner as the Court may direct.

(3) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (I) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court:

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

(4) Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgment due), the provisions of rule 21 shall not apply.

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing

the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3)

when tendered or transmitted to him, the Court issuing

the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed,

pre-paid and duly sent by registered post acknowledgment

due, the declaration referred to in this sub-rule shall be

made notwithstanding the fact that the acknowledgment

having been lost or mislaid, or for any other reason, has

not been received by the Court within thirty days from the

date of issue of summons.

(6) The High Court or the District Judge, as the case may

be, shall prepare a panel of courier agencies for the

purposes of sub-rule (1).

9A Summons given to the Plaintiff for Service

(1) The court may, in addition to the service of summons

under rule 9, on the application of the plaintiff for the issue of a summons for the appearance of the defendant, permit such plaintiff to effect service of such summons on such defendant and shall, in such a case, deliver the summons to such plaintiff for service.

(2) The service of such summons shall be effected by-or on behalf of such plaintiff by delivering or tendering to the defendant personally a copy thereof signed by the Judge or such officer the Court as he may appoint in this behalf and sealed with the seal of the Court or by such mode of service as is referred to in sub-rule (3) of rule 9.

(3) The provisions of rules 16 and 18 shall apply to a summons personally served under this rule as if the person effecting service were a serving officer.

(4) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in the same manner as a summons to a defendant. "

19 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

affidavit of the serving officer and may, if it has been so verified examine serving officer on oath or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry 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.

18. Above provision makes it clear that the refusal of notice can be considered as deemed service only if it is refused before the serving officer - processor server or proper officer as referred in different rules but not during the Dasti service which is permitted by Rule 9A. Because in sub rule (3) of Rule 9A, it is made clear that Provisions of Rule 16 & 18 shall apply to a summons personally served under this rule as if the person effecting service were a serving officer. Thus when two Rules are specifically referred leaving the Rule falls in sequence between those two rules, namely Rule 17, it is certain that provision of Rule 17 do not apply to such option of service which is given to plaintiff (which includes petitioner, appellant and all litigant). More over sub rule (4) make it mandatory for the Court to issue fresh notice through regular course by the Court in the same manner as a summons to a defendant. Rule 19 A empowers the Court to examine the serving officer and though word "shall" is used, the next action /step is discretionary i.e. ether to declare that

the summons as duly served or order such service as it thinks fit.

19. It is also certain that the provision regarding filing affidavit  
in

Performa No. 11 of Appendix B makes it clear that such Affidavit is

to be filed by the process server of the Court. Moreover affidavit

makes a provision for the deponent of such affidavit that what to

disclose specifically, with following options in para 3 as under; with

specific provision for the signature of process server;

"Here state whether the person served, signed or

refused to sign the process and in whose presence.'

OR

"Enter fully and exactly the manner in which the

process was served, with special reference to Order 5,

Rules 15 and 17."

AND

"Signature of the process server."

20. The judgment in A.A.A.O. No. 5 of 1962, decided on 20.06.1969

between Parasurama Odayar vs. Appadurai Chetty and Ors by the

Full Bench of Madras High Court and reported in AIR 1970 Madras

271referred by the petitioner is also confirming the same position.

The only difference is that petitioner wants to emphasize that

Serving Officer means litigant also and that once affidavit is file

d

regarding refusal, the notice shall be considered as deemed service.

The relevant portion (para 12 on page 276 & 277) of the judgment,  
which is with reference to the provision of Rule 19 of the Order V  
of the Code reads as under:

"12. Now let us consider the rule more closely. The first part says that, where a summons has been returned under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the service 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. Thus it says that, where the return under Rule 17 has not been verified by the affidavit of the serving officer, the Court shall examine him on oath and it is mandatory. If there is an affidavit, it means that the serving officer has stated something on oath and, if the statement turns out to be false he could be prosecuted. That itself would put him on guard and make him adhere to the truth as far as possible and would minimize the chances of a false return of service. It is with the same object that the Court is required to examine him on oath where he has not verified the return by an affidavit before the prescribed officer (Nazir). We know of numerous instances where defendants and judgment-debtors come to the Court and state that the process server has not come to their place at all and that the

alleged affixture is a myth; and there are several cases where such a contention of the defendant or judgment-debtor has been accepted by the Courts. Such a danger would be minimized if the Court adheres to the provisions of Order V, Rule 19. If it makes it a point to question the serving officer as to what he did when he went to the village and what attempts he made to get at the defendant, there is no doubt that the service would be more real and effective than it would be otherwise. We cannot really over-emphasise the importance of this provision. Very often there is room for thinking that the Court does not even look into the return, but simply says "Service sufficient, defendant absent; set ex parte". That defeats the salutary purpose for which the detailed provisions have been enacted with anxiety by the Legislature."

In the above judgment it is nowhere confirmed that serving officer means the litigant and even in case of refusal of notice before the litigant, it can be considered as deemed service. What is emphasised by the petitioner, as observed by the High Court in above discussion, is that no one would file a false affidavit since he may be prosecuted for false affidavit and hence litigant / petitioner is the serving officer once Dasti is allowed and affidavit by him is proper for assumption of deemed service in case of refusal to accept



officer / process-server and when we refer the process server, it is of Court and not the litigant as difference being confirmed in prescribed draft of affidavit which is to be filed by the process server of the Court. In para 13 of the reported judgment, the Apex Court has categorically determined that the summons was not served on defendant-appellant.

23. Reference to the reported case of the Apex Court in Civil Appeal No: 144 to 147 of 1969, decided on 8-8-1972 between State of Jammu & Kashmir vs. Haji Wali Mohammed, AIR 1972 SC 2538 is also necessary, inasmuch, as in this case also it is categorically confirmed that even simple affidavit is not enough for considering the service as deemed service in case of refusal of service by the concerned litigant. The relevant para is 11 on page 2543 reads as under:

11. It cannot be and indeed it has not been disputed that notices were not served in accordance with the procedure prescribed for service of summons in the Civil Procedure Code. Even if we accept what Dr. Singhvi says that there was a refusal to accept the summons and that was the reasons for effecting service by affixation the provisions of O. 5, R. 19 of the Code were not complied with by the filing of an affidavit of the serving officer etc. All that has been pointed out by Dr. Singhvi is that the notices were

produced along with the writ petitions which showed that they had been affixed to the premises and that in the writ petitions it was admitted that notices had been affixed on January 9, 1968 on the properties of the petitioners. We do not consider that any such averment dispensed with the requirement of the statutory provision contained in S. 239 of the Municipal Act in the matter of service of notices.

which makes it clear that provision of Order 5 Rule 19 is required to be followed strictly, which refers to filing of affidavit as per prescribed details and it must be confirming conditions of the rule regarding the affixing the notice, witnessing of such affixing etc. by the process server.

24. This view is confirmed by provision of sub rule (3) & (4) of Rule 9A of Order V of the Code; where in there is no mention of Rule 16 and as per sub rule (5) court has to issue fresh notice to un served defendant / respondent.

25. Thus, in view of the above discussion, it is certain that even in case of refusal of notice by the litigant, the notice or summons is required to be affixed at the given address in presence of the witnesses as provided under the Rules and such facts must be properly disclosed with proper affidavit and proper endorsement on original copy of the summons before the Court by the process

server of the Court, who is a public servant.

26. Therefore in the present case when petitioner, who is not a process server of the Court and hence not a public servant also, even if he has affixed the notice in the presence of witnesses, with proper endorsement on summons and proper affidavit, it would be debatable question that whether such endorsement by affidavit can be considered as a deemed service or not. Whereas in the present case petitioner has failed to take appropriate steps so far as second part of the provisions of Order V Rule 17 of the Code regarding affixing the notice at the address of the respondent in the presence of the witnesses and endorsement on the notice, return of original copy of the notice with endorsement of witnesses etc. are concerned. Therefore notice can not be considered as deemed served, as requested by the petitioner.

27. Therefore in absence of proper compliance of the provisions of Order V Rule 17, no notice can be considered as deemed served only because of statement given by the party litigant that his opponent has refused to accept the notice. To make it clear, it is stated that in such cases litigant who has obtained Dasti service has to request the nearest Civil Court to affect the service to the concerned litigant through the process-server of that Court at the given address and proper affidavit is necessary by the process server as required under the Rule and Performa affidavit in Appendix B.

28. In view of the above discussion, the request of the petitioner to consider the unserved respondents duly served, considering their services as deemed service on the ground of affidavit by the petitioner alone regarding refusal of service by such respondents, cannot be accepted and the same is hereby rejected.

29. Fresh notice to be issued to unserved respondents by Registered Post A. D. To be listed on 24th April, 2007.

(S.G. Shah)  
Registrar  
16.03.2007

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Code of Civil Procedure, 1908

Appendix B

Form No. 11

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF

SUMMONS OR NOTICE

(Order V, rule 18)

(Title)

The affidavit of \_\_\_\_\_, son of \_\_\_\_\_

I \_\_\_\_\_ make oath/affirm and say as follows :

-

(1) I am a process-server of this Court.

(2) On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_, I received

summon/notice issued by the Court of \_\_\_\_\_ in

Suit No. \_\_\_\_\_ of 19\_\_, in the said Court, dated \_\_\_\_\_ the

\_\_\_\_\_ day \_\_\_\_\_ of 19 \_\_, for servi  
ce on \_\_\_\_\_

\_\_\_\_\_.

(3) The said \_\_\_\_\_ was at the time personally

known to me, and I served the said summons/notice on

him/her on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_ at about \_\_\_\_\_

o'clock in the \_\_\_\_\_ noon at \_\_\_\_\_ by tendering a copy

thereof to him/her and requiring his/her signature to the

original summons/notice.

(a)

(b)

(a) Here state whether the person served signed or refused

to sign the process, and in whose presence.

(b) Signature of process-server.

or

(3) The said \_\_\_\_\_ not being personally

known to me \_\_\_\_\_ accompanied me to

\_\_\_\_\_ and pointed out to me a  
person whom he stated to be the said \_\_\_\_\_, and I  
served the said summons/notice on him/her on the  
\_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_, at about \_\_\_\_\_ o'clock in the  
\_\_\_\_\_ noon at \_\_\_\_\_ by tendering a copy thereof to  
him/her requiring \_\_\_\_\_ his/her signature to the  
original summons/notice.

(a)

(b)

(a) Here state whether the person served signed or refused  
to sign the process, and in whose presence.

(b) Signature of process-server.

or,

(3) The said \_\_\_\_\_ and the house in which he  
ordinarily resides being personally known to me, I went to  
the said house, in \_\_\_\_\_ and there on the \_\_\_\_\_ day  
of \_\_\_\_\_ 19\_\_ , at about \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, I  
did not find the said

(a)

(b)

(a) Enter fully and exactly the manner in which the process

was served, with special reference to Order V, rules 15 and

17.

(b) Signature of process-server.

or,

(3) One \_\_\_\_\_ accompanied me to \_\_\_\_\_ and there

pointed out to me \_\_\_\_\_ which he said was the

house in which \_\_\_\_\_ ordinarily resides. I did

not find the said \_\_\_\_\_ there.

(a)

(b)

(a) Enter fully and exactly the manner in which the process

was served, with special reference to Order V, rules 15 and

17.

(b) Signature of process-server.

or,

If substituted service has been ordered, state fully and

exactly the manner in which the summons was served with

special reference to the terms of the order for substituted

service.

Sworn/Affirmed by the said \_\_\_\_\_ before me

this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_/20\_\_\_\_.

Empowered under Section 139  
of the Code of Civil  
Procedure, 1908 to administer  
the oath to deponents.