

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

CR 5797 of 2009

Date of Decision: May 12, 2015

Pushpa Ahuja and ors.

.....Petitioners

Vs.

Umardin and ors.

.....Respondents

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.

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Present:- Mr.Lokesh Sinhal, Advocate
for the petitioners.

Mr. Kulbhushan Sharma, Advocate.

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M.M.S. BEDI, J.(ORAL)

An ex-parte decree was passed in favour of Sat Pal, the predecessor-in-interest of petitioners No.1 to 4 and petitioner No.5 on September 25, 1982. The predecessor-in-interest of the defendant-respondents filed an application under Order 9 rule 13 CPC when steps for execution of the decree were taken on February 9, 1996 and possession was delivered by executing the ex-parte decree. The application filed under Order 9 rule 13 CPC for setting aside ex-parte decree was dismissed by the trial Court , however, the Appellate Court allowed the appeal and set aside

the order passed by the lower Court and the ex-parte decree vide order dated July 24, 2009 directing the trial Court to enable the defendants- respondents and their successors to contest the suit by appearing before the trial Court. Aggrieved by the order passed by the Appellate Court, the plaintiff no.1 (represented by petitioners No.1 to 4) and plaintiff No.2 have preferred this revision petition.

Counsel for the petitioners have vehemently contended that the decree has actually been executed and the possession has been taken by the petitioners since long and that the defendant- respondents had been actually served with the summons and that they had intentionally evaded appearance before the trial Court in order to delay the execution of the decree going to be passed against them.

On the other hand, learned counsel for the respondents has vehemently urged that the service had not been effected of the summons during the course of trial and that the process server, post man or any other witness having not been examined to establish that the defendants have been served by ordinary process as well as by registered post, the Appellate Court has rightly allowed the application under Order 9 Rule 13 CPC.

Counsel for the petitioners has contended that the application under Order 9 rule 13 CPC was barred by time. He placed reliance on **Mahabir Singh Vs. Subhash and ors.** (2008) 1 SCC 358 in support of his contention. In the said case, an application filed after period of 1½ years of the ex-parte decree was not approved by the Apex Court in view of Article

123 of the Limitation Act. He has argued that the non-examination of process server and postman will have no effect as there exists a presumption that the acts by them are done in ordinary course of business.

I have heard learned counsel for the petitioners. There is no dispute regarding the proposition that there exists a presumption in favour of official act done in ordinary course of business. The said judgment would have been applicable to the facts of the present case only if the process server or the official from the Post Office been produced in support of the report of refusal to establish that the defendants had been served by munadi and affixation as claimed by the petitioners. Had the said officials been examined to prove their report and given an opportunity to be cross-examined, only then the presumption of law that an official act will be deemed to have been done in accordance with law in ordinary course of business could have been drawn. In the present case, even if it is presumed that the decree has been executed, still the rules of natural justice would require that the prejudicial party should have the satisfaction of having contested the matter on merits.

Counsel for the petitioners has submitted that the petitioners had claimed possession on the basis of title whereas the defendant-respondents had no right to remain in possession.

Without expression of any opinion on merits of the case, I am of the considered opinion that ends of justice would be adequately met in case the defendant-respondents or the heirs are given fair opportunity to

defend the case, however, the petitioners at the same time are required to be compensated for the unnecessary harassment caused to the plaintiff-petitioners.

The appeal is dismissed with a condition that the defendant-respondents will pay a cost of Rs.20000/- to the plaintiff-petitioners on the next date of hearing before the trial Court which will be considered as cost of setting aside of ex-parte decree as the issue regarding service has been a controversial and debatable issue.

Parties are directed to appear before the trial Court (successor Court) on July 18, 2015, for further proceedings in accordance with law. It is further directed that the trial will be concluded expeditiously as the matter is pretty old.

May 12, 2015
sanjay

(M.M.S.BEDI)
JUDGE