

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

CR No.562 of 2015

Date of Decision:-23.01.2015

Mehar Singh.

.....Petitioner.

Versus

Suresh Kumar.

.....Respondent.

CORAM:- HON'BLE MR. JUSTICE JASWANT SINGH

Present:- Mr. V.K. Jindal, Senior Advocate assisted by
Mr. Akshay Kumar Jindal, Advocate for the Petitioner.

JASWANT SINGH, J.(ORAL)

Plaintiff is in revision aggrieved against the order dated 09.12.2014 passed by the learned Civil Judge(Jr. Divn.), Karnal whereby application filed by the respondent/defendant under Order 9 Rule 13 CPC for setting aside the ex-parte order dated 15.04.2004 as well as ex-parte judgment and decree dated 25.09.2008 has been set aside.

Learned Counsel for the petitioner has vehemently argued that there is no sufficient cause shown by the respondent in her application as to why she could not appear in the case and furthermore, in her evidence has admitted that she knew about the pendency of this suit for the past 2/3 years. Thus, it has been prayed that the impugned order be set aside and the present petition be allowed.

After hearing learned Counsel for the petitioner and perusing

the paper book, this Court is of the considered view the present petition is devoid of any merit and same deserves to be dismissed.

Perusal of the record reveals that the plaintiff has filed a suit for specific performance which was decreed ex-parte on 25.09.2008. It is further apparent from the record that the respondent/defendant while moving an application under Order 9 Rule 13 CPC has categorically stated that she was never served through any process of the Court and thus, she was not in knowledge of the pendency of the suit. It is also not in dispute that the report of the process server was that the respondent/defendant was not available at the address as and when he went there. It is also apparent that the learned trial Court had passed order whereby it had asked the petitioner/plaintiff to supply the correct address of the respondent. Instead of supplying the correct address the respondent moved an application for getting the substituted service done on the defendant/respondent and never used the process through Court by either going with the dasti summons or furnishing the correct address of the defendant/respondent. It is also evident from the memo of parties and not disputed by the learned Counsel for the petitioner/plaintiff that both the parties are residents of Gharaunda and judicial notice can be taken on the fact that the Gharaunda is a small town and the parties are very well aware as to where the other party resides. Furthermore it is evident that the suit is for specific performance in which material rights of a party are directly involved and thus it deserves to be decided on merits. It is cardinal principle of law that no one should be condemned unheard and endeavor should be made for deciding the litigation on merits after affording effective opportunities to the parties. Even if it is presumed that non appearance of defendant was intentional one

still substantive rights cannot be crushed on such a technical issue.

There is another aspect of the matter which concerns second proviso to Order 9 Rule 13 CPC. As per the said second proviso, no court shall set aside the decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. The court can refuse to set aside the ex-parte decree if it is convinced that there was some irregularity in the service of summons and the defendant had sufficient notice of his appearance.

In the present case, as observed above it is not the case where the plaintiff has been diligent and had come to the court with clean hands because he never adopted the process of serving the summons personally upon the defendant/respondent if he was so sure that the defendant/respondent was residing at the same address. The argument of the petitioner that the defendant/respondent in his evidence has admitted that he knew about the pendency of the suit for the past 2/3 years is also of no value because when a party is deposing before the Court after a sufficiently long gap, some minor discrepancies are bound to creep in the said oral evidence.

In view of the above observations made herein above and finding no merit in the present revision petition, the same is hereby dismissed.

(JASWANT SINGH)
JUDGE

January 23, 2015
Vinay