

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR No. 6552 of 2014 [O&M]
Date of Decision : February 18th , 2015

Narinder Kaur Petitioner

Versus

Darshan Singh Respondent

CORAM : HON'BLE MR. JUSTICE DR. BHARAT BHUSHAN PARSOON

Present Mr. K.B.Raheja, Advocate,
for the petitioner.

Mr. Tapish Gupta, Advocate
for Mr. N.K.Manchanda, Advocate,
for the respondent.

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Dr. BHARAT BHUSHAN PARSOON, J.

A civil suit by Darshan Singh, plaintiff, respondent herein, seeking a decree of declaration that he is joint owner in possession of land measuring 7 kanals 7 marlas in village Guruharshai Shamli and further that sale deed dated 3.1.2001 in favour of the defendant- Smt.Narinder Kaur, petitioner herein, was illegal, null and void and was ineffective on the rights of the plaintiff being a fraudulent and sham transaction, as also for seeking possession of the land, was pending adjudication before the Court below. For non-appearance of the defendant – petitioner herein, she was proceeded against *ex parte*. Receiving ex-parte evidence from the plaintiff, his suit was decreed vide judgment and decree dated 13.2.2008 [Annexure P/3].

2. Later, an application under Order IX Rule 13 CPC for setting aside this ex-parte judgment and decree was filed before the lower Court.

A tough contest was made by the respondent-plaintiff. The Lower Court framed following questions for adjudication of this application :-

- “1). Whether there are sufficient grounds to set-aside the *ex parte* judgment and decree dated 13.2.2008 passed by Sh. Anantdeep Singh, PCS, the then CJ [JD], Ferozepur? OPA
- 2). Whether the application is not maintainable? OPR
- 3). Whether the present application is time barred? OPR
- 4). Whether the applicant is estopped by her own act and conduct from filing the present application? OPR
- 5). Whether the present application is not properly verified as per provisions of law? OPR
- 6). Relief.”

3. Receiving oral as well as documentary evidence from the parties and providing hearing to their counsel, all the issues were decided against the applicant-defendant and consequently, the application for setting-aside *ex-parte* decree was dismissed vide order dated 27.11.2013 [Annexure P/2]. This order was unsuccessfully challenged in appeal by the defendant-petitioner herein, is of 16.7.2014 [Annexure P/1]. The defendant-petitioner herein has impugned these judgments dated 27.11.2013 [Annexure P/2] and 16.7.2014 [Annexure P/1] in the present revision petition.

4. It is claimed by the petitioner-defendant that the trial Court was in a great haste to serve the defendant and without even satisfying itself that service cannot be effected in ordinary way, had sought to serve the defendant, petitioner herein by substituted mode, which service was not effected as per law and consequently, *ex-parte* proceedings were taken to the great prejudice of the petitioner-defendant. Claiming that the petitioner-defendant had come to know of the *ex parte* judgment and decree against her only in the first week of June, 2008, whereupon she filed the application for setting-aside the *ex-parte* decree, it is averred that neither there was refusal to receive the summons nor a case was made out for service of the petitioner-defendant by substituted mode and thus, the *ex-parte* proceedings taken against the petitioner-defendant are wrong, null and

void and are not sustainable in the eyes of law.

5. When the petitioner-defendant has questioned the validity and legality of the order of the trial Court whereby service by substituted mode of service was ordered on 23.10.2003 and has further questioned the ex-parte proceedings taken on 23.4.2004, ex-parte decree passed sequently on 13.2.2008 [Annexure P/3] has also been challenged.

6. Respondent on the other hand has urged that the defendant-petitioner herein continued to play truant with the Court and when ultimately was ordered to be served through substituted mode of service, knowing well about pendency of the suit, she did not appear with the sole intention of causing delay.

7. Hearing has been provided to learned counsel for the parties while going through the paper book as also the attending facts and circumstances.

8. Perusal of the paper book reveals that service by substituted mode i.e. by way of *munadi* and affixation was ordered by the lower Court on 23.10.2013 as defendant had refused to accept service of the summons. Previous orders also reveal that the defendant had been playing truant with the Court and service was not being effected. To add sanctity to the report of refusal by the Process Server on the summons and thereafter service of the defendant by substituted mode i.e. by *munadi* and affixation, the concerned Process Server was required to be examined by the respondent-plaintiff to thwart the claim of the petitioner-defendant questioning validity and legality of the service of refusal and then service by substituted mode.

9. Counsel for the revision petitioner has sought support from an authority of the co-ordinate Bench of this Court in **Bijender Singh Vs. Rambir Singh and others 1991 [1] PLR 375** wherein, referring to the provisions of Order IX Rule 7 CPC, it was clearly held that to prove report of refusal by a Process Server, when the other party disputes factum of such refusal, Process Server who presented the summons, is required to be produced in Court to prove such factum of refusal. It was further held

that in the absence of such evidence, report of Process Server cannot be treated as evidence.

10. Going a step further, it has further been held that case of irregular service or defect in the service stands at par with that of a case of non-service. In this context, para No. 9 of the said judgment is reproduced below :-

“9. Case of irregular service or defect in the service would stand at par with the case of non-service as regards Order 9 Rule 7 of the Civil Procedure Code. Non-appearance on the date fixed on account of non service of summons in the suit would be a good cause for setting aside order proceeding ex-parte. Such a defendant on his appearance on showing good cause as above would be entitled to contest the suit by filing written statement taking all the pleas available to him.”

11. Reference may be made to Para No. 9 of the judgment in **Bijender Singh's case [supra]** which for ready reference is reproduced as under:-

“8. The principle laid down in rule 13 of Order 9 Civil Procedure Code that on account of irregularity in the matter of service of summons, the ex-parte decree is not to be set aside, is not attracted to the applications filed under Order 9 Rule 7 of the Civil Procedure Code. Rule 7 of Order 9 reads as under:-

“Whereas the Court has adjourned the hearing of the suit ex-parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.”

12. It is further to be noticed that the plaintiff was given opportunity to serve the defendant by all modes, i.e. dasti or registered post, but no such effort was made and instead, report of refusal allegedly came from the Process Server, which had been accepted.

13. Counsel for the petitioner has referred to another authority of this Court in **Smt. Chhanno Vs. Bachan Singh 1988 [2] PLR 598** and has urged that where specific orders were made for issuance of summons by registered post, but no such registered covers were filed, report of

Process Server regarding refusal of service could not be made basis for initiating *ex-parte* proceedings. For ready reference, para No. 6 of this judgment is reproduced as under:-

“6. I have heard the learned counsel for the parties. I am of the considered view that the decree secured by the respondent should be set aside and the petitioner should be allowed to enter defence to contest the suit on merits. Order 5, Rule 19-A of the Code provides for simultaneous issue of summons to the defendant for service by post in addition to personal service. It lays down that the Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in Rule 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgment due, addressed to the defendant, or his agent. The proviso to Rule 19-A (1) no doubt lays down that nothing in this sub-rule shall require the Court to issue summonses for service by registered post, where, in the circumstances of the case the Court considers it unnecessary. In a case where the Court does not make any order for simultaneous issuance of summons by registered post acknowledgment due in addition to personal service it can legitimately be deemed that the Court considered it unnecessary to issue summons for service by registered post. In the present case, however, the trial Court made specific orders on 13.6.1979 and 1.8.1979 for issuance of summons to the petitioner by registered post for appearance as defendant in the suit on 1.8.1979 and 19.9.1979 respectively. The respondent, however, did not comply with the orders of the court and did not file registered cover. Thus, the report of alleged refusal of service of summons issued by ordinary way for 19.9.1979 could not be made the basis for taking *ex-parte* proceedings against the petitioner. I have no hesitation to hold that the petitioner was never served with any valid notice in accordance with law to appear as defendant in the suit. The order taking proceedings against the petitioner *ex-parte* passed on 19.9.1979 was, therefore, without jurisdiction.”

14. Perusal of the impugned order of the lower Court reveals that though, the petitioner-defendant entered the witness box as AW-1 and has produced another witness – Subhash Chander as AW-2, plaintiff – respondent herein appeared in the proceedings under Order IX Rule 13 CPC as RW-1, but never thought of examining the Process Server to prove his report of refusal and thereafter alleged service of the defendant by substituted mode.

15. It is important to note that report of refusal of the Process

Server is neither signed by respondent – plaintiff Darshan Singh nor by any other witness examined by him in the proceedings under Order IX Rule 13 CPC. As has already been noticed, even the Process Server has not been brought as a witness by him. If we go through the order dated 23.10.2013 when service through substituted mode i.e., by way of *munadi* and affixation was ordered for 16.1.2014 by the lower Court, it is found that the Court had nowhere recorded its satisfaction that the defendant could not be served in ordinary manner and thus, was required to be served through substituted mode i.e., by way of *munadi* and affixation.

16. Now, the question of knowledge comes. The ex-parte judgment and decree is dated 13.2.2008 [Annexure P/3]. There is specific averment in the application under Order IX Rule 13 CPC that the petitioner-defendant had come to know of the said judgment and decree in the first week of June, 2008. Learned lower Court has nowhere dealt with the matter of condonation of delay, which matter the petitioner had clearly set-up in her application under Order IX Rule 13 CPC.

17. Merely because the applicant-defendant in her cross-examination has not been able to specify the date as to when she got the knowledge of ex-parte decree, *ipso facto* is not a ground to disbelieve the version in the application which is supported by her affidavit, that she got knowledge of *ex parte* judgment and decree, Annexure P/3, only in the first week of June, 2008.

18. It may further be noticed that even the appellate Court did not deal with this matter with the involvement and concern required of it. There is absolutely no explanation coming forth from the respondent-plaintiff as to why the Process Server was not examined to prove the report of refusal on the summons as also of service by substituted mode. The Appellate Court has also failed to take note of this serious lapse.

19. Consequently, finding merit in the revision petition, the same is allowed and both the judgments and decrees impugned in this petition are set-aside.

file written statement within 10 days thereof. Since the case has become old, the Court would decide the same within six months allowing the parties to lead their respective evidence and by conducting day-to-day proceedings, if so required.

(Dr. BHARAT BHUSHAN PARSOON)
JUDGE

February 18th, 2015
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1. Whether Reporters of local papers may be allowed to see the judgment? yes
2. Whether to be referred to the Reporters or not? yes
3. Whether the judgment should be reported in the Digest? yes