

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CR No.2017 of 2015
Date of Decision: 09.09.2016**

Satbir Singh Saini

.....Petitioner

Vs

M/s Chawla Plywood Traders

.....Respondent

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Amit Jain, Advocate
for the petitioner.

Mr. Rakesh Dhiman, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. In this revision petition, defendant-petitioner has assailed order dated 18.12.2014 passed by Additional District Judge, Gurgaon whereby appeal against the order dated 01.10.2013 passed by Additional Civil Judge (Senior Division), Gurgaon dismissing the application under Order 9 Rule 13 CPC for setting aside the ex parte judgment and decree dated 07.06.2011 and ex parte order dated 05.02.2011 was dismissed.

[2]. Plaintiff filed a suit for recovery under Order 37 CPC. Defendant-petitioner was ordered to be proceeded against ex parte on the basis of report of Process Server that he was served through his son. Despite service, none appeared on that day and the petitioner-defendant was proceeded against ex parte vide order dated 05.02.2011. On 07.06.2011, ex parte judgment and decree was passed against the defendant-petitioner and the plaintiff was held entitled to recover an amount of Rs.1,70,139/- from the defendant-petitioner along with interest @ 6 % per annum from 06.04.2009 till final realisation of the amount.

[3]. Petitioner-defendant came to know about the ex parte judgment and decree only when warrant of attachment was issued against him on 09.11.2011. Accordingly, an application under Order 9 Rule 13 CPC was moved on 03.12.2011 for setting aside the ex parte judgment and decree dated 07.06.2011 and also for setting aside the ex parte order dated 05.02.2011 passed by the trial Court. It was pleaded that there was no service at all, nor any *munadi* was done. No report of refusal was recorded by the Process Server before proceeding against the defendant-petitioner and also no registered letter was issued in compliance to any substituted mode of service.

[4]. The application was contested by the plaintiff.

[5]. Additional Civil Judge (Senior Division), Gurgaon vide order dated 01.10.2013 dismissed the application under Order 9 Rule 13 CPC on the premise that as per report of service Ex.R1, defendant-petitioner was served through Tejeshwar Saini i.e. son of the petitioner as the petitioner was not present in the house. Against the order dated 01.10.2013, petitioner-defendant filed civil appeal before the Additional District Judge, Gurgaon which was also dismissed by the lower Appellate Court on 18.12.2014.

[6]. I have considered the submissions made by both the learned counsel for the parties and have also scrutinized the material on record.

[7]. At the time of issuance of notice of motion, this Court passed the following order on 01.09.2015:-

“Learned counsel for the petitioner inter alia submits that report of process server Ex.R-1 dated 04.02.2011 carries material overwriting of date and words. The alleged service upon son of petitioner has not been witnessed by any independent person nor the process server has been examined as witness by the decree-holder.

Learned counsel states that onus of issue No.1 under the proceedings under Order 9 Rule 13 though was on the applicant at the first

instance, but the same stands shifted to the decree-holder once it is demonstrated that the process server has not recorded any statement of witness while serving summon upon the son of petitioner. The alleged signature of Tejeshwar Saini is not appearing at the end of the alleged report, rather some signature in the name of Tejeshwar Saini is shown to have been affixed at the top of the said report.

Learned counsel by referring to collective photocopies of cause list (Annexure P-9) before the trial Court further states that the case was fixed for 22.8.2013 before the trial Court and it was adjourned for 23.09.2013 and thereafter on 23.09.2013 it was adjourned for 26.09.2013. On 26.09.2013, the case was further adjourned for 26.11.2013. The trial Court is shown to have decided the application on 01.10.2013. According to learned counsel there is no material on record to show whether the date was ever pre-poned by the trial Court at the instance of any of the parties, nor any intimation was ever served upon the applicant in respect of change of date for arguments.

Notice of motion for 19.01.2016.

Executing Court is directed to adjourn the case beyond the date fixed by this Court.”

[8]. Perusal of vernacular of Ex.R1 i.e. report of Process Server shows that there was overlapping of figures in date i.e. 04.02.2011 in the report. The report in vernacular reads like

this:-

“AAJ DINAK 04.02.2011 KO MAUKE PAR JA KAR SH. SATBIR SINGH KO TALASH VA DARIAFT KIYA TOH MAUKE PAR MAUJUD NA MILE. MAUKE PAR MILE UNKER DUSRE NUMBER KE BETE NE JUBANI BATAYA KI VEH KISI KAAM SE BAHAR GYE HAI VA BA KHUSHI EK PARAT SUMMON VA DAVA COPY LE KAR TAMIL VARSAN KIYA”

“Sir today on 04.02.2011 by going to the spot, Sh. Satbir Singh was searched then on the spot his son No.2 met who orally told that he has gone out in connection of some work and he on his own received summon and copy of plaint.

Sd/

Nitin Jain, P.S/05.02.2011”

[9]. Perusal of report also reveals that at the top of the report signature of Tejeshwar Saini appeared and towards right hand side of the report, signature of Nitin Jain, P.S appeared with date as 05.02.2011. Just at the lower adjoining space of signature of Nitin Jain, illegible short signature of someone has also appeared with date as 05.02.2011 without any specification whether such short signature was that of any person who had allegedly witnessed the service upon Tejeshwar Saini. The

overlapping done in the date as 04.02.2011 was not initialled by the Process Server, nor the same was re-returned after cutting the original incorporation.

[10]. It is true that initial onus of issue No.1 i.e.

“Whether the ex parte judgment and decree as well as ex parte order dated 05.02.2011 is liable to be set aside? OPP”

even if presumed to be on the petitioner, the same shifted on the decree holder once it was demonstrated that the report of the Process Server had showed unauthorized overlapping of words and was not witnessed by any person when alleged service of summon was effected on the son of the petitioner. Even signature of son of the petitioner namely Tejeshwar Saini was not appearing at the end of the report, rather signature of Tejeshwar Saini appearing at the top of the page was also not uniformly made and was also conspicuous by the nature of signing.

[11]. In view of initial discharge of onus by the applicant, the same shifted to the decree holder as per issue No.1. Process Server was not examined. The report itself showed that the same was written as if proceedings were done on 04.02.2011 itself but the Process Server signed the same at the end of report on 05.02.2011. No witness has been examined in whose

presence the aforesaid report was allegedly prepared. Moreover, as per collective photocopies of cause list (Annexure P9) on record, the incriminating details came to fore. The case was fixed for 22.08.2013 before the trial Court and it was adjourned for 23.09.2013. From 23.09.2013, the case was adjourned for 26.09.2013. From 26.09.2013, the case was further adjourned to 26.11.2013. The trial Court has shown the application to have been decided on 01.10.2013 for which there appears to be no answer available with the respondent. No material has been brought on record to show that the date was ever preponed by the trial Court at the instance of any of the party, nor any intimation was ever served upon the applicant-defendant in respect of change of date for arguments.

[12]. The question was of onus which kept on shifting on the parties with discharge of initial onus. Since there was no statement of Process server on Oath, therefore, the statement of the defendant-petitioner which was on Oath has to be given preference. Even in case of Oath Vs. Oath, the cause of the petitioner should have been given more weightage than the Oath of the Process Server (which admittedly not taken in the instant case). Learned counsel for the petitioner relied upon **Sushil Kumar Sabharwal Vs. Gurpreet Singh and others,**

(2002) 5 SSC 377 to supplement his argument on the aforesaid premise.

[13]. Having appraised the material on record, I am of the considered view that the petitioner-defendant should not have made to suffer on account of inadmissible evidence. Defendant was not lawfully proceeded against ex parte and the ex parte judgment and decree based on such order was also illegal and not sustainable in the eyes of law.

[14]. For the reasons mentioned above, this revision petition is accepted. Ex parte order dated 05.02.2011, consequent ex parte judgment and decree dated 07.06.2011 passed by the trial Court, impugned order dated 01.10.2013 passed by Additional Civil Judge (Junior Division), Gurgaon and order dated 18.12.2014 passed by Additional District Judge, Gurgaon are hereby set aside. Trial Court is directed to proceed with the suit after issuing notices to both the parties in accordance with law.

09.09.2016
Prince

(RAJ MOHAN SINGH)
JUDGE

Whether Reasoned/Speaking

Yes/No

Whether Reportable

Yes/No