

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

**CR No.2138 of 2014  
Date of Decision-20.09.2016**

|                     |                 |
|---------------------|-----------------|
| Satdev              | ... Petitioner  |
| Versus              |                 |
| Omi Devi and others | ... Respondents |

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

Present: Mr. R.S. Chauhan, Advocate for the petitioner.

Mr. Peeyush Gagneja, Advocate for respondent No.1.

Mr. Sandeep Sharma, Advocate for  
Mr. Snehdeep Oberoi, Advocate  
for respondents No.6 and 7.

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**RAJ MOHAN SINGH, J.**

[1]. In this revision petition, petitioner has assailed order dated 26.02.2014 passed by Civil Judge (Junior Division), Abohar vide which application filed by the petitioner under Order 9 Rule 7 CPC was rejected.

[2]. Respondent No.1 initially filed a suit for declaration on 13.08.2009 challenging the sale deed executed by Rameshwar predecessor-in-interest of petitioner and respondents No.2 and 3. The subject matter of sale was 12 kanals of land out of 146 kanals. Transfer deed alleged to have been executed on 11.07.2008 in favour of petitioner and proforma respondents namely Madan Lal and Sita Ram in respect of land measuring 24 kanals, 10 marlas and consequent mutations No.2290 and 2341 were also the subject matter.

[3]. In the said suit, without exhausting to the process of ordinary service, mode of effecting service through munadi was ordered on 15.09.2009. In the report of service, alleged refusal of defendant No.1 was recorded whereas qua defendants No.2 and 3, report of roohposh was made. Defendants No.4 and 5 showed to be validly served, but they did not appear. On that premise, the Court observed that the defendants No.1 to 5 could not be served through ordinary mode of service and therefore, munadi was ordered.

[4]. Petitioner submitted that without effecting munadi, a manipulated report dated 04.11.2009 was prepared. No separate notice was served. The report was totally fabricated report and on the basis of the same, petitioner was proceeded against ex parte on 05.11.2009.

[5]. Respondent No.1 had also filed a suit for specific performance of agreement to mortgage deed dated 22.08.2005 in which petitioner was made a party and the suit was filed against Rameshwar, Amit and Anil vide Civil Suit No.581-1 dated 03.09.2009. The said suit was dismissed by the trial Court vide judgment and decree dated 01.09.2012. Appeal was also dismissed by the lower Appellate Court on 05.12.2013.

[6]. On coming to know about ex parte proceedings dated 05.11.2009 on 02.02.2014, petitioner filed an application on

03.02.2014 under Order 9 Rule 7 CPC for setting aside the ex parte proceedings and order dated 05.11.2009.

[7]. Petitioner alleged that he was never served personally or by substitute mode of service. No process server came to effect service upon the petitioner, nor any registered cover was ever received by him. No proclamation by beat of drum was ever effected to secure the presence of the petitioner. No postman had ever come to serve the petitioner. Petitioner came to know about the ex parte nature of order only on 02.02.2014 when the plaintiff Omi Devi and her husband openly threatened the petitioner and disclosed the factum of ex parte proceedings against him and also asserted that they will obtain ex parte decree against the petitioner. On necessary enquiries, it came to the light that ex parte proceedings were ordered against the petitioner on 05.11.2009.

[8]. The said application was contested by the plaintiff-Omi Devi. Trial Court dismissed the application vide order dated 26.02.2014. That is, how, the present revision petition came to be filed.

[9]. I have heard learned counsel for the parties and also perused the material placed on record.

[10]. The suit filed by the plaintiff was in respect of declaration qua alleged coparcenary property as well as for setting aside the transfer deed allegedly executed by defendant No.1 in favour of defendants No.2 to 5. The sale deed allegedly executed by

defendant No.1 in favour of defendants No.7 and 8 was also assailed along with mutations sanctioned in respect thereof. The address of defendants mentioned in the suit was village Jandwala Hanumanta, Tehsil Abohar, District Ferozepur. Defendant No.1 was father of defendants No.2 to 5. On 15.09.2009, summons issued to defendant No.1 were received back with a report of refusal. Summons issued to defendants No.2 and 3 were received with a report of roohposh. Summons issued to defendants No.4 and 5 were received back duly served. In this way, defendants No.1 to 5 were ordered to be served through substituted service i.e. by way of munadi for 05.11.2009. Munadi was conducted. Thereafter, defendant No.1 appeared through Advocate, but defendants No.2 to 4 did not appear and they were ordered to be proceeded against ex parte on 05.11.2009. Plaintiff completed his evidence and the case reached at the stage of defendants' evidence. Defendant had availed four effective opportunities for concluding his evidence. At that stage, the application in question came to be filed by defendant No.2-Satdev i.e. after more than 4 years from the date of order dated 05.11.2009.

[11]. Learned counsel for the petitioner vehemently contended that before resorting to the process of substituted service in terms of Order 5 Rule 20 CPC, the Court was obligated to exhaust mode of ordinary service. Learned counsel further contended that the ex parte proceedings should not have been ordered on the presumption that appearance of defendant No.1

would suffice to infer knowledge of litigation qua the petitioner as well. Plaintiff was none else, but the sister of the petitioner who had filed suit against her father and brothers wherein she had challenged the transfer deeds executed by the father in favour of her brothers as well as other defendants.

[12]. Learned counsel for the petitioner also contended that there is a mark difference between ex parte proceedings and ex parte judgment and decree. For ex parte proceedings, only good cause is to be shown, whereas sufficiency of cause is needed for setting aside the ex parte judgment and decree. Defendant No.3 (brother of the petitioner) was also proceeded against ex parte vide order dated 05.11.2009.

[13]. Trial Court emphasized that at the belated stage, petitioner-defendant No.2 cannot be allowed to file written statement. However, he was allowed to participate in the proceedings of the case on that stage onwards when he moved the application.

[14]. Learned counsel for the petitioner submitted that without there being any foundation, petitioner would not be in a position to lead evidence and his participation in the proceedings would be of no consequence.

[15]. At the time of issuance of notice of motion on 21.03.2014, the passing of final judgment by the trial Court was stayed. The case is still at the stage of defendants' evidence.

Petitioner-defendant No.2 has prayed indulgence of the Court for allowing him to file written statement before joining the proceedings.

[16]. On the other hand, learned counsel for respondent No.1 and learned counsel for respondents 6 and 7 vehemently submitted that defendant No.1 was duly served on the basis of munadi conducted in the village and he had appeared in the suit proceedings. This fact itself was sufficient to presume that there was a valid service. Secondly, the address shown by the plaintiff in the suit was the same as shown by the petitioner in the application for setting aside the ex parte proceedings and therefore, it has to be presumed that munadi was effected in the same village where petitioner and his father were residing.

[17]. Learned counsel for the respondents further submitted that a satisfaction was recorded by Civil Judge on 15.09.2009 on receiving a report of refusal qua defendant No.1 and report of roohposh qua defendants No.2 and 3. At last, learned counsel for the respondent submitted that interference by this Court will open the flood gate for other defendants also who were proceeded against ex parte in the same manner.

[18]. I have considered the submissions made by both the sides.

[19]. It is a settled principle of law that before resorting to substitute mode of service in terms of Order 5 Rule 20 CPC,

requirement under Order 5 Rules 12, 15 and 17 CPC has to be complied with.

[20]. Rule 12 of Order 5 CPC prescribes that the service shall be made on the defendant in person unless he has an agent empowered to accept service. Service upon agent in such a situation would be sufficient. Rule 15 of Order 5 CPC prescribes that when on service, defendant is absent from his residence and service of summon sought to be effected on him at his residence and if there is no likelihood of his being present at residence within reasonable time and he has no agent empowered to accept the service on his behalf, then service may be made on any adult member of the family who is residing with him. Rule 17 of Order 5 CPC prescribes that when there is a refusal to accept the summon or to sign the acknowledgement and serving officer after using due diligence cannot find the defendant or there is no likelihood of his being found at the residence within reasonable time and there is no agent empowered to accept service of summon and there is no adult member present in the house, then the serving officer shall affix a copy of summon on the outer gate of house or some other conspicuous place of the defendant in which defendant ordinary resides or carries out business or personal works for gain. The serving officer shall then return the original summon to the Court with a report endorsed thereon stating that he has so affixed the copy in the circumstances. Name and address of the person (if any)

by whom the house was identified and in whose presence the copy was affixed is also required to be mentioned in the report.

[21]. The cumulative reading of all the provisions makes it mandatory for the serving officer to affix the summon on the outer gate of the house or at some other conspicuous part of the house in which the defendant ordinary resides or carries out business or personal works for gain. Such an affixation of summon should have been witnessed by some person who had identified the house and in whose presence such an affixation was made.

[22]. In **Subedar Amar Singh Vs. Avtar Singh, 2003(3) RCR (Civil) 580**, it was held that the application for substituted service in terms of Order 5 Rule 20 CPC should not be allowed in a mechanical manner. Various steps laid down in Rules 12, 15 and 17 of Order 5 CPC have to be exhausted and thereafter, satisfaction of the Court is required to be recorded that defendant is keeping himself out of the way in order to avoid service or that for any other reason, the service of summon by ordinary mode of service cannot be served upon him. Under Rule 19 of Order 5 CPC, examination of serving officer on affidavit is mandatory.

[23]. The ratio of the aforesaid case if applied to the facts and circumstances of the present case would show that the compliance of Rules 12, 15, 17 of Order 5 CPC was not made by the trial Court. Appearance of defendant No.1 pursuant to munadi cannot be held to be conclusively in nature so as to infer knowledge qua the

petitioner. The factum of munadi even if taken to be on its face value, would require pre requisite for ordering munadi under Order 5 Rule 20 CPC.

[24]. In my considered opinion since requirement of Rules 12, 15, 17 of Order 5 CPC has not been complied with before proceeding against defendant No.2-petitioner ex parte, therefore, only a good cause has to be shown for setting aside the ex parte proceedings. The sufficiency of cause would under the domain for setting aside the ex parte judgment and decree, if any.

[25]. In view of aforesaid, impugned order dated 26.02.2014 passed by Civil Judge (Junior Division), Abohar is set aside. Application filed by the petitioner under Order 9 Rule 7 read with Section 151 CPC for setting aside the ex parte proceedings dated 05.11.2009 is hereby allowed. Necessary consequences to follow in the suit proceedings.

**(RAJ MOHAN SINGH)**  
**JUDGE**

20.09.2016

Prince

**Whether reasoned/speaking**

**Yes/No**

**Whether Reportable**

**Yes/No**