

CR-4586-2014(O&M)

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IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

CR-4586-2014(O&M)

Date of decision : 18.02.2016

Bijender

... Petitioner

Versus

Vidya Devi

... Respondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Ashwani Bakshi, Advocate
for the petitioner.

Mr.Kulvir Narwal, Advocate
for the respondent.

REKHA MITTAL. J.

By invoking Article 227 of the Constitution of India, the present petition lays challenge to order dated 31.08.2012 (Annexure P2) passed by the Civil Judge (Senior Division), Rohtak whereby the application filed by the respondent / judgment debtor under Order 9 Rule 13 read with Section 151 of the Code of Civil Procedure (in short 'CPC') for setting aside the ex-parte judgment and decree dated 11.08.2008 has been allowed.

A brief backdrop of the case is that Bijender (petitioner) filed a civil suit for possession by way of specific performance of the agreement to sell dated 29.05.2007 purported to be executed by the respondent for sale of house No.509, Housing Board Colony, Sectors 2,3

and 4 Part, Rohtak for a sale consideration of ₹3,80,000/- on receipt of ₹1 lac towards earnest money. The sale deed was agreed to be executed on 29.06.2007. The suit filed by the petitioner was decreed ex-parte vide judgment and decree dated 11.08.2008. The respondent / judgment debtor filed an application for setting aside the ex-parte judgment and decree which has been allowed by the trial Court vide impugned order dated 31.08.2012.

Counsel for the petitioner has submitted that the respondent was duly served as she refused to accept the summons issued by the Court for 03.11.2007 and the process server affixed the summons along with a copy of the plaint at the outer door of the house of the respondent namely House No.509, Sectors 2, 3, 4, Rohtak. The report made by the Process Server bears attestation / endorsement made by Sh.Ishwar Singh, in token of identification of respondent Vidya Devi. The plea of the respondent that she was not residing in House No.509, Housing Board Colony, Rohtak in October / November 2007 gets falsified and belied from documentary evidence as she received a legal notice dated 14.09.2007 sent by the respondent through his Advocate and said notice was duly replied by the respondent vide reply Ex.R8 proved by RW-4 Birbal Ahlawat, Advocate, District Court, Rohtak.

Counsel for the respondent, on the contrary, has supported the impugned order with the submissions that the respondent was proceeded against ex-parte on the very first day fixed in the suit for her service and

that too on a report of refusal and affixation, attested by none else than father of the petitioner, highly interested in success of claim of the petitioner for specific performance of the agreement. It is further argued that in application filed under Order 9 Rule 13 CPC, a categoric plea has been raised that she (Vidya Devi) was not residing in House No.509, Housing Board Colony, Rohtak in the months of October and November 2007. It is further argued that receipt of notice Ex.P17 in September 2007, in the circumstances would not enure to benefit of the petitioner when otherwise the said notice was neither received by Vidya Devi personally nor by any of her family member in view of the endorsement on the acknowledgment Ex.P19. Counsel has urged that Jaswinder Singh, Process Server RW2 in his cross-examination has specifically stated that he had gone to House No.507 for service of summons but the address on the summons was of House No.509. There was no direction issued by the Court for service of the respondent through affixation, therefore, report made by the Process Server in regard to affixation cannot form the basis for initiating ex-parte proceedings against the respondent on 03.11.2007. Had the respondent received the notice of pendency of the suit, there was no reason for her to contest the proceedings particularly in the circumstances that in her response Ex.R8 to the notice dated 14.09.2007, she has taken a specific stand that the petitioner failed to get the sale deed executed and registered as per terms and conditions of the agreement and the agreement stands cancelled. The last submission made by counsel is

that in view of the principle of natural justice, every person must get an opportunity of hearing before being made to suffer as no one can be condemned unheard.

I have heard counsel for the parties and perused the records.

The short question that calls for determination is whether the respondent can be said to be duly served in the light of report dated 31.10.2007 on the summons issued by the Court.

Indisputably, the suit was instituted by the petitioner on 23.10.2007 and the respondent was ordered to be summoned for 03.11.2007 on filing of PF, copy of plaint etc. with order of dasti summons, if so desired. On 03.11.2007, just after 10 days from the date of institution of the suit, the respondent was proceeded against ex-parte by taking cognizance of the report of refusal. A relevant extract from order dated 03.11.2007 reads as follows:-

*“Present:- Sh.N.S.Kataria, Advocate for the plaintiff.
None for the defendant.*

Notice issued to the defendant received back with the report of refusal. But none has appeared. It is already 3-30 P.M. Waited sufficiently. No further wait is justified. Hence, defendant is hereby proceeded against ex-parte.”

After ex-parte proceedings being initiated, the Court passed interim order directing the defendant to maintain status quo regarding alienation of the suit property and the case was fixed for ex-parte evidence

of the plaintiff.

A perusal of the aforesaid extract makes it evident that the trial Court neither took into consideration the report of affixation nor bothered to examine as to by whom the report made by the Process Server has been attested. Had the trial Court examined the report of the Process Server properly and noticed that the report has been attested by none else than father of the petitioner, the decision of the Court might have been different than what has been held in the order dated 03.11.2007.

This brings the Court to report of refusal and affixation made by Sh.Jaswinder Singh. Order 5 Rule 17 of the CPC provides for procedure when defendant refused to accept service or cannot be found. A relevant extract therefrom, germane to the controversy, reads thus:-

“17. Procedure when defendant refuses to accept service, or cannot be found *Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for*

gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person(if any) by whom the house was identified and in whose presence the copy was affixed.”

Jaswinder Singh, the serving official has been examined by the petitioner. In his cross-examination, he has deposed that he had taken the summons to House No.507. Ishwar Singh did not know Vidya Devi. The statement that he had taken the summons to House No.507 is sufficient to show that he did not go to House No.509 in which Vidya Devi was stated to be residing as per address given to the Court. Secondly, if Ishwar Singh did not know Vidya Devi where was the occasion for the serving official to get the report attested from Ishwar Singh. There is nothing on record to suggest that Ishwar Singh was residing in the neighbourhood of House No.509 to prove that his presence there was natural as deposed by Jaswinder Singh. Ishwar Singh is admittedly father of the petitioner and thus, highly interested in securing a decree in favour of his son. As a matter of fact, the entire proceedings from the stage of execution of the agreement, obtaining order of ex-parte proceedings that culminated in the ex-parte judgment and decree were being persuaded by Sh. Ishwar Singh. I get fortification to my observations from the facts elicited during cross-examination of petitioner Bijender, who does not seem to be conversant with various relevant facts.

Keeping in view the facts and circumstances brought on record coupled with the manner and haste in which the ex-parte proceedings have been initiated against the respondent, I do not find any reason to differ with the findings recorded by the learned trial Court that the respondent was not duly served, therefore, the ex-parte judgment and decree are liable to be set aside. As the report dated 31.10.2007 in regard to refusal of Vidya Devi or affixation of summons at the given address appears to be maneuvered by Sh.Ishwar Singh, father of the petitioner, the said report cannot be allowed to stand to deprive the respondent of her right to contest the proceedings, in accordance with law.

For the foregoing reasons, finding no merit, the petition is dismissed. No order as to costs.

(REKHA MITTAL)
JUDGE

February 18, 2016.
Davinder Kumar