

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

**Civil Revision No.5282 of 2015 (O&M)
Date of Decision: 05.09.2016**

Naveen Kumar

.....Petitioner

Vs

Sanjana and others

.....Respondents

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

Present: Mr. Deepak Vashisht, Advocate
for the petitioner.

None for respondent Nos.1 and 2.

RAJ MOHAN SINGH, J

[1]. Petitioner has assailed order dated 02.07.2015 passed by Civil Judge (Jr. Division), Sonapat vide which application for setting aside *ex parte* order dated 18.10.2012 was dismissed.

[2]. Petitioner/defendant No.2 was proceeded against *ex parte* on 18.10.2012. He filed an application for setting aside the *ex parte* order dated 18.10.2012 on 01.08.2013, stating that he had no knowledge about the pendency of the suit and he was not lawfully served by the Process Server.

[3]. The order dated 18.10.2012 was passed by the Civil Judge (Jr. Divn.) Sonapat on the premise that the summon

issued to defendant No.2/petitioner was received back duly served, but none appeared on his behalf. After awaiting sufficiently, he was proceeded against *ex parte*.

[4]. Learned counsel for the petitioner has pointed out that the report of the Process Server is discrepant inasmuch as that firstly, he visited the place of living of the petitioner where he found that petitioner was a practicing lawyer and thereafter, allegedly visited the place of practice i.e. chamber of the Advocate in Court, where alleged refusal was recorded by the Process Server.

[5]. During the course of arguments, it transpired that after issuance of notice of motion on 20.08.2015, stay in respect of further proceedings before the trial Court was not granted. Respondent Nos.1 and 2 were ordered to be served through their counsel appearing in the trial Court. Respondent No.3 refused to accept the notice. As per office report dated 14.03.2016, notices issued to respondent Nos.1 to 2 were received back duly served. Service was treated to be complete vide order dated 17.03.2016.

[6]. The requirement of Order 5 Rule 17 CPC is to the effect that where the defendant or his agent or such other person refuses to sign the acknowledgment or where the serving officer

after due and reasonable diligence could not find the defendant on account of his absence from the house at the relevant time and there is no likelihood of his being found at the residence within reasonable time, then the serving officer shall affix a copy of summon on the outer door or other conspicuous place/part of the house in which defendant ordinarily resides or carries on business or personally works for gain and, then return the original to the Court from which it was sent with a report endorsing therein. Apparently, no such proceedings were undertaken by the Process Server, whereas on finding the defendant No.2 to be not present in house, he happened to visit the place of working of the petitioner in the Court. No affixation was done at the door or on conspicuous place/part of the house of the defendant No.2.

[7]. Secondly, as per Order 5 Rule 19 CPC where a summon is returned under Rule 17 CPC, then the Court shall, if the report has not been verified by the affidavit of the serving officer and may, if it has been so, verify and examine the serving Officer on oath or cause him so examined by another Court touching his proceedings and may make such further enquiry in the matter as it thinks fit. Apparently, no affidavit of the serving officer has come forth on record after alleged verification in respect of service of the petitioner/defendant No.2.

[8]. Sufficiency of cause has to be established where *ex parte* decree is drawn. Here is a case in which only *ex parte* proceedings have been assailed by the petitioner, who was defendant No.2 in the suit, has all right to join the proceedings at any subsequent stage. In view of **Kuldeep Kaur vs. Gurdeep Singh, 1993(2) PLR 703**, there was no limitation for setting aside the *ex parte* proceedings. The delay if, any has to be reasonably explained.

[9]. Petitioner moved the application for setting aside the *ex parte* proceedings/order when he came to know about the *ex parte* order without any delay. The refusal on summon was not witnessed by any independent person. The meritorious matter cannot be thrown at the verge of technicality which even seems to be not founded on sound legal reasonings. Petitioner is a defendant in a declaratory suit in which plaintiff has challenged the Will in respect of urban property having great potentiality and market value. Petitioner is not to gain anything by becoming *ex parte* in a suit where his stakes were so high.

[10]. Doctrine of natural justice is based on the principle that nobody should be condemned unheard and fair opportunity has to be given to the person to represent his case. The Process Server cannot be the judge of his own acts. His

endorsement/report should carry evidentiary value inasmuch as that the report of refusal should have been witnessed by some independent person. Even the Process Server failed to observe mandatory requirement of Order 5 Rule 17 CPC before resorting to record refusal straightway without even, obtaining statement of witness to that effect.

[11]. The trial Court is not justified in rejecting the application for setting aside the *ex parte* proceedings at the instance of petitioner merely on mere assumptions viz-a-viz. the knowledge possessed by the petitioner with regard to pending litigation and his inaction in not resorting to any lawful action on that basis.

[12]. Taking into consideration of all these attending circumstances, I am of the view that impugned order dated 02.07.2015 is not legally sustainable and is, therefore, set aside. Revision petitions stands allowed. Petitioner is entitled to all consequential proceedings.

September 05, 2016

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**(RAJ MOHAN SINGH)
JUDGE**

Whether speaking/reasoned

Yes / No

Whether reportable

Yes / No