

In the High Court of Punjab and Haryana at Chandigarh

SAO No. 3 of 2016 (O&M)

Date of Decision: 14.1.2016

Makhan Singh

---Appellant

versus

Gurmit Kaur and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

**Present: Mr. M.S.Bhatti, Advocate
for the appellant**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

Rekha Mittal, J.

The present appeal has been directed against order dated 5.8.2015 passed by the Additional District Judge, Amritsar whereby the appeal preferred by respondents Gajjan Singh and others against order dated 10.1.2013 passed by the trial court has been accepted and the application filed by the respondents for setting aside ex parte decree dated 8.11.2010 passed by the Civil Judge (Junior Division), Amritsar in suit titled “Makhan Singh vs. Gurmit Kaur and others” has been allowed with a direction to the trial court to decide the civil suit afresh in accordance with law.

Makhan Singh, appellant filed a suit for declaration that he is

the owner in possession of land bearing khasra No. 27//26 khata/Khatauni No. 141/172 in village Bal Sichandar Tehsil and District Amritsar to the extent of 1/8th share measuring 1 kanal 8 marlas. The suit filed by the appellant was decreed as respondents No. 1 to 6, legal heirs of Joginder Singh (since deceased) and Mohan Singh (respondent No. 7) were proceeded against ex parte. An application filed by Gurmit Kaur and others, legal heirs of Joginder Singh for setting aside the ex parte judgment and decree dated 8.11.2010 was dismissed by the trial court but the appeal preferred by the applicants-respondents has been allowed.

Counsel for the appellant has submitted that the appellate court has held that there was irregularity in service of the respondents/applicants but irregularity itself cannot be a ground for setting aside the ex parte judgment and decree. For this purpose, he has pressed into service proviso appended to Rule 13 Order IX of the Code of Civil Procedure (for short "CPC") which reads as follows:-

“Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.”

Another submission made by counsel is that as per the case set up by the respondents/applicants, they are not residing in village Bal Sichandar Tehsil and District Amritsar for the past many years and have been residing in village Malsi, Tehsil Kichha District Udham Singh Nagar (Uttanchal). It is argued that the applicants have not produced any

documentary evidence to substantiate their plea that they are residents of the said village situated in the State of Uttarakhand. In addition, it is submitted that as Gurmit Kaur, Gajjan Singh and Sahib Singh refused to accept the summons as per report of the process server on the summons issued for 19.2.2010, it is sufficient to prove that these applicants had notice of the date of hearing to appear and answer the claim of the plaintiff-appellant.

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

The learned appellate court on a detailed consideration of the report made by the serving officer on the summons sent for service of the respondents for 19.2.2010 and the order for their substituted service through munadi and affixation in the light of provisions of Order V Rule 17 CPC has recorded a finding that there is no due and proper service of the applicants/respondents, therefore, the ex parte judgment and decree passed by the trial court is liable to be set aside. The court has noticed that on the summons issued for 19.2.2010, the process server made a report that Gurmit Kaur, Gajjan Singh and Sahib Singh met him (Process Server) as identified by Baljinder Singh son of Makhan Singh (appellant) and they refused to accept the summons by stating that they have not been residing in village Bal Sichandar and it was also reported that Rajwinder Kaur, Darshan Kaur and Shamsher Singh have not been residing in the village. The learned trial Court in place of calling upon the appellant to file correct addresses of Rajwinder Kaur, Darshan Kaur and Shamsher Singh made an order that the applicants be served through affixation and munadi, a process to be resorted to when the court is satisfied that the defendant/respondent is evading service or no other address of the defendant/respondent except the last

known address given by the plaintiff/appellant is known.

So far as the report with regard to refusal on the part of Gurmit Kaur, Gajjan Singh and Shamsheer Singh is concerned, as per report of the process server, they were identified by Baljinder Singh who is none else than the son of the appellant/plaintiff. Baljinder Singh did not appear in the witness box to prove correctness and authenticity of the report made by the process server and the respondents were deprived of an opportunity to cross examine said Baljinder Singh in respect of identification of the respondents.

The appellate court has further noticed that even at the time of service by way of munadi, there is no report that copy of summons much less that of plaint was affixed on the outer door or some conspicuous part of the house in which the applicants-defendants were stated to be ordinarily residing. In view of the discussion made by the appellate Court in paras 12 and 13 of the impugned order, I find myself unable to accept the submissions made by counsel for the appellant that there was only irregularity in the service of summons. This apart, there is no material on record to satisfy the court that the respondents had notice of the date of hearing to appear and answer the claim of the appellant. Taken from any angle, the appellant cannot seek any aid to his contentions from what is envisaged in the proviso referred to hereinbefore. That being so, I do not find any reason to differ with the well founded findings recorded by the appellate court that there was no due and proper service of the respondents-applicants which entitle them to get the ex parte judgment and decree dated 8.11.2010 set aside with liberty to contest the proceedings from the stage of

filing of written statement onwards.

In view of what has been discussed hereinabove, finding no merit, the appeal is dismissed in limine. No order as to costs.

(Rekha Mittal)
Judge

14.1.2016

PARAMJIT