

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

Civil Revision No.5065 of 2015 (O&M)
Date of Decision: 27.09.2017

Smt. Anil Sandhu**Petitioner**
Vs
Manjit Singh Sodhi and others**Respondents**

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. K.B. Raheja, Advocate
for the petitioner.

Ms. Nimrata Shergill, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. Petitioner has filed this revision petition against the order dated 23.07.2015 passed by the Civil Judge (Jr. Divn.) Ferozepur vide which application of the petitioner for setting aside the *ex parte* proceedings was dismissed.

[2]. Brief facts are that plaintiff/respondent-Manjit Singh Sodhi filed a suit for declaration to the effect that he was owner in possession of 1/3rd share as shown in yellow colour in the site plan attached to the plaint which consisted of one hall, three rooms, two bathrooms, kitchen, verandah, staircase and lawn on the southern side and three garages, three rooms and verandah on the western side as shown in blue colour in the site plan of bungalow No.50, Hussainiwala Border Road, Ferozepur

Cantt. A consequential relief of permanent injunction restraining the defendant Nos.1 and 2 from causing any illegal and unlawful interference over the suit property was also sought.

[3]. Defendant No.2/petitioner was proceeded against *ex parte* on 06.02.2013 when none appeared on her behalf. Defendant No.2/petitioner filed an application under Order 9 Rule 7 CPC for setting aside the order dated 06.02.2013 vide which she was proceeded against *ex parte* with a prayer to allow her to file the written statement in her defence and decide the suit on merits. Defendant No.2/petitioner contended that she was never served with the summons. Neither the process server, nor any postman ever served the summons upon her, nor she had ever avoided to accept the summon of the Court as she never refused to accept the same. The report of the process server, if any, to that effect was claimed to be false and manipulated by the plaintiff in connivance with the process server. Ultimately it was prayed that the non-appearance of the petitioner was unintentional, nor the same was deliberate, therefore, the prayer for setting aside the *ex parte* order dated 06.02.2013 was sought to be accepted. Petitioner also pleaded that factum of *ex parte* proceedings dated 06.02.2013 came to be known by her only a day earlier to the filing of the application from one caretaker of the bungalow.

[4]. Plaintiff contested the application on numerous grounds. The stand of the defendant No.2/petitioner was denied. It was contended that the other defendants had already filed their written statements and defendant No.2/petitioner remained away from the Court intentionally and thereafter filed the application. The summons were issued to the petitioner on number of times on her Mohali address, but service was not effected and thereafter the Court passed an order for service of defendant No.2 through registered cover which was not received back in the Court and, therefore, presumption of due service was attached to it.

[5]. The trial Court dismissed the application vide order dated 23.07.2015 primarily on the ground that the summons issued to defendant No.2/petitioner were received with a report of refusal on 26.11.2012 and thereafter the Court passed an order to issue summons to the petitioner by registered cover for 03.01.2013. A postal receipt dated 08.01.2013 was placed on record bearing the name of the defendant/petitioner on the aforesaid premise. Registered cover issued for service of the petitioner was not received back and, therefore, a presumption regarding due service was drawn by the trial Court and the petitioner was proceeded against *ex parte* on 06.02.2013. The trial Court dismissed the application by recording a fact that the

evidence of the plaintiff and defendant Nos.3 and 4 have already been concluded and the suit has reached at the stage of rebuttal and arguments and at this stage, if the application is allowed, the trial would proceed *de novo*. The trial Court also observed that defendant No.2/petitioner could not give any plausible explanation for his non-appearance on 26.11.2012 as well as on 06.02.2013, therefore, the application was dismissed on merits, but at the same time the petitioner was allowed to join proceedings at the present stage in the interest of justice subject to payment of cost of Rs.2,000/-.

[6]. I have heard learned counsel for the parties and have also considered the necessary material on record.

[7]. Firstly, defendant No.2/petitioner was sought to be served by means of ordinary process for 26.11.2012 wherein a report of refusal was made by the process server. Thereafter defendant No.2/petitioner was sought to be served by means of registered post. Postal receipt dated 08.01.2013 was tendered on record. It is a settled principle of law that once the defendant refused to accept the service or cannot be found and the serving officer after due diligence cannot locate the defendant, then the serving officer shall affix a copy of the summon on the outdoor 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 stating that he has so affixed the copy and the circumstances under which he did the same along with name and address of the person (if any) by whom the house was identified and in whose presence the copy so affixed.

[8]. In view of order 5 Rule 17 CPC, it was obligatory on the part of the process server to make an affixation of the summon on the door or any other conspicuous part of the house in the event of refusal of the defendant to accept the summon and such affixation should have been followed by disclosure and particulars of the person in whose presence such an affixation was made by the process server. Apparently, no such material has come forth on record showing such compliance by the process server.

[9]. Secondly, the order effecting service by registered post, if any, taken to be a substituted mode, the same should have been followed by a satisfaction to be recorded by the Court that the defendant could not be served by means of ordinary process. No such satisfaction has been recorded by the Court while issuing process by registered post. It is a settled principle of law that firstly ordinary process of service should have been exhausted and thereafter substituted mode of service should be

resorted to that too after recording a satisfaction on record that the defendant cannot be served by means of ordinary process.

[10]. Thirdly, presumption of due service in respect of registered notice can only arise after expiry of 30 days. As per postal receipt, the same was issued on 08.01.2013 and before expiry of 30 days, the defendant No.2./petitioner was proceeded against ex parte on 06.02.2013 and from that angle the impugned order appears to be defective in law. Looked from any angle, I deem it appropriate not to allow the defendant to be condemned unheard.

[11]. In view of above, impugned order dated 23.07.2015 passed by the trial Court is set aside. This revision petition is allowed. Defendant No.2/petitioner is permitted to contest the suit after filing the written statement and to take recourse of lawful proceedings in pursuance thereof. The trial Court is directed to take follow up action in accordance with law.

September 27, 2017

Atik

Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No