

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

CR No.5620 of 2012 (O&M)
Date of decision : 28.07.2017

Gurjit Singh

...Petitioner

Versus

Harsaroop Singh and another

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Mukul Aggarwal, Advocate for the petitioner.

Mr. R.S. Bajaj, Advocate for respondent No.1.

ANIL KSHETARPAL, J.

The petitioner namely Gurjit Singh has filed the present revision petition under Article 227 of the Constitution of India for setting aside the order dated 08.09.2011 confirmed in appeal vide order dated 12.09.2006 whereby application filed by him for setting aside the ex parte decree dated 28.07.1994 has been rejected.

The plaintiff-Harsaroop Singh had filed a suit with assertion that although the plaintiff had executed a sale deed in favour of Gurjit Singh-petitioner and his sister Jagjot Kaur on 15.12.1986 for a total sale consideration of ₹18,000/-, however, since remaining amount of ₹15,000/- was not paid which was kept as security, therefore, the sale deed is liable to be set aside. The plaintiff had also arrayed the father of Gurjit Singh-petitioner and Jagjot Kaur namely Santokh Singh as party defendant.

Notices were issued to all the defendants. The order as recorded by the trial Court on 09.08.1991 is extracted as under:-

“Present:- Counsel for the plaintiff.

Summons not issued as PF RC not filed. The report on the previous RC reveals that service is not possible in the ordinary way of service as some of them have already left India. The plaintiffs have no other address of the defendant except given in the plaint. Hence all the defendants are ordered to be summoned by way of publication in the paper. The Tribune on deposit of PF & publication charges within three days for 10.10.91.

Sd/- SJIC 09.08.91”

A look at the order would show that although it was intimated to the Court that some of the defendants have already left the country. However, the learned Court chose to issue notices through publication in the Tribune. After publication, the petitioner and her sister were proceeded against ex parte vide order dated 30.11.1991. The plaintiffs filed an application for deleting the name of defendant No.3-Santokh Singh from the array of the parties. However, the said application was dismissed. The suit was decreed ex parte on 28.07.1994.

The petitioner filed an application for setting aside ex parte decree and proceedings on 07.11.1994.

The learned trial Court as well as the learned First Appellate Court has dismissed the application for setting aside the ex parte decree and order on the ground that at one stage Sh. Gurdev Singh, Advocate had appeared and filed memorandum of appearance on behalf of all the defendants. On the next date, Gurdev Singh filed Vakalatnama only for

Santokh Singh. Therefore, it is apparent that the petitioner had knowledge of the pending suit. Courts have further recorded a finding that since father Santokh Singh was in knowledge and relationship between father and son are good, therefore, the petitioner was in knowledge of the suit. It has further been noticed by the Court that the application filed for setting aside ex parte decree was filed through attorney Ajit Singh. However, neither attorney Ajit Singh was appeared nor copy of the power of attorney was produced.

Order 5 Rule 25 CPC lays down a manner in which service is to be effected where defendants resides out of India. Order 5 Rule 25 CPC is extracted as under:-

“25. Service on defendant resides out of India and has no agent.- *Where the defendant resides out of India and has not agent in India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him or by post or by such courier service as may be approved by the High Court, by fax message or by electronic mail service or by any other means as may be provided by the rules made by the High Court, if there is postal communication between such place and the place where the court is situate:*

Provided that where any such defendant resides in Bangladesh or Pakistan, the summons, together with a copy thereof, may be sent for service on the defendant, to any court in that country (not being the High Court) having jurisdiction in the place where the defendant resides:

Provided further that where any such defendant is a public officer in Bangladesh or Pakistan (not belonging to the Bangladesh or, as the case may be, Pakistan military,

naval or air forces) or is a servant of a railway company or local authority in that country, the summons, together with a copy thereof, may be sent for service on the defendant to such officer or authority in that country as the Central Government may, by notification in the Official Gazette, specify in this behalf”

As per report of Process Server, it came to the notice of the Court that some of the defendants are residing out of country. It has been specifically recorded in the order dated 09.08.1991 by the Court which has been reproduced above.

In these circumstances, the trial Court committed a serious illegality in ordering the publication of notice in the local newspapers.

The trial Court ought to have followed the procedure as prescribed under Order 5 Rule 25 CPC.

The reason given by the trial Court that since relationship of father and son are not shown to be strained, therefore, the petitioner would be deemed to have knowledge of the pending suit. Each defendant is required to be summoned and served personally . In this case, the contesting defendants were defendant Nos.1 and 2. Both were residing out of country. However, the learned trial Court committed material illegality in not following the procedure as provided under CPC.

Learned counsel for the respondents has submitted that single revision petition is not maintainable because by one revision petition orders Annexure P-12 and P-13 have been challenged. Learned counsel has further submitted that on the notice sent through registered post, there was a report of refusal dated 29.07.1990.

Learned counsel has further submitted that Sh. Gurdev Singh, Advocate had filed a memo of appearance on behalf of all the defendants. Of course, later on, he filed power of attorney only on behalf of the defendant No.3. He further submitted that conduct of the father of the petitioner disentitles the petitioner from getting the decree set aside. He submits that in the Vakalatnama executed by father, father had signed in Urdu and later on he claimed that he has never signed in Urdu.

Learned counsel for the respondent has further submitted that application for setting aside ex parte decree itself was not maintainable because it was filed through Ajit Singh as power of attorney. However, neither Ajit Singh appeared nor the power of attorney was produced on the file. Therefore, application itself was not maintainable.

Learned counsel for the respondent has further submitted that the petitioner has given the address of his village in all the applications. Therefore, the plea of the petitioner that he is residing out of country is not borne out of the record.

I have considered the submissions made by the learned counsel for the respondents in detail.

No doubt, the petitioner has challenged the orders Annexure P-12 and P-13 by filing one Revision petition. Annexure P-12 is order passed by the First Appellate Court while dismissing the application filed under Order 41 Rule 27 whereas Annexure P-13 is an order by which appeal filed by the petitioner was dismissed. Order Annexure P-12 was passed in the miscellaneous appeal, decision whereof is Annexure P-13, therefore, it is not possible to conclude that single revision petition was not maintainable.

In any case, the petitioner has challenged both the orders. Therefore, the single revision petition is found to be maintainable.

Learned counsel for the respondent has not been able to point out any provisions of law permitting the petitioner to challenge only single order in a revision petition under Article 227 of the Constitution of India. Therefore, there is no merit in the argument.

Learned counsel for the respondent has further submitted that notice was sent through registered post and defendants had refused to accept the notice and report of refusal is dated 29.07.1990.

I have examined zimni order. On 24.10.1990, the trial Court passed a following order:-

“Present:- Counsel for the plaintiff.

Summons received back unserved with the report not met. The plaintiff has paid the court fee on declaration and has sought setting aside of the sale deed executed by him. Now case to come up for consideration regarding valuation of the suit on 7.11.90.

SJIC 24.10.90”

A reading of the order reproduced above would show that Court did not find report of refusal to be reliable and did not proceed against the petitioner ex parte.

No doubt, on 10.10.1991, Gurdev Singh had filed a memo of appearance on behalf of all the defendants. However, the next date i.e. on 13.11.1991, he filed vakalatnama only on behalf of defendant No.3. Thereafter, the Court on the basis of the publication proceeded against the defendant Nos.1 and 2 ex parte vide order dated 30.11.1991. Therefore,

mere filing of the memo of appearance which is valid only for one date, the service on the petitioner cannot be assumed.

Learned counsel for the respondent has further pointed out the conduct of the father and stressed upon that the petitioner is not entitled to any relief. In this regard, it is sufficient to say that the sale deed was in favour of defendant Nos.1 and 2. The contesting defendants were defendant Nos.1 and 2. Personal service of defendant Nos.1 and 2 was necessary. The defendant Nos.1 & 2 had not been served in accordance with law. Therefore, the conduct of the father, who was defendant No.3, would not disentitle the petitioner for rehearing the case on merits.

Learned counsel for the respondent has further argued that application for setting aside ex parte decree itself was not maintainable because it was filed through power of attorney Ajit Singh. Neither Ajit Singh appeared nor power of attorney was produced.

I have considered the submissions. It is not in dispute that during the pendency of the proceedings under Order 9 Rule 13 CPC for setting aside ex parte decree, fresh attorney was issued by the petitioner in favour of one Smt. Sushma Rani. Sushma Rani appeared before the Court and deposed in support of the application. In these circumstances, submissions of learned counsel for the respondent cannot be accepted.

Last submission of the learned counsel for the respondent is that in every proceedings, the petitioner has given the address of village and, therefore, it is wrong to assume that the petitioner is living out of country. The order dated 09.08.1991 itself establishes that defendant Nos.1 and 2 were living out of country. Therefore, service through ordinary

process was not possible because some of them had left India.

The Courts have always been making endeavour to decide the cases on merits after giving due opportunities to the parties. In the present case, it is admitted position on record that the plaintiff had executed a registered sale deed in favour of defendant No.1-petitioner and defendant No.2. The aforesaid sale deed has been set aside by ex parte decree. A valuable right to the property has been snatched from defendant Nos.1 and 2 without giving them proper opportunity to defend the same.

Therefore, for the reasons mentioned above, in my opinion the orders passed by the Courts below cannot be sustained. Both the orders (Annexures P-12 and P-13) are set aside. Revision petition, is accordingly, allowed.

Since the suit was instituted on 24.12.1988, therefore, the trial Court shall expedite the hearing of the suit.

28.07.2017

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No