

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

Civil Revision No.5466 of 2017(O&M)

Date of Decision: September 22, 2017

Karnail Singh

...Petitioner

versus

Malkiat Singh

...Respondent

CORAM: HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: - Mr.N.S.Sodhi, Advocate
for the petitioner.

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HARINDER SINGH SIDHU, J.

This petition has been filed impugning the order of the Ld.Civil Judge (Junior Division), Moga dated 29.4.2017, whereby, the application of the petitioner under Order 5 Rule 20 of the Code of Civil Procedure for summoning the respondent by way of substituted service has been dismissed.

The petitioner filed a suit for possession by way of specific performance of the agreement to sell dated 15.9.2007. The suit was contested by the respondent through his son Gursewak Singh as his general attorney. The respondent filed written statement refuting the claim of the petitioner. However, he did not lead any evidence. The suit was decreed vide judgment and decree dated 14.9.2015. After the expiry of the period of limitation for filing appeal, the petitioner filed execution application, in which notice was issued to the respondent for 16.2.2017. However, he could not be served and the process server reported that the respondent had

gone abroad. Thereafter, the Ld. Executing Court vide order dated 16.02.2017 directed that notice be issued to the respondent under Order 5 Rule 25 CPC, which required the summons to be addressed to the respondent at the place outside India where he was residing. As the petitioner did not know the address of the respondent outside India where he could be served, but only knew his last known address, on which he was served in the suit and had put in appearance and filed written statement, the petitioner moved an application for permission to effect substituted service under Order 5 Rule 20 CPC. That application has been declined by the impugned order.

The Ld. Court held that where a defendant is residing out of India and has no agent in India empowered to accept service, then as per Order 5 Rule 25 the summons shall be addressed to the defendant at the place, where he is residing. It was held that as Order 5 Rule 25 CPC deals with the specific situation, where the defendant is residing outside India and does not have any agent in India, hence, service of the defendant-respondent, who was reported to have gone abroad, could be only effected in the manner prescribed in Order 5 Rule 25 and the general provisions of Order 5 Rule 20 CPC could not be resorted to.

I have heard Ld. Counsel for the petitioner.

Order 5 Rule 20 and Order 5 Rule 25 CPC read as under:

“20. Substituted service.- (1) Where the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(1A) Where the court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily

newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

*(2) **Effect of substituted service**—Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally.*

*(3) **Where service substituted, time for appearance to be fixed**—Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require”.*

25. Service on defendant resides out of India and has no agent.—Where the defendant reside 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.”

In my view, in the facts of this case, the Ld. Executing Court may not have been justified in dismissing the application of the petitioner.

Order 5 Rule 25 deals with service in cases where the defendant resides out of India and has no agent in India empowered to accept service. The report of the process server is that the respondent could not be served as he had gone abroad. The report does not say that the respondent has left India and has started residing out of India. Order 5 Rule 25 would essentially deal with service in cases where the defendant is residing outside India on a permanent or quasi-permanent basis, which would mean that he has given up his residence in India and shifted to country outside India. A temporary absence, even for a relatively long time, may not lead to an inference that a person is residing out of India.

In Kasi Visvanathan Chetty And another vs Muthu K.R.

Aranachellam Chetty (1911) 21 MLJ 978, the peon on being informed that the defendants had gone to a village in the territory of Puducottah (outside British India) and it was not known when they would return, affixed a copy of the summons to the outer door of the defendants' residence. The Ld. Lower Court held that this was due service of summons on the defendants. The defendants filed a revision in the High Court.

Rejecting the argument of the defendants that the summons ought to have been served on the defendants at Puducottah, the Madras High Court held that the procedure of Section 89 of the Code of Civil Procedure, 1882 which deals with service of summons where the defendants reside out of British India, would not apply where the defendant has gone to a foreign country for a temporary purpose and the summons are taken to the defendants' place of residence in British India. The Court observed as under :

“2. It is argued by the learned vakil for the appellants, that summons ought to have been sent to Puducottah and he relies on Abraham Pillai v. Donald Smith (1906) I.L.R. 29 M. 324, as authority for this proposition. But Section 89 of the Code of Civil Procedure, 1882, on which reliance is placed in that case, deals with cases in which the defendants reside out of British India and if the learned Judge meant to lay down a general proposition to the effect that when summons is taken to a defendant's place of residence in British India but he is away in a foreign territory for a temporary purpose, then the court must act-under the section of the Code which lays down the mode for effecting service in a foreign territory, we should, with all respect, dissent from such a view. On the other hand, the ruling in Sankaralinga Mudali v. Rathnasabapathi

Mudali (1897) I.L.R. 21 M. 324, in our opinion, lays down the law correctly....”

In the instant case, the defendant was duly served in the suit at the same address as furnished before the Executing Court. He appeared through counsel and filed written statement controverting the allegations in the plaint. But he did not lead any evidence and the suit was decreed against him. He did not appeal against that order. The respondent would, thus, be deemed to be aware of the judgment and decree against him. He would also be expected to be aware that the execution proceedings would necessarily follow. In these circumstances, if he has chosen to go abroad, without leaving any agent empowered to accept service on his behalf, it may legitimately be inferred that he is intentionally avoiding service. Hence, also, recourse to Order 5 Rule 20 CPC would be justified.

Accordingly, this revision petition is allowed. The impugned order is set aside.

Let fresh notice will be issued by the Ld. Executing Court at the address of the respondent in the civil suit. If the respondent yet again is not served and is reported to have gone abroad, then the Court may direct substituted service as per Order 5 Rule 20 CPC which would be deemed proper service in the execution proceedings.

September 22, 2017

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**(HARINDER SINGH SIDHU)
JUDGE**

<i>Whether speaking/ reasoned:</i>	<i>Yes/No</i>
<i>Whether Reportable:</i>	<i>Yes/No</i>