

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

Date of decision: 29.09.2017

1.

CR No.854 of 2013(O&M)

Aasha @ Asha

....Petitioner

VERSUS

Tikam Ram and others

.....Respondents

2.

CR No.874 of 2013(O&M)

Roshni

....Petitioner

VERSUS

Tikam Ram and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Pankaj Jain, Advocate for the petitioner.

Mr. S.K. Tripathi, Advocate for respondents No.1 to 3.

REKHA MITTAL, J.

CM No.3009-CII of 2013

Prayer in this application filed under Order 22 Rule 4 read with Section 151 of the Code of Civil Procedure, 1908 is for bringing on record the legal representatives of respondent - Ranbir Singh (since deceased).

In view of averments made in the application supported by an affidavit of Aasha - the petitioner, the application is allowed and the

persons mentioned in para 2 of the application are allowed to be brought on record as legal representatives of deceased- Ranbir Singh (respondent No.2) for the purpose of present *lis*, subject to just exceptions.

Amended memo of parties is taken on record.

Disposed of accordingly.

CR Nos.854 and 874 of 2013

This order will dispose of CR No.854 and 874 of 2013 as identical questions of law and fact are involved for adjudication. For the sake of convenience, facts are taken from CR No.854 of 2013.

Ranbir Singh and Vikram Singh sons of Malkhan Singh, erstwhile owner of the suit property filed a civil suit for declaration with consequential relief of permanent injunction against Aasha @ Asha wife of Ranjit Singh and Smt. Roshni wife of Ved Parkash Rathi to challenge the sale deed bearing vasika No.1692 dated 09.12.1981 executed by Malkhan Singh in favour of the defendants on the premise that the sale was without legal necessity. On the basis of service effected through munadi, the defendants were proceeded against ex parte vide order dated 19.11.1998. Eventually, suit filed by the plaintiffs/respondents was decreed ex parte vide judgment and decree dated 04.12.2004 and the sale deed dated 09.12.1981 executed by Malkhan Singh was declared to be illegal and accordingly set aside.

The petitioners filed application dated 12.08.2005 for setting aside ex parte judgment and decree but the trial Court on the basis of findings recorded on issue No.1, dismissed the same vide order dated 18.05.2011 (Annexure P-1). Two separate appeals were preferred by Aasha @ Asha and Smt. Roshni against order dated 18.05.2011 and the

same were decided by a common judgment by the Additional District Judge, Gurgaon whereby findings recorded by the trial Court were affirmed and the appeals were dismissed.

Being dissatisfied with the verdict of the Courts below, two separate petitions have been preferred by Asha and Roshni.

Counsel for the petitioners has submitted that there was no due service of the defendant in the suit, therefore, the Courts below have committed a grave error rather illegality by rejecting plea of the petitioners for setting aside the ex parte judgment and decree dated 04.12.2004 and permitting the defendants to contest the suit on merits. It is further argued that as per facts on record, the defendants were sought to be served through registered cover on which a report was received that the defendants are not residing at the given address i.e. House No.21, DLF Colony, Rohtak. The trial Court did not call upon the respondents/plaintiffs to furnish correct address of the defendants nor recorded its satisfaction that the defendants are avoiding service but straightway passed an order for effecting service of the defendants through munadi.

Another submission made by counsel is that the trial Court on the basis of alleged munadi effected at village Bhondsi and not at the given address of the defendants proceeded ex parte against them. In addition, it is argued that it was nobody's plea that the defendants are residents of the said village. It is argued with vehemence that the Courts below did not advert to the procedure prescribed under Order 5 of the Code of Civil Procedure, 1908 (in short 'CPC') while negating plea of the petitioners that there are sufficient grounds for setting aside the ex parte judgment and decree. The last submission made by counsel is that as soon as the petitioners came to know about passing of the ex parte decree from other

litigation in which the petitioners were arrayed as defendants along with one Ashok Kumar, they immediately filed the application under Order 9 Rule 13 CPC, therefore, application filed by the petitioner on 12.08.2005 is clearly within limitation from the date of knowledge of the ex parte judgment and decree.

Counsel representing the respondents, on the contrary, has strenuously argued that consistent findings of fact recorded by the Courts below do not warrant intervention in exercise of supervisory jurisdiction under Article 227 of the Constitution of India. According to counsel, the petitioners/defendants were admittedly residing in house No.21, DLF Colony, Rohtak, when summons through registered cover were sent at that address. It is further argued that the report made by postal official on registered summons is rightly presumed to be made at the behest of the defendants. It is further argued that the trial Court did not pass an adverse order of proceeding ex parte on the basis of report received on the registered letter but gave another opportunity for service of the defendants by way of munadi and munadi was rightly effected in village Bhondsi where the land in dispute was situated and the defendants had been visiting that place for looking after the land in question. According to counsel, the defendants intentionally did not appear before the trial Court despite knowing fully well of pendency of the suit, therefore, the application for setting aside ex parte judgment and decree is nothing but a mischievous effort to delay final outcome of the suit.

I have heard counsel for the parties, perused the paper-book and the records.

The present case demonstrates a very shocking and startling picture wherein three Courts have given complete good-bye to the

procedure envisaged under Order 5 CPC and allowed the petitioners to suffer throughout.

The trial Court registered the suit on 08.04.1996. Various orders were recorded with regard to failure of the respondents/plaintiffs to file the process fee and copies. On 01.08.1997, the suit was transferred to other Court. The plaintiffs were directed to comply with earlier orders for filing of PF and copies immediately and the defendants were ordered to be served for 29.08.1997 on deposit of PF, RC and copies. In the margin of the said order dated 01.08.1997, there is an endorsement dated 02.08.1997 “Issued”. However, it is not clear if ordinary process was issued or process through registered cover was issued or both the processes were issued. However, the case was taken up on 23.08.1997 as the Presiding Officer was not to hold Court on 29.08.1997 due to departmental examination. On 23.08.1997, the case was adjourned to 27.09.1997 for the same purpose. On the adjourned date, the Court recorded the order, reads as follows:-

“Summons of defendant received back with the report of correct address (the words ‘correct address’ appears to be wrongly written). Counsel for plaintiff has requested for a short date to enable him to file an application u/O 5 R 20. Heard. To come up on 13-10-97.”

The application under Order 5 Rule 20 CPC was filed after few dates fixed for the purpose. On 15.04.1998, order passed by the trial Court reads as follows:-

“Application u/O 5 Rule 20 CPC filed. Now munadi fee be deposited then defendants be summoned by way of munadi for 21.7.98”.

On the adjourned date i.e. 21.07.1998 another order was recorded, extracted hereinbelow:-

“Notice munadi for the service of deft. not issued as munadi fee PF filed late. Now notice munadi be issued for 19.11.98 on PPF.”

On 19.11.1998, the defendants were proceeded against ex parte and the case was adjourned to 28.01.1999 for ex parte evidence. A relevant extract from order dated 19.11.1998 speaks as follows:-

“Summons of munadi received duly served of defendant. Case called several time since morning. It is already 12:30 PM. Now defendants be proceeded against ex parte. Now the case is adjourned to 28.1.99 for ex parte evidence.”

The case remained pending for ex parte evidence from January 1999 till 14.02.2003 and on that day, the plaintiffs closed their evidence and eventually the arguments were heard on 01.12.2004 and the ex parte judgment and decree was passed on 04.12.2004.

Perusal of the zimini orders recorded by the trial Court leaves no manner of doubt that summons for service of defendants were issued only once and the summons sent through registered cover received back with the report that no such person (addressee) is there in House No.21. On the request made by counsel for the plaintiffs, the Court adjourned the case for filing of an application under Order 5 Rule 20 CPC to serve the defendants by way of substituted service. The Court did not bother to examine that in view of report made by postal authorities, the plaintiffs were required to file correct address of the defendants in order to ensure their personal service at the first instance. On the contrary, as soon as the plaintiffs filed an application under Order 5 Rule 20 CPC on the premise that service cannot be effected by way of summons as they are intentionally and malafidely avoiding service, vide order dated 15.04.1998

(reproduced hereinbefore), defendants were ordered to be served by way of

munadi. The application for substituted service is not accompanied by an affidavit. There is nothing on record suggestive of the fact that summons through ordinary process were issued much less tendered to the defendants. The Court did not record its satisfaction that the defendant(s) is keeping out of the way for the purpose of avoiding service or for any other reason summons cannot be served in the ordinary way. Not only this, the Court did not pass an order for the summons to be served by affixing a copy thereof, in compliance with mandatory procedure prescribed under Order 5 Rule 20 CPC. The trial Court either being lacking knowledge of the relevant provisions in CPC or for reasons best known passed order dated 15.04.1998, quoted in the earlier part.

Not only the aforesaid, in pursuance of order dated 15.04.1998, summons for service through munadi were not issued at the given address of defendants i.e. House No.21, DLF Colony, Rohtak but issued for munadi to be effected in village Bhondsi, Tehsil Sohna, District Gurgaon. No order was passed by the trial Court for effecting munadi at village Bhondsi. It appears that the respondents/plaintiffs hoodwink the proceedings and manoeuvred the summons to be issued by an official with munadi to be effected at village Bhondsi. It is shocking that the Courts that dealt with the matter for setting aside ex parte judgment and decree tried to justify this illegality by saying that summons of munadi were sent after affixation of signatures by the presiding officer and land in dispute is situated at Bhondsi, despite knowing fully well that ordinarily summons are signed by the presiding officer without looking into the file. The aforesaid observation that munadi could be effected at village Bhondsi where the land is situated is clearly contrary to what has been envisaged under Rule 20 of Order 5 CPC. The manner in which the

respondents/plaintiffs could manage munadi to be effected at village Bhondsi viz-a-viz the address given in the plaint, is a clear indicator that report on the registered cover that no such addressee is residing there is the handiwork of respondents/plaintiffs in connivance with the postal employee. The Courts below failed to appreciate these vital aspects and misdirected themselves by raising a presumption against the petitioners that they got made a false report on the summons sent through registered post. In view of the above, findings recorded by the Courts below that petitioners were duly served are patently illegal rather absurd.

A relevant extract from para 9 of the impugned order dated 18.05.2011 passed by the trial Court reads as follows:-

“9. It may be pointed out here that in the suit titled as **“Ranbir Singh Vs. Asha”**, the address of Asha W/o Ranjit Singh and Roshni W/o Ved Parkash has been given as H. No.21, DLF Colony, Rohtak. On the said address summons were sent through registered cover on which a report has been received that no such person of the said name was residing on the said address. Thereafter, an application u/o 5 rule 20 CPC was filed and accordingly munadi was duly effected at village Bhondsi. Counsel for the applicants pointed out that there was no order on the court file for effecting munadi at the said village. However, it may be pointed out here that summons of munadi has duly been signed by Ld. Civil Judge (Jr. Divn.), Gurgaon. It means that the summons were duly sent for effecting munadi at village Bhondsi. Therefore, there is no force in arguments of counsel for applicants because the summons of munadi was sent after affixation of signatures by the Presiding Officer. Even otherwise, the land in dispute is situated at Bhondsi, therefore, there is no illegality in getting the munadi effected on the said place because earlier registered cover was sent to the applicant. Reports were received that they were not residing there. Thus, after effecting of munadi, the applicants were proceeded against ex-parte. Now, the applicants cannot deny that they were not residing at the address given in the plaint because they themselves are showing the said address of their residence when Asha petitioner appeared as AW1 and furnished her affidavit showing the said address. Therefore, it is clear that the report of registered cover sent to the petitioners was procured by the petitioners

themselves. In addition to this, applicant Roshni is related to applicant Asha as has been admitted by Ved Parkash Rathi AW2. In his cross examination, he admitted that Roshni Devi is sister in law of Asha Devi w/o Ranjit. On the basis of these grounds, the case law as relied upon by counsel for the applicants are not applicable to the facts of the present case because the petitioners though were residing in H.No.21, DLF Colony, Rohtak procured a report on the registered cover that they were not residing there. This fact stands established on the file that the petitioners were residing on the said address, as is clear from cross examination of Asha AW1 as she admitted that they shifted from the said address only a year back, when the report was received, on an application u/o 5 Rule 20 CPC, the applicants were ordered to be served through munadi at village Bhondsi, where the land is situated, therefore, there is no illegality in effecting munadi in Bhondsi. Thus, the applicants were duly served in the said case. Besides this, applicants have not examined the person who allegedly disclosed about the decree in question. Thus, it has remained unproved on the file that the applicants came to know about the decree in question only in the month of August 2005. Therefore, the application is held to be time barred. On all these grounds, it is held that the petitioners have failed to discharge the onus of this issue. ”

The Court in appeal has virtually reproduced para 9 of the trial Court judgment dated 18.05.2011 in para 11 of the order dated 18.12.2012 while affirming findings recorded by the lower Court on issue No.1. It appears that the Court in appeal was aware that it may not be feasible to justify the order passed by the trial Court rejecting application under Order 9 Rule 13 CPC and for that reason it adopted a short-cut method for disposing of the appeal by reproducing findings of the trial Court without recording its own reasons.

It is mystified as to why an officer of the rank of Additional Civil Judge (Senior Division) who dealt with the application under Order 9 Rule 13 CPC as well as the Court in appeal closed their eyes and ignored the provisions in law while rejecting plea of the defendants to set aside the judgment and decree passed against them. As has been discussed

hereinbefore, the trial Court proceeded with the matter by ignoring the prescribed procedure under CPC. The Courts that dealt with the issue of setting aside ex parte judgment and decree in place of rectifying the error(s) committed by the trial Court put their seal and tried to justify the procedure followed by the trial Court. In view of the discussion made hereinbefore, I have least of hesitation to record my serious anguish that the judicial officers who dealt with the proceedings under Order 9 Rule 13 CPC were either not aware of the provisions in CPC or they passed the orders for extraneous consideration. The procedure followed by the trial Court is in complete violation of what is prescribed under Order 5 CPC, therefore, it can be safely concluded that the order passed by the trial Court proceeding ex parte against the defendants and passing ex parte judgment and decree cannot be allowed to sustain and liable to be set aside. Consequently, the orders passed in application under Order 9 Rule 13 CPC suffer from perversity and cannot stand the test of judicial scrutiny.

The petitioners raised a plea that they came to know about the ex parte judgment and decree on 12.08.2005 and filed the application on the very same day. This plea has been rejected by the trial Court on the premise that the applicants have not examined the person who allegedly disclosed about the decree in question, thus, it has remained unproved that the applicants came to know about the decree only in the month of August 2005. No reasons have been assigned by the Court as to why statement of Asha with regard to her knowledge of the decree is not found worthy of credence and reliance much less acceptance.

Asha appeared in the witness box to substantiate the averments raised in the application under Order 9 Rule 13 CPC. She tendered into evidence her affidavit Ex.AW1/A. In para 5 of the affidavit,

she has deposed about knowledge of the ex parte judgment and decree. A relevant extract therefrom reads as follows:-

“after coming to know about the above exparte judgment and decree, the deponent alongwith Roshni Devi came to Gurgaon on 12.08.2005 and engaged Advocate and got the above file inspected and also file the present petition.”

She was cross examined at length by counsel representing the respondents/plaintiffs. In her cross examination, she has deposed in the following terms (Hindi version translated in English):-

“We came to know above ex parte decision on 12.08.2005. I do not know as to when the case of which ex parte order has been challenged was decided but it was decided by the Court of Jaibir Singh Civil Judge. We have caused appearance in the case Dharamvir Vs. Ashok but I do not remember the next date in the said case. In that case, Roshni is not a party and only I am a party. It is wrong to suggest that we knew the present case from the beginning and we did not appear in the Court intentionally. I do not know if any munadi was or was not effected on the land in question.”

There is no challenge to testimony of Asha that she came to know about the ex parte judgment and decree on 12.08.2005. In the suit, sons of Malkhan challenged the sale deed executed by Malkhan qua land measuring 22 Kanal 14 Marlas in favour of Asha and Smt. Roshni. It is difficult to accept to reason that had the defendants knew about pendency of the case, they would have avoided appearance before the trial Court and allowed the proceedings to culminate into an ex parte judgment and decree thereby setting aside the registered sale deed executed in their favour by Malkhan Singh. The respondents/plaintiffs have failed to bring any materials on record much less cogent and convincing that the defendants namely Asha and Smt. Roshni had any ulterior reason to stay away from the proceedings despite having knowledge of pendency of the suit and that

too at the risk of first suffering an ex parte decree and thereafter moving from pillar to post for getting that ex parte decree set aside. Counsel for the respondents has failed to point out any materials on record sufficient to create any inkling that the defendants/petitioners were aware of pendency of the suit or of passing of the ex parte judgment and decree at any time prior to 12.08.2005. Conversely, counsel for the respondents has not disputed that in the suit filed against Ashok, Asha and Roshni, there is reference to the ex parte judgment and decree in question and in the said suit Ashok, one of the defendants caused appearance on 23.07.2005 when otherwise the said fact is borne out from order (Ex.PC) passed in civil suit **Ranbir Singh and another Vs. Ashok Kumar and others**. In this view of the matter, findings recorded by the Courts on question of limitation in filing application under Order 9 Rule 13 CPC are incorrect and the result of gross mis-appreciation of evidence. As a matter of fact, the petitioners were not duly served in the suit. They have been able to substantiate their plea that they filed the application under Order 9 Rule 13 CPC within the prescribed period of limitation from the date of knowledge of ex parte decree. That being so, the application is held to be within limitation.

For the foregoing reasons, the petitions are allowed. The impugned orders are set aside. The application filed by the petitioners under Order 9 Rule 13 CPC for setting aside the ex parte judgment and decree dated 04.12.2004 is allowed. Resultantly, the ex parte judgment and decree dated 04.12.2004 is set aside and the suit titled **Ranbir Singh and another Vs. Asha and others**, is restored on the Board of the trial Court for decision afresh after providing an opportunity to the petitioners to file the written statement and thereafter to proceed with the case in accordance with law.

A copy of this judgment be sent to Hon’ble the Chief Justice for consideration. Simultaneously, copy of this judgment be sent to the Presiding Officer who passed the order proceeding ex parte as well as the Courts that decided the matter with regard to setting aside ex parte judgment and decree.

SEPTEMBER 29, 2017
‘D. Gulati’

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned	:	yes/no
Whether reportable	:	yes/no