

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Civil Revision No.1356 of 2018

Date of Decision: May 25, 2018

Harkrishan Lal

...Petitioner

Versus

M/s Sardari Lal Milkhi Ram, Commission Agents & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr.Salil Bali, Advocate,
for the petitioner.

Mr.Ashok Khunger, Advocate,
for the respondents.

AMIT RAWAL, J.

The present revision is directed against the impugned orders dated 15.10.2015 (Annexure P-5) rendered by the Civil Judge (Junior Division), Abohar and 25.1.2018 (Annexure P-7) of Additional District Judge, Fazilka, whereby the application of the petitioner submitted under Order 9 Rule 13 of CPC for setting-aside the judgment and decree dated 17.3.2009, has been declined.

Respondent No.1-plaintiff instituted the suit in the year 2003 against the petitioner-defendant for recovery of ₹83,11,097.81P on the premise that defendant No.1 was a Rice Mill and a partnership firm, whereas defendant Nos.2 to 5 were partners and carrying on the business. Defendant No.1 purchased Jhona/Rice for their own use and sale on credit from the plaintiff firm against interest @ 18% per annum, customary rate of interest, which was prevalent in the market areas of Abohar, Fazilka,

Jalalabad etc. As per the accounts of the respondent-plaintiff, the amount aforementioned was inclusive of principal and interest. The defendants did not appear and were proceeded ex-parte.

As per ex-parte evidence brought on record, the trial Court, vide judgment and decree dated 17.3.2009, decreed the suit for a sum of ₹53,84,211.11P with interest @ 8% per annum on the amount due from the date of last transaction, i.e., 30.12.2000 and interest @ 6% per annum from the date of filing of the suit till the actual realisation.

Mr.Salil Bali, learned counsel for the petitioner-defendant submitted that the Courts below did not follow the procedure as prescribed under Order 5 Rule 9 (1) of CPC, for, as per the zimni orders, extracted in the petition, the Court had only resorted to service upon the defendants through registered post, but not through ordinary process as the defendants were also residents of the same very area. Specific objection in this regard had been taken, but the Courts below committed illegality and perversity in not advertng to the same and, therefore, the impugned orders are liable to be set-aside on this ground alone.

The Postman had submitted the report of refusal qua acceptance of the registered envelope, but it did not disclose whether Postman met the petitioner or duly authorized agent. In such circumstances, the Court ought to have effected the munadi or ordered substituted service. The findings are based upon surmises and conjectures. Even the application was filed on 5.8.2010 when knowledge of the ex-parte judgment and decree acquired. No harm and prejudice would be caused to the respondent-plaintiff in case the impugned orders are set-aside subject to any terms and conditions which this Court deem appropriate, for, the petitioner has a prima-facie case. There

is every likelihood that the suit would be dismissed.

Per contra, Mr.Ashok Khunger, learned counsel for the respondent-plaintiff submitted that there is no force and merit in the submissions of Mr.Bali, for, it is clear that the address of the defendants was not within the jurisdiction of the Court, therefore, as per the provisions of Order 5 Rule 9 of CPC, service upon such defendant is to be effected only through registered post. Defendants intentionally avoided the service to delay the matter for one reason or the other, to avoid the recovery of the amount due, for, they were aware of the pendency of the suit and intentionally refused to accept the summons.

He further submitted that AW-1 Har Krishan Lal feigned ignorance with regard to the name of the Court which passed the ex-parte decree, for, his testimony revealed that there was business transaction between the plaintiff and defendants. It also surfaced that no complaint against the Postman, who allegedly made the report of refusal, had been made. The Courts recorded the satisfaction in passing the ex-parte judgment and decree and, thus, urged this Court for upholding the orders by dismissing the revision petition.

I have heard the learned counsel for the parties and appraised the paper book.

This Court, while issuing notice of motion in this case, stayed the finalization of sale subject to the condition of deposit of ₹5.00 lacs within a period of two weeks. As per office report, a sum of ₹5.00 lacs had been deposited on 12.3.2018. On merits, it is seen that the provisions of Order 5 Rule 9 (1) of CPC, as sought to be projected by Mr.Bali, would strictly apply, for, the Courts had not resorted to effect the service upon the

petitioner-defendant through ordinary process as it is discernible from the memo of parties that the defendants are carrying on the business in Ghubaya, Tehsil Jalalabad, District Ferozepur, whereas the plaintiff is also having partnership firm at Tehsil Abohar, District Ferozepur, in essence both the parties are residents of District Ferozepur, but no reasoning has been assigned of not sending the notice through ordinary process.

It would be in the fitness of things to extract the zimni orders and as well as Rule 9 of Order 5 of CPC, which read thus:-

7.11.2003

“Present: Anil Kamra, Advocate for plaintiff.

Court fee made good. It be registered. Notice to defendant be issued n PF/RC etc.for 29.1.2004.

Date: 7.11.2003

CJ (JD).

29.1.2004

Present: Mr.Jai Dayal, Adv.Proxy for plaintiff.

Case called repeatedly but none appeared on behalf of defendant no.1, 4, 5 RC with regard to defendants no.1, 4, 5 received back with the report of refusal. So, as none appeared on their behalf of defendant no.1, 4, 5 are proceeded against exparte. Defendant no.2, 3 reported to be not residing at given address. They be summoned on PF/RC on 6.4.2004.

Date: 29.1.2004

CJ(JD)

6.4.2004

Present: Anil Kamra, Advocate, counsel for the plaintiffs

Defendant no.1, 4, 5 exparte.

Learned counsel for plaintiff placed on record receipt dated 28.2.2004 whereby the summons sent to defendant no.2, 3 through registered cover. Case called repeatedly but neither defendant no.2, 3 nor anyone on their behalf has come present today though a period of one month has already been lapsed

from the date of summons through registered cover. Presumption of due service is drawn against defendant no.2, 3. As today none appeared on behalf of defendant no.2, 3, so they are proceeded against exparte.

File is adjourned for exparte evidence of plaintiff for 24.8.2004.

Date: 6.4.2004

CJ (JD) ”

Order V Rule 9

“9. Delivery of summons by Court.- (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier service as are approved by the Court.”

On conjoint reading of the zimni orders and provisions reproduced above, in my view, the Court below was required to send the ordinary summons along the registered notice and should not have resorted to stringent measure of proceeding ex-parte by believing the report of the Postman. Order 5 Rule 20 CPC, which deals with substituted service, in such circumstances, should have been pressed into service. No doubt, respondent-plaintiff has claimed ₹53.00 lacs odd amount along with interest, but the Court cannot remain mute spectator while weighing scale as the balance did not tilt in favour of the respondent-plaintiff. It is yet to be discerned whether on actual fair trial, the parties to the lis would be able to prove their pleaded case in accordance with law or not, but I deem it appropriate that the ex-parte proceedings, in such circumstances, should not come in the way of the petitioner and, therefore, the impugned orders are

CPC is allowed. Ex-parte judgment and decree is set-aside.

The petition is disposed of with the following directions:-

- a) It will be subject to payment of ₹50,000/-, which shall be condition precedent;
- b) ₹5,00,000/- deposited before the trial Court is ordered to be disbursed to the respondent-plaintiff against security;
- c) Petitioner-defendant shall file the written statement within 15 days immediately from the date of appearance before the trial Court and the respondent-plaintiff shall file replication, if any, within 15 days thereafter;
- d) Parties shall file the requisite documents along with the written statement and replication, if not filed with the plaint;
- e) The trial Court shall undertake the task of admission and denial and frame the issues on which the parties are at variance;
- f) The trial Court shall afford 4-4 effective opportunities to the parties to lead evidence in support of their respective claims which would be spanning period of two months each and thereafter shall decide the suit in all within a period of ten months.

May 25, 2018
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No