

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

CR No.3446 of 2017 (O&M)
Date of decision: 4th May, 2018

Umesh Kumar and others

... Petitioners

Versus

Usha Rani

... Respondent

CORAM: HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present: Ms. Sharmila Sharma, Advocate
for the petitioners.

Mr. D.S. Matya, Advocate for the respondent.

FATEH DEEP SINGH, J.

Challenge by the petitioners Umesh Kumar and others, who were the plaintiffs in a suit filed by them by way of pre-emption before the Court of learned Additional Civil Judge (Senior Division), Gurgaon, through this revision is over an order dated 05.04.2017 whereby an application under Order IX Rule 13 CPC read with Section 151 CPC for setting aside ex-parte orders dated 12.03.2009 and judgment and decree dated 30.01.2012 passed by the then Court of learned Additional Civil Judge (Senior Division), Gurgaon, was allowed.

Heard Ms. Sharmila Sharma, Advocate for the petitioners; Mr. D.S. Matya, Advocate for the respondent and perused records of the case.

The stand of the applicant, respondent herein, in her application under Order IX Rule 13 CPC read with Section 151 CPC was that she had purchased the suit property through registered sale deed bearing No.629 dated 09.05.2008 from Smt. Shanti Bai and further sold the land to Smt. Zule Khan claiming that the plaintiffs have threatened Smt.Zule Khan for taking forcible possession for which Smt.Zule Khan filed a suit for declaration and permanent injunction against Umesh Kumar and others wherein the present respondent/applicant was also made a defendant. When she came to appear before the Court on 04.07.2015 she came to know about the ex-parte judgment and decree dated 30.01.2012 obtained by Umesh Kumar and others by filing suit for pre-emption against her and claiming that she was never served with the process and hence the application in question.

Upon notice, the other side besides taking usual preliminary objections of non-maintainability and that it was barred by delay, on merits claimed that the applicant was fully aware of the pendency of the suit and it was a collusion of Smt.Zule Khan with the applicant who were duly served with the process of the Court and had sought dismissal of the application.

The trial Court framed following issues:

1. Whether ex-parte order dated 12.03.2009 and judgment and decree dated 30.01.2012 are liable to be set aside on the grounds taken in the application?
OPA
2. Whether the application in hand is not maintainable in the present form? OPR
3. Whether the application is barred by limitation? OPR
4. Relief.

The applicant/defendant examined herself as PW1 and closed evidence whereas respondents examined RW1 Sunil Saini, Process Server of District Court, Faridabad; RW2 Ram Singh Naib Nazir Tamil Office of Civil Judge (Sr. Divn.) Gurgaon; RW3 Baldev Parkash and RW4 Mahipal Tamil Nazir, District Court, Faridabad and tendered documents Ex.D1 to Ex.D6 and it was consequent thereupon the impugned findings were returned.

Upon hearing learned counsel for the two sides and perusal of the records. The moot point that has been assailed and canvassed before this Court by the two sides revolves around the fact whether the defendant/applicant was duly and properly served with the process of the Court or not.

It is there in the own evidence of plaintiffs/petitioners that the notice sent to the defendant was received back with the report of refusal which is proved as Ex.D1 and which is also proved by RW4 Mahipal, Tamil Nazir, District Court, Faridabad. Thereafter through RW1 Sunil Saini, Process Server of the District Court, Faridabad it has been brought on the records that the defendant refused to receive the process and therefore, report of refusal was made. However, it is sufficiently elicited from the evidence that there has been non-adherence of the provisions of Order V Rule 17 CPC which mandates that in such an eventuality, the serving officer shall affix a copy of the summons on the outer door 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 to the effect that he has affixed a copy of the same as per these rules and circumstances under which he has to do so.

Admittedly, the arguments put forth by Mr. D.S. Matya, learned counsel representing the respondent/defendant could not be controverted by the learned counsel for the petitioners Ms. Sharmila Sharma and this is what precisely the learned Court below has taken serious note of to hold that it was not refusal in the eyes of law and it

was consequent thereupon, the Court had ordered service through publication which was done and thereafter the applicant (now respondent) was proceeded against ex-parte leading to passing of the ex-parte judgment and decree. Even under the provisions of Order V Rule 20 CPC 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 in which the defendant is known to have last resided or carried on business or personally worked for gain, and thereafter lays down the procedure by virtue of Order V Rule 20(1-A) CPC to be adopted and therefore, there ought to be satisfaction of the Court that the defendant cannot be served through ordinary manner and thereafter ought to have opted for substituted service through publication. Order V Rule 20(1-A) CPC further lays down that the advertisement for service shall be given in a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided or carried on business or personally worked for gain.

The respondent apparently is a household lady and thus, a serious doubt cropped up in the mind of the Court below whether it was a valid service through publication and therefore, has relied upon a view of this Court in the case of '**Dharampal Singh v. Amar Singh & others**' 2013(2) CCC 069 (P&H) to hold the observation that there was lack of proper service and thus, has rightly drawn a conclusion on issue No.1 that the defendant/applicant was never served with the process of the Court. Besides the fact that the law for dispensation of justice needs to be liberally construed to ensure that undue prejudice is not caused to a party by narrow interpretation of the provisions and to the mind of this Court there are exceptional circumstances which impels this Court to certainly uphold the findings of the Court below. More so, no prejudice is likely to be caused to the revisionists and rather would afford the parties to get the matter adjudicated on merits. Apparently there is no illegality or perversity in the impugned findings necessitating interference by this Court. The revision petition being hopelessly without any merit, stands dismissed. Records be sent back.

(FATEH DEEP SINGH)
JUDGE

May 4, 2018

rps

Whether speaking/reasoned Yes/No

Whether reportable Yes/No