

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No.3562 of 2017 (O&M)

Date of Decision:11.12.2018

Smt. Raj Dulari

...Petitioner

Vs.

Shopat Rai and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Sandeep Jasuja, Advocate,
for the petitioner.

Mr. Suresh Ajneja, Advocate and
Mr. Yogesh Ajneja, Advocate,
for the respondents.

Amol Rattan Singh, J.

By this petition, the petitioner has challenged the order of the learned trial court (Additional Civil Judge (Senior Division), Fazilka), dated 24.04.2017, by which her application has been dismissed, the application being one seeking that the order dated 22.09.2012 passed by that Court, proceeding against her *ex parte* be set aside.

The petitioner is a defendant (alongwith proforma defendants no.2 to 27) in a suit filed by respondent no.1 herein (plaintiff) seeking a declaration to the effect that he continues to be the owner of the suit land described in the plaint, he also having challenged a 'memorandum of family settlement'/partition dated 13.07.2004.

2. The learned trial Court first noticed the fact that the petitioner (applicant before that Court) is 89 years old and is contended to have been residing at Ahmedabad for about 20 years, with her contention being that she

had not been served of the summons/notices issued qua institution of the suit, at her permanent place of residence, despite the plaintiff, who is her husbands' younger brother, being fully aware of her permanent address.

Her contention in her application was that the plaintiff had in fact managed to get her proceeded against *ex parte* by ensuring that she was actually never served of notices issued to her, qua the institution of the suit, with eventually she having been shown to be served by way of substituted service, i.e. by publication of the notice.

She had further contended that it was only when she met her counsel on 21.02.2017 in the court complex at Fazilka, in connection with a complaint filed by the respondent-plaintiff in the court of the learned Chief Judicial Magistrate, that she was informed by her counsels' clerk that on 16.02.2017, when he was present in Court in connection with another case, the case in the present *lis* was called out and upon "probing into the court file", he came to know that the petitioner was a party to the suit who had been proceeded against *ex parte* about 4½ years earlier.

3. The respondent-plaintiff, in reply to the petitioners' application, had stated that she was only the nominal head of the family of defendants no.1 to 7, who were residing with her either at Fazilka or at Ahmedabad, with defendant no.7 being at Fazilka, defendants no.3 and 5 being at Ahmedabad.

The plaintiff further contended that in fact the application had been filed only at the asking of defendant no.7, who had been appearing in the case since 2011 through his counsel, though defendants no.2 to 6 also, despite being fully aware of the proceedings, had intentionally got themselves proceeded against *ex parte*.

The plaintiffs' contention therefore was that only when the suit

was “about to mature”, the application had been filed to prolong the proceedings, with in fact counsel for the applicant, Shri Pardeep Kataria, Advocate, also being counsel for defendant no.5 in another case pending between the parties, with a 'similar practice' also having been adopted by the defendant in the other cases, to prolong the litigation.

4. The plaintiff further contended that, as a matter of fact, the applicant (present petitioner) had been duly served of the process through registered post in July 2012, despite which neither she nor defendants no.2 to 5 put in an appearance, with them all therefore proceeded against *ex parte*, after they had also been summoned through publication in the 'Hindustan Times'.

The application being time barred was also a plea taken by the respondent-plaintiff.

5. Upon considering the aforesaid pleadings, the learned trial Court observed that the petitioner (applicant) had been arrayed as defendant no.1 through her general attorney, Satish Kumar son of Hari Ram (i.e. one of her sons), resident of Ahmedabad, with a report received that she and defendants no.2 to 5 were not residing at the given address, after which the correct address was filed by the plaintiff, upon which summons were again issued to them through registered post, which were received back 'being unclaimed'.

Hence, they were all proceeded against *ex parte*, (after substituted service was effected by way of publication in the newspaper).

6. Thereafter, the learned trial Court recorded a finding that defendant no.7 (also respondent no.7 in the present petition), who is also the petitioners' son, had been appearing through his counsel since 21.09.2011 and therefore it was not believable that he would not disclose, to his mother, the

fact of the suit having been instituted.

Hence, with in any case the petitioner having been proceeded against *ex parte* only after due procedure of publication had been undertaken by way of substituted service, no ground to recall the order dated 22.09.2012 (proceeding against her *ex parte*) was found by that Court, with the application of the petitioner therefore dismissed.

7. At the time when notice was issued in this petition on May 16, 2017, returnable at that stage on November 16, 2017, passing of the final judgment by the learned trial Court had been stayed by a co-ordinate Bench.

However, the turn of the case not having come up on 16.11.2017 it was adjourned to April 16, 2018, on which date, as per the report of the office, notice (pursuant to the order dated May 16, 2017) could actually be not issued for want of requisite number of copies of the paper-book and consequently fresh notice was ordered to be issued, returnable on 03.10.2018 through ordinary process, by way of registered cover, as also by *dasti* process; with it also directed by this Court that in case of non-compliance by the petitioner, the petition would be dismissed for want of prosecution.

8. Thereafter, on October 03, 2018 respondent no.1 appeared through counsel and though learned counsel for the respondent-plaintiff was prepared to argue the matter on that date, counsel for the petitioner sought time to do so, with the case adjourned to 12.10.2018, this Court making it clear that if it was not argued on that date the interim order would stand automatically vacated.

Yet, the turn of the matter not having come up on 12.10.2018 it was adjourned “by order” to November 26, 2018, on which date both learned counsel argued the matter and judgment had been reserved.

9. Mr. Jasuja, learned counsel for the petitioner, has essentially argued in terms of the application made before the trial court for setting aside the order proceeding against the petitioner *ex parte*, as per what has already been noticed by this Court at the beginning of this judgment, to the effect that the petitioner being at Ahmedabad actually never stood served of the notice issued in the suit.

10. Mr. Ajneja, learned counsel for the respondent, *per contra*, has drawn specific attention to the reasoning given by the trial court as has also been noticed hereinabove and is therefore not being repeated, with learned counsel also relying upon a judgment of a co-ordinate Bench of the Himachal Pradesh High Court in **Smt. Vijaya Shakti Gupta v. Shri Rakesh Khanna** **2017 (2) ILR (HP) 223**, to submit that once the court is satisfied that the petitioner is not able to serve the respondent and an order of substituted service was made, with notices duly published in the newspaper, the presumption would be that the respondent was duly served and consequently there would be no occasion to recall the order proceeding against the respondent *ex parte*.

Mr. Ajneja reiterated that the application had only been filed to delay the proceedings in the suit, with one son of the petitioner, i.e. respondent no.7 herein (defendant no.7 in the suit), duly appearing before the trial Court ever since 2011, and with there being no conflict of interest between the mother and son, it cannot be presumed that the petitioner actually was not aware of the suit filed against her.

Hence, he submitted that the petition deserves to be dismissed.

11. Having considered the matter, I agree with learned counsel for the respondents, to the effect that there being no conflict of interest shown,

whatsoever, between the petitioner and her son (respondent no.7, Vinod Kumar), there would be no reason for her to be not aware of the pendency of the *lis* and as has rightly been held by the trial Court, it was only to delay proceedings at the fag end of the trial, that the application for setting aside the order proceeding against her *ex parte* was filed, though notice issued at her Ahmedabad address through registered post had been received back unclaimed, and due process was thereafter also followed for effecting substituted service by way of publication in a prominent newspaper.

In fact, with the petitioner being 89 years old, it is obvious that her application was filed only at the instance of her son to delay proceedings, when the suit was reaching the stage of finalisation.

Even if that presumption by this Court is to be only a presumption, in the aforesaid circumstances, I still see absolutely no reason to interfere with the impugned order, firstly in view of the fact that nothing has been shown even to this Court that there was any conflict of interest between the petitioner and her son, who duly was defending the suit right since 2011 (respondent-defendant no.7), and further, because due process was adopted before she was proceeded against *ex parte*.

Consequently, finding this petition to be wholly without merit, it is dismissed with costs of Rs.10,000/-.

December 11, 2018
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(AMOL RATTAN SINGH)
JUDGE

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| 1. Whether speaking/reasoned? | Yes |
| 2. Whether reportable? | Yes |