

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

C.R. No.4296 of 2016

Date of Decision.31.05.2018

Balwinder Singh and another

...Petitioners

Vs

Sukhbir Singh and others

...Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. S.D. Sharma, Senior Advocate with
Mr. Ved Priya Malik, Advocate
for the petitioners.

Mr. Sumeet Mahajan, Senior Advocate with
Mr. Amit Kohar, Advocate
for respondent No.1.

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AMIT RAWAL J.(ORAL)

The present revision petition is directed against the order dated 14.01.2016 passed by the Appellate Court whereby the application filed by defendant No.4 for setting aside the ex parte judgment and decree dated 20.02.2007 has been allowed, in essence, the order dated 05.05.2014 passed by the trial Court dismissing the aforementioned application has been set aside.

Mr. Sharma, learned Senior Counsel assisted by Mr. Ved Priya Malik appearing for the petitioners submitted that the petitioner No.1-plaintiff had instituted the suit for declaration to the effect that the the plaintiff is absolute owner in possession of the house/property No.1018/7 measuring about 3 ¼ marlas situated within the *lal lakir* in Adampur, District Jalandhar as per the site plan and that the defendant had no right, title or concern in the suit property by

challenging the sale deed s dated 28.04.1998/30.04.1998 executed by defendant No.1 with consequential relief of permanent injunction.

In the aforementioned suit, Sukhbir Singh son of Sewa Singh was impleaded as defendant No.4 by giving the address as House No.1772/12, Adampur, Tehsil and District Jalandhar. The address given was correct but the summons for appearance were not accepted by respondent No.1, for, there was no refusal but the process server reported that he was avoiding service and had caused the affixation as per the provisions of Order 5 Rule 17 CPC and accordingly was proceeded ex parte on 29.07.2006 in a suit filed on 17.07.2006. The aforementioned suit was decreed vide ex parte judgment and decree dated 20.02.2007. The respondent-defendant No.4 moved an application dated 07.05.2007 on allegedly acquiring the knowledge of the aforementioned ex parte judgment and decree.

The aforementioned application was contested by the petitioner-plaintiff by raising all possible pleas.

The trial Court framed the issues and both the parties led evidence in support of their respective stands. The trial Court vide order dated 05.05.2014 dismissed the application. However, the appeal preferred against the aforementioned order by defendant No.4 has been allowed vide impugned order dated 14.01.2016 and has been challenged by raising the following submissions:-

(i) The suit aforementioned was filed on 17.07.2006.

Notice was issued to all the defendants. Process Server went to the residential address of the respondent-defendant No.4 on 29.07.2006 and

despite being available at home, did not accept service and report in this regard was made, much less, copy of summon was also affixed on outer door of the house, therefore, there was a compliance of the aforementioned provisions. In this regard, attention of this Court to provisions of Order 5 Rule 17 CPC was drawn.

- (ii) The Appellate Court has committed illegality and perversity by holding that the Process Server did not record the statement of any habitant of the village, for, there is gross misreading of the report. The process server had reported no person from the vicinity came forward to become witness of the report. In support of such contention, relied upon para 5 of the judgment rendered by Division Bench of Calcutta High Court in *Mira Rani Dey Vs. Namita Goswami and others AIR 1977 (Calcutta) 372.*

- (iii) The process server stated on that respondent No.1, Sukhbir Singh had hidden himself in the house, therefore, he pasted the copy of the summons on the outer door of the house. The story coined in the application for setting aside the ex parte judgment and decree was that wrong address of respondent No.1/defendant No.4 was given in the suit. The address given in the suit as House

No.1772/12 was old address whereas the new address was House No.3280/13, therefore, the service upon respondent No.1/defendant No.4 was specifically effected, thus, urges this Court for setting aside the finding under challenge.

Per contra, Mr. Sumeet Mahajan, learned Senior Counsel assisted by Mr. Amit Kohar appearing for respondent No.1 submitted that the lower Appellate Court being the last court of fact and law examined the evidence on record while allowing the application for setting aside the aforementioned ex parte judgment and decree by noticing that process server had not taken any steps for obtaining signature of the independent witness *vis-a-vis* his report, thus, there is a serious doubt on report whether he actually visited the premises or not, for, he did not bring on record any material to corroborate that he identified defendant No.4. Provisions of Order 5 Rule 17 CPC cannot be read in isolation, for, Rule 18, 19 and 20 are also to be looked into and read in conjunction, for the purpose of effecting service upon the defendants. No harm and prejudice would be caused to the petitioner-plaintiff in case the ex parte judgment and decree is set aside, thus, urges this Court for dismissal of the revision petition.

I have heard learned counsel for the parties and appraised the paper book. It would be apt to reproduce Rule 17, 18, 19 and 20 of Order 5 of the Code of Civil Procedure, which are as under:-

“17. Procedure when defendant refuses to accept service, or cannot be found.- Where the defendant or his agent or such other person as aforesaid refuses to

sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, 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 or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and 'whose presence the copy was affixed.'

18. Endorsement of time and manner of service.- *The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.*

19. Examination of serving officer.- *Where a summons is returned under rule 17, the court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the*

matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

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.”

As per Rule 17, process server is required to visit the address given in the summons and affixed the summons in case of refusal by the addressee. Equally so, he is enjoined upon an obligation to witness the aforementioned report from the person in the locality. In such cases, where the report is given, the Court should record the satisfaction of effective service otherwise the

remedy as provided under Rule 20 is for effecting substituted service upon the defendant.

Concededly, the suit was filed on 17.07.2006 and the first date for appearance was 29.07.2006. It is on this date only, respondent No.1/defendant No.4 was proceeded ex parte. If at all, there was an identity problem of the respondent No.1, the plaintiff should have accompanied the process service for effecting service in case no other resident of the village had come forward as witness for effecting service. The trial Court should not have initiated ex parte proceedings against the respondent No.1-defendant No.4 in such undue haste but should have resorted to the provisions of Rule 20 of Order 5 CPC by causing substituted service.

All these factors have been taken into consideration by the lower Appellate Court. There is no dispute to the ratio decidendi culled out in the judgment cited supra, for, the judgment did not deal with the provisions of Rule 18, 19 and 20 of the Code of Civil Procedure, therefore, the aforementioned judgment cannot be read as judgment *in rem*.

As an upshot of my finding, I do not find any illegality and perversity in the order passed by the lower Appellate Court, much less, cannot be said to be passed without jurisdiction. No ground for interference is made out. The revision petition is dismissed.

(AMIT RAWAL)
JUDGE

May 31, 2018
Pankaj*

Whether reasoned/speaking
Whether reportable

Yes
No