

CR No.4107 of 2017 (O&M)

Ashok Kumar
2018.01.29 13:35
I attest to the authenticity and
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decree dated 13.05.2005 (Annexure P3) whereby suit of the respondent/plaintiff was decreed for possession of property measuring 98.6 x 27ft. known as Haveli Sardarni Basant Kaur situated in village Attari, District Amritsar along with mesne profits. Further the defendant was restrained from raising construction over the property in dispute.

Mohinderpal Kaur widow Navinder Singh Sidhu and Birinder Singh Sidhu, sons of Col. Jagjit Singh filed application dated 18.11.2005 (Annexure P16) for setting aside ex-parte judgment and decree dated 13.05.2005. On completion of pleadings of the parties, the trial Court framed issues, permitted them to adduce evidence in respect of their contentions but answered all the issues against the applicants and the proceedings under Order 9 Rule 13 CPC were decided against legal representatives of late Col. Jagjit Singh. The appeal preferred by the unsuccessful applicants did not find favour with the Court that affirmed findings recorded by the trial Court.

Still feeling dissatisfied, one of the applicants Birinder Singh Sidhu has filed the instant petition.

Counsel for the petitioner has assailed consistent findings recorded by the Courts below primarily on two counts. The first submission made by counsel is that the summons qua personal service of Col. Jagjit Singh do not bear attestation by a witness who could identify Col. Jagjit Singh, in compliance with the procedure prescribed under Order 5 Rule 18 CPC, therefore, service of the defendant purported to be effected by

Bagicha Ram, process server is not due and valid service. The second submission made by counsel is that on the back of summons, there are initials purported to be affixed by Col. Jagjit Singh but Col. Jagjit Singh had not been signing any document by putting his initials but had been affixing full signatures as is apparent from his Swedish passport (Annexure P9). In addition, it is argued that the applicants examined Sukhjinder Singh, hand-writing and finger prints expert who proved his report Ex.AW2/1 and gave his expert opinion that the questioned signatures do not tally with standard signatures of Col. Jagjit Singh but the Court in appeal has wrongly brushed aside opinion of the expert.

I have heard counsel for the petitioner, perused the paper book particularly the various annexures available on record.

Before advertng to the submissions made by counsel for the petitioner, it is pertinent to extract material averments raised in paras 3 and 4 of the application, reads thus:-

“3. xx xx xx the service of Col. Jagjit Singh was not effected in any manner whatsoever. He never refused to accept service of summons. No summons were sent to him. No process server came to effect the service of Col. Jagjit Singh with the summons of the Court. Even no proclamation was made in the village. All the proceedings were kept concealed from the notice of Col. Jagjit Singh. The plaintiff/DH has obtained false reports in connivance with process serving agency. Col. Jagjit Singh along with his wife Mohinderpal Kaur came to India on 06.11.2004. Bir Inder Singh son of Col. Jagjit Singh arrived India on

06.11.2005. Nov Inder Singh son of Col. Jagjit Singh arrived India on 25.09.2005. Col. Jagjit Singh has died on 28.10.2005. The other sons of Col. Jagjit Singh are in Sweden.

4. That after the death of Col. Jagjit Singh, the decree holder proclaimed in the presence of the applicants that he has got an ex-parte decree dated 13.05.2005 from this Hon'ble Court against deceased Col. Jagjit Singh and that he is going to get possession of the property in question in execution of the said ex-parte decree. Immediately thereafter, the applicants contacted their counsel who made enquiries and came to know that an ex-parte decree dated 13.05.2005 has been passed by the Hon'ble Court against Col. Jagjit Singh."

Indisputably, the application for setting aside ex-parte decree was filed on 18.11.2005.

Before dealing with the question, whether Col. Jagjit Singh was duly served or not, I would like to deal with the issue of limitation. Article 123 of the Limitation Act, 1963 (in short 'the Act') prescribes limitation of 30 days for filing application to set aside a decree passed ex-parte. A relevant extract therefrom reads as follows:-

"An application for setting aside ex-parte decree can be filed within 30 days from the date of knowledge of the decree where the summons or notice was not duly served. However, in case summons or notice was duly served, period of limitation of 30 days starts from the date of decree."

Assuming that Col. Jagjit Singh was not duly served in the

case and the applicants could file application within 30 days from the date of knowledge of the decree, the application is conspicuously silent as to the date on which the applicants gained knowledge of passing of the ex-parte judgment and decree. As per averments in the application, Smt. Mohinderpal Kaur, one of the applicants came to India on 06.11.2004. Navinder Singh who appeared in the witness box to substantiate plea of the applicants came to India on 25.09.2005. In his cross-examination, he has deposed that his mother told him about the present case. A relevant extract from his cross-examination reads as follows:-

“I came to know about the present case on 25.09.2005 when I came to India. My mother told me about the present case. My mother is presently living in village. She is even today at the village. She is heart patient. I have not brought any medical record of my mother. I do not know when my mother came to know about the present litigation.”

Smt. Mohinderpal Kaur, widow of the deceased and one of the applicants did not appear in the witness box to say something about knowledge of the litigation or the decree. Under the circumstances, it is difficult to differ with findings consistently recorded by the Courts below that the application is barred by limitation. As the application for setting aside the ex-parte judgment and decree is barred by limitation, the other submissions made by counsel for the petitioner may not assume any relevance and significance.

A bare look and first glance over the averments raised in para 3

of the application and extracted hereinabove gives an impression that the applicants wanted to plead that Col. Jagjit Singh, his wife and two sons were not in India in the year 2001. There is no specific plea raised by the applicants that Col. Jagjit Singh was not in India on 01.11.2001 or where was he on that date.

Navinder Singh Sidhu, one of the applicants tendered into evidence his affidavit Ex.AW1 (Annexure P17). In para 1 of the affidavit, he has deposed to the following effect:-

“That I am son of Col. Jagjit Singh Sidhu. My father was also national of Sweden and he also used to reside with me in Sweden. My father had visited India on 13.01.2002. Before that, my father never permanently resided in India and especially in village Attari, Tehsil and District Amritsar in the year 2001.”

The word 'permanently' was added in the aforesaid para with a pen. Navinder Singh Sidhu has stated that Col. Jagjit Singh visited India on 13.01.2002 as against allegation in the application that he along with his wife came to India on 06.11.2004. Again, he is silent as to where Col. Jagjit Singh was on 01.11.2001. However, in his cross-examination, he has stated that passport Ex.A1 was issued on 05.11.2001. His father must be holding passport earlier to Ex.A1 but he has no knowledge about the same. He did not know if he was holding any passport before 05.11.2001 or not. The very fact that the applicants have tried to conceal material fact with regard to availability of Col. Jagjit Singh on 01.11.2001 goes a long way to show that

the applicants have not approached the Court with clean hands. They have failed to adduce clear, satisfactory and cogent evidence if Col. Jagjit Singh was holder of a passport prior to 05.11.2001 what to talk of his being not in India on 01.11.2001. It appears that the application for setting aside ex-parte decree and so also the affidavit of Navinder Singh Sidhu has been cleverly drafted with a clear intent to avoid as to where Col. Jagjit Singh was on 01.11.2001.

Order 5 Rule 16 CPC provides for person served to sign acknowledgment. A relevant extract therefrom reads as follows:-

“Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.”

Order 5 Rule 18 CPC deals with endorsement of time and manner of service. A conjoint reading of Rules 16 and 18 makes it evident that the serving officer shall prepare a return stating the time and manner in which the summons were served and the name and address of the person (if any) identifying the person served and witnessing delivery of the summons. There is no such mandatory requirement in law that the person upon whom the summons have been served under Rule 16 must be identified by a witness.

Bagicha Ram, process server was examined by the

respondent/plaintiff to prove service of summons upon Col. Jagjit Singh vide endorsement dated 01.11.2001. Under Order 9 Rule 13 CPC, irregularity in service of summons is not a ground for setting aside ex-parte decree if the Court is otherwise satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. In this view of the matter, I find myself unable to accept contention of the petitioner that since the report made by the process server does not contain reference to the person who identified Col. Jagjit Singh at the time of his purported service, it amounts to an illegality and a ground for setting aside ex-parte decree.

Col. Jagjit Singh could not be examined as he passed away before the application for setting aside ex-parte decree was filed. However, perusal of the endorsement with regard to service makes it evident that the person who put his signatures in token of acknowledgment of service also made an endorsement above his signature to the following effect:-

'received summons with copy of plaint'

It is difficult to accept that if the respondent/plaintiff wanted to fabricate report qua service, he would have taken the risk of even writing something more than initials/signatures of the defendant.

Perusal of the application for setting aside ex-parte decree would reveal that no such averment has been raised by the applicants that the summons issued by the Court for 07.11.2001 does not bear the hand writing and signatures of Col. Jagjit Singh. It is neither the plea of the

applicants that Col. Jagjit Singh had not been putting his initials or had been putting his full signatures on the documents. It is for the first time when Navinder Singh appeared in the witness box and tendered into evidence his affidavit by way of examination-in-chief that he brought forth an after thought story that his father used to write his full name while signing on the documents as Jagjit Singh Sidhu and he never put initials on a document. There cannot be dispute about the settled position in law that evidence beyond pleadings cannot be looked into much less accepted. It appears that as the applicants were finding it difficult to get away from endorsement on the summons qua service of Col. Jagjit Singh, they concocted a story of full signatures and initials. Statement of Navinder Singh is conspicuously silent if the endorsement on the summons 'Received with copy of plaint' is not in the hand-writing of his father. Similarly, the so called expert examined by the applicants before the appellate court has not bothered to compare standard hand-writing of Col. Jagjit Singh with disputed writing on the summon containing aforesaid endorsement. In this view of the matter, it can be safely held that the applicants failed to adduce satisfactory much less cogent evidence that endorsement on the summons qua personal service of Col. Jagjit Singh is not made by the deceased himself. The mere fact that on the passport (Annexure P9) issued from Sweden bears full signatures of Col. Jagjit Singh is not at all sufficient to accept contention of the petitioner that either Col. Jagjit Singh had not been putting his initials or short signatures by way of acceptance of service of

summons is not made in the hand of Col. Jagjit Singh. I would hasten to add that counsel for the petitioner has failed to point out any discrepancy/contradiction in the testimony of Bagicha Ram, process server to substantiate plea of the applicants that report on the summons issued for 07.11.2001 is the result of manipulation by the respondent in connivance with process serving agency of the Court. That being so, the petitioner cannot derive any advantage to his contention from the testimony of so called hand-writing expert. This apart, science of hand-writing comparison is not a perfect science. Testimony of an hand-writing expert is of fragile nature when otherwise such like experts always toe to the line of the party who has availed of their services. Analysed from any angle, applicants have failed to make out a case to interfere in the well founded orders passed by the Courts below, on any ground whatever.

For the foregoing reasons, the petition fails and is accordingly dismissed in limine.

25.01.2018
ashok

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned:	Yes / No
Whether reportable:	Yes / No