

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

**CR-4670-2014 (O&M)
Decided on: May 10, 2018.**

HIMMAT SINGH

.... Petitioner

Versus

RAJESH KUMAR

..... Respondent

CORAM: HON'BLE MR. JUSTICE KULDIP SINGH

Present: Mr. Prem Chand Chaudhary, Advocate
for the petitioner.

Mr. Diwan S. Adlakha, Advocate
for respondents No. 2 and 4.

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KULDIP SINGH, J(ORAL)

Impugned in the present revision is the judgment dated 17.12.2013 passed by the Court of learned Additional District Judge, Yamuna Nagar at Jagadhari affirming the order dated 19.02.2011 passed by learned Additional Civil Judge (Senior Division) Yamuna Nagar at Jagadhari vide which an application filed under Order IX Rule 13 CPC, 1908 by defendant-petitioner for setting aside the ex-parte order dated 28.02.2006 and ex-parte decree dated 26.02.2008 was dismissed. The background of the case is that Rajesh Kumar-plaintiff filed a suit for possession by way of specific performance of the agreement of sale dated

10.06.2004 regarding land measuring 12 kanals 0 marlas situated at village Karkauli, Tehsil-Chhachhrauli, District Yamuna Nagar. It was prayed that out of total sale consideration of ₹ 5,00,000/-, ₹ 3,00,000/- were paid as earnest money. The sale deed was to be executed on or before 30.06.2005. Defendant had taken a loan of ₹ 30,000/- on this land. In that suit the summons were sent to the petitioner/defendant twice but these were not served and ultimately vide order dated 01.02.2006 notice to the defendant was again ordered to be issued on filing of process fee for 28.02.2006. On the said date following orders was passed:-

“Registered AD issued to the defendant received back with the report of refusal. Summon issued by this court not received back served or unserved. Repeated calls made since morning but none has appeared on behalf of defendant. It is 1.35 p.m. Waited sufficiently. It appears that the defendant is not interested to appear and contest the, present suit, therefore defendant is proceeded against ex parte”.

Therefore on account of refusal to receive a registered letter/AD the defendant/petitioner was proceeded against ex parte. Thereafter, the statement of the plaintiff was recorded and suit was decreed against ex parte on 26.02.2008. Thereafter after about 07 months, the defendant petitioner instituted the present application under Order IX Rule 13 CPC, 1908 on 29.09.2008 for setting aside the ex parte judgment and decree dated 26.02.2008 on the ground that he was not duly served in this case.

On the other hand the plaintiff took the stand that defendant had refused to receive the summons and was ordered to be proceed ex parte and the trial Court framed the following issues:-

- 1. Whether exparte order dated 28.02.2006 and the exparte judgment and decree dated 26.02.2008, are liable to set aside on the grounds mentioned in the application? OPA*
- 2. Whether the present application is not maintainable in the present form? OPR*
- 3. Whether the applicant is estopped from filing the present suit by his own act and conduct? OPR*
- 4. Whether the application is time barred? OPR*
- 5. Relief.*

The trial Court while deciding the matter believed the statement of Rajesh Kumar RW-1 Postman who deposed that he had gone to get the service of registered letter effected. Himmat Singh-defendant met him and after seeing and reading the same, refused to receive the said letter. The trial Court also noticed that when earlier, the plaintiff has sent a legal notice through registered letter, same Postman had tried to effect the service and then also the defendant had refused to accept the said notice. Therefore, the self serving statement of applicant-petitioner was not believed and relying upon the statement of Postman, it was held that defendant was duly served. Consequently, the application was dismissed. The appeal against the said order was dismissed by the learned Additional District Judge, Yamuna Nagar at Jagadhari on 17.12.2013.

I have heard learned counsel for the parties. First of all it is necessary to reproduce the provisions of Order IX Rule 13 CPC as under:-

13. Setting aside decree ex parte against defendant.- *In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an Order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an Order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:*

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be sent aside as against all or any of the other defendant also:

Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation : Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the

appellant has withdrawn the appeal, no application shall lie under this rule of setting aside the ex parte decree.

A perusal of the said provisions shows that the ex parte decree/order can be set aside on the ground that summons were not duly served or the defendant was prevented by any sufficient cause from appearing when the suit was called for hearing. The proviso to said rule makes it clear that mere irregularity in service of summons is no ground to set aside the ex parte decree, if the court is satisfied that the defendant had the notice of date of hearing and has sufficient time to appear and answer the plaintiff's claim. The perusal of interim order dated 01.02.2006 shows that when on the earlier occasion the summons were received back un-served, the Court issued the fresh notice to the defendant on filing of process fees, it was not specified that the summons should be sent through registered letter with acknowledgment due. In any case, it appears that plaintiff, in place of obtaining the ordinary summons, filed a registered letter which was received back with the report of Postman. Now the question would be whether in such a case the report of Postman could be believed or not? The history of the case would show that plaintiff in this case is a commission agent and defendant is a farmer. Defendant claimed that he was selling the produce on the commission agent firm of the plaintiff. In this case, the total sale consideration for 1½ Kilas was ₹ 5,00,000/- out of which ₹ 3,00,000/- was stated to be paid as earnest money and for payment of balance of sale consideration, a time of one year was given. Now the question would arise

whether this Court should blindly believe the Postman or not? I am of the view that there could be some ground to suspect the statement of Postman. First of all, no registered letter was ordered to be filed. Postman states that defendant had refused to accept the service by way of registered letter. The registered letter in the Court was found open and only the copy of summons was found, but a copy of plaint was not with the summon. Therefore, it cannot be said that the defendant had the notice of the date of hearing. Moreover, there is no reason why the defendant will allow the ex parte decree to be passed against him regarding the land which is his bread and butter. Considering the facts of the case, this Court is of the considered view that the matter needs to be decided on merits. Learned counsel for the respondent has referred to the authority of Hon'ble Supreme Court in **Parimal Vs. Veena @ Bharti;2011(3) SCC 545** and has prayed that the ex parte judgment decree cannot be set aside in routine in the case where the registered letter was not received back. However in the present case registered letter was never ordered to be filed by the Court. Each case has its own facts and background and each case has to be decided on its own merits. Learned counsel for the respondent has also relied upon the authority of **Dev Karan Vs. Bhagwan Dass; 1991(2) R.R.R 303** to press that the application has been filed beyond limitation. The limitation is from the date of knowledge. The applicant has stated that when he came to know about the passing of ex parte decree, he immediately filed the application.

In view of the above, revision is allowed. The impugned order dated 17.12.2013 passed by the Court of learned Additional District

Judge, Yamuna Nagar at Jagadhari affirming the order dated 19.02.2011 passed by Additional Civil Judge (Senior Division) Yamuna Nagar at Jagadhari are set aside. The suit is restored to its original number and ordered to be decided on merits.

In view of the above the revision petition is allowed.

Since the main petition is allowed, pending Misc. application, if any, stands disposed of.

(KULDIP SINGH)
JUDGE

May 10, 2018.
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Whether speaking/reasoned: Yes

Whether reportable: No