

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Civil Revision No.7550 of 2017(O&M)

Date of Decision:09.01.2018

Prabhwati Devi & anr.

...Petitioners

V/S

Gurdish Singh.

...Respondent

CORAM: HON'BLE MR. JUSTICE B.S.WALIA

Present: Mr.Vishal Moudgil, Advocate for the Petitioners.
Mr.Ritu Raj Singh, Advocate for the respondent/Caveator.

B.S.Walia, J. (Oral).,

1. Petitioners seek setting aside of impugned judgment Annexure P-1 dated 09.09.2017 passed by the learned District Judge, Fatehgarh Sahib, dismissing appeal against order Annexure P-2 dated 08.04.2016 passed by the learned Civil Judge (Jr. Div.), Amloh in Civil Misc. No.23/24.07.2016 dismissing the application under Order 9 Rule 13 CPC seeking setting aside of exparte judgment and decree dated 17.02.2010 as well as exparte order dated 09.11.2006 in Civil Suit No.291 of 18.07.2006 in case titled as '*Gurdish Singh Vs. Prabhawati Devi and another*' as well as subsequent proceedings thereto.
2. Facts of the case as set up in the application under Order 9 Rule 13 CPC are that the respondent-plaintiff filed a suit for possession on the basis of sale deed dated 06.05.2004 and the same was decreed exparte by the learned Trial Court on 17.02.2010 against the defendants-petitioners, that defendant-petitioner No.1 was an illiterate housewife while defendant-petitioner No.2 only knew how to sign but could not read or right and the respondent-plaintiff being a clever person had committed fraud with the

defendants-petitioners and got exparte judgment and decree. Plea was that the defendants-petitioners never received any summons from the Court nor was any publication effected upon the defendants-petitioners and they had no knowledge of the suit or the proceedings in the same, therefore could not appear before the Court, leading to their being proceeded exparte vide order dated 09.11.2006, eventually leading to exparte judgment and decree dated 17.02.2010. It was further pleaded that the defendants-petitioners acquired knowledge of the exparte judgment and decree on 28.06.2010 when the respondent-plaintiff along with bailiff came to their house to take possession of the house and told them that the plaintiff-respondent had obtained a decree against them whereupon the defendants-petitioners approached engaged a counsel who inspected the case file 16.07.2010 i.e. the first opening day of the Court after summer vacations, therefore the application under Order 9 Rule 13 of the CPC was filed within limitation from the date of knowledge. It was further pleaded that the absence of the defendants-petitioners from the Court was not intentional and they being contesting defendants were required to be heard on merit, that there were valid and sufficient grounds for the setting aside of exparte order dated 09.11.2006 as well as exparte judgment and decree dated 17.02.2010.

3. Upon notice of the application, the plaintiff-respondent appeared and contested the application by filing reply that the defendants-petitioners were duly served in the suit, therefore, there was no question of any publication, that despite valid service, the defendants-petitioners, did not appear intentionally, therefore, were rightly proceeded exparte on 09.11.2006 and

the suit decreed vide judgment and decree dated 17.02.2010. It was further stated that in the execution proceedings, the Court passed order for delivery of possession of the property in question to the plaintiff and the Naib Tehsildar, Mandi Gobindgarh was deputed to deliver the possession of the suit property to the respondent/plaintiff/decreed holder and when the concerned Kanugo deputed by the Naib Tehsildar went to effect delivery of possession, the defendants-petitioners obstructed delivery of possession on which the Kanugo made a report seeking police help. It was further stated that the application moved by the defendants-petitioners was not within time as personal service having been effected, limitation could not be said to commence from the date of knowledge as the defendants-petitioners had full knowledge and were aware of the pendency of the suit filed by the plaintiff against them and they had intentionally and willfully not put in appearance leading to exparte decree being passed in favour of the respondent-plaintiff, that the judgment and decree was valid, therefore, the respondent-plaintiff was entitled to get possession of the suit property from the defendants-petitioners. It was further stated that the defendants-petitioners had no direct interest in the suit property as defendant-petitioner No.1 had sold the suit property to one Charan Singh vide registered sale deed dated 16.01.2003, who had further sold the same to the respondent-plaintiff vide registered sale deed dated 06.05.2004 and further that the application was hopelessly time barred and no sufficient ground was made out for setting aside exparte judgment and decree as well as exparte order. In the aforementioned background, prayer was made for dismissal of the application.

4. Learned Counsel for the petitioner contended that the learned trial

Court vide order dated 08.04.2016 and the learned Appellate Court vide judgment dated 09.09.2017 failed to take into account the fraud played upon the defendants-petitioners by the plaintiff-respondent in connivance with late Shri Charan Singh s/o Sadhu Singh r/o Ward No.9, Mandi Gobindgarh, Tehsil Amloh, District Fatehgarh Sahib. It was further contended that defendant-petitioner No.1 had purchased the property in dispute from Smt. Charanjit Kaur w/o aforesaid Late Shri Charan Singh vide registered sale deed dated 14.02.2001 for Rs.40,000/- Annexure P-3 and that on 16.01.2003 late Shri Charan Singh defrauded defendant-petitioner No.1, an illiterate house wife by exercising undue influence over her by projecting that he was getting her a bank loan, instead got her property registered in his own name vide registered sale deed dated 16.01.2003 for a meager amount of Rs.45,000/- i.e. Annexure P-4, but till his death, did not approach a Court seeking possession of the disputed property. It was further contended that instead Charan Singh sold the suit property to Gurdish Singh s/o Labh Singh i.e. respondent-plaintiff for Rs.1,10,000/- vide registered sale deed dated 06.05.2004 i.e. Annexure P-5.

5. It needs noticing here that the learned trial Court dismissed the application filed under Order 9 Rule 13 CPC for setting aside exparte judgment and decree dated 17.02.2010 and exparte order dated 09.11.2006 passed by the learned Civil Judge (Jr. Div.), Amloh in the aforementioned case by inter-alia taking into account that defendant-petitioner No.1 had filed a suit against the plaintiff-respondent for permanent injunction which was dismissed in default and defendant- petitioner No.1 did not appear intentionally in that case also.

6. The following issues were framed by the learned Civil Judge(Jr. Div)
Amloh in the application under Order 9 Rule 13 of CPC.

- “1. Whether the exparte judgment and decree dated 17.02.2010 and exparte order dated 09.06.2006 are liable to be set aside? OPA.*
- 2. Whether the application of applicants/defendants is hopelessly time barred? OPR.*
- 3. Whether applicants/defendants have no locus standi to present application? OPR*
- 4. Whether application is not maintainable in the present form? OPR.*
- 5. Relief”*

7. The learned trial Court came to the conclusion that defendant-petitioner No.1 i.e. Prabhawati Devi was duly served on 30.10.2006 as she had affixed her thumb impression on behalf of self as well as her husband Shashi Kant in token of receipt of summons and was proceeded exparte on 09.11.2006 on failure to put in appearance. Learned trial Court also took into account that earlier Prabhawati Devi had filed a suit against plaintiff-respondent Gurdish Singh and Charan Singh bearing No.208-A of 01.07.2005 which was decided on 09.11.2005. It was observed that the defendant in that case and respondent in the application under Order 9 Rule 13 CPC took the same plea regarding execution of sale deed dated 16.01.2003 by Prabhawati Devi in favour of Charan Singh and agreement to sell dated 06.05.2004 by Charan Singh in favour of Gurdish Singh. The said suit was dismissed in default on 09.11.2005. The learned trial Court took into account that defendant No.1-petitioner-Prabhawati Devi had filed a suit for injunction and when the plea of respondent came into picture by way of written statement regarding execution of agreement to sell by Prabhawati in favour of Charan Singh and by Charan Singh in favour of Gurdish Singh even then, defendant-petitioner No.1-Prabhawati did not challenge the sale deed dated 16.01.2003 by her in favour of Charan Singh and agreement to

sell dated 06.05.2004 by Charan Singh in favour of Gurdish Singh i.e. respondent-plaintiff herein, and on the said basis came to the conclusion that the same clearly reflected that the defendants-petitioners were having knowledge regarding agreement to sell dated 16.01.2003, but in spite of that the defendants-petitioners did not seek setting aside of sale deed dated 16.01.2003 and 06.05.2004.

8. Learned trial Court also took into account that Mutation No.2746 had been sanctioned in favour of Charan Singh and Mutation No.2285 had been sanctioned in favour of Gurdish Singh and Charan Singh and the same clearly reflected that the defendants-petitioners were in the knowledge regarding the sale deed but in spite of that they neither filed any suit nor bothered to appear in the suit filed by the plaintiff-respondent, despite being duly served and that application under Order 9 Rule 13 of CPC had been filed by Prabhawati and Shahsi Kant, though Prabhawati had not been examined in the case.

9. On the basis of position noted above, the learned trial Court decided issue No.1 against the defendant-petitioner and in favour of plaintiff-respondent and in view thereof dismissed the application under Order 9 Rule 13 CPC.

10. Aggrieved, defendants-petitioners filed an appeal against order dated 08.04.2016 passed by the learned Civil Judge (Jr. Div.), Amloh dismissing the application under Order 9 Rule 13 CPC.

11. The learned District Judge, Fatehgarh Sahib took into account that the defendants-petitioners had filed appeal i.e. MCA No.20 of 18.02.2014 which was decided by the then Additional District Judge, Fatehgarh Sahib vide order dated 12.02.2016 remanding the case to the learned Lower Court with a

direction to decide the matter afresh within a period of two months from the date of order by giving specific findings on all the issues framed in the case.

The learned District Judge took into account the plea of the defendants-petitioners that the learned trial Court had failed to take into account that the respondent-plaintiff had not examined any process server to prove that the defendants-petitioners were rightly proceeded against exparte as also the contention that it was incumbent upon the learned Lower Court to ensure that the defendants-petitioners had willfully remained absent in spite of knowledge of the suit and the same could be proved only by examining the process server, that the learned Lower Court had failed to take into account that the alleged summons, which were the very basis of proceedings exparte, did not bear any signatures of the witness identifying the defendants-petitioners. The learned District Judge also took into account the plea that the defendants-petitioners never sold their residential house to Charan Singh from whom the respondent-plaintiff allegedly purchased the house nor they had sold the same to the respondent-plaintiff, as also that the plea that respondent-plaintiff in connivance with Charan Singh has committed fraud with the defendants-petitioners to grab their only residential house.

12. The learned District Judge also took into account the plea that defendant-petitioner No.2, i.e. Shashi Kant Singh i.e. AW-1 testified that the defendants-petitioners never received any summons from the Court in the case in question nor summons were served upon the defendants-petitioners nor any publication was served upon the defendants-petitioners, that they had no knowledge regarding the said proceedings and due to said reason, they had not appeared before the Court due to which there were proceeded against

exparte on 09.11.2006. Besides, AW-1 testified that the defendants-petitioners acquired knowledge of the said exparte judgment and decree on 28.06.2010 when the respondent-plaintiff along with bailiff came their house to take possession and disclosed to them that the plaintiff-respondent had obtained an exparte judgment and decree whereupon the defendants-petitioners approached the Court and engaged a counsel, but due to summer vacations, their counsel could inspect the case file only on 16.07.2010 i.e. the first opening day of the Court. Consequently, application filed under Order 9 Rule 13 CPC was within time.

13. On behalf of the defendants-petitioners, it was also contended that report of the process server was allegedly bearing thumb mark of defendant-petitioner No.1-Prabhawati but there were no signatures of any witness identifying said defendant-petitioner and further that in the registered sale deed, it was mentioned that possession was handed over, whereas even as on date, defendants-petitioners were in possession of the house in question.

14. The learned District Judge also took into account that onus to prove issue No.1 i.e. whether the judgment and decree dated 17.02.2010 and exparte order dated 09.06.2006 was liable to be set aside was on the defendants-petitioners and that only Shashi Kant i.e. defendant-petitioner No.2 had appeared as AW-2 *and neither petitioner-defendant No.1-Prabhawati Devi appeared in the witness box nor process server had been examined by the defendants-petitioners.* Learned District Judge also took into account that Prabhawati had filed suit against Gurdish Singh and Charan Singh bearing 208A of 1.07.2005 which was decided on 09.11.2005 and in that suit also the defendants-petitioners had taken the same plea regarding

execution of the sale deed dated 16.10.2003 by Prabhawati in favour of Charan Singh and agreement to sell dated 06.05.2004 by Charan Singh in favour of Gurdish Singh, but the said suit was dismissed in default on 09.11.2005 and Prabhawati had not challenged sale deed dated 16.01.2003 executed by her in favour of Charan Singh and agreement to sell dated 06.05.2004 executed by Charan Singh in favour of Gurdish Singh and on the said basis observed that the said facts clearly revealed knowledge of the defendants-petitioners regarding the sale deed.

15. Learned District Judge also took into account that as per Article 123 of the Limitation Act, limitation for challenging judgment and decree was 30 days from the date of judgment in case summons were served upon a party in the light of decision of the Hon'ble Supreme Court in “Sneh Gupta Vs. Devi Sarup and others” 2009(2) Civil Court Cases 404.

16. I have considered the submission made by learned counsel for the parties. The matter revolves around the question as to whether service was effected on the defendants-petitioners or not? It has come on record that AW-1 Sashi Kant Singh testified that the defendants-petitioners never received any summons from the Court nor summons were served upon the defendants-petitioners nor any publication was effected upon the defendants-petitioners and they had no knowledge regarding the said proceedings and further they acquired knowledge of the exparte judgment and decree on 28.06.2010 only when the respondent-plaintiff along with Baliff came to their house to take possession of the same. Report of the process server allegedly bears thumb mark of petitioner-defendant No.1-Prabhawati, but there is no signature of any witness identifying the said defendant-petitioner.

17. This Court in case titled as 'Karnail Singh Vs. Dina Nath and others', 1985 (2) PLR 477, considered a somewhat similar proposition and after taking into account that in case a defendant against whom ex parte decree is passed comes to Court praying for setting aside of ex parte decree on the ground that he was not served, then onus would be in the negative form on him and his statement on oath denying service would shift onus on the plaintiff to disprove his statement and in order to rebut onus it would be necessary to produce the Bailiff in Court so that in case he had made a statement against the parties seeking setting aside of ex parte proceedings, he could be cross-examined by said party. Relevant extract of the aforementioned decision is reproduced hereunder :-

3. *After hearing the learned counsel for the parties and on perusal of the record, I am of the view that the Court below seriously erred in law and failed to exercise their jurisdiction, in not setting aside the ex-parte decree. This Court has held authoritatively that in case the defendant against whom ex-parte decree is passed, comes to Court praying for setting aside the ex-parte decree on the ground that he was not served onus would be in the negative form on him and his statement on oath denying service would shift the onus on the plaintiff to dis-prove his statement. On the facts of this case, in view of the denial of the tenant the onus shifts to the landlords.*

4. *To rebut the the onus, it was necessary to produce the Bailiff in Court so that in case he made statement against the tenant, he could be cross-examined by him. The non-production of Bailiff in Court goes a long way against the landlords.*

5. *A reading of the report on the summons shows that the summons were presented to the tenant on 13th April, 1974 when he refused to accept the same. Then the report says that the summons could not be pasted on the door because the Process-Server had only one copy. Order 5 Rule 17 of the Code of Provides that in case the defendant refuses to sign the acknowledgment of service of summons, the serving officer has to 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 and to return the original to the Court from which it was issued with a report endorsed thereon and the circumstances under which he did so and he has to mention the name and address of the person in any, by whom the premises was identified and in whose presence the copy was affixed.*

6. *The totality of facts clearly goes to show that there was no service on the defendant and a fake report was obtained by one of the landlords and that is why the Process-Server was not produced as a witness in the Court.*

7. *Then it is the requirement of law that summons must be accompanied by the copy of the plaint and unless this is done mere presentation of summons without copy is no service. It is not even remotely apparent from the copy of the summons on record that copy of the plaint was attached with, the summons and was offered to the tenant. Even Bhagat*

Ram one of the landlords, has not stated that copy of the plaint was offered and he refused to accept the same. Hence if the plaint was not presented along with the summons it cannot be said that there was due service.

8. *The decision of the two Courts below is illegal and without jurisdiction because they did not keep in view the correct legal position enunciated by this Court to the effect that initial onus on the defendants stand discharged by making a statement on oath by him denying service. The decision of the two Courts below and the trial of the case has gone as if it was the tenant who was to lead evidence which was obviously of a negative nature. If correct legal proposition had been kept in view then on failure of the landlords to produce the Process-Server and to prove that copy of the summons was accompanied with the copy of the plaint, they would have held that there was no due service. Accordingly, I reverse the decision of the two Courts below and hold that there was no due service on the tenant.*

9. *Coming to the point of limitation, once there is no due service then the limitation would be counted from the date of knowledge. According to the defendant he acquired knowledge on 1st March, 1975. No evidence to the contrary has been led by the landlords. Hence, the application is clearly within limitation and the decision to the contrary is hereby reversed.*

Since in the case in hand, defendant-petitioner No.2 i.e. AW-1 had clearly stated that the defendants-petitioners were not served, onus would be in the negative form on him, and his statement on oath denying service would shift the onus on the respondent-plaintiff to disprove his statement. Accordingly, in view of the evidence of AW-1 denying service, the onus shifts on to the respondent-plaintiff. In that situation, it was necessary for the process server to have been produced in Court for his cross-examination by the defendants-petitioners.

18. Both the Court below have proceeded on the assumption that there was due service of summons on the defendants-petitioners whereas once it was stated on oath by defendant-petitioner No.2 that service was not effected upon them, it was incumbent on the respondent-plaintiff to produce the process server to prove due service on the defendants-petitioners. The same not having been done, service having been effected on the defendants-petitioners cannot be deemed to have taken place. Accordingly, the decision of the Court's below is unsustainable. Once due service is not established,

limitation for setting aside ex parte judgment and decree would count from the date of knowledge. Accordingly, in the circumstances, the application under Order 9 Rule 13, CPC is held to be within limitation. Since, service of summons on the petitioners defendants has not been established due to non examination of the process server, therefore the exparte proceedings and exparte judgment and decree are liable to be set aside.

19. In the light of the position as noted above, the revision petition is allowed, judgment of the trial Court dated 08.04.2016 dismissing the application under Order 9 Rule 13 CPC as well as order dated 09.09.2017 dismissing the appeal against order of the trial court dated 08.04.2016 are set aside. Consequentially, exparte order dated 09.11.2006 as well as ex parte judgment and decree dated 17.02.2010 are set aside.

20. Parties through their counsel are directed to appear before the trial Court on 01.02.2018. Learned trial Court would give a date to the defendants-petitioners to file their written statement. Learned trial Court would thereafter proceed to decide the civil suit in accordance with law. Since the civil suit is of the year 2006, it is deemed appropriate to direct the learned trial court to conclude the proceedings expeditiously and decide the case preferably within nine months from 01.02.2018.

21. Revision petition allowed in the aforementioned terms.

(B.S. WALIA)
JUDGE

09.01.2018
Anjal

Whether speaking/reasoned : *Yes / No*

Whether reportable : *Yes / No*