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

CM No. 606-CII of 2019 and
CM No. 1443-CII of 2019 in/and
CR No. 2373 of 2018 (O&M)
Date of Decision: 05.02.2019

Surjit Singh

-Petitioner

Vs

Punjab Wakf Board through Chief Executive Officer

-Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Rahul Bhargava, Advocate,
for the petitioner.

Mr. Ghulam Nabi Malik, Advocate,
for the respondent.

RAJ MOHAN SINGH, J. (ORAL)

CM No. 1443-CII of 2019

With the concurrence of learned counsel for both the parties, the main case is ordered to be heard today.

Application stands disposed of.

Main case

This revision petition has been preferred by the petitioner against the order dated 06.02.2018 passed by Presiding Officer, Wakf Tribunal, Amritsar vide which the application filed by the petitioner under Order 9 Rule 13 CPC for

setting aside exparte judgment and decree dated 05.04.2010 was dismissed.

Respondent- Punjab Wakf Board filed a suit for possession of land measuring 30K-8M and for mesne profit for unauthorized use and occupation of the land by the defendant-petitioner.

Defendant-petitioner was proceeded against exparte vide order dated 18.09.2009 and thereafter, plaintiff led exparte evidence and exparte judgment and decree was passed on 05.04.2010.

An application was filed by the defendant-petitioner under Order 9 Rule 13 read with Section 151 CPC for setting aside exparte judgment and decree dated 05.04.2010 passed by Wakf Tribunal, Amritsar.

Paras No.3,4 and 5 of the application read as under:-

“3. That the applicant is an old, aged, weak and heart patient and is having the age of 85 years and is a senior citizen. The plaintiff has given wrong address of the applicant/defendant in the plaint whereas the applicant/defendant is residing at his farm house which is at a distance of about 1 KM

from abadi Gujjarpura, Tehsil Ajnala, District Amritsar. The fact remains that no process sever ever approached the applicant nor any chowkidar nor any post-man ever approached the applicant/defendant for his service nor any munadi was ever effected nor any publication was effected/made in the newspaper and the plaintiff in a clandestine manner obtained previously an exparte proceedings order against the applicant on 18-9-09 and thereafter obtained an exparte judgment and decree on 5-4-10. Had the appellant been served he must would have appeared in the court and the fate of the case would have been otherwise.

4. That the applicant came to know about the exparte judgment and decree only when the DH filed execution before the predecessor of this Hon'ble Court and the JD/applicant earlier engaged Sh. D.S. Gill, Adv. Asr. and filed objections in the execution and also applied for certified copy of the exparte judgment and decree for the purpose of moving an application under O. 9 R. 13/Sec. 151 CPC

for setting aside the exparte judgment and decree dt. 5-4-10.

5. That the certified copy of the judgment and decree was delivered to the applicant on 16-9-13 and in the meanwhile the applicant being an old and aged person and a heart patient, suffered heart attack and he remained admitted in different hospitals and as such, he could not file the application immediately. Now after recovering from his illness he engaged Shri M.S. Bhatti, Advocate, Asr. and as such, the instant application under O. 9 R. 13/Sec. 151 CPC for setting aside the exparte judgment and decree dated 5-4-10 is filed today in this Hon'ble Court. However, in order to avoid any complication which may arise later on, a separate application u/s 5 of the Limitation Act is also being filed herewith, for the condonation of delay in filing the application under O. 9 R. 13/Sec. 151 CPC.”

Perusal of the stand taken by the defendant-petitioner would show that the petitioner allegedly came to know about factum of exparte judgment and decree only during

execution.

Wakf Tribunal, Amritsar vide the impugned order dated 06.02.2018 dismissed the application after observing that even if it is assumed that the petitioner was not validly served, then also the onus was upon him to prove as to when he got the knowledge about exparte judgment and decree passed by the Tribunal.

The stand taken by the petitioner in the application in respect of acquiring knowledge of exparte judgment and decree was negated on the basis of proviso to Order 9 Rule 13 CPC and it was held that the petitioner was having the knowledge about exparte judgment and decree, therefore, in terms of proviso to Order 9 Rule 13 CPC, filing of application on 22.02.2014 after a delay of 04 years was not liable to be entertained and the same was dismissed.

Learned counsel for the petitioner vehemently submitted that as per the impugned order itself, petitioner was not lawfully served. Onus was on the decree holder to prove that the petitioner was lawfully served by means of process of the Court. In case of refusal to accept summons, petitioner was allegedly served by means of munadi and affixation in the presence of Chowkidar namely Chanan Singh. Report of process server on the summons issued on 29.07.2009 and

munadi summons issued on 18.09.2009 were required to be proved by the respondent. The process server has not been examined nor the Chowkidar- Chanan Singh, therefore, the aforesaid reports could not be proved by way of lawful means.

Mohd. Nusrat was examined as RW1 and Rashid Mohammad was examined as RW2. Mohd. Nusrat was not produced for cross-examination and was given up by the respondent by making statement dated 06.07.2017.

Statement of RW1 cannot be considered in evidence. Statement of Rashid Mohammad was not sufficient to hold that the petitioner was validly served by any lawful process.

Despite noticing the aforesaid incriminating facts, the Tribunal proceeded to hold that the petitioner was having knowledge regarding exparte judgment and decree from his own stand taken in the application as the information received by him from Patwari was conspicuously silent about the date, month and year of acquiring knowledge from him.

Exparte judgment and decree was passed on 05.04.2010. Limitation for filing application for setting aside exparte judgment and decree was of 30 days in view of Article 123 of the Limitation Act and the application was filed on 22.02.2014 i.e. after a delay of about 04 years.

Learned counsel for the petitioner submitted that the

decree obtained by fraud attracts no limitation as the same is a nullity. Fraud vitiates all solemn act and puts an end to everything. The decree obtained on fraud can be ignored at any stage of litigation.

Learned counsel relied upon **S.P. Changalvaraya Naidu (dead) by LRs. vs. Jagannath (dead) by LRs., 1994 AIR (SC) 853; Hamza Haji vs. State of Kerala and another, 2006(7) SCC 416** and **A.V. Papayya Sastry and ors. vs. Government of A.P. and ors, 2007(2) RCR (Civil) 431** and contended that limitation starts from the date on which fraud is detected and the decree passed even by the highest Court can be interfered with in case the same is found to be fraudulent at the instance of the plaintiff.

Petitioner has specifically pleaded in the application that he applied for certified copy of judgment and decree after acquiring knowledge of the same and the copy was supplied only on 16.09.2013. Plaintiff being an old man aged 85 years and heart patient could not act promptly after obtaining certified copy and therefore, further delay has occasioned in moving the application under Order 9 Rule 13 CPC.

On the other hand, learned counsel for the respondent vehemently submitted that in the application under

Order 9 Rule 13 CPC, petitioner has nowhere pleaded the date of acquiring knowledge from Patwari. Execution was filed on 21.01.2013. Though, date of knowledge has not come forth but the certified copy of judgment and decree was obtained on 16.09.2013. Petitioner had also filed an objection in the execution without mentioning the date of filing of such objection but reply filed to the said objection was indicative of the fact that the same was filed on 20.07.2013. This fact would further deteriorate the factual matrix in favour of the petitioner and the proviso to Order 9 Rule 13 CPC would be attracted. Mere irregularity in service of summon would not nullify the effect of passing of exparte judgment and decree.

I have considered the arguments made by learned counsel for the parties.

Perusal of the impugned order would show that report of process server on summons as well as on munadi summons could not be proved by the respondent with reference to any evidence on record. Process server was not examined nor the Chowkidar was examined.

Mohd. Nusrat who was examined as RW1 was never brought for cross-examination, therefore, his testimony could not be relied upon in evidence and testimony of second witness i.e. Rashid Mohammad- RW2 could not be relied in context of

valid service upon the petitioner.

Once it was held by the Wakf Tribunal itself that the petitioner was not lawfully served, therefore, proviso to Order 9 Rule 13 CPC cannot be applied on the ground that there was mere irregularity in the service, rather it is a case of no service.

As per requirement of Order 5 Rule 17 CPC, in the event of refusal by the defendant, process server was required to make affixation of summon on some conspicuous place and that process should have been witnessed by some independent witness. In the absence of any such compliance, there cannot be any valid service of ordinary process of summon. Substituted service can only be resorted to in case ordinary process of service is found to be not viable. In adopting substituted mode, the Court is required to record reasons and its satisfaction that the defendant cannot be served by means of ordinary process. No such material has been produced by the respondent to show that the petitioner was ever validly served by means of ordinary process or by substituted mode of service by proving report of process server in the context of munadi summons. Service aspect of the case hits to the hilt.

According to the petitioner, he was fraudulently shown to be served and proceeded against exparte. Instant of fraud would negate all solemn acts.

In view of ratio of cited precedents, filing of application on detection of fraud cannot be held to be beyond limitation.

Even otherwise, in view of facts and circumstances of the case, I deem it appropriate to condone delay of 04 years in filing the application under Order 9 Rule 13 CPC. Allowing the defendant to contest the litigation on merits in the circumstances of the case would be in consonance with principles of natural justice.

For the reasons recorded hereinabove, I accept this revision petition by setting aside the impugned order.

Normal consequences to follow.

05.02.2019
Jyoti Yadav

(RAJ MOHAN SINGH)
JUDGE

1. Whether speaking/reasoned : Yes/No
2. Whether reportable : Yes/No