

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

**CR No.4528 of 2018(O&M)
Date of Decision-31.01.2019**

Avtar Singh

... Petitioner

Versus

Joginderpal etc.

... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Dinesh Kumar, Advocate for
Mr. M.K. Singla, Advocate for the petitioner.

RAJ MOHAN SINGH, J.

[1]. Petitioner has preferred this revision petition against the order dated 24.05.2018 passed by Additional District Judge, Fatehgarh Sahib and order dated 18.04.2014 passed by Additional Civil Judge (Senior Division), Fatehgarh Sahib vide which application under Order 9 Rule 13 read with Section 151 CPC for setting aside the *ex parte* judgment and decree dated 20.02.2006 passed in Civil Suit No.437 dated 03.11.2014 titled Joginderpal Vs. Bhupinder Singh and others as well as *ex parte* order dated 26.03.2005 was dismissed.

[2]. Notice of motion was issued on 19.07.2018 to respondent No.1 only and status quo regarding possession was ordered to be maintained. As per office report, service was complete.

[3]. Plaintiff/respondent No.1 filed a suit for possession by way of specific performance, declaration and in alternative, for

recovery and permanent injunction. Defendants were proceeded against *ex parte*. The suit was decreed *ex parte* with costs. Sale deed dated 20.12.2002 executed by defendant No.1 in favour of defendants No.2 and 3 was declared null and void and not binding upon the rights of the plaintiff. Plaintiff was held entitled to decree for specific performance in respect of agreement to sell Exs.P1 and P2 and defendant No.1 was directed to execute sale deed on the basis of agreement to sell on receiving balance sale consideration within a period of one month from the date of decree, failing which the plaintiff was held entitled to get the sale deed executed through process of the Court. Defendants No.2 and 3 were restrained from alienating the suit property.

[4]. Defendant No.2 filed an application under Order 9 Rule 13 read with Section 151 CPC for setting aside the aforesaid *ex parte* judgment and decree dated 20.02.2006 and also *ex parte* order dated 26.03.2005.

[5]. The said application was contested by the plaintiff/respondent No.1.

[6]. Trial Court vide order dated 18.04.2014 dismissed the application. Petitioner/defendant No.2 remained unsuccessful even in appeal before the Additional District Judge, Fatehgarh Sahib which was dismissed vide order dated 24.05.2018.

[7]. Learned counsel for the petitioner contended that petitioner/defendant No.2 along with Harjit Singh/defendant No.3 was sought to be summoned on the address of village Ganduan, Tehsil Bassi Pathana, District Fatehgarh Sahib vide order dated 03.11.2004 passed by Additional Civil Judge, Fatehgarh Sahib. Service was incomplete. On 22.11.2004, the trial Court again issued fresh summons for 25.01.2005, but the summons were not received back served or otherwise. Defendant No.3 was reported to be living abroad. Fresh summons issued to the defendants were never served, rather defendant No.1 reported to have refused to accept the summons and thereafter, substituted service was ordered to be effected by means of publication. Learned counsel further contended that petitioner/defendant No.2 and defendant No.3 were never sought to be served in terms of Order 5 Rule 25 CPC which was the prescribed mode of service in case defendant was found to be living abroad. The service could have been effected through their father also as he could have been treated to be an agent on their behalf in case of their living abroad. Father had already executed sale deed dated 20.12.2002 on behalf of the defendants, therefore, it was more appropriate to serve the father of the defendants in the capacity of their agent. No summons were issued to Harbhajan Singh on the given address. No compliance in terms of Order 5 Rule 25 CPC was made. The application was not contested by respondent No.2 Bhupinder Singh who was vendor of the petitioner. The application was contested by the

plaintiff/respondent No.1 alone. Plaintiff/respondent No.1 has not turned up to contest the present revision petition.

[8]. Perusal of the record in the aforesaid context would show that the petitioner was never served by means of ordinary process before ordering substituted service through publication. Defendants No.2 and 3 were legally required to be served in terms of Order 5 Rule 25 CPC. Secondly, the service could have been effected through their father who at the most could have been treated as an agent on their behalf as he was instrumental in executing the sale deed dated 20.12.2002 on behalf of defendants No.2 and 3.

[9]. Since no summons were issued to Harbhajan Singh, therefore, in my considered opinion, Courts below have fallen in error in dismissing the application under Order 9 Rule 13 read with Section 151 CPC. It was onerous duty on the part of the Court to ensure proper service in terms of Order 5 CPC. Substituted service cannot be resorted to straight away without exhausting provision to serve the defendant(s) by means of ordinary process. Without recording satisfaction of the Court that the defendants cannot be served by means of ordinary process, mode of substituted service cannot be resorted to.

[10]. For the reasons mentioned hereinabove, I deem it appropriate to set aside the impugned orders and allow the application under Order 9 Rule 13 read with Section 151 CPC.

This revision petition is accordingly allowed. Normal consequences to follow.

(RAJ MOHAN SINGH)
JUDGE

31.01.2019
Prince

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