

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

**CR No.4846 of 2018(O&M)
Date of Decision: 17.10.2019**

Inderjit Kaur

.....Petitioner

Versus

Amrit Lal

.....Respondent

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

Present:Mr. H.S. Bhullar, Advocate
for the petitioner.

Mr. Ravish Bansal, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Petitioner has preferred this revision petition against the order dated 25.07.2008 passed by Additional Civil Judge (Senior Division), Faridkot, vide which suit of the plaintiff/respondent was decreed after proceeding *ex parte* against the petitioner, order dated 09.09.2015 passed by Additional Civil Judge (Senior Division), Faridkot, whereby application under Order 9 Rule 13 CPC filed by the petitioner was dismissed and order dated 08.05.2018 passed by the

Additional District Judge, Faridkot, vide which appeal filed by the petitioner was dismissed.

[2]. In order to appreciate the controversy in question, photostat record of the trial Court was requisitioned vide order dated 23.05.2019.

[3]. Order dated 27.09.2006 passed by the trial Court reproduced hereasunder:-

“Present: Counsel for the plaintiff.

Suit got by entrustment. Office report seen. Suit be registered. Notice of the suit be given to the defendant on filing of PF etc. for 17.10.2006.

ACJ(SD) 27.09.2006.”

Perusal of the aforesaid order would show that the suit was registered on 27.09.2006 and notice was issued to the defendant Inderjit Kaur (petitioner) on filing PF etc for 17.10.2006.

On 17.10.2006, following order was passed by the trial Court:-

“Present: Counsel for the plaintiff.

Summons issued for the service of defendant received back unserved with the report that she is not residing at the given address. Now defendant be summoned again on filing of PF/CA/RC etc. for 10.01.2007.

ACJ(SD) 17.10.2006”

Perusal of the aforesaid order would show that

summons issued to the defendant were received back unserved with the report that she was not residing on the given address. Defendant was ordered to be summoned on filing PF/CA/RC etc. for 10.01.2007.

Order dated 10.01.2007 passed by the trial Court reads as under:-

“Present: Counsel for the plaintiff.

Summons could not be issued for want of PF/RC/CA. Learned counsel for the plaintiff is directed to file the same and thereafter, defendant be summoned for 15.02.2007.

ACJ(SD) 10.01.2007”

On the adjourned date i.e. 15.02.2007, following order was passed by the trial Court:-

“Present: Counsel for the plaintiff.

RC issued for the service of defendant not received back. As ordered earlier defendant be again summoned on filing of PF/RC etc. for 09.05.2007.

ACJ(SD) 15.02.2007”

In view of aforesaid orders, defendant was ordered to be served again on filing PF/RC as the earlier summons issued to the defendant were not received back served or otherwise.

On 09.05.2007, following order was passed by the trial Court:-

“Present: Counsel for the plaintiff.

RC issued for the service of defendant

received back unexecuted. On the perusal of file I find that the defendant has not been served for the last about 6 months. As such, I am satisfied that she cannot be served through ordinary process. As such, defendant be now summoned through publication in Daily Desh Sewak on filing of necessary publication charges for 24.07.2007.

ACJ(SD) 09.05.2007”

Perusal of the aforesaid order would show that the registered cover issued for the service of the defendant were received back unexecuted. The trial Court recorded its satisfaction that the defendant could not be served through ordinary process and thereafter, resorted to serve the defendant through publication in 'Daily Desh Sewak' newspaper on filing publication charges for 24.07.2007.

On 24.07.2007 following order was passed by the trial Court:-

“Present: Counsel for the plaintiff.

Case called several time since morning through out the day but nobody is present on behalf of defendant despite service through publication in Desh Sewak dated 24.07.2007. As such defendant is proceeded against ex parte and now case is adjourned for 12.12.2007 for ex parte evidence of the plaintiff.

ACJ(SD) 24.07.2007”

Perusal of the aforesaid order would show that after

publication, none appeared on behalf of the defendant and the defendant was proceeded against *ex parte* and the case was adjourned to 12.12.2007 for *ex parte* evidence of the plaintiff.

[4]. Trial Court had recorded the aforesaid interlocutory orders in the context of service. Thereafter, trial Court proceeded to record further interlocutory orders in the context of leading *ex parte* evidence by the plaintiff and ultimately, vide judgment and decree dated 25.07.2008 proceeded to decree the suit *ex parte* against the defendant for specific performance of agreement to sell.

[5]. It appears that reasoning given by both the Courts below while dismissing the application under Order 9 Rule 13 CPC by the Additional Civil Judge (Senior Division), Faridkot in the order dated 09.09.2015 and by the Additional District Judge, Faridkot in the order dated 08.05.2018 was that the summons were issued to the defendant on her residential address of Burj Masta for 17.10.2006 and the said summons were received back with the report that she was not residing on the given address and fresh summons were issued. Both the Courts below have observed that on 10.02.2007 when the summons were presented to the defendant, she has refused to accept the summons herself and directed her husband to receive the summons. The husband of the defendant namely Baljinder

Singh has received the summons and put his signature in English. Service was taken to be completed under Order 5 Rule 15 CPC. Thereafter, the trial Court proceeded to serve the defendant by way of substituted mode of service.

[6]. Perusal of the aforesaid interlocutory orders would show that there was no order dated 10.02.2007 on record depicting the factum of receiving summons by the husband of the defendant, rather the order dated 15.02.2007 was in the context of issuance of fresh summons to the defendant for 09.05.2007. On 09.05.2007, it was recorded that as the defendant has not been served for the last about 6 months, therefore, she cannot be served through ordinary process. No such refusal was recorded on the part of the defendant in the order dated 09.05.2007 and the trial Court simply proceeded to record its satisfaction on that premise for substituted mode of service.

[7]. The grounds and reasons recorded to the contrary in the impugned orders, in my considered opinion, do not depict true factual picture on record which has emerged from the aforesaid interlocutory orders. Both the Courts below have proceeded to record that the defendant had the knowledge of pending suit proceedings in view of expert evidence of RW 2 Sanjiv Sharma who had compared the signature of husband of

the defendant appearing on the summons viz-a-viz his signature on the cross-examination. The husband of the defendant has denied his signatures on the summons on 10.02.2007.

[8]. At the time of issuance of notice of motion on 01.08.2018, following order was passed:-

“Learned counsel for the petitioner contends that service on the adult member of defendant family can only be evolved when defendant is absent from the house. In the present case, petitioner was present in the house and allegedly refused to accept the process and asked her husband to accept the same. In such situation, the case falls under the ambit of Order 5 Rule 17 CPC and affixation was required to be done followed by testimony of some independent witness. In addition to aforesaid non-compliance, learned counsel also points out that the alleged service by means of publication in 'Daily Desh Sewak' is illegal inasmuch as that the aforesaid newspaper has no circulation in the area, where the petitioner is residing.

Notice of motion for 17.10.2018.

Till the next date of hearing, execution proceedings shall remain stayed.”

[9]. In the event of refusal by the defendant, the Process Server ought to have affixed the same followed by recording of statement of some independent witness. Secondly, resorting to substituted service without exhausting ordinary mode of service is not permissible in law. For effecting service by summons of

ordinary process, there is no conclusive opinion recorded by the trial Court in the interlocutory orders dated 15.02.2007 and 09.05.2007, rather the summons issued to the defendant were received back unexecuted. The said report has to be read in conjunction with the order dated 17.10.2006, wherein it was recorded that the summons issued to the defendant were received back with the report that she was not residing on the given address. The interlocutory orders on record do not provide any such clue that correct address was filed by the plaintiff and fresh summons were issued on the correct address. The publication in 'Daily Desh Sewak' newspaper was required to be sent to the defendant under the certificate of posting by the office of newspaper.

[10]. By referring to **M/s Radha Balabh & Sons Vs. Ganga Din Har Parshad, 1978 PLR 442**, learned counsel for the petitioner proposed to highlight non-compliance of Order 5 Rule 17 CPC and Order 5 Rule 20 CPC and contended that in view of aforesaid tentative knowledge of pendency of the suit, the same cannot substitute personal service of the defendant by any stretch of imagination. Learned counsel relied upon **G.P. Srivastava Vs. R.K. Raizada and others, 2002(2) RCR (Civil) 161** and submitted that the trial Court ought to have adopted hypo-technical approach, particularly when interlocutory orders

on record do not give rise to any such assumption against the defendant and the interlocutory orders on record have been misread and misconstrued to the facts of the case. By referring to **Sri. Bhagwan Vs. Satender Kumar, 2013(36) RCR (Civil) 623**, learned counsel further submitted that in the absence of sending the copy of newspaper under certificate of posting by the office of newspaper to the defendant, the mandatory compliance has not been made and no evidence was led on record by the plaintiff to show that the newspaper 'Daily Desh Sewak' was having any circulation in the locality where the defendant was residing.

[11]. On the other hand, learned counsel for the respondent relied upon proviso to Order 9 Rule 13 CPC to contend that the *ex parte* decree cannot be set aside merely on the ground that there has been irregularity in the service of summons. Learned counsel placed reliance upon **Parimal Vs. Veena @ Bharti, 2011 AIR (SC) 1150, Gurpartap Singh Vs. Rajinder Kumar and another, 2007(3) RCR (Civil) 619, Vijay Kumar Vs. Hardam Singh, 2017(1) Law Herald 736, Manjit Singh Vs. Yashwant Rai, 2012(1) RCR (Civil) 181** and **M/s Om Oil and Service Station and another Vs. Jasbir Singh, 2014(33) RCR (Civil) 819** in support of his contention.

[12]. After perusal of material on record, I find that the

findings recorded by both the Courts below are contrary to the interlocutory orders available on record in the context of service of the defendant. It appears that both the Courts below have gone beyond the evidence on record and have proceeded to record findings on the basis of some other material which was not considered by the trial Court in the aforesaid interlocutory orders in the context of service of the defendant.

[13]. At this stage, without making any further reference to the record, I deem it appropriate to set aside the impugned orders with a direction to the trial Court to proceed afresh strictly in accordance with the material on record and decide the application under Order 9 Rule 13 CPC afresh strictly in accordance with law. Any observation made hereinabove, shall not be construed to be an expression of opinion on merits of the case.

17.10.2019

Prince

**(RAJ MOHAN SINGH)
JUDGE**

Whether reasoned/speaking Yes/No

Whether reportable Yes/No