

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

Civil Revision No.539 of 2017
Date of Decision: January 18, 2019

Satwant Kaur & others

...Petitioners

Versus

Kuldeep Singh

...Respondent

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr. Sanjiv Gupta, Advocate &
Mr. Rakesh Gupta, Advocate,
for the petitioners.

Mr. Arun Abrol, Advocate,
for the respondent.

AMIT RAWAL, J.

The present revision is directed against the impugned orders dated 13.09.2016 (Annexure P-3) and 02.12.2016 (Annexure P-1) of the trial Court and the Lower Appellate Court, whereby the application and the appeal preferred by the petitioner-defendants for setting-aside the ex-parte judgment and decree dated 24.11.2001 in a suit for specific performance of the agreement to sell, have been dismissed.

Respondent-plaintiff instituted the suit for specific performance of the agreement to sell dated 07.11.1997 stated to have been executed by husband of petitioner No.1 and father of petitioner Nos.2 and 3, whereby land measuring 51 kanals 9 marlas was agreed to be sold for a consideration of ₹ 1,50,000/- per killa against the payment of ₹ 7,00,000/- as earnest money. On receipt of the suit, notice was issued on 08.12.1998. Process Server reported that the summons issued to petitioner Nos.1 and 3 were refused, whereas petitioner No.2 avoided service. On the basis of the said

report, order for effecting service upon the petitioners through munadi and affixation for 23.01.1998 was passed and on 23.01.1999, the petitioners were proceeded ex-parte, resulting into ex-parte judgment and decree dated 24.11.2001.

Mr. Sanjiv Gupta and Mr. Rakesh Gupta, learned counsel appearing on behalf of the petitioner-defendants submitted that the respondent-plaintiff sought the execution of the ex-parte judgment and decree and on receipt of the notice in the execution application, petitioners came to know about the ex-parte judgment and decree and immediately moved the application dated 23.09.2016 (Annexure P-4).

The aforementioned application was opposed. The trial Court after giving opportunity to the parties to lead evidence, dismissed the application. Appeal laid before the Lower Appellate Court was also dismissed. The aforementioned orders are not sustainable in the eyes of law, for, there is no compliance of provisions of Rule 19A of Order 5 CPC, which envisage simultaneous issuance of summons for service by post in addition to personal service. No such effort was made by the trial Court and, therefore, there was deviation of the provisions of law. The primary ground for rejection of the application was that Chaman Lal retired Process Server appeared as DW-1 and deposed on oath that he had gone to the house of the petitioners along with Village Chowkidar. The petitioners stepped into the witness box and also led evidence of Ram Singh Chowkidar, who deposed that he was an illiterate person and did not know how to read and write any language but appended his thumb impression only. He further deposed that about 16-17 years back, a person had come to him representing himself to be Process Server in connection with some

official work and he wanted to get his presence verified, but obtained the thumb impression on some papers and, therefore, there was defect in the report of the Process Server. The courts below have adopted a hyper-technical approach merely because Ram Singh was working as a Chowkidar for the last 40-45 years.

Mr. Gupta also pointed out certain facts with regard to the perpetual litigation by the relatives of plaintiff Kuldeep Singh. Jit Kaur (mother of Kuldeep Singh), on 17.07.1998, had filed a suit for specific performance of the agreement dated 08.11.1994. The same was dismissed on 09.09.2006. Appeal filed was also dismissed on 24.02.2010. Khasra number was common in both the aforementioned suits, i.e., present suit and suit filed by the mother. Kuldeep Singh filed the suit against the petitioners for recovery of ₹ 3,00,000/- on the basis of the pronote dated 20.09.1998 in the month of September, 2001 which was dismissed by the trial Court in November, 2006 and the appeal was filed in May, 2008. Teja Singh, father-in-law of Kuldeep Singh filed a suit on 12.02.2005 in which they obtained the ex-parte judgment and decree and this Court in Civil Revision No.5768 of 2014 allowed the same and set-aside the ex-parte judgment and decree. All these aforementioned facts reflect the mens rea and the intention of the respondent-plaintiff.

Per contra, Mr. Arun Abrol, learned counsel for the respondent-plaintiff supported the orders under challenge and says that the facts of each case have to be examined. The factum of other suits is not part and parcel of the record of the court and, therefore, cannot be looked into. The petitioner-defendants have failed to explain the delay in filing the application for setting-aside the ex-parte judgment and decree as they had the knowledge

and the same was intentionally avoided to tire out the plaintiff. Chaman Lal Process Server had been called and was consistent in his statement. He stated that the summons in the names of Hardeep Singh son of Sarja Singh, Sant Kaur wife of Sarja Singh and Kulwinder Singh son of Sarja Singh were marked to him and also with regard to service effected by munadi and affixation. Non-compliance of provisions of Rule 19A of Order 5 CPC, in such circumstances, would pale into insignificance and, thus, urged this Court for dismissal of the revision petition.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submissions of Mr. Gupta.

The provisions of Rule 19A of Order 5 CPC have been omitted by the amendment w.e.f. 01.07.2002, but Rule 17 of Order 5 which remained intact, prescribes that in case of refusal of the service, the serving officer is required to affix 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 or personally works for gain, and shall then return the original to the court from which it was issued with a report endorsed thereon or annexed the affixed copy and circumstances. For the sake of brevity, Rule 17 of Rule 5 CPC reads as under:-

“17. Procedure when defendant refuses to accept service, or cannot be found Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, ²²[who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is

no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall 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 or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person(if any) by whom the house was identified and in whose presence the copy was affixed”.

There is no such compliance of the provision, which fact is evident from the zimni order dated Annexure P-6, which reads thus:-

“Present: Counsel for the plaintiff.

Defendants not served. Summons of defendants no.1 and 3 received back with the report that they have refused the service of summons while defendant no.2 has been reported to be avoiding his service. Let the defendants be served through Munadi and affixation for 22.01.1998 on filing of Munadi fee and P.F.

ACJ(SD)/8.12.98.”

The trial Court did not notice that the Process Server had complied with the aforementioned provisions or not but ordered service upon the petitioner-defendants by way of munadi and affixation. Both the courts have remained oblivious of the aforementioned provisions and laid heavy reliance and focus on the statement of the Process Server, though reference of other suits at the instance of the relatives and Kuldip Singh are not part of the records, but this Court cannot ignore.

Keeping in view the totality of the circumstances, I am of the view that the impugned orders are not sustainable in the eyes of law as the same suffer from illegality and are without jurisdiction. The same are hereby

set-aside. The application for setting-aside the ex-parte judgment and decree dated 24.11.2001 is allowed. The suit is restored to its original number.

The parties shall appear before the trial Court on 20.02.2019. The petitioner-defendants shall file their written statement within 15 days and thereafter replication, if any, shall be filed within another 15 days. After framing of the issues, the trial Court shall grant 4-4 effective opportunities to the parties to lead their evidence and thereafter conclude the trial within a period of one year.

With the aforementioned observations, revision petition stands disposed of.

January 18, 2019
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned
Whether Reportable:

Yes/No
Yes/No