

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

**CR No.6273 of 2018(O&M)
Date of Decision: 25.11.2019**

Jitender and others

....Petitioners

Versus

Ramphool and others

.....Respondents

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

Present:Mr. S.K. Garg Narwana, Sr. Advocate with
Mr. J.S. Johal, Advocate
for the petitioners.

Mr. Vikas Bahl,Sr. Advocate with
Mr. Nikhil Sabharwal, Advocate
for respondent No.2.

RAJ MOHAN SINGH, J.

[1]. Petitioners have preferred this revision petition against the order dated 24.08.2018 passed by Civil Judge (Junior Division), Faridabad, vide which application filed by respondent No.2 under Order 9 Rule 13 read with Section 151 CPC for setting aside the *ex parte* order dated 16.01.2013 and *ex parte* judgment and decree dated 29.09.2014 has been allowed.

Judgment and decree dated 29.09.2014 has been set aside qua respondent No.2 and the case has been fixed for filing written statement on behalf of respondent No.2.

[2]. Before adverting to the merits of the case, some past history of the case is relevant to be noticed. It is not in dispute that respondent No.2 had entered into an agreement to sell with respondent No.3 Dharambir vide agreement to sell dated 30.01.1996 in respect of 20 kanals of land. On refusal to execute the sale deed, a civil suit was filed by respondent No.2 against respondent No.3 Dharambir. The civil suit was decreed by the trial Court vide judgment and decree dated 19.11.2003.

[3]. During pendency of the suit, respondent No.3/Dharambir executed sale deed dated 29.03.2001 in favour of respondent No.1 Ramphool. Judgment and decree dated 19.11.2003 was upheld by the Lower Appellate Court on 21.03.2005 in an appeal filed by respondent No.3/Dharambir. Thereafter respondent No.3/Dharambir filed RSA No.3805 of 2005 in which judgment and decree passed by the Courts below were modified to the extent of 2 kanals out 20 kanals of land which was acquired. The suit was decreed against remaining 18 kanals of land in favour of respondent No.2 vide judgment dated 29.05.2006. Respondent No.3/Dharambir feeling dissatisfied with the judgment of the High Court, preferred to file SLP, but

the same was dismissed. Respondent No.3/Dharambir after remaining unsuccessful upto the Hon'ble Apex Court, motivated respondent No.1/Ramphool to file third party objections on the basis of sale deed dated 29.03.2001 which was allegedly executed on the basis of Civil Court decree dated 09.08.1999.

[4]. The executing Court dismissed the objections filed by respondent No.1/Ramphool vide order dated 22.09.2010 holding that respondent No.1/Ramphool and respondent No.3/Dharambir were in collusion with each other and they had prepared an agreement dated 04.07.1995. It was also observed that the suit filed by respondent No.2 was prior in point of time and the sale deed executed in favour of respondent No.1/Ramphool had been executed during pendency of the suit and the Civil Court decree dated 09.08.1999 was obtained in collusion with each other. Sale deed dated 29.03.2001 and consequent mutations were declared to be null and void. Thereafter, respondent No.1/Ramphool filed appeal against the order dated 22.09.2010 and the same was dismissed by the Lower Appellate Court on 21.09.2011. Respondent No.1/Ramphool further filed regular second appeal, but the same was also dismissed by the High Court on 29.11.2011. Objector Ramphool further filed SLP No.31598 of 2012 and the same was dismissed by the Hon'ble Apex Court on 05.11.2012.

Even review application filed by respondent No.1 was dismissed by the Hon'ble Apex Court.

[5]. In the execution filed by respondent No.2, the sale deed dated 18.11.2011 was executed in favour of respondent No.2 in view of decree dated 19.11.2003 which was modified by the High Court to the extent of 2 kanals. The execution was held to be fully satisfied and the same was ordered to be dismissed as withdrawn on 03.12.2011. Mutations No.1857 and 1858 were sanctioned and were duly given effect in the revenue record after dismissal of objections filed by Ramphool. Vide mutation No.1875, the land was reverted from Ramphool to Dharambir and vide mutation No.1858, the same was mutated in favour of respondent No.2 on the basis of sale deed dated 18.11.2011. Respondents No.1 and 3 disputed the mutations, but their objections were dismissed by the Assistant Collector, 1st Grade, Ballabgarh.

[6]. Evidently, the parties had litigated upto the Hon'ble Apex Court on two occasions during the span of more than 15 years. Thereafter, the present Civil Suit titled 'Jitender and others Vs. Ramphool and others' for declaration and joint possession was filed by the legal heirs of Dharambir who had unsuccessfully fought the litigation upto the Hon'ble Apex Court and proxy litigation at the instance of Ramphool upto the final

Court. In the present suit, defendant No.3 has been claimed to be a man of questionable habit. Earlier litigation was conspicuously concealed.

[7]. In the present suit, a decree for declaration is sought to the effect that sale deed dated 16.03.2001 registered on 29.03.2001 and another sale deed dated 18.11.2001 in respect of suit land executed by Dharambir in favour of Ramphool and Sudesh Pal Bisla are wrong, illegal and *non est* qua the rights of coparceners of the plaintiffs. In the present suit, respondent No.2 was proceeded against *ex parte* on 16.01.2013 on the basis of alleged report of refusal given by the Process Server. Ultimately, *ex parte* decree was passed on 29.09.2014 against respondent No.2 Sudesh Pal Bisla.

[8]. In the application under Order 9 Rule 13 read with Section 151 CPC, the stand of the applicant/respondent No.2 is that he was never served with the process of the Court and he was proceeded against *ex parte* at his back and *ex parte* judgment and decree dated 29.09.2014 was passed. Applicant/respondent No.2 claimed that he was having properties in two villages i.e. Mojpur and Dayalpur. Plaintiffs illegally got the summons issued on the address of Dayalpur. The report of the Process Server was not authenticated by any of the person of the locality of village Dayalpur, rather the same

was witnessed by one of the plaintiffs namely Joginder which apparently proved collusion between the plaintiffs and the Process Server. Report of the Process Server is claimed to be against the provisions of Order 5 Rule 17 CPC as he did not put any effort to get the signatures of Panch, Sarpanch, Chowkidar and Namberdar of village Dayalpur. Applicant/respondent No.2 came to know about mutation No.2038 when he visited the office of Patwari on 04.04.2016 in pursuance of order dated 16.02.2016 passed by Assistant Collector, 1st grade, Ballabgarh. On coming to know *ex parte* decree dated 29.09.2014, he immediately filed an application for review of mutation No.2038 and also inspected the record pertaining to impugned judgment and decree.

[9]. Trial Court on the basis of pleadings of the parties, framed necessary issues to the following effect:-

- “1. Whether the applicant/defendant No.2 was never served with summons of the case and whether he had no knowledge about the pendency of the case? OPA*
- 2. If issue No.1 is proved then whether the ex parte order dated 15.01.2013 and ex parte decree dated 29.09.2014 passed against the applicant/defendant No.2 are liable to be set aside? OPA*
- 3. Whether the present application is time barred? OPR*
- 4. Whether the applicant/defendant No.2 has not approached the Court with clean hands and whether he*

has suppressed the true and material facts? OPR

5. Whether the application in hand is not maintainable in the present form? OPR

6. Relief.”

[10]. Both the parties led their respective evidence to prove their case.

[11]. Sudesh Pal Bisla appeared as AW 1 and tendered his affidavit Ex.AW1/A along with certain documents. AW 2 Gurudutt, Chowikdar of village Mojpur has testified that Sudesh Pal Bisla/respondent No.2 was residing in village Mojpur from the last 15-16 years. Similarly, AW 3 Pratap Singh, Namberdar also endorsed the aforesaid fact that Sudesh Pal Bisla/respondent No.2 was residing in village Mojpur from the last 15-16 years. AW 4 Prem Prakash, office Kanungo brought the summoned record of mutation No.2038 along with application dated 04.04.2016 filed by Sudesh Pal Bisla and proved its copy as Ex.A10. Similarly, AW 5 Mohd. Abid also brought the summoned record pertaining to application dated 04.04.2016 and proved its copy as Ex.A10.

[12]. On the other hand, petitioners side examined RW 1 Ramesh Chand, Record Keeper, District Court, Faridabad who brought the summoned record of execution bearing No.27 dated 27.11.2014 titled 'Jitender Vs. Ramphool' decided on 09.04.2015. Joginder who is one of the plaintiffs appeared as

RW 2 and tendered his affidavit, reiterating the contents of reply as he had allegedly accompanied the Process Server at the time of alleged service upon respondent No.2/Sudesh Pal Bisla. He also identified signatures of Process Server namely Suresh Chand on summons and proved his report. He also deposed that Process Server had died. RW 3 Harnam is resident of villager Dayalpur. He stated that both the parties are known to him. He further stated that when Process Server namely Sudesh Chand had gone with the summons to serve respondent No.2/Sudesh Pal Bisla, respondent No.2 has refused to accept the summons in his presence, but he did not sign as a witness as he did not want to have souring relations with Sudesh Pal Bisla/respondent No.2. RW 4 Mohd Abid was initially examined as AW 5 and thereafter, present petitioners called him in their evidence. On the objections raised by Sudesh Pal Bisla, his examination was allowed subject to appreciation by the trial Court at appropriate stage.

[13]. Trial Court after appreciation of material on record found that there were two persons in the name of Sudesh Pal in the village having same father's name. Respondent No.2 is Sudesh Pal Bisla whereas second person is Sudesh Pal Hooda. Trial Court has adverted to the record with reference to page No.609 of the record to show the aforesaid position that

respondent No.2 is known by Sudesh Pal Bisla in the village. When the service was effected upon Sudesh Pal Hooda, he stated in so many words that summon was not in respect of his case and he further disclosed that there is one more person of similar name belongs to the family of Dharampal son of Raja Ram Bisla, Harender Bisla, Narender Bisla son of Gajraj Bisla, MLA Rajender Singh Bisla and now the said Sudesh Pal is residing in village Mojpur. Despite the aforesaid endorsement made by Sudesh Pal Hooda on the summon, the process was allegedly shown to have been served upon respondent No.2 and he was proceeded against *ex parte*. In the earlier litigation, report dated 18.02.2004 had evidenced that Sudesh Pal Bisla/respondent No.2 was living in his farm in village Mojpur and he was to be served on the said address.

[14]. Learned Senior Counsel for the petitioners vehemently submitted that respondent No.2 was having knowledge about the pendency of the suit and therefore, the *ex parte* judgment and decree ought not to have been set aside. Learned Senior Counsel further submitted that respondent No.2 has not come to the Court with clean hands, therefore, on the basis of his falsehood, he can be summarily thrown out at any stage of litigation. Learned Senior Counsel placed reliance upon **S.P. Chengalvaraya Naidu (Dead) by LRs Vs. Jagannath (Dead)**

by LR's and others, AIR 1994 SC 853, Inder Mohan Goswami and another Vs. State of Uttaranchal and others, 2007(4) RCR (Criminal) 548 and High Court Rules and Orders, Chapter 7, Part B(c) in the context of proof of service to show that after due service, respondent No.2 was proceeded against *ex parte*. Report of Process Server has to be proved by affidavit or examination in Court. Report of Process Server alone would be sufficient to conclude that respondent No.2 had due knowledge of the pendency of the suit and *ex parte* decree cannot be set aside. Learned Senior Counsel further made reference to **M/s P.A. Times Industries VS. M/s Apex Marketing, AIR 2016 (NOC) 48 (H.P.)**.

[15]. On the other hand, learned Senior Counsel for respondent No.2 submitted that doctrine of natural justice is based on the principle that no person should be condemned unheard and fair opportunity has to be given to the person to represent his cause. Process Server cannot be judge of his own cause. The report should carry evidentiary value inasmuch as that the report of refusal must be witnessed by some independent witness. One of the plaintiffs has allegedly become witness of the report by colluding with the Process Server. Learned Senior Counsel placed reliance upon **Naveen Kumar Vs. Sanjana and others, 2017(1) PLR 485, Ajit Singh Vs.**

Santokh Singh, 2002(4) RCR (Civil) 13, G.P. Srivastava Vs. R.K. Raizada and others, 2000(2) RCR (Civil) 161, Baburao Soma Bhoi Vs. Abdul Raheman Abdul Rajjak Khatik, 2000(1) BCR 306 and CR No.5306 of 2019 titled **Khusdil Vs. Virender @ Birender** decided on 04.10.2019 and contended that the Process Server was required to make report in accordance with law and it ought to have been witnessed by an independent person/witness. The witness should not be interested witness. The Court must record its satisfaction in regard to the report of refusal and that would be deemed to be service in accordance with law, then alone direct the *ex parte* proceedings to be taken against the person. In the absence of recording any satisfaction by the Court, *ex parte* proceedings conducted by the trial Court are not legally sustainable. *Ex parte* decree under Order 9 Rule 13 CPC can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any sufficient cause from appearing in the Court when the suit was called for hearing. Rule 19 of Order 5 CPC states that where the summon is returned under Rule 17 of Order 5 CPC, the Court shall, if the return of summon under that Rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court,

touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summon has been duly served or order such service as it thinks fit. Form No.11 provided in First Schedule of Appendix 'B' provides form of affidavit of Process Server to accompany the return of summon or notice and therefore, while returning the summon after having served as provided under Rule 17 of Order 5 CPC, the affidavit in the said form shall accompany because this affidavit requires to state whether the person served has signed or refused to sign the process and in whose presence, and the signature of the Process Server. This form further provides that the manner in which the process was served with special reference to Order 5 CPC. Rules 15 and 17 of Order 5 CPC shall be stated, so is the case in respect of other portion of the said form. That means the compliance of Rule 17 of Order 5 CPC in what manner it has been carried out has to be stated in the prescribed affidavit. In the present case, such affidavit has not come forth, rather one of the plaintiffs has allegedly witnessed the report of refusal, which in any case, cannot be treated to be a valid service by any stretch of imagination. Rule 19 of Order 5 CPC requires that in case, it is returned without verification by way of an affidavit, then the Court shall record the statement of the Process Server and

thereafter, make such further inquiry in the matter as it thinks fit and shall state whether the summon has been duly served or not; and therefore, option to make the inquiry may arise when the affidavit has not been accompanied the said summon because in the later part of the said Rule word “may” has been used. The Court while making endorsement that it is duly served and proceeded *ex parte*, has not recorded the statement of Bailiff as required under Rule 19 of Order 5 CPC and without recording the statement of Bailiff, it has been declared that summon has been duly served on respondent No.2. Such service is not a proper service and on the basis of such alleged service, respondent No.2 should not have been proceeded against *ex parte*. The aforesaid concept has been reiterated in the aforecited case laws.

[16]. Having considered the controversy on the basis of material on record, I find that respondent No.2 was wrongly proceeded against *ex parte* and *ex parte* judgment and decree ought not to have been passed on the basis of alleged service on record. Even as per record, *munadi* was conducted at village Mujeri. *Munadi* should have been conducted at the place where the property is situated either in village Dayalpur or Mojpur. The trial Court has exercised lawful jurisdiction in setting aside the illegality at naught.

[17]. In my considered opinion, no interference is called for.
This revision petition is accordingly dismissed.

25.11.2019
Prince

(RAJ MOHAN SINGH)
JUDGE

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