

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

**SAO No. 81 of 2014 (O&M)
Date of Decision: April 02, 2019**

Rohtash

.....APPELLANT

VERSUS

Nathu Ram

.....RESPONDENT

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Vikas Mohan Gupta, Advocate
for the appellant.

Mr. Jaivir Yadav, Advocate
for the respondent.

SURINDER GUPTA, J.(Oral)

Heard.

Plaintiff-respondent Nathu Ram filed suit for specific performance of agreement which was dismissed by Additional Civil Judge (Sr. Division), Rewari vide judgment dated 08.11.2011. The defendant-appellant was ex parte before the trial Court.

The plaintiff preferred an appeal before Additional District Judge, Rewari which was decided on 19.04.2012 after dispensing with the service of defendant on the ground that he was ex parte before the trial Court. The appeal was accepted and suit of plaintiff was ordered to be decreed.

Thereafter, the defendant/appellant moved an application before the Ist Appellate Court under Order 41 Rule 21 CPC for fresh

decision of appeal after giving him opportunity of being heard which was dismissed vide order dated 01.10.2014 passed by Additional District Judge, Rewari with the observations that there was no need to serve the respondent/defendant again in first appeal, as he was ex parte before the Court below.

Learned counsel for the appellant has argued that when the defendant was ex parte before the trial Court and the suit was dismissed, the Ist Appellate Court could not decide the appeal and reverse the findings of the trial Court by dispensing with the service of defendant/respondent as per provisions of Order 41 Rule 14(3) CPC, which gives discretionary power to the Appellate Court to dispense with the service. The appeal should have been decided after hearing both the parties and order of the Ist Appellate Court dispensing with the service of defendant is not sustainable in the eyes of law. In support of his contentions, he has relied upon the observations in the cases of ***Roshan Lal and others Versus Kewal Singh and others, 2008 (1), R.C.R. (Civil), 679; Satnam Singh Versus Roop Lal, 1998(4) R.C.R. (Civil), 656*** and ***Hanumant Singh Versus Kiran Kumar & Ors., 2012(1) R.C.R.(Civil) 821.***

Learned counsel for the respondent has argued that provisions of Order 41 Rule 14(3) CPC as amended by this Court clearly provides that the Appellate Court has a discretion to dispense with the service of notice on any respondent, who had not appeared before the Court below. Against the judgment and decree passed by the lower Appellate Court, the plaintiff has right to file Regular Second Appeal but he has not opted to avail that remedy and moved an application under Order 41 Rule 21 CPC before the

service of appellant was rightly dispensed with. In support of his contentions, he has relied upon the observations in the cases of ***Gian Singh Vs. Joginder Singh and others, Vol. LXXX-1978, PLR (298)*** and Full Bench of this Court in the case of ***Mohan Masih Versus Smt. Bashiro and others, 1998(2), PLR, 138.***

In the case of ***Gian Singh (Supra)***, some of the respondents had not put in appearance while other respondents were being represented by counsel and in these circumstances, the Hon'ble Bench had dispensed with service of other respondents, who had not appeared before the lower Court. The case of ***Mohan Masih(Supra)*** relates to the matrimonial dispute wherein the allegations against the respondent was that she was living in adultery with a person and she had opted not to appear before the Court below.

The facts and circumstances in both the citations referred by learned counsel for the respondent are different and distinguishable. In the case in hand, the Ist Appellate Court without ascertaining that service of appellant before the trial Court was duly effected had dispensed with his service and proceeded to reverse the findings of trial Court while accepting the appeal. As held the case referred by learned counsel for the appellant, the provisions of Order 41 Rule 14(3) CPC as applicable to the States of Punjab and Haryana is neither mandatory nor obligatory on the Appellate Court to dispense with the service of respondent, who had not appeared before trial Court despite service. In case, it has to proceed under the above provisions, it was required to first ascertain that respondent despite having knowledge of the proceedings before the Appellate Court or before the

is required that instead of dispensing with the service, the Appellate Court should proceed to get the service effected in accordance with the provisions of Order 5 CPC. I am of considered opinion that the procedure adopted by the Ist Appellate Court in accepting the appeal by dispensing with the service of defendant on the ground that he was ex parte before the trial Court is not tenable and legally sustainable.

Consequently, this appeal is accepted and the order dated 01.10.2014 and judgment dated 19.04.2012 passed by the Appellate Court are set aside. Parties are directed to appear before the Ist Appellate Court/Successor Court, Rewari on 02.05.2019, on which date, the file of appeal shall be taken on Board to decide the same in accordance with law.

April 02, 2019
Jyoti-II

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No