

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Civil Revision No.388 of 2022 (O&M)

Date of Decision: March 02, 2022

Dalbir Kaur and another

..Petitioners

Versus

Kahsmir Singh and others

...Respondents

CORAM: HON'BLE MR. JUSTICE SUDHIR MITTAL

Present: Mr. Divanshu Jain, Advocate, for the petitioners.

SUDHIR MITTAL, J.

The petitioners are the judgment-debtors. They have approached this Court through this revision petition because the Executing Court has refused to recall the order by which they were proceeded against ex parte.

2. Respondent No.1-plaintiff had filed a suit for possession by way of specific performance of agreement to sell dated 25.12.2010 in respect of land measuring 40 kanal 11 marlas. During the pendency of the suit, the parties reached an amicable settlement and based thereupon compromise decree dated 10.09.2015 was passed. One of the terms of the decree was that sale deed was to be executed on or before 15.05.2016 and in case, the remaining consideration amounting to Rs.6.5 lacs was not deposited by then, the earnest money would stand forfeited and the

agreement would stand cancelled. According to the petitioners-JDs, the balance amount was deposited on 08.07.2016. Execution petition was preferred on 29.11.2018 and the JDs were proceeded against ex parte vide order dated 08.03.2019. Application dated 21.10.2019 for setting aside the ex parte order was filed but the same has been dismissed vide impugned order dated 05.10.2021. The Executing Court has found that service had been effected through an adult male member of the family i.e. husband of J.D. No.1 who is also the son of deceased Gopal Kaur (JD No.2) and thus, no valid ground existed for recall of the order proceeding ex parte against the JDs. They were, however, permitted to join proceedings from the stage at which the proceedings stood on the date of passing of the order.

3. It appears that meanwhile Gopal Kaur-JD No.2 passed away on 04.12.2019 and vide order dated 01.03.2021 the Executing Court directed warrants of possession to be kept in abeyance till the decision of the application filed for setting aside the order by which the JDs had been proceeded against ex parte.

4. Learned counsel for the petitioners has argued that impugned order dated 05.10.2021 is illegal and deserved to be set aside. According to him, Order 5 Rule 15 CPC has been misconstrued by the Executing Court. Service through an adult member of the family is permissible only if there is no likelihood of the defendant being found at the residence within a reasonable time. In this case, on the first date for service of notice, the JDs have been proceeded against ex parte and thus, there is no determination of likelihood of not being found. Reliance has

been placed upon *Kishore Kumar Arora vs. Harvinder Singh and others, 2011 (30) RCR (Civil) 250* and a Division Bench judgment of this Court in *Charanjit Singh Mann vs. Neelam Mann, 2006(2) RCR (Civil) 497*.

5. A perusal of the Division Bench judgment of this Court in *Charanjit Singh (supra)* shows that effecting service through an adult member of the family is an accepted mode of service provided the party resides at that address and there is no likelihood of his being found within a reasonable time. There is no dispute that the JDs resided at the address mentioned in the summons. Thus, the only point to be examined is whether the Executing Court has taken into consideration the likelihood of the JDs not being found within a reasonable time. The case of the petitioners is that it has not done so but they have not attached the service report. Had they done so, it could have been seen whether there was likelihood of the J.D's being found within a reasonable time. Thus, it is difficult to hold that the Executing Court failed to construe Order 5 Rule 15 CPC properly. In *Charanjit Singh (supra)*, the report of the Process Server was on record and it stated that the adult member of the family had informed him that the party had gone abroad after re-marrying. Based thereupon it was held that service had been validly effected as the party could not be expected to be found within a reasonable time. The argument is thus rejected.

6. The next argument raised is based on Order 9 Rule 7 CPC. It has been submitted that where a party has been proceeded against ex parte and such party appears before the Court and assigns good cause for the non-appearance, the Court must permit him/her to join the suit as if he/she

had appeared on the day fixed for his/her appearance. In this case, good cause had been assigned as the application for setting aside the order proceeding against ex parte was filed just 07 months later on acquiring knowledge from JD No.3. Service had not been effected in person and service under Order 5 Rule 15 CPC was not proper service. To support this argument, reliance has been placed upon ***Kuldip Kaur vs. Gurdeep Singh, 1993(3) RRR 696.***

7. A related argument raised on the basis of ***Bijay Kumar and others vs. Shri Sanatan Dharam High School Bhiwani, 2008(4) RCR (Civil) 633*** is that the JDs should have been permitted to join proceedings with effect from the date of filing of the application for setting aside the ex parte order even if they had failed to show good cause.

8. In ***Kuldip Kaur (supra)***, it has been held that power to set aside ex parte order should be liberally exercised. The expression ‘good cause’ should be interpreted widely and not confined to the restricted interpretation placed on the expression ‘sufficient cause’ as mentioned in Order 9 Rule 13 CPC. There is no quarrel with this proposition of law. The question is whether the JDs have been able to show ‘good cause’. They failed to put in appearance despite valid service and submission of an application after seven months cannot qualify as ‘good cause’. Hence, reliance upon the judgment is misplaced. The judgment in ***Bijay Kumar (supra)*** does support the argument raised on behalf of the petitioners that the JDs should have been permitted to join proceedings w.e.f. the date of filing of the application but I am respectfully not in agreement with it. The interpretation placed upon Order 9 Rule 7 CPC is on the basis of a

judgment of the Supreme Court in *Sangram Singh vs. Election Tribunal, Kotah, AIR 1955, Supreme Court 425* which holds that if good cause is not shown the party can be permitted to join proceedings prospectively. The clock cannot be turned back. This is precisely what has been done in the instant case and thus, this argument is also rejected.

9. It has next been submitted that the application for setting aside the ex parte order was kept pending for two years. Meanwhile, draft sale deed was received and directions were issued to the Local Commissioner to execute the sale deed. While issuing such directions, notice should have been issued to the JDs as their application for setting aside the ex parte order was pending. However, no legal principle has been cited in support of this argument. A person who is not yet a party to the execution proceedings is not entitled to be given notice. Moreover, the order by which the Local Commissioner was directed to execute the sale deed is not under challenge and thus, the argument is rejected.

10. Finally, it has been submitted that the balance sale consideration having been deposited beyond the time fixed in the decree, the agreement between the parties stood rescinded in view of Section 28 of the Specific Relief Act, 1963. A right stood accrued in favour of the JDs on the date of filing of the application for setting aside the ex parte order and the same could not have been taken away.

11. Section 28 of the Specific Relief Act, 1963 provides for rescission of the contract by a Court order provided an application in this regard is made to the Court which passed the decree. The provision does not make it mandatory for the Court to rescind the contract upon delayed

deposit of the purchase money. It is in the nature of an enabling provision and does not confer an indefeasible right. To succeed, the JDs could have filed an application for the rescission of the contract before the Court which decreed the suit. Having not done so, they cannot be permitted to raise this objection before the Executing Court. Reliance upon *Prem Jeevan vs. K.S. Venkata Raman and another, 2017(2) Civil Court Cases 1* is misplaced as in the said judgment the legal issue of the jurisdiction of the Executing Court to accept a plea of rescission of contract in the absence of a petition filed for the said purpose before the concerned Court has not been examined.

12. For the aforementioned reasons, the revision petition has no merit and is dismissed.

March 02, 2022
'Ankur Goyal'

(SUDHIR MITTAL)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes</i>
<i>Whether Reportable</i>	<i>Yes</i>