

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

CR-3309-2021 (O&M)

Date of Decision: December 13, 2022

Neelam Rani

...Petitioner

V/S

Gaurav Madaan and others

...Respondents

CORAM: HON'BLE MRS. JUSTICE ARCHANA PURI

Present: Mr. Sachin Gupta, Advocate for
Ms. Varinder Kaur Warraich, Advocate
for the petitioner.

Mr. Gaurav Datta, Advocate
for respondent No.1.

ARCHANA PURI, J.

Challenge in the present revision petition is to the judgment dated 20.04.2021 passed by learned Addl. District Judge, thereby, affirming the order dated 13.02.2021 (Annexure P-12) passed by learned Civil Judge (Sr. Divn.), whereby, an application under Order 9 Rule 13 CPC, filed by the petitioner was dismissed.

The background facts, having bearing on the controversy, in nutshell, are as follows:-

That, initially, respondent-plaintiff Gaurav Madaan had filed a suit for seeking recovery of Rs.4 lakh against Ms/ Shankar Lal Kashmiri Lal through its partner Chiranji Lal and he also impleaded three partners of the

aforesaid firm as defendants No.2, 3 and 4. The present petitioner was impleaded as defendant No.3, in the aforesaid suit. However, the suit was only contested by respondent No.4 Kashmiri Lal, whereas, defendants No.1 to 3 (including present petitioner) were proceeded against ex-parte. Ultimately, the suit was decreed on 21.05.2019.

On coming to know about passing of the ex-parte judgment in the aforesaid suit, the petitioner-defendant No.3 filed an application under Order 9 Rule 13 CPC for setting aside the ex-parte judgment dated 21.05.2019 and ex-parte order dated 13.07.2018. However, the said application was dismissed vide order dated 13.02.2021 and lower Appellate Court, affirmed the said order vide impugned judgment dated 20.04.2021.

Feeling aggrieved, the petitioner-defendant No.3, has filed the present revision petition.

In pursuance of the notice issued, contesting respondent No.1 made appearance through counsel.

Learned counsel for the parties heard and record perused.

In the application under Order 9 Rule 13 CPC, the stand taken by petitioner-defendant No.3 is that summons regarding institution of the suit were never served upon her nor any effective service was effected upon her. In this manner, she was not at all aware about the pendency of the suit. Further, it is claimed that the plaintiff (respondent No.1 of the present case) is a clever person and he must have procured false report on the summons, allegedly issued to defendant No.3 (petitioner) that defendant No.3 has refused to accept the summons, whereas, neither any

Process Server had visited the house of the defendant No.3-petitioner nor any other effective information was received by her, which clearly shows that the report, is a result of active collusion between plaintiff-respondent No.1 and the Process Server and the same had been procured by the plaintiff-respondent No.1 for obtaining ex-parte judgment. Moreover, the alleged refusal report also does not bear the signatures of any respectable person of the neighbourhood or the MC of the area. The ex-parte order as well as the ex-parte judgment are against the principle of natural justice, as no effective opportunity of hearing was ever afforded to defendant No.3 (petitioner) and that it is settled law that no one should be condemned unheard. Now, under the guise of the ex-parte judgment dated 21.05.2019, the plaintiff-respondent No.1 is all out to get the same implemented. Rather, there are relevant grounds with defendant No.3-petitioner to defend the suit on merits and there is every possibility of dismissal of the suit, on the basis of the material available on record.

In reply, plaintiff-respondent No.1 Gaurav Madaan had taken the stand that Neelam Rani-defendant No.3 was duly served with the summons and she knew the proceedings very well, but intentionally delayed the matter, just to prolong the proceedings. Also, it is averred that the detail has been given qua number of times, the Process Server had visited the house of defendant No.3-petitioner and that she refused to sign the same and thereafter, she did not allow the summons and copy of the plaint, to be affixed on her house. In this way, it was averred that she was duly served, but she intentionally refused to sign the summons and so, the ex-parte proceedings were rightly conducted and ultimately, ex-parte

judgment and decree was rightly passed on 21.05.2019. As such, it is submitted that application under Order 9 Rule 13 has been rightly dismissed.

At this juncture, it is pertinent to mention that from the material coming on record, it is evident that during the pendency of the suit, filed by respondent No.1-plaintiff, summons were issued under the signatures of the Presiding Officer on 05.05.2018, to get the service effected upon the petitioner, who was defendant No.3, before the Court below. The next date fixed, as evident, from the summons, was 13.07.2018. Reports made by the Process Server, on the summons, so dispatched, which is Annexure P-3, reveals that Process Server had allegedly visited the house of the petitioner-defendant No.3, three times. First report is of 11.05.2018, wherein, it is stated that the enquiry about Neelam Rani was made and the house was found locked and it was verbally known that she had gone out. Similar report was made, vis-a-vis, visit made by the Process Server on 18.05.2018. These reports were made by Sh.Jitender Singh, Process Server. Third time, visit was allegedly made to the place of Neelam Rani (petitioner) and she was asked to receive the summons, after informing her about the date of hearing, but after reading the summons, she refused to receive the same, nor did she permit to affix the copy of summons and copy of the plaint, on the house. This report was made by Sh.Hitesh, Process Server on 21.05.2018.

Even, on the basis of the aforesaid reports, on 13.07.2018, the Court concerned had passed the following order:-

“Notice issued to defendants no.1 to 3 received back through served. Case called several time since morning, but

none has appeared on behalf of defendants no.1 to 3. It is already 2.30 PM. No further wait is justified. Hence, defendants no.1 to 3 are hereby proceeded against exparte.

Power of attorney filed on behalf of defendant no.4. Now, case is adjourned to 29.08.2018 for filing written-statement on behalf of defendant no.4.”

Considering the report so made, learned counsel for the petitioner has assiduously submitted that the 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/her case. The report should carry evidentiary value, inasmuch as, that the report of refusal must be witnessed by some independent witness. Learned counsel submits that the Process Server was required to make report in accordance with law and it had to be witnessed by an independent witness and thereupon, the ex-parte proceedings could be ordered to be taken against the person. In the absence of recording any satisfaction by the Court, the ex-parte proceedings conducted by the Court below, are not legally sustainable. Rather, it is submitted that the Court had begun with the assumption about the service, having been duly effected, which is factually wrong, in view of the report, so made, which though, has not been authenticated by any person.

On the contrary, learned counsel for respondent No.1 has refuted the claim of the petitioner. It is submitted that service is deemed to be duly effected. Moreover, the petitioner had knowledge about the pendency of the suit and therefore, application under Order 9 Rule 13 CPC has been rightly dismissed.

In the light of the rival submissions, so made, it should be

taken note of that three reports have been made by the Process Servers, within a short span of 10 days, though the date fixed was 13.07.2018. These reports have not been witnessed by any person. Even, if such reports were made by Process Servers, then also, the Court concerned, before passing order of conducting the ex-parte proceedings, ought to have recorded its satisfaction, vis-a-vis, 'deemed' service. However, this satisfaction is missing in the order dated 13.07.2018, so passed. Rather, the Court concerned observed that notice issued to defendants no.1 to 3 received back served, which observation is palpably wrong.

Learned Court below has solely acted upon the said observation and proceeded against ex-parte, qua defendants No.1 to 3.

In any event, in view of the report having made by the Process Server, not witnessed by any person and in view of the satisfaction, not so recorded by the Court below as well as in view of the assertions made by the petitioner, thereby, stating about the summons having not received by her, at any time and also about the refusal having not so made, vis-a-vis, the affixation of copy of summons and copy of plaint, the disputed question of fact is definitely raised, on which the Court below was obliged to give an opportunity to the petitioner to lead evidence.

Even if, assuming a presumption of the 'deemed service' is raised against the petitioner, learned Court below should have given an opportunity to the petitioner to disprove the same. This was not done.

Learned counsel for respondent No.1, while relying upon the Second Proviso to Order 9 Rule 13 CPC, contends that the mere irregularity of service would not be a ground to set aside the ex-parte

decree. However, it is pertinent to mention that this Proviso would come into play, only if there was service but it was irregular and the Court below is satisfied that the petitioner had notice of the date of hearing and had opportune time to make appearance in the Court.

As noticed, there is no material on record to show that there was any service on the petitioner or family member or about the petitioner's refusal, as observed in the report of Process Server or of having any intimation or knowledge about the pendency of the present suit.

In these circumstances, second Proviso to Order 9 Rule 13 CPC also does not further the case of respondent No.1. Even if assuming, in the facts and circumstances of the case, the Court concerned raised the presumption that service has been effected, it was obligatory on the part of the Court below, to give an opportunity to the petitioner, to rebut the presumption, which, as observed aforesaid, has not been granted.

In the fact and circumstances of the present case, as held above, an issue should have been framed by the Court below, as to whether, petitioner was served and/or had knowledge of the pendency of the suit and thereafter, an opportunity should have been given to the petitioner to lead evidence, to rebut the same.

However, the said procedure, as such, has not been followed and in these circumstances, this Court is of the view that learned Court below has erred in dismissing the application under Order 9 Rule 13 CPC. Furthermore, even learned lower Appellate Court, had erroneously dismissed the appeal, so filed, against the dismissal of the application by the Court below.

Accordingly, the impugned order and judgment passed by learned trial Court as well as learned lower Appellate Court, are hereby set aside and the application filed by the petitioner-defendant No.3 under Order 9 Rule 13 CPC, is restored to the file of learned trial Court.

The parties are directed to make appearance before learned Court below on 20.12.2022 for further directions. Learned Court below, shall thereafter, proceed to frame the requisite issues and give an opportunity to the petitioner-defendant No.3, in support of the application under Order 9 Rule 13 CPC and shall thereafter, proceed expeditiously to decide the aforesaid application, in accordance with law.

The present revision stands allowed, in above terms.

December 13, 2022
Vgulati

(ARCHANA PURI)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes/No