

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

**CR-1191-2020
Reserved on 01.09.2022
Pronounced on: 15.09.2022**

Gurdev Singh

.....Petitioner

Versus

Biro and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Argued by : Mr. Gagandeep S. Sirphikhi, Advocate
for the petitioner.

Mr. Harminder Singh, Advocate
for the caveator/respondent No.1.

MANJARI NEHRU KAUL, J.

The instant revision petition has been filed under Article 227 of the Constitution of India for setting aside of the order dated 18.08.2016 passed by learned Civil Judge (Jr. Divn.), Batala (Annexure P/10) vide which an application filed under Order 9 Rule 13 of the Code of Civil Procedure, 1908 (for short, 'the Code') by the petitioner/defendant No.3 for setting aside judgment and decree dated 11.11.2013 (Annexure P/5) was dismissed by the Trial Court Batala vide Annexure P/10 and the appeal preferred against the aforementioned judgment and decree also met the same fate vide order of the learned Additional District Judge, Gurdaspur (Annexure P/12).

Learned counsel appearing for the petitioner contends that the impugned orders are patently erroneous having been passed without appreciating the material on record in the right perspective. Learned counsel for the petitioner submits that while effecting service of summons, the process server neither made any attempt to serve the

petitioner personally nor did he record his satisfaction to the effect that there was no likelihood of the petitioner being found at his residence within a reasonable time. He submits that a perusal of the report of the process server which has been annexed as Annexure P-2 makes it amply clear that there had been gross violation of the provisions of order 5 Rule 15 of the Code by serving summons directly on Narinder Kaur on behalf of the petitioner. Thus the service so effected in the above said manner could not be said to be effective service in the eyes of law. Learned counsel further argued that in fact it was a ploy and calculated move on the part of respondent No.2 who colluded with the plaintiff to get the petitioner proceeded against ex-parte in the suit in order to deprive him of his property. It was still further argued that the counsel who allegedly put in an appearance on behalf of the petitioner in the suit before the Court below was neither engaged nor authorised by the petitioner as the power of attorney filed did not bear the signatures of the petitioner. Learned counsel submitted that the petitioner had been affixing his thumb impression on all documents in the ordinary course of business and even otherwise and hence the question of the petitioner signing the power of attorney did not arise. Learned counsel submitted that in the circumstances there could be no manner of doubt that the power of attorney was forged and fabricated document. He still further submitted that the clerk namely Santokh Singh of the counsel Mr. G.S. Parmar, Advocate, who stepped into the witness box as RW1 brought only a few pages of the diary of Advocate G.S. Parmar instead of the whole diary by giving an excuse that it was untraceable. He submitted that the Trial Court erred in not considering

the material contradictions in his testimony including the cuttings and wrong entries in some of the pages of the diary so produced before it. He submitted that one of the dates which was mentioned in the pages of the aforesaid diary, was not even the date of hearing of the suit before the Trial Court. Furthermore, the petitioner in his examination-in-chief had categorically stated that the power of attorney was a forged and fabricated document as it did not bear his signatures. However, the said fact went unchallenged as no question or suggestion qua the aforementioned was put to the petitioner during his cross-examination. In support, learned counsel has placed reliance upon ***Rukhmani Vs. Vasudev : 2020(4) RCR (Civil) 365; Atar Singh Vs. District Judge, Ghaziabad and others : 2011(3) RCR (Civil) 476; Mithlesh Vs. Punjab National Bank : 1995(25) ALR 293; Smt. Sheona Vs. Smt. Maro and others : 2015(1) RCR (Civil) 247 and Vinergy International Pvt. Ltd. Vs. Dimple Dineshbhai Shah 2017 AIR (Bombay) 109.***

Per contra, learned counsel appearing for the caveator/respondent No.1 while controverting the submissions made by the counsel opposite, vehemently contended that the petitioner was duly served through Narinder Kaur, who accepted the summons on his behalf and she was none other than his own mother. He submitted that the petitioner in his cross-examination had admitted that he and his mother i.e. Narinder Kaur were living in the same house and had a joint mess. Therefore, it was abundantly clear that the petitioner had been duly served and also had knowledge not only about the institution of the suit in question but also about the dates of hearing before the Courts below. He still further submitted that the petitioner in his cross-

examination had admitted that he was a literate person, however, strangely he had chosen to come up with a false version that he had been affixing his thumb impression on documents in ordinary course of business. He submitted that even if for the sake of arguments, it was believed that the petitioner had all along been affixing his thumb impression in the ordinary course of his business on documents, it was incumbent upon him to bring on record at least some cogent evidence in the form of any document which had been executed and attested by him during the relevant period when the power of attorney in question was filed in the suit or prior thereto which he failed to do. Learned counsel submitted that in the absence of any such document having been brought on record, the Trial Court had rightly drawn an adverse inference against him. It was also vehemently submitted that in order to succeed the petitioner was required to stand on his own legs to prove his case beyond reasonable doubt by leading some cogent evidence specifically when fraud had been alleged by him. Learned counsel submitted that in the circumstances, the Courts below had not erred while passing the impugned orders

I have heard learned counsel for the parties and perused the relevant material on record.

The petitioner has prayed for setting aside of the ex-parte judgment and decree 11.11.2013 primarily on two grounds i.e. (i) that he was unaware about the pendency of the suit in question as he had never been served with summons and (ii) that he had not engaged and authorised any counsel to appear on his behalf before the Trial Court in the suit in question and if any counsel had appeared, it was a result of

collusion between the plaintiff and the said counsel.

A perusal of the report of the process server annexed as Annexure P-2 dated 29.01.2009 reveals that though the petitioner was not served personally, however, it was his mother Narinder Kaur who received the summons on his behalf and also undertook to get the petitioner to appear in the Court.

This Court no doubt concurs with the submissions made by the learned counsel for the petitioner that provisions of Order 5 Rule 15 were not completely complied with when the service was effected. However, in order to set aside an ex-parte judgment it would be necessary to consider the effects of such no-compliance in the facts and circumstances of the case in hand.

To deal with the matter in issue, it would be relevant to reproduce Order 9 Rule 13 of the Code, which reads as under:-

“13. Setting aside decree ex parte against defendants.-In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation-

Where there has been an appeal against a decree passed

ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.”

It is evident from a perusal of the second proviso which has been reproduced hereinabove that if the Court is satisfied that the defendant had due notice of the date of hearing, and had sufficient time to appear and answer the claim of the plaintiff, then an ex-parte decree should not be set aside on the ground that there had been some irregularity in the service of summons.

Adverting to the case in hand, admittedly the mother of the petitioner Narinder Kaur accepted the summons on his behalf. It is the admitted case of the petitioner that he and his mother are not only residing in the same house but are also having a joint mess. It was also categorically deposed by the petitioner during his cross-examination that Narinder Kaur was literate and used to sign in Punjabi. Still further, the petitioner admitted that the signatures on the backside of the summons for 07.02.2009 (Annexure P/2) were his mother's. In the wake of the above admissions made by the petitioner, it is clearly discernible that the petitioner had knowledge not only about the institution of the suit in question but also about the next date of hearing. It cannot be digested that the petitioner's mother Narinder Kaur after receiving the Court summons would not have brought it to his notice, moreso, when it is not even the case of the petitioner that he has strained relations with her. It needs to be reiterated that service upon an adult member of a family whether literate or illiterate, is a valid service. The instant case is no different as admittedly the petitioner and Narinder Kaur are not

only living in the same house but are having cordial relations as well. Still further it has also nowhere been averred that the petitioner did not get sufficient time to appear and answer the plaintiff's claim. The judgments relied upon by learned counsel for the petitioner would not come to his rescue in the peculiar facts and circumstances of the instant case as it can be discerned that the petitioner did have notice of the date of hearing.

As a sequel to the above, the instant revision petition is dismissed.

15.09.2022

Vinay

(MANJARI NEHRU KAUL)
JUDGE

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