

CR-7096-2017 (O&M) & CR-7099-2017 (O&M)

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

Reserved on:- 17.10.2023

Pronounced on:- 05.12.2023

(1) CR-7096-2017 (O&M)

Smt. Santosh and another

...Petitioners

Versus

Vijay Pal and others

...Respondents

(2) CR-7099-2017 (O&M)

Smt. Santosh and another

... Petitioners

Versus

M/s S.J. Towers and Developers Pvt. Limited and others

...Respondents

CORAM:- HON'BLE MS. JUSTICE AMARJOT BHATTI

Present:- Mr. Sunil Chadha, Senior Advocate with
Ms. Devyani Sharma, Advocate
for the petitioners.

Mr. Aashish Chopra, Senior Advocate with
Ms. Nitika Sharma, Advocate
for respondent No. 1 in CR-7096-2017 and
for respondent No. 9 in CR-7099-2017.

Mr. Amit Jain, Senior Advocate with
Mr. Anupam Mathur, Advocate
for respondent Nos. 1 to 4 in CR-7099-2017.

AMARJOT BHATTI, J.

1. The petitioners/plaintiffs Santosh and Sushma alias Rekha have filed two Civil Revisions under Article 227 of the Constitution of India for setting aside the common judgment dated 30.08.2017 (Annexure

P-12) passed by the Court of learned Additional District Judge, Gurugram in Civil Appeal No. 66 of 11.05.2015/10.08.2015 (M/s S.J. Towers and Developers Private Limited and others versus Smt. Santosh and another) and in Civil Appeal No. 86 of 15.05.2015/06.07.2017 (Vijay Pal versus Smt. Santosh and others) and to restore the common order dated 07.04.2015 (Annexure P-9) passed by the Court of learned Civil Judge (Junior Division), Gurgaon, whereby the application filed under Order 9 Rule 13 read with Section 151 C.P.C. for setting aside *ex parte* judgment and decree dated 07.03.2006 filed by applicant/defendant No. 8 Vijay Pal and application under Order 9 Rule 13 read with Section 151 C.P.C. filed by applicants/defendants No. 5 to 7 and 9 were rightly dismissed. Both these civil revisions have arisen out of the same judgment dated 30.08.2017 (Annexure P-12) and order dated 07.04.2015 (Annexure P-9), therefore, the civil revisions are taken up together for disposal.

2. The learned Senior Counsel for the petitioners argued that the learned Additional District Judge, Gurgaon has erroneously allowed the appeal of defendants No. 5 to 7 and 9 on the one hand and respondent/defendant No. 8 on the other hand. In-fact, the facts and circumstances of the case were rightly considered by learned Civil Judge (Junior Division), Gurgaon while dismissing the application under Order 9 Rule 13 C.P.C. by passing well reasoned order dated 07.04.2015, Annexure P-9. The petitioners/plaintiffs had filed Civil Suit No. 141 dated 10.03.1999/07.09.1998 seeking declaration that they are absolute owners in possession of the suit land and challenged mutation No. 784 sanctioned on 24.12.1994 and subsequent sale deeds dated 19.12.1994 and 20.04.1995 and the mutations sanctioned on that basis as illegal, null and void, nonest,

void ab initio and the same did not confer any right, title or interest on the

defendants along with the relief of permanent injunction restraining the defendants from creating any charge over the property by alienating or transferring the same or changing the nature of property. The copy of said plaint dated 07.09.1998 is Annexure P-1. The defendants No. 1 to 4 i.e. respondents No. 6 to 9 in CR-7096-2017 appeared through their counsel Sh. Anil Grover, Advocate and ultimately the suit was decided vide judgment and decree dated 07.03.2006. The copy of judgment and decree dated 07.03.2006 is Annexure P-2. Sh. Anil Grover, Advocate filed application dated 07.12.2000 seeking one opportunity to file written statement on behalf of defendants No. 5 to 7 and 9. The copy of said application is Annexure P-4. The copy of Memo of Appearance as well as *vakalatnama* submitted by Sh. Anil Grover, Advocate as well as Sh. Anil Grover, Advocate gave *vakalatnama* in favour of Sh. G.L. Malik, Advocate, which are Annexure P-5. The learned counsel for defendants No. 5 to 7 and 9 were granted several opportunities to file their written statement. The cost was also imposed and ultimately their defence was struck off vide order dated 10.11.2001.

The defendant No. 8 Vijay Pal had purchased 1/8th share in the suit property who remained unserved by way of ordinary process as well as through registered post. Thereafter, application dated 26.05.2004 was filed to effect his service by way of substitute means, which is Annexure P-6. As per order dated 28.05.2004, the defendant No. 8 was ordered to be served through publication in the newspaper "*Bharat Desh Hamara*" for 20.09.2004 on filing of publication charges and process fee. The publication was duly effected and thereafter, vide order dated 22.01.2005, the defendant No. 8 Vijay Pal was also proceeded against

Annexure P-3. The suit filed by the plaintiffs was ultimately decreed vide judgment and decree dated 07.03.2006, Annexure P-2. Thereafter, the petitioners through their lawful General Power of Attorney Holder Rajesh Monga sold the property in favour of Priya Monga vide registered sale deed dated 06.07.2006. On 08.01.2007, the defendants No. 5 to 7 and 9 filed application under Order 9 Rule 13 C.P.C. read with Section 151 C.P.C. for setting aside the aforesaid judgment and decree dated 07.03.2006 (Annexure P-2). The copy of application dated 08.01.2007 is Annexure P-7. The reply filed by the petitioners is Annexure P-8. Vijay Pal, defendant No. 8 filed separate application for setting aside the judgment and decree dated 07.03.2006 (Annexure P-2). The true copy of the application dated 23.09.2009 is Annexure P-10. The reply dated 09.10.2009 is Annexure P-11. Both the applications were disposed of by passing common order dated 07.04.2015, Annexure P-9. Thereafter, two separate appeals were filed against the aforesaid order dated 07.04.2015, Annexure P-9 i.e. one Civil Appeal No. 66 dated 11.05.2015/10.08.2015 filed at the instance of defendants No. 5 to 7 and 9 and another Civil Appeal No. 86 dated 15.05.2015/06.07.2017 filed at the instance of defendant No. 8 Vijay Pal. These appeals were disposed of by passing impugned judgment dated 30.08.2017, which is Annexure P-12. The appeals were wrongly accepted by restoring the suit of the petitioners/plaintiffs to its original number with the direction to the defendants to file their respective written statements. Now, two separate civil revisions have been filed against the impugned judgment dated 30.08.2017, Annexure P-12.

3. The learned Senior Counsel for the petitioners pointed out that

Vijay Pal – respondent/defendant No. 8 wrongly claimed that he was not

aware of the impugned judgment and decree dated 07.03.2006, Annexure P-2 and he came to know about this fact when he received notice in the application filed by defendants No. 5 to 7 and 9. It is pointed out that the address mentioned in the plaint as well as in the application Annexure P-7 is the same, therefore, it cannot be said that he was not served on the correct address. Despite repeated notices, he did not appear and ultimately he was ordered to be served through publication. The conduct of defendant No. 8 clearly shows that he was having full knowledge about the proceedings of the suit Annexure P-1 and he did not choose to appear deliberately. The learned Additional District Judge, Gurgaon has wrongly concluded that the newspaper "*Bharat Desh Hamara*" had no circulation in the area and it is further wrongly concluded that there was a long gap in the order issuing notice by way of publication and the date when the notice was actually published in the newspaper for 22.01.2005. The justification given by the learned Additional District Judge, Gurgaon regarding passing of impugned judgment qua respondent No. 8 Vijay Pal is not on sound footing. The dates were given as the publication fee was not deposited. Thereafter, the publication fee was deposited and notice was issued through publication for 22.01.2005. The reasoning given by learned Civil Judge (Junior Division), Gurgaon while passing order dated 07.04.2015, Annexure P-9 qua respondent No. 8 Vijay Pal is fully justified and the same does not require any interference.

The learned Senior Counsel for the petitioners/plaintiffs further raised the issue that the defendants No. 5 to 7 and 9 were duly represented by their counsel. They availed numerous opportunities to file their written statement and when their counsel failed, their defence was struck off. Therefore, the stand taken by these defendants that they were

not aware of the proceedings of the case does not hold any ground. The defendants No. 5 to 7 and 9 have their separate legal department in the company to handle such matters. Therefore, they cannot plead ignorance. It is wrongly concluded that Sh. Anil Grover, Advocate wrongly appointed Sh. G.L. Malik, Advocate to pursue their case. The perusal of Power of Attorney given to Anil Grover, Advocate shows that there is a specific clause that he could hire another Advocate to pursue the matter. Therefore, neither Anil Grover, Advocate nor G.L. Malik, Advocate have done anything wrong against the rules. These facts were rightly considered by the trial Court while passing the order dated 07.04.2015, Annexure P-9 and their application for setting aside the judgment and decree dated 07.03.2006 (Annexure P-2) was rightly declined. The learned Senior Counsel for the petitioners has relied upon the authority cited in **2011(3) SCC 545, Supreme Court of India**, case titled “**Parimal versus Veena @ Bharti**”, referring paras No. 7, 8 and 12, which runs as under :-

“7. Order 9, Rule 13 CPC:

The aforesaid provisions read as under:

"Setting aside decree ex-parte against defendant 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;

xx xx xx

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.

xx xx xx" (Emphasis added)

8. It is evident from the above that an ex-parte decree against a defendant has to be set aside if the party satisfies the Court that summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court.

The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.

12. In order to determine the application under Order 9, Rule 13 Civil Procedure Code, the test has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application."

The learned Additional District Judge, Gurgaon while passing judgment dated 30.08.2017, Annexure P-12 wrongly accepted the appeal without considering the fact that the contesting respondents/defendants were bound to file their respective applications within the period of limitation for setting aside the judgment and decree dated 07.03.2006, Annexure P-2. The mandatory provisions under Order 9 Rule 13 C.P.C. have been totally ignored. Under these circumstances, it is prayed that impugned judgment dated 30.08.2017, Annexure P-12 passed by learned Additional District Judge, Gurgaon may kindly be set aside by restoring the order dated 07.04.2015, Annexure P-9 passed by the learned Court of Civil

Judge (Junior Division), Gurgaon.

4. The learned Senior Counsel representing the respondent/defendant No. 8 Vijay Pal pointed out that Vijay Pal was never served in this case. There is long gap between the date of order for publication and the date when the publication was actually effected. The defendant No. 8 never got a chance to contest the suit filed by the plaintiffs. There was no proper service. This fact was rightly considered by the learned Additional District Judge, Gurgaon and accordingly, the judgment dated 07.03.2006, Annexure P-2 was rightly set aside giving opportunity to the respondent/defendant No. 8 to file his written statement and to contest the case. Therefore, the impugned order dated 30.08.2017, Annexure P-12 does not require any interference.

The learned Senior Counsel representing the respondents/defendants No. 5 to 7 and 9 raised the issue that they were not properly represented before the trial Court. They had hired Sh. Anil Grover, Advocate on their behalf who stopped appearing before the trial Court without any intimation to the respondents/defendants No. 5 to 7 and 9. He, on his own, appointed Sh. G.L. Malik, Advocate who appeared once and thereafter did not comply the orders of the Court, as a result, their defence was struck off. The learned Senior Counsel has relied upon the authority cited in **1998(1) R.C.R.(Civil) 277, Supreme Court of India**, case titled “**Malkiat Singh versus Joginder Singh**”, where in that case while dealing with the provisions of Order 9 Rule 13 Civil Procedure Code, 1908 for setting aside *ex parte* decree, it was observed in para No. 4 as under :-

“4... There is no denying the fact that the appellants had engaged a counsel to defend them in the civil suit. The counsel for the appellants pleaded "no instructions" but the court did not issue any notice to the appellants, who were admittedly not present on the date when their counsel reported no instructions in the court. It is nobody's case that the counsel informed them after he had reported

no instructions to the court. The appellants only came to know about the order dated 18.11.1991 and the ex-parte decree dated 8.2.1992 when they approached their counsel on 6.6.1992. It was within four days thereafter that the appellants filed an application under Order 9, Rule 13, C.P.C. for setting aside the order dated 18.11.1991 and the decree dated 8.12.1992.”

There was complete negligence on the part of their Advocates and therefore, they did not get proper chance to present their case. It is in the interest of justice that the matter is disposed of on merits after giving due opportunity to the parties to present their respective cases. Therefore, the impugned order dated 30.08.2017, Annexure P-12 for setting aside the order dated 07.04.2015, Annexure P-9 does not require any interference and the civil revisions preferred by the petitioners/plaintiffs may kindly be dismissed.

5. I have considered the arguments advanced by the learned Senior Counsels contesting the present civil revisions and have gone through the record carefully. As per the facts of the present case, Smt. Santosh and Smt. Sushma alias Rekha filed suit for declaration and possession with consequential relief of permanent injunction against the defendants by filing this suit on 07.09.1998. The copy of plaint is Annexure P-1. The aforesaid civil suit No. 141 of 10.03.1999/07.09.1998 was ultimately decreed vide judgment and decree dated 07.03.2006, which is Annexure P-2. After the passing of aforesaid judgment and decree, the application for setting aside the same under Order 9 Rule 13 C.P.C. was filed for the first time on 08.01.2007 by defendants No. 5 to 7 and 9. The copy of application is Annexure P-7 and the reply to this application is Annexure P-8. Similarly, the respondent/defendant No. 8 Vijay Pal filed separate application dated 23.09.2009 under Order 9 Rule 13 read with

Section 151 C.P.C., Annexure P-10 and the reply to this application dated 09.10.2009 is Annexure P-11. These applications were declined by the trial Court vide order dated 07.04.2015, which is Annexure P-9. It is matter of record that the aforesaid order dated 07.04.2015 was challenged by filing separate civil appeals which were accepted vide common judgment dated 30.08.2017, Annexure P-12 and feeling aggrieved of this judgment, the aforesaid revisions have been preferred by Santosh and Sushma alias Rekha, petitioners/plaintiffs.

Firstly, I will deal with the application filed by Vijay Pal, respondent/defendant No. 8 under Order 9 Rule 13 read with Section 151 C.P.C. for setting aside the judgment and decree dated 07.03.2006, Annexure P-2. It is the case of respondent/defendant No. 8 Vijay Pal that he was never served in this case personally, therefore, he did not get a chance to contest the suit filed by the petitioners/plaintiffs. The application was filed after a gap of three years. He claimed that he came to know about the judgment and decree dated 07.03.2006, Annexure P-2 when he received notice in the application filed by respondents/defendants No. 5 to 7 and 9, which is Annexure P-7. The learned counsel for the petitioners/plaintiffs rightly pointed out that in the plaint, Annexure P-1, the address of Vijay Pal was mentioned as son of Suraj Singh, r/o House No. 83 Old Faridabad (Haryana), whereas, in the application filed by applicants/defendants No. 5 to 7 and 9 same address was mentioned. Therefore, it cannot be said that the present petitioners/plaintiffs had given incorrect address of the respondent/defendant No. 8 Vijay Pal, as a result, he was not served. Now, it is to be seen what efforts were made to procure the service of respondent/defendant No. 8 Vijay Pal. The learned counsel for the petitioners/plaintiffs have placed on record the *zimni* orders, Annexure P-3,

which shows that process was sent to effect the service of respondent/defendant No. 8 several times but it was either received back unserved or not received back. There are *zimni* orders starting from 12.09.1998 to 28.05.2004, when the process was received back unserved time and again and ultimately application was filed under Order 5 Rule 20 C.P.C. for service of Vijay Pal by way of substitute means. Therefore, the case remained pending for years together to procure the service of respondent/defendant No. 8. It is not the case that publication was issued to procure his service in a hasty manner. Order 5 Rule 20(1-A) C.P.C. deals with service by substitute means by way of publication in daily newspaper circulated in the locality. There is nothing on record to show that the newspaper which was selected by the trial Court was not in the approved list of newspapers in which the publication was issued. After a long gap of three years, the respondent/defendant No. 8 Vijay Pal appeared on his own and filed application for setting aside the judgment and decree dated 07.03.2006 (Annexure P-2). The explanation given by him that he came to know about the aforesaid judgment and decree when application was filed by the respondents/defendants No. 5 to 7 and 9 does not hold ground as the address mentioned in the application as well as in the plaint was the same. The conduct of the respondent/defendant No. 8 Vijay Pal indicates that he deliberately kept away from the aforesaid litigation and after the passing of judgment and decree dated 07.03.2006 (Annexure P-2), he again remained silent for about three years and thereafter, filed the application. In the light of aforesaid factual position, I am not convinced with the reasoning given by learned Additional District Judge, Gurgaon for setting aside the order dated 07.04.2015, Annexure P-9 qua the respondent/defendant No. 8 Vijay

6. The respondents/defendants No. 5 to 7 and 9 filed application for setting aside *ex parte* judgment and decree dated 07.03.2006 (Annexure P-2) by filing application on 08.01.2007, which is Annexure P-7, after period of about 10 months from the passing of judgment. So far as the respondents/defendants No. 5 to 7 and 9 are concerned, they were duly served in this case and Sh. Anil Grover, Advocate filed his Memorandum of Appearance as per order dated 07.06.1999 and thereafter, filed his *vakalatnama* on 12.11.1999. Thereafter, the case was adjourned several times for filing of written statement. Even cost was imposed and ultimately the defence was struck off as per *zimni* order dated 10.11.2001 after a period of more than two years. The suit filed by the petitioners/plaintiffs was decreed as per judgment and decree dated 07.03.2006 (Annexure P-2). During this period, the respondents/defendants No. 5 to 7 and 9 never approached any forum to set aside the order dated 10.11.2001 and after a gap of about 10 months from the passing of judgment and decree, the application was filed under Order 9 Rule 13 C.P.C., Annexure P-7. The learned counsel for the respondents/defendants No. 5 to 7 and 9 took the stand that they had hired Sh. Anil Grover, Advocate. He left the practice and gave Power of Attorney to Sh. G.L. Malik, Advocate, whose presence was marked on few dates and thereafter, he also stopped appearing. The copy of Power of Attorney in favour of Sh. Anil Grover, Advocate is Annexure P-5 and in this Power of Attorney, there is a specific clause that *he was competent to appoint, instruct any other legal practitioner authorizing him to exercise the power and authorities hereby conferred upon the Advocate whenever he may think fit to do so and to sign the Power of Attorney on my/our behalf*. On the basis of this clause, Sh. Anil Grover, Advocate appointed Sh. G.L. Malik, Advocate to appear in the

case. Therefore, it cannot be said that either Sh. Anil Grover, Advocate or Sh. G.L. Malik, Advocate did any act against the rules. It is also appreciated by the learned Civil Judge (Junior Division), Gurgaon that the respondents/defendants No. 5 to 7 and 9 never opted to proceed against these Advocates for any professional misconduct. The learned Civil Judge (Junior Division), Gurgaon further appreciated the fact that the respondents/defendants No. 5 to 7 and 9 are companies having special legal cells dealing with their litigation. Therefore, they cannot plead ignorance regarding the progress of their case.

The aforesaid facts clearly indicate that the respondent/defendant No. 8 as well as respondents/defendants No. 5 to 7 and 9 kept away when the proceedings were going on in Civil Suit No. 141 of 10.03.1999/07.09.1998 which were ultimately decided on 07.03.2006, after a period of more than 7 years. It was for the aforesaid respondents/defendants to prove sufficient cause for setting aside the *exparte* judgment and decree dated 07.03.2006, Annexure P-2 passed against them. The respondent/defendant No. 8 as well as respondents/defendants No. 5 to 7 and 9 cannot be permitted to misuse the process of law to delay the legal proceedings. In view of my above discussion, the order dated 07.04.2015, Annexure P-9 passed by learned Civil Judge (Junior Division), Gurgaon is on the sound footing and the same does not require any interference.

Therefore, both the Civil Revisions bearing Nos. 7096 of 2017 and 7099 of 2017 preferred by the petitioners/plaintiffs are accepted and the impugned common judgment dated 30.08.2017, Annexure P-12 passed by learned Additional District Judge, Gurgaon in Civil Appeal No. 66 of 11.05.2015/10.08.2015, titled 'M/s S.J. Towers and Developers Private

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Limited and others versus Smt. Santosh and another’ and in Civil Appeal No. 86 of 15.05.2015/06.07.2017, titled ‘Vijay Pal versus Smt. Santosh and others’, is set aside being without justification and the order dated 07.04.2015, Annexure P-9 passed by learned Civil Judge (Junior Division), Gurgaon is restored. The Civil Revisions are accordingly, allowed.

Pending application(s), if any, in both the Civil Revisions shall stands disposed of, accordingly.

Photocopy of this order be placed on the file of another connected case.

05.12.2023
lalit

(AMARJOT BHATTI)
JUDGE

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