

CR-1187-2019 (O&M)

-1-

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

CR-1187-2019 (O&M)
Reserved on : 14.03.2023
Date of Decision : 11.04.2023

Amrit Kaur (since deceased) through LRsPetitioners

VERSUS

Inderpal Kaur and OthersRespondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Ashish Aggarwal, Sr. Advocate with
Mr. Karan Singla, Advocate for the petitioners.

Mr. Santosh Sharma, Advocate for the respondents.

-. -

ALKA SARIN, J.

The present revision petition under Article 227 of the Constitution of India has been filed for setting aside the impugned order dated 10.01.2019 whereby the application under Order 9 Rule 13 CPC filed by the defendant-respondents has been allowed.

The brief facts relevant to the present *lis* are that the plaintiff-petitioner filed a suit for joint possession against the defendant-respondents herein who are none-other than the daughter-in-law and grand-children of the plaintiff-petitioner. The defendant-respondents were proceeded against ex-parte and vide judgment and decree dated 03.09.2016 the suit was decreed. The defendant-respondents filed an application for setting aside the ex-parte order dated 28.08.2016 and the ex-parte judgment and decree dated 03.09.2016. The Trial Court vide impugned order dated 10.01.2019 allowed

the application and the ex-parte order dated 28.08.2016 as well as the ex-parte judgment and decree dated 03.09.2016 were set aside and the suit was restored to its original number. Hence, the present revision petition.

Learned senior counsel appearing on behalf of the plaintiff-petitioner would contend that as far as the minors are concerned, since they were not represented by a guardian they cannot be considered defendants and no application under Order 9 Rule 13 CPC would be maintainable at their behest. In support of his argument, learned counsel has relied upon the judgment of Gauhati High Court in the case of **Budhai Nepal Chandra Lalit Moban Saha Firm & Anr. Vs. Sudhangshu Ranjan Dev & Ors. [AIR 1976 (Gauhati) 7]** and **Gendalal Vs. Sitabai Bhagwat [AIR 1957 (Madhya Bharat) 10]**. It is further the contention of the learned counsel that where the mother is concerned, she was duly served and that as per the summons dated 24.06.2015 she had flatly refused and affixation was done. Thereafter, even *munadi* was effected and as per the report dated 22.07.2015 it has been stated that after effecting the *munadi* a copy of summons were also affixed on the house of the addressee.

Per contra, learned counsel for the defendant-respondents has contended that not only the minors were never served, even the mother Smt. Inderpal Kaur, defendant-respondent No.1 herein, was never served. Learned counsel has pointed out that as per the summons appended with the petition as Annexure P-6 collectively, it is apparent that on 24.06.2015 the refusal and affixation of the plaint was not witnessed by any person. Even the *munadi* and affixation after effecting *munadi* was also not witnessed by any person. In view thereof, the ex-parte order dated 28.08.2016 as well as

CR-1187-2019 (O&M)

-3-

the ex-parte judgment and decree dated 03.09.2016 have rightly been set aside.

Heard.

In the present case even if the arguments of the learned counsel for the plaintiff-petitioner is accepted that no application is maintainable at the behest of the minors, however, a perusal of the report of the summons by the Process Server as well as the *munadi* report clearly reveals that the same have not been witnessed by anyone. In the absence of any witness, it cannot be said that the defendant-respondents stood duly served. Order 5 Rule 17 of CPC reads as under :

“17. Procedure when defendant refuses to accept service, or cannot be found - Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally

works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.”

In the absence of the service of summons/affixation/*munadi* having been made as per the procedure prescribed, it cannot be said that the defendant-respondents stood duly served.

In Bhajan Singh Arora vs. IVth Additional Judge to the Court of District Judge, Bilaspur & Ors. [AIR 2011 Chhattisgarh 89] a Division Bench of the Chhattisgarh High Court, after noticing the judgements in Budhai Nepal (*supra*) and Gendalal (*supra*), held that an application under Order 9 Rule 13 CPC for setting aside an ex-parte decree against a minor or a person of unsound mind, who was not represented through his next friend or duly appointed guardian, is maintainable. This Court deems it appropriate to follow the ratio of the decision in Bhajan Singh’s case (*supra*). A minor is entitled to an indulgent consideration so far as procedural lapses are concerned at the hands of the Court.

Thus, in the present case the application under Order 9 Rule 13 CPC was maintainable on behalf of the minors. Further, the application deserved to be allowed on the ground that even defendant-respondent No.1 was not properly served.

CR-1187-2019 (O&M)

-5-

In view of the above, the impugned order setting aside the ex-parte order as well as the ex-parte impugned judgment and decree is upheld. The present revision petition, which is devoid of any merit, is dismissed. Pending applications, if any, also stand disposed off.

Dismissed.

11.04.2023
tripti

(ALKA SARIN)
JUDGE

NOTE : Whether speaking/non-speaking : Speaking
Whether reportable : YES/NO