

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-4883-2022 (O&M)

Date of decision: March 15, 2023

Sucha Singh

...Petitioner

versus

Harish Talwar

...Respondent

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. Sanjay Majithia, Senior Advocate with
Mr. Sumit Sinha, Advocate for applicant-petitioner.

Mr. Sunil Agnihotri, Advocate for non-applicant/respondent.

ARUN MONGA, J. (ORAL)

Assailed herein are two orders viz. dated 27.01.2020 (Annexure P-6) and 03.10.2022 (Annexure P-8) learned trial Court and Appellate Court, respectively, whereby application filed by defendant/petitioner under Order 9 Rule 13 CPC, seeking to set-aside *ex parte* judgment and decree dated 04.09.2018 (Annexure P-3), was dismissed.

2. Succinct facts, as pleaded in the revision petition.

2.1 Respondent/plaintiff filed a suit for possession by way of specific performance against petitioner/defendant on the basis of an alleged agreement to sell dated 23.06.2015, stated to be executed by petitioner in respect of a house constructed over an area measuring 06 Marlas. Total sale consideration per agreement is claimed to be Rs.2 lakh with date for registration of sale deed fixed on 30.12.2015 and a sum of Rs.60,000/- was paid to petitioner by respondent as earnest money.

2.2 Learned trial Court issued notice to petitioner. Per judicial record, he was served, but chose not to appear. He was accordingly proceeded *ex parte*

vide order dated 21.08.2017 after relying upon report of process server dated 04.08.2017 (Annexure P-2). Learned trial Court on the basis of evidence produced by respondent/plaintiff decreed the suit filed by respondent herein vide *ex-parte* judgment and decree dated 04.09.2018 (Annexure P-3).

3. After obtaining the *ex parte* decree, the respondent filed execution application. Upon munadi, the petitioner came to know about the judgment and decree. He immediately moved an application under Order 9 Rule 13 CPC, which was eventually dismissed by the trial Court vide impugned order dated 27.01.2020 Annexure P-7. The petitioner's appeal against the same was also dismissed by the learned Appellate Court vide impugned order dated 03.10.2022 Annexure P-8.

4. Learned senior counsel for petitioner, Mr. Sanjay Majithia, argues that both Courts below placed over-emphasis on the service report of process server (Exhibit D-1). He would urge that sole residential house of petitioner is subject matter of civil suit where he along with his family is residing and there was no reason for petitioner to remain absent and not contest the suit. The report of process server is shrouded with suspicion.

5. Per contra, Mr. Sunil Agnihotri, learned counsel for respondent supports the impugned orders. He submits that signatures of petitioner were obtained by process server as per due procedure. It cannot thus be said that he was never served. When petitioner himself chose not to appear before learned trial Court, he was rightly proceeded against *ex-parte*. It does not now lie in the mouth of petitioner to turn around and say that he was never served. Especially, when he did not dispute his signatures on the summons.

6. I have heard rival contentions and perused the case file.

7. Plaintiff on the basis of the *ex parte* decree, instituted the execution proceedings and that is when petitioner claims that he came to know of the fact of

filing of suit for specific performance against him. He then took immediate steps to file an application under Order 9 Rule 13 CPC seeking to recall *ex parte* decree. While upholding dismissal of application by trial court, following are the reasons given by learned First Appellate Court in impugned order dated 03.10.2022:-

“So as the things stand out, the main question which is begging for the answer is that whether applicant/ defendant/appellant was served in the main case and whether he signed on the summons. Perusal of the original file shows that notice was issued to applicant/defendant/appellant to appear in the Court to contest the suit of plaintiff/respondent and the same was received back as served with the report of Process server Hari Parshad. This Hari Parshad is also examined as RW-1 and he proved the report as Ex.D1. This witness also proved that he also handed over one copy of the summons to the applicant/ defendant/appellant. And this service of summons is opposed by the applicant/defendant/ appellant with the averments that he never signed the summons and secondly process server did not along any respectable of the locality, but both these contentions are rightly dismissed by the learned trial Court, firstly by observing that, “this Court is of the view regarding the denial of signatures, that it was incumbent upon the applicant to prove on record that the said signatures were forged or the said summons does not bear his signatures. He has also not stated in his affidavit that the said summons have been got served by the process server of the Court (employee of the Court) and the work done by an employee in discharge of his official duty shall be deemed to be rightly done unless the contrary is proved. Now it is the duty of the applicant to prove on record that any foul play has been done by the respondent or the employee of the Court”.

And secondly by observing that, “when the applicant has duly received the summons and put his signatures on the same, then the argument of learned counsel for the applicant that the process server did not accompany any respectable of the locality for the execution of the summons is without any substance”.

So accordingly, to my mind the application for setting aside the ex parte judgment and decree is devoid of any merits and deserves to be dismissed.”

8. From the aforesaid what thus emerges is that application was dismissed solely on the basis of testimony of process server. Pertinently, he clearly stated while appearing in the witness box that he did not know petitioner-Sucha Singh and, at the time of causing service, he did not make any attempt to associate any independent witness to identify petitioner-Sucha Singh.

9. Case pleaded by the petitioner herein is that defendant/Judgment debtor is that service report is result of misrepresentation and fraud played on

him. He states that plaintiff/respondent is actually a travel agent who is in the business of sending skilled workers, unemployed persons abroad by enticing them with better job prospects. Petitioner states that he is a Carpenter by profession and being a skilled worker, had approached the respondent for going to Dubai. He further states that he was enticed by respondent and there was a deal struck between petitioner and respondent that he would be sent abroad on a total payment of Rs.1,50,000/-. Out of this, an amount of Rs.50,000/- was paid in cash by petitioner and remaining amount was to be paid after grant of requisite job visa. He further pleads that in order to secure balance of Rs.1,00,000/- from petitioner, respondent also obtained signatures of petitioner on some blank papers and also on a register which is in custody of respondent.

10. Petitioner is stated to be an illiterate person having had education only upto 4th or 5th standard. He barely knows how to put his signatures and does not know niceties of legal language, including agreement to sell which is stated to have been signed by him, basis which suit for specific performance was filed resulting in *ex parte* decree against him. He further pleads that a civil suit was filed by respondent to counter the demand of petitioner asking for refund of Rs.50,000/- which he had paid as part consideration for sending him Dubai, since respondent had failed to fulfill his promise. He pleads that not only suit was filed as a counterblast, but on a misrepresentation orchestrated by him, the petitioner was proceeded *ex parte* resulting in judgment and decree dated 04.09.2018 (Annexure P-3), passed behind his back.

11. Aforesaid facts are though disputed by respondent stating that they are merely fictitious as he is neither in the business of sending any workers abroad nor did he make any kind of misrepresentation in causing the petitioner to be proceeded against ex-parte.

12. Learned counsel for respondent, in fact, in course of arguments has over-emphatically argued that service of respondent on Court summons speak for itself as he did not deny his signatures on the summons; and therefore, effective service was caused upon him and petitioner was also aware of pendency of civil Court proceedings. It is only after passing of decree, when execution proceedings were initiated that petitioner caused appearance.

13. On the other hand, learned senior counsel for applicant/petitioner would point out that mere signatures, though not admitted in as many words as it may look to be, would not suffice any service on petitioner. He relies on an Order V Rule 16 read with 18 of CPC. For better appreciation of arguments of learned senior counsel, said Rules are reproduced herein below :

“ORDER V: ISSUE AND SERVICE OF SUMMONS

Rule 16. Person served to sign acknowledgement.

Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

Rule 18. Endorsement of time and manner of service.

The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.”

14. In the present case, service of summons has to be carried out in terms of Order V Rule 16 when read with Rule 18 of CPC, which would no doubt seem to suggest that serving officer of the Court should obtain identification report of a third person in case person to be served is not known to him. However, I am of the view that aforesaid provision is directory in nature, as is borne out from words used “if any” and shows that if any person is not

available, it is left to the discretion of serving officer to obtain signatures of person served and submit his report accordingly.

15. Be that as it may, in this case the service was disputed by petitioner before learned trial Court. In this context, pertinent it is to refer to the summons bearing the report of service made thereon by the process server (Annexure P-2). Their perusal shows that the summons does not bear any note that it was accompanied by a copy of the plaint. Other particulars in the summons do not at all show what was the nature of the suit and the claim against the petitioner. The acknowledgement purportedly signed by the petitioner shows that he had received only a copy of the summons. Similarly, the report of the process server itself shows that only the copy of the summons had been given by him to the petitioner. It is thus obvious that the summons to the defendant was not accompanied by a copy of the plaint nor was a copy of the plaint given to the petitioner. In these circumstances, it seems that mere delivery of the summons to the petitioner which did not bear any particulars showing the nature of the suit without delivery of any copy of the plaint, was not sufficient/complete and effective service of the petitioner, a practically illiterate person, to understand as to what was the case filed against him.

16. Order II Rule 2 read with Rule 1 of the Code of Civil Procedure mandates that every summons to the defendant shall be accompanied by a copy of the plaint. It cannot, therefore, be said that it was a case of sufficient/complete and effective as mandated by the Rules *ibid*. Learned trial Court as also the learned first Appellate Court seems to have just ignored this material aspect of the case. They ought to have proceeded to put respondent/plaintiff to discharge onus of proving and showing that sufficient/complete and effective service was indeed effected on plaintiff.

17. That apart, rules of Procedure including those for service of summons are but handmaid of justice and they should not so strictly be cast in iron so as to defeat the very ends of substantive justice. Now let us assume for a moment, without holding, that sufficient/complete and effective service was indeed effected on plaintiff. Given the nature of disputed facts and defense of petitioner that he is an illiterate person and was desirous of going abroad and had parted with Rs.50,000/- as part consideration, I am of the view that it is very unlikely that if he had really known at the relevant time that his only house would be acquired by the respondent in the suit filed by him, he would not yet take steps to defend himself and protect his house.

18. There is another aspect of the matter, which deserves to be noted. In course of hearing, on a Court query as to why respondent who have concededly stated that he is having a general merchant shop and is not a travel agent, as alleged by the petitioner, would be interested to buy a mere 6 Marla dilapidated house from the petitioner, given his own financial status of much higher level, an argument was sought to be raised, though very seriously objected by the other side, that respondent had in fact, given Rs.60,000/- as a loan to the petitioner and, agreement to sell was executed as a collateral security, in case of failure by the petitioner to repay aforesaid loan. It is only when the petitioner did not pay loan liability as was the apprehension of respondent, a suit for specific performance was filed. Be that as it may, entire transaction, at this stage, *prima facie* seems to be dubious. One does not know whether respondent is a general merchant as he claims or a money lender or he is a travel agent in the business of sending jobless skilled workers out of Country. All these factual contentions give rise to triable issues which can be adjudicated only after weighing rival pleadings and evidence of both parties. In the circumstances, it becomes all the more imperative and in the interest of justice to give the

petitioner an opportunity to defend himself by contesting the civil suit on merits in accordance with established procedure of law.

19. In totality of circumstances, in my opinion, the ends of justice would be met in case respondent is compensated with costs and petitioner is granted an opportunity to defend himself by filing written statement. Since suit was filed way back in the year-2017, it is expected of learned trial Court to decide the matter expeditiously and proceed with the trial without granting unnecessary adjournments, subject of course to its own limitations depending upon day to day work load.

20. For the foregoing reasons, the revision petition is allowed, the impugned order dated 27.01.2020 (Annexure P-6) passed by learned trial Court and order dated 03.10.2022 (Annexure P-8) passed by learned Appellate Court are set aside, the petitioner is granted one opportunity to file written statement, subject to payment of costs of Rs.10,000/- and subject of course to discretion learned trial Court to grant further opportunity, in case it so desires depending upon work exigency before it. Costs shall be paid to the respondent herein.

21. Allowed accordingly.

22. Pending application(s), if any, shall also stand disposed of.

(ARUN MONGA)
JUDGE

March 15, 2023

Shalini/mahavir

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No