

2024:PHHC:126222



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

Civil Revision No.1172 of 2023

Pronounced on: 25.09.2024

Hartek Singh and Surlekh Singh through their GPA Dharminder Singh
.... Petitioners

Versus

Jai Singh and others
.... Respondents

CORAM: HON'BLE MR. JUSTICE GURBIR SINGH

Present: Mr. Sangram Singh Saron, Advocate and
Mr. Madhavrao B. Rajwade, Advocate, for the petitioners.

Mr. G.C. Shahpuri, Advocate, for respondent No.1.

GURBIR SINGH, J.

1. Present revision petition has been filed under Article 227 of the Constitution of India for quashing the order dated 24.01.2023 (Annexure P-23) passed by learned Additional District Judge, Yamuna Nagar at Jagadhri, dismissing the appeal filed by the petitioners against the order dated 08.09.2016 passed by learned Civil Judge (Senior Division) Yamuna Nagar at Jagadhri dismissing the application filed under Order 9 Rule 13 of CPC for setting aside ex-parte judgment and decree dated 03.03.2011 and order dated 18.08.2006 whereby petitioners were proceeded against ex-parte, in a suit filed for possession by way of pre-emption.

2. For the sake of convenience, the parties herein are being addressed as per their status before the trial Court. The petitioners herein are

defendants No.1 and 2 and respondent No.1 is the plaintiff whereas respondents No.2 and 3 are defendants No.3 and 4.

3. In brief, defendants No.1 and 2 have challenged the ex-parte judgment and decree on the ground that they were never served in the suit. They were not aware about the pendency of the suit. The plaintiff filed execution on the basis of ex-parte judgment and decree dated 03.03.2011 and got the order for execution of the sale deed. When the plaintiff approached the office of Sub-Registrar, Mustafabad for execution of the sale deed in their favour only, then Harbhajan Singh and Surender Singh told the defendants No.1 and 2 that Jai Singh, plaintiff, had got some ex-parte decree against them. The defendants are residents of Mani Majra, U.T., Chandigarh whereas munadi was got effected at some other place. Well established procedure for service on the defendants was not followed. Defendants No.1 and 2 had no knowledge about the filing of the suit and passing of the ex-parte judgment and decree against them and they came to know only on 24.11.2013. The application was filed without any delay on having knowledge of passing ex-parte judgment and decree.

3.1 The respondent-plaintiff contested the application by raising preliminary objection that the application is time barred and no application for condonation of delay has been separately filed. The notice was sent to defendants No.1 and 2 through registered post. Same was received with the report of refusal and the court passed the order to effect service in the said village where suit property was situated and the defendants No.1 and 2 were

proceeded ex-parte in accordance with law. Notice in the execution was also sent to the defendants but they did not appear and the application was moved at the final stage of the execution.

3.2 Vide order dated 08.09.2016, the application filed by defendants No.1 and 2 for setting aside judgment and decree, was dismissed and said order was upheld by the learned Appellate Court vide order dated 24.01.2023.

3.3. Aggrieved against the said orders, present revision petition has been filed.

4. Learned counsel for the petitioners-defendants No.1 & 2 has argued that the address given in the suit is the permanent address of the petitioners. They never received any notice/summon at their residential address regarding suit. The petitioners purchased the land in village Khanpur and are not resident of said village. They are residing permanently at Mani Majra, Chandigarh (UT). The munadi was conducted at Village Khanpur. The petitioners could not know about the pendency of the suit. The entire proceedings are non-est and had been conducted behind the back of the petitioners. The plaintiff never gave the true and current address of the petitioners in order to prevent them in appearing, presenting their defence and objections in the proceedings.

5. Learned counsel appearing on behalf of respondent No.1-plaintiff has argued that the application filed under Order 9 Rule 13 CPC is itself time barred as the proceedings in the civil suit for pre-emption were

well in the knowledge of the petitioners-defendants No.1 and 2, but they intentionally did not appear. Earlier registered AD notice issued to the petitioners received back with the report of 'refusal' and subsequently, substituted service by way of *munadi* was effected in the village where land was situated. Thus, it cannot be said that the petitioners were not having the knowledge of proceedings and therefore, the cause pleaded for being ex-parte has remained totally unproved.

6. I have heard the submissions of learned counsel for the parties and have gone through the file.

7. Brief history qua suit property is that plaintiff-Jai Singh (for himself and as General Attorney of other LRs of Shankar purported *gair marusi* tenant of the suit land) filed a suit, in the year 2006, for possession by way of pre-emption of suit land as fully described in the plaint. In fact, Mangal Singh was the original owner of the suit land which was under the cultivating possession of the father of plaintiff, namely, Shankar. After the death of Mangal Singh, the property was inherited by his wife Rameshwari Devi, who sold the suit land to Amar Nath, who in turn, sold the same to Gian Singh. Initially, Shankar, the tenant, filed a suit for permanent injunction for restraining Gian Singh from taking forcible possession but during pendency of that suit, Gian Singh succeeded in taking possession, which led Shankar to file a suit for possession in 1979. Though the suit was dismissed by the trial Court, but the learned Appellate Court set aside the judgment of trial Court and decreed the suit for possession vide judgment

dated 23.01.1985. Said decision was upheld by this Court as well as Hon'ble Supreme Court. In execution of that decree, objections filed by Gian Singh and others were dismissed. Later, a statement was made that the possession of the land would be given by 30.11.1987. But when the possession was not given, it was sought with the assistance of police and executive authorities and as a result thereof, Shankar was finally put in possession of the suit land on 15.04.1988. Meanwhile, Gian Singh initiated proceedings against Shankar seeking possession before the revenue authority, which were dismissed vide order dated 07.10.1988. On 15.04.1988 itself, a civil suit was filed by Gian Singh against Shankar for injunction against forcible interference in possession and a similar suit was also filed by Shankar against Gian Singh. Both the suits were tried together. The trial Court vide judgment and decree dated 01.12.1997 decreed the suit of Shankar and dismissed that of Gian Singh. Said decision of the trial Court was also upheld by the learned Appellate Court vide judgment dated 14.09.2000. Parties approached this Court by way of RSA No.3906 of 2000 and in the meanwhile, Gian Singh and his wife Surjit Kaur sold the suit land measuring 39 bighas 10 biswas to Hartek Singh and Surlekh Singh (present petitioners) vide sale deed No.596, dated 30.06.2005. Shankar died on 12.03.2005 and his son Jai Singh for himself and also attorney of other legal heirs of deceased, filed a suit seeking to pre-empt the sale deed dated 30.06.2005 on the ground that they were the tenants in cultivating possession over the suit land. Said suit was decreed ex-parte vide judgment and decree dated 03.03.2011 vide which the plaintiffs

were held owners of the suit land and were directed to deposit the balance sale consideration/pre-emption money. The application was moved to set aside this ex-parte judgment and decree.

7.1 Respondent No.1-plaintiff self and also attorney of other legal heirs of Shankar filed the suit for possession by way of pre-emption. The petitioners, who were defendants No.1 and 2 in the suit, are shown as residents of House No.1518, NAC Road, Mani Majra, Chandigarh (UT) and defendants No.3 and 4 in the suit were residents of Village Khanpur, Tehsil Jagadhri, District Yamuna Nagar.

7.2 Vide order dated 25.04.2006, registered cover (RC) issued for summoning defendants No.1 and 2 at Chandigarh address was received back with the report of refusal and therefore, they were ordered to be served through munadi for 07.06.2006. Fresh notice was issued to defendants No.3 and 4. On the adjourned date, since notice issued to defendants No.3 and 4 received back with the report of refusal and munadi issued against defendants No.1 and 2 was not received back, therefore, all the defendants were ordered to be summoned through munadi and by way of beat of drum and affixation for 18.08.2006. On said date, munadi was received back duly effected, but none appeared on behalf of the defendants and they were proceeded ex-parte. Said orders read as under:-

“Present: Sh. S.K. Gupta, Counsel for Plaintiff

RC issued for summoning of defendant No.1 and 2 received back with the report of refusal.

Therefore, now defendant No.1 & 2 be now summoned through munadi for 7.6.06 on MF, PF.

Defendant 3, 4 not served. Be summoned for the date fixed.

Sd/-
CJSD/25.04.06”

Present: Sh. S.K. Gupta, Counsel for Plaintiff
None for the defendants.

Notice issued to the defendant No.3 & 4 received back unserved with (illegible) of refusal. Munadi issued against the defendant No.1 & 2 not received back. Request for (illegible). Heard. Now all the defendants be summoned through Munadi and way of beat of drum and affixation for 18/8/06 on duty of PF/MF.

Sd/-
Civil Judge (Sr. Division)
7/6/06”

Present: Sh. S.K. Gupta, Counsel for Plaintiff

Munadi issued against defendants received back duly effected but none appeared on behalf of defendants. Case has been called several times. Waited sufficiently. Hence, defendants are proceeded ex parte.

To come upon 25.11.06 for ex-parte evidence.

Sd/-
ACJM/18.08.06”

The totality of the facts shows that the petitioners are residents of Mani Majra, Chandigarh (UT), but munadi was effected at Village Khanpur, Tehsil Jagadhri, on the basis of which, petitioners were proceeded against ex-parte. It is not the case of the respondent/plaintiff that petitioners were resident of Village Khanpur. From evidence, it can be safely concluded that there was no service effected upon the petitioners-defendants in the suit. The extract of order passed by trial Court is as under:-

“11. After considering the rival submissions, this court finds essence in the submissions made by the learned counsel for the

respondent. It is noticeable that there is a long history of litigation between the parties pertaining to suit property. It is also important to note that order for issuance of munadi against the applicants was made subsequent to receipt of registered notice with the report of refusal. Even if it is presumed that subsequent vendees Harbhajan Singh and Surender Singh were in possession of the suit property at the time when munadi was effected, the applicants were still required to show that they were not aware of the litigation. In this regard two facts assume significance. First that Harbhajan Singh and Surender Singh have also filed the objections along with the applicants in the execution petition which would show that all of them were in touch and were keeping a secret watch over the proceedings. Second that the applicants have filed the present application at the fag end of the execution when the court had already appointed a local commissioner and had directed him to execute the sale deed. It is noticeable that applicants did not appear initially in the execution also upon service and had moved the objections at the fag end of the execution. Importantly, there is no explanation as to how the applicants came to know of the execution proceedings. This would show that applicants were very well aware of the proceedings and were keeping an eye on the proceedings secretly. Moreover, the applicants have chosen not to appear in the witness box in support of the averments contained in the application, but have examined their power of attorney holder. Certainly, power of attorney holder cannot be aware of the entire facts from his personal knowledge and the right of respondent to cross examine the applicants on material aspects has been constrained by this fact. The burden to show that report of post office regarding

refusal of registered notice was false and that munadi proceedings were ineffective was upon the applicants which they have failed to discharge. It would be apt to observe that official proceedings of postal department and proceedings of the court cannot be lightly set aside and doubted. Noticeably the suit was instituted in the year 2006 and ex parte judgment and decree was passed in the year 2011. It is not such a case where the plaintiff hurriedly obtained ex parte judgement and decree in his favour. The fact that there was no occasion for the applicants to receive notice of the execution proceedings at the stage when they filed objections is also very significant in order show that the applicants in fact were keeping secret eye on the proceedings and delayed appearance till the very end. Therefore, this court is of the view that applicants deliberately did not appear before the court in the main suit and kept on watching entire proceedings till very end and filed the present application merely to procrastinate the trial.”

The learned court of Civil Judge presumed that the subsequent vendees were in possession of the suit property at the time when munadi was effected. The petitioners were still required to show that they were not aware of the litigation. Surrender Singh filed objections along with the petitioners in the execution petition. All of them were in touch and were keeping a secret watch over the proceedings and the application under Order 9 Rule 13 CPC was filed at the fag end of the execution when the court had already appointed a Local Commissioner and directed him to execute the sale deed. There is no explanation as to how the petitioners came to know of the execution proceedings. The petitioners did not opt to appear in the court but

examined their power of attorney holder, who cannot be aware of the entire facts from his personal knowledge. It is not the case where the plaintiff hurriedly obtained ex-parte judgment in his favour. Suit was instituted in 2006 and ex-parte judgment was passed in 2011. The petitioners were keeping a secret eye on the proceedings and delayed appearance till the very end.

7.3 The learned Appellate Court dismissed the appeal and came to the conclusion that notice was sent to defendants No.1 and 2 on their correct address. A registered notice sent through registered post and munadi effected by officials of the court are liable to be presumed to have been effected in the ordinary course of official duties unless it is not shown that there was any collusion of the concerned official with the respondent. Registered notices were sent at the correct address and when the same were received back with the report of refusal, for abundant caution, the learned appellate Court again issued process for service by way of munadi. Munadi was effected at the village where the land is situated and it does not make any difference as defendants No.1 and 2 had already got knowledge of the pendency of suit. The extract of order passed by appellate Court is as under:-

“18. A perusal of the case file would reveal that registered covers were sent to defendants No.1 and 2 on their correct address. There is presumption that addressee had received the letter sent by registered post, however, the presumption is rebuttable, but the same is not rebutted by the appellants/defendants No.1 and 2 while appearing in the witness box. None of the defendants appeared in the witness box to depose

that either registered notices were not sent to their correct address or they had not refused to accept the same. In place of defendants No.1 and 2, their power of attorney Dharmender Singh examined himself as AW1, who is a resident of Jagadhri. The service of registered AD notices was admittedly got effected at the address of defendants No.1 and 2 at Manimajra, Chandigarh (UP) (sic.) UT and, therefore, said Dharmender Singh being a power of attorney holder cannot be presumed to have knowledge about the fact that whether service of registered AD notice was effected upon defendants No.1 and 2 at Manimajra, Chandigarh (UT) or not. A power of attorney holder cannot be assumed the facts from his personal knowledge and he/she cannot depose for the principal in respect of the matters for which only the principal is entitled to be cross examined. For this view reliance can be placed upon the Judgment in Jasbir Singh's case (supra). It is to be mentioned further that a registered notice sent through registered post and munadi effected by officials of Court are liable to be presumed to have been effected in the ordinary course of official duties unless it is shown that there was any collusion of the concerned official with the respondent. It is not the case of appellants/defendants No.1 and 2 that there was collusion of concerned official, who effected the munadi with the plaintiff/respondent, rather case of appellants-defendants No.1 and 2 is that they were not owners of the property at the time of substituted service through munadi. However, there is no denial of the fact that registered covers were sent to their correct address, but the same were received in the Court with the report of refusal and the same was effective/proper service under Order 5 Rule 9(5) CPC. Though after receiving the registered notices issued to defendants No.1

and 2 with the report of refusal, for abundant caution, the learned Lower Court again issued process for serving upon them through substituted service i.e. by way of effecting munadi and merely the munadi was effected at Village, where the land is situated, does not make any difference as defendants No.1 and 2 had already got knowledge of the pendency of suit against them by way of registered-post.

19. It may be mentioned further that as per appellants/defendants No.1 and 2, they came to know about the exparte decree from Harbhajan Singh and Surender Singh. However, to prove this fact, defendants No.1 and 2 have not stepped into witness box and they examined said Surender Singh as AW2, but in his affidavit Ex.AW2/A, he nowhere stated that he had informed about the exparte decree to defendants No.1 and 2. He has vaguely stated in para No.10 of his affidavit that some time ago, Jai Singh came at the spot and threatened to take possession forcibly being owner of the land and thereafter, he enquired from the Court and came to know about the exparte decree. It is pertinent to mention here that in the execution petition filed by respondent/plaintiff, said Surender Singh had filed objections and also appeared as OW6, whereby he stated that decree holder/plaintiff was about to get executed and registered sale deed in his favour and thereafter, they enquired the matter and came to know about the exparte decree. Neither in his objections nor while appearing as OW6, Surender Singh nowhere stated that Jai Singh had come at the spot and threatened to take possession of the land forcibly as has been deposed by him in this application while appearing as AW2.

20. As far as the period of limitation for filing of an application under Order 9 Rule 13 CPC is concerned, Article 123 of the Limitation Act clearly prescribes that period of

limitation is 30 days for filing of application under Order 9 Rule 13 CPC from the date of decree where the defendant has caused appearance and in other cases from the date of knowledge.

21. However, in the present case, this Court is of the considered view that the defendants No.1 and 2 were having knowledge about the pendency of the suit since the very beginning when they refused to accept the service of summons by way of registered post. Thus, in the present case, the period of limitation commences from the date of decree whereas the present application has been filed on 06.12.2013. Thus, the application filed by defendants No.1 and 2 is clearly time barred.”

7.4 The orders passed by both the courts are on the basis of assumptions and presumptions. Once registered notice is received with the report of refusal, the court should either proceed on the basis of report on the registered notice or adopt other way for service upon the party. After receipt of said report of refusal, the court opted to serve the petitioners-defendants by way of affixation and munadi, which means that the court itself was not sure whether the petitioners were served or actually refused the registered envelope containing notice. The court ordered to serve the petitioners by way of affixation and munadi. Munadi was not effected at the residential address of the petitioners as the petitioners were not the residents of Village Khanpur where the property is situated. There was no specific order to effect munadi at Village Khanpur, District Yamuna Nagar. In the earlier order also order was passed to serve the petitioners through munadi which means at their

residential address. So, in these circumstances, it can be safely concluded that munadi was not actually effected as per orders of the Court. Thus, it can be safely concluded that notice was never served upon the petitioners.

7.5 In case ***Karnail Singh Versus Dina Nath and others, 1985(2) PLR 477***, this Court held that in case the defendants against whom ex-parte decree is passed comes to the court praying for setting aside of ex-parte decree on the ground that he was not served, then onus would be in the negative form on him and his statement on oath denying service would shift onus on the plaintiff to disprove his statement. In the case in hand, it is proved that the petitioners were not served and there is statement of attorney of petitioners denying service of notice upon petitioners, so the onus was on the respondent No.1-plaintiff to rebut the same, but in this case, there is no such evidence that munadi was actually effected as per the orders of the court at the residential address of the petitioners. It is settled law that once due service is not established, the limitation of setting aside ex-parte judgment would count from the date of knowledge. I draw support from case ***Prabhwati Devi and another Versus Gurdish Singh, 2018(1) Law Herald 526***, an authority of this Court. Since no service was effected, so the application moved under Order 9 Rule 13 CPC is within the limitation

7.6 The relief of setting aside ex-parte decree and condonation of delay is one and same. These are not distinct reliefs. Unless the question of condonation of delay is considered, the application under Order 9 Rule 13

CPC cannot be taken up at all. So the filing of application praying for the relief of setting aside the ex-parte judgment and decree is not any illegality. Separate applications are required only in respect of each distinct relief prayed for. It is specific case of the petitioners that they came to know about the passing of ex-parte decree only on 24.11.2013. In the case in hand, the application for setting aside ex-parte judgment is filed within 30 days of coming to know about passing of the same, so no separate application for condonation of delay in filing the application for setting aside, was required.

7.7 It is well settled that the parties should be permitted or made to litigate the matter on merits unless they are shown to have remained indifferent or negligent.

8. In the light of above discussion, the present petition is allowed and the orders passed by the courts below are hereby set aside, however, subject to costs of Rs.20,000/- to be paid to respondent No.1-plaintiff, in the trial Court.

9. Keeping in view the fact that the case is very old, so the trial Court is directed to dispose of the case expeditiously. Petitioners/defendants No.1 and 2 shall be liable to file written statement positively on the date to be fixed by the trial Court. After framing of issues, the plaintiff as well as petitioners-defendants No.1 and 2 would be given only three effective opportunities each for leading evidence.

10. Parties are directed to appear before the trial Court on
15.10.2024.

(GURBIR SINGH)
JUDGE

September 25, 2024
sanjeev

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