(2003) 3 CivCC 52 : (2003) 133 PLR 282 : (2003) 1 RCR(Civil) 616

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Revision No. of 2000

Ami Chand		APPELLANT
	Vs	
Partapa		RESPONDENT

Date of Decision: Nov. 12, 2002

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13

Citation: (2003) 3 CivCC 52 : (2003) 133 PLR 282 : (2003) 1 RCR(Civil) 616

Hon'ble Judges: M.M. Kumar, J

Bench: Single Bench

Advocate: S.P. Singh, for the Appellant; Rakesh Gupta, for the Respondent

Final Decision: Dismissed

Judgement

M.M. Kumar, J.
Challenge in this revision petition filed u/s 115 of the Code of Civil Procedure, 1908 (for brevity "the Code") is to the order dated August 9, 2000 passed by the Additional District Judge, Kaithal dismissing the appeal of the defendant-petitioner in which the order dated May 25, 1998 was challenged. The Additional Civil Judge (Senior Division) Kaithal, vide his order dated May 25, 1998 had dismissed the application of the defendant-petitioner under Order 9 Rule 13 seeking setting aside of the exparte judgment and decree dated August 1, 1988 passed by the Civil Judge, Kaithal in Civil Suit No. 529 of 1987 titled as Partapa v. Sarup.

2. Brief facts of the case which are necessary to decide the legal controversy raised may briefly be noticed. Plaintiff-respondent No. 3 filed a, civil suit No. 473 of 1984 titled as Partapa v. Sarupa for a permanent injunction regarding the property in dispute. The suit was however, dismissed on July 23, 1987. In that suit the plea of family settlement was not set up by the plaintiff Partapa. As a consequence another Civil Suit No. 529 of 1987 was filed in July 1987 by Partapa-respondent No. 2 in which the exparte decree dated August 1, 1988 was passed by the Civil Judge, Kaithal. Defendant-petitioner filed an

application with the allegation that he was never served in the suit and when he came to know about passing of the exparte decree in the month of February 1989, he immediately filed an application under Rule 13 of Order 9 of the Code with a prayer that the exparte decree dated August 1, 1988 be set aside. Various allegations were levelled pleading fraud and ulterior motive against the plaintiff-respondent. It was alleged that the Civil Suit No. 529 of 1987 was barred under Rule 2 of Order 9 as well as Rule 2 of Order 2 of the Code. Similar other objections were also raised with regard to maintainability of the suit like misjoinder of parties non-payment of Court fee and lack of jurisdiction. After issuing notice of the application to the plaintiff-respondent. Various issues were framed by the Civil Judge, which read as under: -

1. Whether there is sufficient ground of setting aside exparte decree? OPA

2. Whether the petition is within limitation? OPA

3. Whether the petition is not maintainable? OPR

4. Relief.

Vide order dated 13.10.1997 my learned predecessor framed the following issue:-1-A) Whether the compromise dated 12.6.1990 as stated in the preliminary objection No. 3 arrived at between the parties, if so what is the fact? OPR

3. On issue No. 1, the Civil Judge recorded the finding that evidence brought on record proved that plaintiff-respondent had filed a suit bearing No. 529 on July, 1987 against the defendant-petitioner as well as one Sarupa, The findings recorded by the Civil Judge read as under:-

"The evidence brought on record accordingly proves that Partapa (present respondent No. 2) has filed the suit against Sarupa (present respondent No. 1) and Ami Chand (present applicant) bearing civil suit No. 529 of 1987 titled as Partapa v. Sarupa etc. the suit was filed on 25.7.1987. The summons were issued against the defendants Sarupa and Ami Chand in that suit. The summon Ex.R-1 shows that it was issued on 18.8.1987 for 20.8.1987 and the personal service was effected on 19.8.1987 on the defendant Ami Chand and Sarupa. The report of the Process Server is Ex, R-2 which is on the back of the summon Ex.R-1. The oral as well as documentary evidence brought on record has proved that the personal service was effected upon the present applicant Ami Chand as he has put his thumb impression on the summon in token of having received the same."

On the second issue, the Civil Judge held that the application under Rule 13 of Order 9 was time barred and on that account also, it was liable to be dismissed. The finding of the Civil Judge on the question of limitation reads as under:

"The applicant has stated that he came to know about the passing of decree in the month of Feb. 1989. However, as per my discussion under Issue no. 1 it has been held that the

applicant was having noticed and knowledge about the passing of decree when the summons were issued for 20.8.1987 and he was rightly proceeded against exparte. The present application under Order 9 Rule 13 CPC filed by the applicant is accordingly time barred. Issue No. 2 is decided in favour of the respondent and against the applicant."

On issue No. 1-A as to whether there was compromise between the parties entered on June 12, 1990 the Civil Judge held that there was no cogent evidence on the file to prove that the matter was compromised between the parties on June, 1990. Having held all the issues against the defendant-petitioner, the application was dismissed.

4. Feeling aggrieved, the defendant-petitioner filed an appeal before the Additional District Judge, Kaithal, under Order 43 Rule l(d) of the Code. The Additional District Judge upheld the findings recorded by the Civil Judge on all the issues. Repelling the contention that the expert witness tend to depose in favour of the parties summoning them, the Additional District Judge held as under:-

Deposition of Sh. R.V. Vasisth, R.W.5 is very material for deciding the controversy. He is handwriting and finger print expert. He has examined the questioned thumb impression of Ami Chand appellant-applicant on summons dated 20.8.1987 Ex.R.3 with eight specimen thumb impressions affixed on the specimen sheet taken in the Court. After though examination and comparison he opined that the questioned thumb impressions has been affixed by the same individual whose standard thumb impressions are compared. He has given detailed reasons in his report about his opinion and the report is Ex.R.6. He has also proved photographic enlargements and the negatives as Ex. R.7 to Ex.R.32. It has been rightly observed by learned trial Court that there is no infirmity or inconsistency appearing in the statement of R.W.5. Hence, learned trial Court has rightly accepted deposition of finger print expert and his report Ex.R.6. It is settled law that science of finger print expert is exact science and that reliance can be placed upon the testimony of the finger print expert. Gulzar Ali''s case (supra) on which reliance was placed on behalf of the appellant is regarding comparing the disputed handwriting and hence observation of the Hon''ble Apex Court had come in respect of comparison of disputed handwriting with admitted handwriting and hence the said authority is of no help to the ease of appellant-applicant.

Moreover, in this case respondent-plaintiff was the best person to identify the appellant and his (plaintiff''s) father plaintiff also put his thumb impression on the back of summons. Summons also contain signature of father of plaintiff. Appellant who is real uncle of respondent-plaintiff has failed to explain as to how his thumb impression appear on the summons. The process server who was acting in the discharge of his official duties categorically deposed that copy of summons as well as copy of plaint was handed over to the appellant as well as to Sampa, father of respondent-plaintiff and that signature of Sampa and thumb impression of appellant were obtained. Even appellant has admitted that Sarupa used to sign in Hindi. Hence oral as well as documentary evidence brought on record has proved that personal service was effected upon the present appellant Ami

Chand as he has put his thumb impressions on the summons in token of having received the summons and the copy of plaint. The authorities on which reliance has been placed by learned counsel for the appellant-applicant are based on different facts and none of the said authorities is of any help to him. Hence, in my view, the appellant-applicant was duly served and as he has not appeared on the date fixed, he was rightly proceeded exparte by learned trial Court. No illegality has been committed by learned trial Court in dismissing the application of appellant-applicant filed under Order 9 Rule 13 CPC for setting aside exparte order and exparte decree."

5. I have heard Mr. S.P.Singh learned counsel for defendant-petitioner and Mr. Rakesh Gupta, learned counsel for the plaintiff-respondent.

6. The counsel for the defendant-petitioner has argued that there is flagrant violation of Order 5 Rule 6 and Order 5 Rule 19-A of the Code. According to the learned counsel, the provision of Order 5 Rule 6 requires grant of sufficient time to enable the defendant-petitioner to appear and answer the cause of the plaintiff-respondent. The learned counsel has further pointed out that the summon was issued to the defendant-petitioner on August 18, 1987 for August 20, 1987 and the personal service was effected on August 19, 1987 on the defendant-petitioner whereas the suit was filed on July 25, 1987. In support of his submission, the learned counsel has placed reliance on a judgment of this Court in the case of Works Manager Carriage and Wagon Shops v. Ghanshyam Doss AIR 1963 Pb. 122. The other argument raised by the learned counsel is that the provision of Order 5 Rule 19-A are mandatory in character, which cast an obligation on the Court to send registered A.D. notices and the failure to send such a notice is considered to be fatal to the judgment and decree passed. Reliance in this regard has been placed on a judgment of the Supreme Court in the case of G.P. Srivastava v. R.K. Raizada and Ors. 2000(2) R.C.R. 161. The learned counsel has argued that a hypertechnical approach should not be adopted in considering the application filed under Order 9 Rule 13. Another judgment relied upon by the learned counsel is in the case of Sushil Kumar Sabharwal v. Gurpreet Singh A.I.R.2002 S.C.2370, where the application filed under Order 9 Rule 13 was allowed by the Supreme Court because some defect was shown in the report of the process server.

7. Mr. Rakesh Gupta learned counsel for the plaintiff-respondent has submitted that service on the defendant-petitioner was effected on August 19, 1987 and the decree was passed on August 1, 1988. Therefore, there is no room to entertain the argument of the defendant-petitioner that the decree has been passed without grant of sufficient time. According to the learned counsel the defendant-petitioner was served on August 19, 1987 for attending the Court on August 20, 1987 and if he had insufficient time to appear on August 20, 1987 there was enough time for him to appear on any subsequent dates as the decree was passed on August 1, 1988. Therefore, according to the learned counsel, there is no infringement of the provision of Rule 6 of Order 5. The other submission made by Mr. Gupta is that Rule 19-A of Order 5, which requires service of summons on the defendant-petitioner by registered post is in the nature of substituted service and only in

the absence of service effected in the ordinary course that substituted service was mandatory. He has further submitted that in these circumstances liberal approach as suggested by the learned counsel for the defendant-petitioner cannot be preferred.

8. After hearing the learned counsel for the parties, I am of the view that the present revision petition does not merit acceptance. It would be appropriate to refer to the Rule 6 of Order 5 and Rule 19-A of Order 5, which read as under:

ORDERV
ISSUE AND SERVICE OF SUMMONS

Issue of Summons

"1. XX XX XX XX

2. xx xx xx xx

3. xx xx xx xx

4. xx xx xx xx

5. xx xx xx xx

6. Fixing day for appearance of defendant. The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day."

"(19-A. Simultaneous issue of summons for service by post in addition to personal service.- (i) The Court shall, in addition to and simultaneously with the issue of summons for service in the manner provided in Rule 9 to 19 (both inclusive), also direct the summons to be served by registered pot acknowledgement due addressed to the defendant or his agent empowered to accept the service at the place where the defendant or his agent actually and voluntarily resides or carries on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where in the circumstances of the case the Court considers it unnecessary.

(2) When, an acknowledgement purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons when tendered to him, the Court issuing the summons had been

duly served on the defendant:

Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for other reason, has not been received by the Court within thirty days from the date of the issue of the summons."

9. A perusal of Rules 6 makes it abundantly clear that the date of hearing fixed by the Court issuing the summons should take into account the place of residence of the defendant and the time necessary for service of summons. It is further provided that sufficient time should be allowed to the defendant to enable him to appear and answer on that date. The address of the defendant-petitioner as disclosed hi the order passed by the trial Court as well as the memo of parties is that he is resident of the local area of village Harsola and, therefore, the Civil Judge fixed the date of August 20, 1987 and service was effected on August 19, 1987. The defendant-petitioner had adequate notice of the filing of suit by the plaintiff-respondent and even if he did not have sufficient time to appear on August 20, 1987 he could have put in appearance on any subsequent date or could have moved an appropriate application on any date thereafter. The Civil Judge cannot be said to have committed a grave procedural irregularity in issuing the summon for two days later.

10. The other argument based on Rule 19-A would also not require any detailed and serious consideration in view of the fact that the service of summon by registered A.D, is in addition to and simultaneously with the issue of summons for service. According to the proviso appended to Clause 1 of Rule 19-A that in cases where the Court considers it unnecessary to issue summons by registered post, it would not be obligatory to do so. On the plain reading of Rule 19-A, it becomes evident that the requirement to issue summons by registered A.D. is not mandatory. Therefore, both the arguments raised by the learned counsel based on Rule 6 and Rule 19-A of Order 5 are liable to be rejected. Moreover, the application filed under Order 9 Rule 13 has concurrently been held to be time barred. The arguments raised before me were not even raised before the Additional District Judge, where the contention of the defendant-petitioner was that the report of the expert cannot be accepted in view of the fact that the party who called the expert is likely to be benefited by the statement made by such an expert.

11. The judgment in the case of Ghansyam Dass (supra) cited by the learned counsel for the defendant-petitioner would not be applicable to the facts of the present case because in that case the specified authority under the Payment of Wages Act, 1936 has refused to recognise the Clerk, who had made request for adjournment of the case, in those circumstances, it was held that when the summons were served on March 20, 1961 for appearance on March 23, 1961 then it would not constitute sufficient time especially when a clerk from the department had appeared and requested for time. The order was passed initiating ex-parte proceedings on March 23, 1961. Therefore, it is apparent that

the afore-mentioned view is entirely on different facts and circumstances. Similarly, the judgment in G.P. Srivastava''s case would also not have any application to the facts of the present case because in that case the Supreme Court has laid down that hypertechnical approach should not be followed while deciding application filed under Order 9 Rule 13. The other judgment rendered in Sushil Kumar Sabharwal ''s case would also not help in advancing the case of the defendant-petitioner because in that case refusal to accept service was not considered to be sufficient service because there was no report with regard to affixation of copy of summons nor copy of the plaint on the wall of the premises and it was also found that the refusal was a day before the appearance. However, in the present case, the summons were duly served although a day before the date of appearance. There is no fault in the service of summons. Both the Courts below have recorded a finding of fact that the summons were duly served. Moreover the decree was passed 15 years back.

12. For the reasons recorded above, this revision petition fails and the same is dismissed.