

(2009) 05 P&H CK 0079

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Ajai Singh

APPELLANT

Vs

Gurinder Singh and Others

RESPONDENT

Date of Decision: May 26, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 7

Citation: (2009) 4 CivCC 630 : (2009) 156 PLR 270

Hon'ble Judges: K. Kannan, J

Bench: Single Bench

Judgement

K. Kannan, J.

The trial of rent petition that had been set up in a time capsule by a direction given by this Hon'ble High Court that it shall be concluded before 31.05,2009 met with a stumbling block, not merely at the instance of the tenant but by the landlord himself, who after a direction from the High Court, moved an application to implead as parties two sons of the respondent, who also had been originally described as the tenant.

2. On summons being sought to be served on respondent Nos. 2 and 3, after the application for impleadment was ordered, they had not been actually served on the parties. Learned Senior Counsel for the respondent would be quick to point out that it is not admitted but still the fact remains that the parties were not served and it was on record that the respective spouses had declined the service stating that the parties were at time at Dubai and Goa respectively. The Court, on return of the summons from the bailiff with the endorsement that they were refused to be served did not immediately treat the service as sufficient. It directed that summons shall be served through issuance of munadi and affixture. The order was passed on 25.2.2009 and on 2.3.2009, when the case was called again, the Court noted that the respondents No. 2 and 3 did not turn up despite service and they were, therefore, proceeded ex parte. On the subsequent date of hearing, the statement of the first

respondent had been received for the amended petition and the case was posted further to 24.03.2009, when the petitioner's witness Vinod Kumar had been examined and cross-examination was completed on 1.4.2009.

3. It is, at this stage, revision petitioner moved an application to set aside the ex parte order under Order 9 Rule 7 stating that he was not in town at the time when the summons was sought to be served. This application was contested and the learned Rent Controller dismissed the petition finding that to sustain the application under Order 9 Rule 7 CPC, the law required a "good cause" for non-appearance and such cause had not been shown. Learned Rent Controller also found that the petitioner ought to have known during all the time when the mother was contesting the actual dates of hearing but he had been sitting on the side lines and indulging in dilatory tactics by moving the application after the completion of the cross-examination of one of the witnesses. The justification, therefore, was that the parties who had been set ex parte had known the actual date of hearing and having allowed themselves to be set ex parte one of them cannot have the trial reopened and permitted to file the written statement.

4. In revision, the learned Counsel for the petitioner states that the zimni orders of the Court would clearly reveal that the actual service of summons had not been effected and when the bailiffs return was that the petitioner was away at Dubai and that he would be back only on 6.3.2009, the Court that allowed issuance of munadi could not have fixed a date earlier than 6.3.2009 and take the non-appearance on that date as unjustified to set him ex parte. According to him, the order passed on 2.3.2009 taking the munadi summons as duly served was wrong. Learned Senior Counsel for the respondent has very strong objections to every one of the contentions urged on behalf of learned Counsel for the petitioner. He would point out to the fact that the direction from this Court for quick disposal before 31.5.2009 was itself on account of the fact that the petitioner was retiring on 28.02.2009. He also refers to the evidence of the mother, the 1st respondent, where she had admitted that it was the son who was assisting her in engaging a counsel and preparing the statement for her and the 2nd respondent, who had such knowledge of the proceedings was deliberately keeping away from the process of court, waiting on the wings, as it were, to enter the fray at a belated stage only to cause a further delay in the proceedings. Learned Counsel for the respondent would refer to the decision of the Hon"ble Supreme Court in [Arjun Singh Vs. Mohindra Kumar and Others](#), that spelt out the distinction between procedure prescribed under Order 9 Rule 7 and Rule 13 and referring to the expression "good cause" and "sufficient cause" employed by the respective provisions, the Court still held that there could not "good cause", which would not "be sufficient" as affording an explanation for non-appearance. He would also cite Vijay Kumar Madan v. R.N. Gupta Technical Education Society 2002 (1) R.C.R. (Rent) 560 to point out that after all, even without setting aside the ex parte order, he could be allowed to participate in the trial. An application under Rule 7 itself is itself required to be made only if the defendant

wishes to be relegated back and re-open the proceedings. Further, to the learned Senior Counsel for the respondent, by the fact that the bailiff had noted the service by refusal, it was itself sufficient for the Court to set him ex parte and the issuance of summons by munadi was superfluous and in the nature of surplusage and the Court setting a date of hearing on 2.3.2009 could not be found fault with. He also referred to a particular factual situation that the landlord himself, who had been examined, had been residing at Mauritius and had gone back, after being in India only for the purpose of giving evidence in Court. The attempt of the petitioner according to the learned Senior Counsel for landlord, was to cause needless hardship knowing fully well that the evidence of PW-1, Gurinder Singh, had been completed setting aside the ex parte order meant re-opening the trial. He would also urge that the mala fides of the petitioner is evident also by the fact that the other brother had deliberately still remained ex parte and no steps have been taken so far to set aside the ex parte order only to avail of opportunity independently to re-open the case by a similar application later and further delay the trial.

5. In an application under Order 9 Rule 7, the Court does not apply same principles as it does under Order 9 Rule 9 or Order 9 Rule 13. Order 9 Rule 9 involves dismissal of suit for default of appearance and the person that applies for restoration literally seeks to resurrect the case, which is dismissed. In an application under Order 9 Rule 13, the Court which grants a decree is made to reopen the case again for fresh consideration but Order 9 Rule 7 is not in the same league as the above two provisions. It has been a common practice of Courts to characterise a situation where a person, who is ordered to be proceeded ex parte but the trial continues, it is taken as an at parte order. Order 9 Rule 7 itself envisages that when the Court adjourns the case setting the party ex parte, the defendant when he appears and assigns a good cause for his non-appearance at the previous hearing, he may upon such terms as direction as to costs be heard in answer to the suit as if he had appeared on that date fixed for his appearance. This provision allows for participation of a defendant, at the trial, although he had been set ex parte at the previous hearing by creating a fiction as though he was present on that date and would hear him in the suit. This right of participation shall be made in such manner as a particular situation might demand. In cases where statement was not filed, it could mean allowing a person to file a statement and proceed from then or, in appropriate cases where evidence of parties are completed, it could allow the defendant, who had been previously set ex parte to continue the proceedings from the stage when he is permitted to enter the fray and deny to him the right of cross-examination of a witness whose evidence is completed.

6. In this case, the only point for consideration would be the nature of right that could be granted to the petitioner, who seeks the ex parte order to be set aside. Having regard to the specific contention raised that the witnesses, Gurinder Singh, who had been examined, had come from a foreign country to give his evidence and had gone back, it would mean ineffable hardship to permit the evidence to be

reopened again or to allow the defendant who comes on record a right to cross-examine the witness. The permission to file the written statement itself ought not to be a cause for complaint; for as far as the party, who is newly impleaded, he had just one chance for his appearance to file his statement before he was set ex parte. It will be too harsh to deny him to even the right of filing the written statement and I am of the view that the interest of justice would be satisfied if only the ex parte order that was passed against him is set aside and he permitted to file the written statement. While granting him such a fact he will participate in the proceedings only from the stage at when the case now stands and he will have no right to cross-examine witnesses whose cross-examination has been completed. The statement will afford a ground to him to cross-examine other witnesses whose evidence is not completed. The permission to file a written statement will be again only on direction of payment of costs of Rs. 5,000/- to the petitioner. This is after taking particular note of the fact that the mother and the son are admittedly staying in the same house and the mother has already given her statement that she was conducting the case only with the assistance of her son. While I do not agree with the learned Senior Counsel for the respondent that even without actual service, he ought to have taken steps to come to Court and file a written statement, it will not be wrong to assume that the petitioner had known the pendency of proceedings by the fact that he was living in the same house as his mother and the mother was actively contesting the case. The costs as awarded shall be paid on the day when the case stands posted and on the same date, he shall also file the written statement. The denial of the right of cross of examination is made, taking note of the peculiar facts and circumstances that the cross-examination had been undertaken on behalf of the mother, with whom the son has a common cause to espouse and by taking note of the expense and inconvenience of bringing the witness from a far away Mauritius to India, again to stand resumption of trial by cross-examination.

7. The order of the Court below dismissing the application for setting aside the ex parte order is set aside and the civil revision is allowed on the above terms.

8. A copy of the order be given dasti on payment of usual charges.