

**(2012) 08 P&H CK 0264**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Civil Revision No. 537 of 2010 (O and M)

Rajinder Kaur

APPELLANT

Vs

Darshan Singh and others

RESPONDENT

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**Date of Decision:** Aug. 21, 2012

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 50, Order 30 Rule 3, Order 9 Rule 13
- Constitution of India, 1950 - Article 227

**Citation:** (2012) 4 PLR 390

**Hon'ble Judges:** L.N. Mittal, J

**Bench:** Single Bench

**Advocate:** Amit Jain, for the Appellant; DS Gurna, Advocate, for the Respondent

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**Judgement**

L.N. Mittal, J.

CM No. 5877.CII of 2012

1. The application is allowed and Annexures P/4 to P/6 are taken on record subject to all just exceptions without commenting anything on merits of the revision petition.

CR No. 537 of 2010

Defendant no. 2 Rajinder Kaur has filed this revision petition under Article 227 of the Constitution of India assailing order dated 21.3.2006 passed by learned Additional Civil Judge (Senior Division), Ludhiana and judgment dated 23.9.2009 passed by learned Additional District Judge, Ludhiana thereby dismissing application of defendant no. 2 - petitioner for setting aside ex parte judgment and decree dated 21.8.2001 passed against her.

2. Respondent no. 1 - plaintiff filed suit against M/s Dhaliwal Trading Agency as defendant no. 1 and against Rajinder Kaur (petitioner) her husband Avtar Singh,

Kulwant Kaur and her husband Dalbir Singh as defendant no. 2 to 5 alleging that they were partners of defendant no. 1 - Firm. In the said suit, defendants no. 4 and 5 appeared for themselves as well as for defendant no. 1 whereas defendants no. 2 and 3 were proceeded against ex parte. The suit was decreed by the trial court vide judgment and decree dated 21.8.2001, Annexure P/2.

3. Defendant no. 2 Rajinder Kaur filed application for setting aside aforesaid judgment and decree against her alleging that her husband Avtar Singh defendant no. 3 had died on 5.5.1999 i.e. even before the suit was filed on 18.1.2000 and thereupon the petitioner shifted to Canada in August, 1999 and she was never served in the suit.

4. The application was opposed by respondent no.1 - plaintiff. Averments of the petitioner were controverted. It was alleged that defendants no. 2 and 3 did not appear in the suit despite service. Various other pleas were also raised.

5. Learned trial court vide impugned order dated 21.3.2006 dismissed the application of the petitioner. Appeal against the said order preferred by the petitioner has been dismissed by learned Additional District Judge vide impugned judgment dated 23.9.2009. Feeling aggrieved, defendant no. 2 - petitioner has filed this revision petition.

6. I have heard learned counsel for the parties and perused the case file.

7. Counsel for the petitioner referring to zimini orders of the trial court as reproduced in the revision petition contended that the petitioner was never served in the suit and therefore ex parte judgment and decree against her are liable to be set aside.

8. On the other hand, counsel for respondent no. 1 - plaintiff referring to Order 30 Rule 3 and Order 21 Rule 50 of the CPC (in short, CPC) contended that service of summons on any one or more of the partners of the partnership firm is sufficient service and defendant no. 2 at best could move the executing court under Order 21 Rule 50 CPC that the decree is not executable against her as she was not served with the summons in the suit.

9. I have carefully considered the aforesaid contentions. From the zimini orders of the trial court passed in the suit it is manifest that defendant no. 2 was not served in the suit. Vide order dated 18.1.2000 notice of suit and stay application was ordered to be issued to defendants for 18.2.2000. Perusal of order dated 18.2.2000 reveals that defendant no. 4 did not appear despite service and was accordingly proceeded against ex parte. On request (of counsel for the plaintiff), remaining defendants were ordered to be summoned by publication in newspaper. After publication in newspaper was effected, remaining defendants were also proceeded against ex parte on 9.6.2000 but at that very stage defendants no. 4 and 5 appeared and therefore, ex parte proceedings against them were set aside.

10. Perusal of the aforesaid orders reveals that defendant no. 2 was never served in the suit. In order dated 18.2.2000, there is no mention about reports on the summons issued for the said date for defendants no. 1 to 3 and 5. Instead thereof, straightway, on request of counsel for the plaintiff, the said remaining defendants were ordered to be served through publication in newspaper vide order dated 18.2.2000. The trial court has not even mentioned in the said order that the said unserved defendants were evading service or could not be served in ordinary course. Consequently, substituted service by publication in newspaper could not be ordered. Said substituted service is, therefore, no service of summons in the eyes of law. Such orders lead to very difficult situation. Defendant no. 3 Avtar Singh had allegedly died even before filing of the suit. However, he was also proceeded against ex parte by the trial court. If the trial court had taken care to see reports on the summons and had proceeded in accordance with law for effecting proper service, this situation of passing ex parte decree against dead person, who had allegedly died even before the filing of the suit, would not have arisen and perhaps defendant no. 2 - petitioner also could have been served properly. However, be that as it may, the fact remains that defendant no. 2 - petitioner was not served properly and legally in the suit and was, therefore, wrongly proceeded against ex parte. Resultantly, the impugned ex parte judgment and decree dated 21.8.2001 are liable to be set aside as against defendant no. 2-petitioner.

11. Contention of counsel for respondent no. 1 - plaintiff that defendant no. 2 could file application in the executing court under Order 21 Rule 50 CPC to seek relief that the decree could not be executed against her as she was not served in the suit, is not acceptable. That may or may not be the remedy available to the petitioner but the remedy of filing of application under Order 9 Rule 13 CPC for setting aside ex parte judgment and decree as availed by the petitioner is certainly available to her under the law. Defendant no. 2 - petitioner was not properly served in the suit and therefore, ex parte judgment and decree passed against her are liable to be set aside under Order 9 Rule 13 CPC. Consequently, the application moved by the petitioner under the said provision deserves to be accepted.

12. Courts below proceeded erroneously on the assumption that service of summons on defendant no. 4 partner of defendant no. 1 - Firm was sufficient service and therefore ex parte judgment and decree against defendant no. 2 are not liable to be set aside. However, service of summons on defendant no. 4 partner could be legal and valid service on the Firm - defendant no. 1 but cannot be deemed to be legal and proper service on defendant no. 2 who has been sued in individual capacity although allegedly being partner of the Firm. Nevertheless when defendant no. 2 was impleaded as defendant in individual capacity, it was necessary to serve defendant no. 2 individually and service of another partner of the Firm cannot be said to be valid and legal service of defendant no. 2 herself in her individual capacity. Consequently, impugned orders of the courts below are erroneous and illegal and suffer from jurisdictional error.

13. As a necessary consequence of the discussion aforesaid, the instant revision petition is allowed. Impugned orders dated 21.3.2006 passed by the trial court and dated 23.9.2009 passed by lower appellate court are set aside. Application moved by defendant no. 2 - petitioner for setting aside ex parte judgment and decree dated 21.8.2001 is allowed and said ex parte judgment and decree are set aside as against defendant no. 2 petitioner only. Parties are directed to appear before the trial court on 24.9.2012. The trial court shall proceed with the suit as against defendant no. 2 only, in accordance with law.