

---

**(2006) 08 P&H CK 0544**

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

**Case No:** S.A.O. No. 38 of 2004

Harmader Singh and Others

APPELLANT

Vs

Malkiat Singh and Another

RESPONDENT

---

**Date of Decision:** Aug. 8, 2006

**Acts Referred:**

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

**Citation:** (2007) 1 CivCC 443 : (2006) 4 RCR(Civil) 669

**Hon'ble Judges:** Vinod K.Sharma, J

**Bench:** Single Bench

**Advocate:** B.S. Bhalla, for the Appellant; M.K. Garg for the Respondent No. 1, for the Respondent

**Final Decision:** Dismissed

---

### **Judgement**

Vinod K. Sharma, J.

Present appeal has been filed against the order passed, by the learned Additional District Judge, Moga vide which the appeal filed by the respondent-defendant for setting aside ex parte decree has been accepted.

2. The respondent herein had filed an application under Order 9 Rule 13 of the CPC (for short the Code) for setting aside ex parte on the following grounds:-

"(a) In this case the summons was not duly served to the applicant-defendant.

(b) No valid service had been effected in this case.

(c) The plaintiffs obtained the ex parte decree by way of practising the fraud and impersonating to get the case decided ex parte in their favour. The respondents/plaintiffs have no concern or connection with the suit property. The applicant/defendant is the absolute owner of the suit property. The applicant/defendant presumes that the plaintiffs obtained the decree by way of preparing the forged and fabricated revenue documents.

(d) The applicant/defendant had no knowledge of this ex parte decree dated 23.1.1983. The applicant/defendant came to know on dated 20.3.1985 from Shri K.K.Gupta, Advocate that an ex parte decree has been passed against the applicant on dated 23.1.1983. The previous counsel of the applicant/defendant did not tell about any ex parte decree passed against the applicant/defendant."

3. The application was contested by the appellant-plaintiffs and on the pleadings of the parties the following issues were framed:-

"1. Whether Gurbax Singh, respondent/plaintiff had died before filing of the present application? if so, its effect? OPR

2. Whether there is any sufficient cause for setting aside the ex parte decree dated 21.1.1983? OPA

3. Whether the application is within time? OPA

4. Relief."

Issue No. 1 was decided against the appellant-plaintiff whereas on issue No.2 learned trial court held that respondent-defendant was duly served, he intentionally did not come present in the Court and he was rightly proceeded ex parte.

4. Even on issue No.3 it was held that the application was barred by time and in view of the findings recorded on issue No.2 and 3 the application was dismissed. The respondent-defendant filed an appeal against the said order. The learned Appellate Court accepted the appeal by observing as under: -

"Perusal of para 2 of such photostat copy of judgment shows that though notice of suit was issued to defendant but he did not appear, then he was proceeded against ex parte. It is not clear as to how defendant was served and whether he was personally served or through Munadi or though Court notice, has not been clarified. It has not been proved that defendant was served personally with the summons. When there is lack of evidence, it cannot be presumed that the defendant was personally served with summons. Rather for want of such proof presumption whatever can be raised, in favour of contention of defendant-applicant because settled position of law is that a fact affirmed by a party is required to be proved by affirmative tangible convincing judicial evidence. Therefore, it is liable to be presumed with summons in civil suit No.212 of 5.8.1982.

15. In para No.3 of photostat copy of judgment whatever evidence was led by plaintiff was mentioned. In para No.4 of same copy of judgment discussion is contained."

5. AW1 Sohan Singh, Chowkidar of village Lopen categorically stated that he had neither effected any service of summons on Malkiat Singh nor any munadi was effected by him against Malkiat Singh in the case titled Gurbax Singh v. Malkiat

Singh. The learned lower Appellate court also took note, of the evidence led by the respondent herein wherein he has stated that he was not served in the case.

6. Learned lower Appellate Court also took note of the statement of AW3 Pran Nath, Reader of the Court to the effect that Shri K.K.Chopra, Advocate who had appeared as AW4 had inspected the file of the Court on 23.3.1985. The application for setting aside ex parte decree was filed on 28.3.1985 i.e. within the limitation prescribed. Shri K.K.Gupta, Advocate had also appeared in support of the case set up by the respondent herein. As against the said evidence, the appellant herein did not examine any Process Server nor brought proof of service of summons on the defendant-respondent. His bald statement about service was not believed. The learned lower Appellate Court also took note of the pleadings and evidence led in suit on the basis of which decree was passed in favor of respondent herein. It was observed that the prayer in suit filed by the plaintiff-appellant was as under: -

"Suit for declaration to the effect that the plaintiffs are the Owens in possession of land bearing KhewatNo.995 Khatoni Nos. 19556 and 1557 as khasra No.25/4/(5 Min), 6, 15, 16, 23/1.Min, 24/5, 15/5 Min as entered in the jamabandi for the year 1976-77 situated in Lapon and issuance of a permanent injunction by way of consequential relief restraining the defendant from interfering in the lawful and peaceful possession of the plaintiff in the land in suit."

The learned lower Appellate court further took note of the fact that the evidence led by the appellant-plaintiffs was to the following effect:-

"3. The plaintiffs have examined PWs Bhajan Singh, Mehar Singh and Gurbaksh Singh. The plaintiffs have also tendered in evidence copy of jamabandi Ex.P-1 and that of khasragirdawari Ex.P-2.

4. The plaintiff as PW3 has stated that the plaintiffs are in possession of the suit land for the last 15 years. They have been cultivating the same since then. He is supported by PW1 and PW2 also, the oral evidence finds support from the copies of revenue record Ex.P-1 and Ex.P-2."

In view of this learned lower Appellate Court was prima facie of the opinion that on the basis of the above pleadings and evidence led no inference of adverse possession could be drawn against the defendant-respondents. However, we are not concerned with this as the matter on merit has to be considered by the trial Court in view of the order passed by the learned Lower Appellate court. It may be noticed that the learned lower appellate court on the basis of evidence led by the parties on application came to the positive conclusion that the defendant-respondent was not served in the case.

7. Learned lower Appellate court relied on the judgment of Hon"ble Supreme Court in Sri Lal Sah and others v. Gulabchand Sah, 1993 CCC 380 (S.C.): 1993( 1) R.R.R. 510 to hold that the limitation for setting aside ex parte decree is to be from the date of

knowledge and the application has been filed within 30 days of knowledge, thus, was within time therefore, findings on issue No.3 were also reversed by the learned lower Appellate Court. In view of the findings recorded by the learned trial Court on issue Nos.2 and 3 were reversed the application moved under Order 9 Rule 13 of the Code was allowed and the case was remanded back to the trial Court for adjudication of the claim on merit.

8. The learned counsel for the appellant vehemently argued that there was presumption in favour of the appellants that there was valid service in view of the fact that the learned Court had categorically observed that the defendant was absent in spite of service and therefore, in view of this there was no occasion for the lower Appellate court to reverse the said finding.

9. However, this contention of the learned counsel for the appellants cannot be sustained though presumption is attached to an act of the authorities. However, the same can be rebutted. In the present case the respondent-defendant by leading cogent evidence proved the factum of non-service and therefore, no fault can be found with the judgment of learned lower Appellate court on this count.

10. Learned counsel for the respondent contended that the appellants had failed to produce any evidence in support of their contention regarding service of summons on the respondent as he failed to examine the Process Server. The contention of the learned counsel was that it was on the plaintiff to prove that the service was effected in accordance with the provisions of Order 5 Rule 17 of the Code and in the absence of effective service it has to be held that the respondent was not served.

11. I have considered the arguments raised by the learned counsel for the parties and find no force in the argument raised by the learned counsel for the appellants. The judgment of the learned lower appellate court shows that on the basis of evidence led by the respondent herein a positive finding has been recorded that the respondent herein was not served and therefore, ex parte proceedings were rightly set aside. The contention of the learned counsel for the appellants that the application was time barred also cannot be sustained in view of the judgment in Lal Sah's case (supra) wherein it was held that the Limitation for setting aside ex parte order is 30 days and starting point of limitation is the date of decree. However, in case summons or notice is not duly served then it is from the date of knowledge of the decree.

12. In the present case the respondent had proved his date of knowledge and the application was filed within 30 days of knowledge. Thus, learned lower Appellate Court rightly held that the application was within time.

13. In view of the findings recorded above, I find no force in the present appeal and the same is dismissed with no order as to costs.