

(2001) 05 P&H CK 0196

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Revision No. 5465 of 1998

Ajit Singh

APPELLANT

Vs

Santokh Singh and Others

RESPONDENT

Date of Decision: May 31, 2001

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 17, Order 5 Rule 18

Citation: (2002) 3 CivCC 657 : (2002) 4 RCR(Civil) 13

Hon'ble Judges: Swatanter Kumar, J

Bench: Single Bench

Advocate: M.S. Bedi, for the Appellant; C.L. Sharma, for the Respondent

Judgement

Swatanter Kumar, J.

This revision is directed against the order dated 29.1.1998 passed by the learned Additional District Judge, Gurdaspur, while exercising its appellate jurisdiction, whereby the appeal preferred by Shri Ajit Singh was dismissed. The appeal was preferred against the order of the learned trial Court dated 19.2.1994 dismissing an application of the said defendant under Order 9 Rule 13 read with section 151 of Code of Civil Procedure.

2. A suit for possession by means of specific performance was filed by Santokh Singh against Gurbachan Singh. This suit filed by the plaintiff was decreed ex parte by the learned trial Court vide its judgment and decree dated 1.9.1998. Gurbachan Singh applicant filed an application under Order 9 Rule 13 read with Section 151 CPC stating that he had no knowledge about the pendency of the suit and he came to know of the passing of the ex parte decree only when notice of the execution proceedings was served upon him. Gurbachan Singh who filed the application, died during the pendency of the application/suit. Ajit Singh and others were then brought on record as legal representatives of the deceased. He claimed that he had come to know of these proceedings on 18.2.1989 and filed the application for

setting aside the decree on 14.3.1989. He specifically contended that the deceased defendant Gurbachan Singh was neither served in accordance with law nor he had the knowledge of proceedings and as such the ex parte decree was liable to be set aside.

3. This application of the defendant was contested by the plaintiff. The learned trial Court framed issues and parties were permitted to lead evidence. The learned trial Court dismissed the application and declined to set aside the ex parte judgment and decree in question. It was noticed by the learned trial Court that the deceased had refused to accept notice and was served by affixation. As such there was no reason for the Court to set aside the ex parte judgment and decree, As already noticed, appeal against this order dated 19.2.1994 was also dismissed by the learned first Appellate Court.

4. A question that arises for consideration in this revision petition is whether deceased Gurbachan Singh was served in accordance with law and he had knowledge of the proceedings pending in the suit. The process server is stated to have made the following report on the basis of which the ex parte proceedings were taken against the de* ceased Gurbachan Singh:-

"Sir, It is prayed that today dated 25.3.1987 after going to the village Dariwal Daroga in the afternoon, Gurbachan Singh son of Udhamb Singh, Zail Singh son of Santa Singh were informed about the date fixed in the titled case and asked them to accept the summons but they refused to do so. A copy was pasted. Report is submitted.

Sd/- Prem Singh 25.3.87

Witness: Smt. Sukhwinder Kaur, wife of Santokh Singh RTI."

5. It is clear from the above report of the process server that it is not in accordance with law. The process server was required to make a report in accordance with law and it ought to be witnessed by an independent person. The bare reading of the report shows that it was witnessed by one Smt. Sukhwinder Kaur who is stated to be the wife of Santokh Singh, the plaintiff in the suit. It cannot be reasonably comprehended that the service upon the deceased was properly effected and he had actually refused to accept the summons/notice. The address as given is of the village and surely in the entire village the process server could at least find a single independent witness, whether man or woman, except the wife of the plaintiff himself. From the judgments of the learned Courts below it appears that this pertinent fact escaped their notice.

6. Merely because a date of knowledge was not specifically mentioned in the application the learned Courts could not have drawn a presumption against the applicant. Another factor which cannot be ignored by the Court is that Gurbachan Singh had admittedly died before the evidence on the application could begin. The

Court has to satisfy itself in regard to the ""refusal" report recorded by the process server before directing ex parte proceedings to be taken against such a party. Such care and caution is implicit in the procedure prescribed under the Code and in any case would be proper to meet the ends of justice. The present suit related to transfer of an immovable property based on an alleged agreement and in ordinary circumstances the Court has to see normal conduct of a party to the Ms. No prudent person in normal course would like to ignore Court proceedings in relation to any immovable property as it could have serious consequences like dispossession of such person from the property and its transfer in favour of the plaintiff.

7. The records of the trial Court further reveal that even summons sent through registered acknowledgment due do not contain a report which could inspire confidence. Firstly, It is recorded on 18th of a month. However, the number or description of the month is missing. On that date it is reported that the person to whom the letter is addressed has gone out of station and would return after 7 days. Then on 24.12.1986 it is recorded that the person was not at home. However, there is a tampering even of the date "24th". Again on 26.12.1986 report is made that he was not available at his home. Again there is a tampering in the noting of the month mentioned on 26th. Suddenly on 27th of December, 1986 word "refusal" is recorded. One can hardly understand that if the person was not available at home and earlier was out of station and he never met the postman or the postman did not record that the addressee was trying to avoid service, how could the report of refusal be given.

8. The procedural provisions are intended to further the cause of justice and to determine the real controversy between the parties. They are not intended to grant any undue benefit to a party over the other in complete contradiction to the spirit of procedural law. Reference in this regard can be made to a judgment of this Court in the case of Balwant Singh and Others Vs. Dalip Kaur and Others . The Court, thus, must record its satisfaction in regard to the report of refusal and that would be deemed to be service in accordance with law, then alone direct ex parte proceedings to be taken against the person. The zimni orders and the order directing ex parte proceedings of the trial Court does not indicate recording of satisfaction upon perusal of the records.

9. The process server concerned has failed to act in consonance with the provisions of Order 5 Rules 17 and 18 of the Civil Procedure Code. Even if it is assumed for the sake of arguments that the service of summons was refused by the defendant, in that event he was obliged to paste or affix copy of the summons and plaint on the outer door or some other conspicuous part of the house in which the defendant was stated to be residing. Thereupon the process server is required to make report in that behalf and then alone report of refusal can be treated as deemed service in law. The copy of the summons on record does not show that the process server had complied with these statutory provisions. It appears that the attempt was made to

somehow get an order directing ex parte proceedings against the defendants.

10. In the circumstances and for the reasons aforesated I have no hesitation in setting aside the impugned order. The application of the defendant under Order 9 Rule 13 CPC is hereby allowed. The ex parte decree dated 1.9.1988 is hereby set aside. The trial Court may expeditiously deal and decide the suit in accordance with law. The defendants shall file written statement on the next date of hearing before the learned trial Court. The petitioner-defendant in the suit must pay costs. Therefore the petition is allowed and written statement shall be taken on record subject to payment of Rs. 1500/- as costs.

11. The parties are directed to appear before the learned trial Court on 18.7.2001.