

(2015) 10 P&H CK 0091

High Court Of Punjab And Haryana At Chandigarh

Case No: CR No. 8283 of 2014 (OandM)

Rupinder Kaur

APPELLANT

Vs

Simardeep Singh and Others

RESPONDENT

Date of Decision: Oct. 16, 2015

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 20, Order 9 Rule 13, 5
- Criminal Procedure Code, 1973 (CrPC) - Section 125
- Hindu Marriage Act, 1955 - Section 13, 20, 21, 22
- Limitation Act, 1963 - Section 5

Hon'ble Judges: Ritu Bahri, J.

Bench: Single Bench

Advocate: R.K Singla, Advocate, for the Appellant; Rajiv Joshi, Advocate, for the Respondent

Final Decision: Allowed

Judgement

Ritu Bahri, J.

Petitioner-defendant No. 4-Rupinder Kaur has come up in revision petition against the order dated 20.11.2014 (Annexure P-6) passed by the Additional Civil (SD) Phillaur in Civil Suit No. 167-A of 21.5.2009 titled as "Simardeep Singh and another v. Surinder Kaur and others" by which an application filed by the petitioner-defendant No. 4 for setting aside the order dated 17.9.2009 vide which present petitioner was proceeded against ex parte has been dismissed.

2. Respondents No. 1 & 2-plaintiffs, Simardeep Singh and Harjot Kaur minor son and daughter of Jatinder Singh had filed a suit Annexure P-1 against their grand mother Surinder Kaur and other defendants challenging the sale deed executed by Jatinder Singh son of Harbhajan Singh in favour of Surinder Kaur widow of Harbhajan Singh as illegal null and void.

3. The facts of the case, in brief, are that Surinder Kaur, mother of the respondents No. 1 & 2-plaintiffs was married with defendant No. 3-Jatinder Singh on 13.6.1998. Out of this wedlock, two children Simardeep Singh and Harjot Kaur i.e respondents No. 1 & 2-plaintiffs were born. A dispute arose between defendant No. 3 and Surinder Kaur and a petition under Section 13 of Hindu Marriage Act was filed which was allowed ex parte on 24.4.2004. Surinder Kaur and respondents No. 1 & 2-plaintiffs filed a petition under Section 125 Cr.P.C which was allowed on 27.3.2009 by SDJM, Phillaur. As per the revenue record, the suit land was ancestral in nature and defendant No. 1-Surinder Kaur had no right to dispose of the land but she had a right to get earning from the said suit land. A padegreetable is used for better understanding of the case as under:

4. As per the above said padegreetable, the respondents No. 1 & 2-plaintiffs are members of joint Hindu Family and they have every right in the ancestral land in the hands of defendant No. 1 to 3 If defendant No. 4-Rupinder Kaur and defendant No. 5 Ravinder Kaur are included in the definition of the joint Hindu family than every member of the joint Hindu family has 1/6th share and in this way respondents No. 1 & 2-plaintiffs have 1/3rd share and defendants No. 2 to 5 have got 2/3rd share in the ancestral property. If defendants No. 1, 4 and 5 are not considered to be entitled to have share in the ancestral property then respondents No. 1 & 2-plaintiffs have 2/3rd share out of 1/2 share i.e share of Jatinder Singh in the ancestral land in suit. The property being ancestral in nature, Jatinder Singh could not alienate, sale, mortgage, transfer the ancestral land in question. But Jatinder Singh transferred his share in favour of Surinder Kaur widow of Harbhajan Singh to grab the share of respondents No. 1 & 2-plaintiffs in the suit land. Thus the mutation No. 2502 of sale in favour of Surinder Kaur entered and sanctioned by the revenue authority was illegal null and void.

5. Written statement was filed by defendant No. 1 (Annexure P-2) denying that the suit property was ancestral, joint Hindu family and coparcenary property. It was submitted that plaintiffs have no concern, title or right in the suit property. Defendant No. 2-Gurinder Singh filed written statement (Annexure P-3) on the same lines as was filed by defendant No. 1. It was denied that the suit land was ancestral, joint Hindu family, coparcenary property and that the plaintiffs had any right, title or interest in the property. Defendant No. 2 was residing along with his mother Surinder Kaur in the residential house in Khasra No. 1219 min (3-17). Jatinder Singh/defendant No. 3 executed a sale deed of the land measuring 10 K 18 1/2 m to his mother, Surinder Kaur vide registered sale deed dated 28.3.2003 and mutation No. 2502 had been sanctioned on the basis of the said sale deed.

6. On 17.9.2009, the petitioner-defendant No. 4 was proceeded ex parte and thereafter the application (Annexure P-4) was filed for setting aside the ex parte proceedings against applicant-defendant No. 4-Rupinder Kaur on the ground that she had no knowledge about the pendency of the suit as she was residing in foreign

country and that she never received summons of this case. It was further stated in the application that Surinder Kaur mother of defendant No. 4 has executed a valid registered Will in favour of the applicant (petitioner-defendant No. 4) of her entire estate in the office of Sub Registrar, Phillaur on 15.5.2008 and she had become owner in possession of the land in dispute of the estate of Surinder Kaur on account of services rendered by her to Surinder Kaur. Her application has been dismissed by the impugned order dated 20.11.2014 (Annexure P-6).

7. Counsel for the petitioner-defendant No. 4 has argued that Surinder Kaur had executed a Will in favour of the petitioner-defendant No. 4 which is not a dispute in the present case. However, the dispute is with regard to the ancestral land belonging to Harbhajan Singh. Proper service had not been effected on defendant No. 4 as she was residing in U.K after her marriage and she had been visiting India off and on. As per plaint (Annexure P-1) her address was given as "resident of Village Garhi Mahan Singh, District Phillaur, Jalandhar." The respondents No. 1 & 2-plaintiffs were very much aware that she was not residing in India and hence as per the zimney orders dated 5.6.1999, defendants No. 2 to 5 remained unserved and were summoned again by way of dasti summons for 27.7.2009. On 1.8.2009, an application was made u/s. 5 Rule 20 CPC to serve the unserved defendants by way of substituted service on the ground that defendants are not willfully and intentionally appearing in the Court. On 17.9.2009, following order was passed:

"Present: Counsel for the parties.

Defendants Nos. 1 & 5 appeared through Sh. S.S Dharhri, Advocate who filed power of attorney. Reminaing defendants have not turned up despite service through publication. Hence they are proceeded against ex parte.

Let W/S be filed on. 1.10.2009

Sd/- Amandeep Singh

CJD 17.09.2009"

8. Counsel for the respondent No. 1 & 2-plaintiffs, at the same time has argued that the order of trial Court does not require any interference as there is no dispute with regard to the Will dated 15.5.2008 executed by Surinder Kaur in favour of defendant No. 4. As per Annexure P-7 placed on record, defendant No. 4 had been visiting India successively in the years 2007, 08, 09, 10, 11, 13, 14 and 2015. She cannot take the plea that she was not aware about the proceedings of the trial Court when defendants 2, 3 and 5 had already put in appearance and tendered their written statements. The question for consideration in the present case is whether under Section 5 Rule 20 CPC, proper service has been effected on petitioner-defendant No. 4. The fact is not in dispute that petitioner-defendant No. 4 after getting married in the year 1996 was residing in London. Hence for all intents and purposes, she cannot be served on the address given on the Village Garhi Mahan Tehsil Phillaur

Distt. Jalandhar. Law on this question has been considered by Hon"ble the Supreme Court of India in the case of GMG Engineering Industries and others v. ISSA Green Power Solution and others, 2015(3) CivCC 142. A suit for recovery of money of Rs. 1.50 Crores has been decreed ex parte. There was a delay of 355 days in filing an application for setting aside the decree. Delay was condoned and it was held that the order of deposit of entire decretal amount is onerous and unreasonable. It was further held that in such cases, in applications for condonation of delay, the delay be condoned if sufficient cause was shown. In paragraphs 8, 9 and 10, Hon"ble the Supreme Court observed as under:

"8. It is well settled that the expression "sufficient cause" is to receive liberal construction so as to advance substantial justice. When there is no negligence, inaction or want of bonafide is imputable to the appellants, the delay has to be condoned. The discretion is to be exercised like any other judicial discretion with vigilance and circumspection. The discretion is not to be exercised in any arbitrary, vague or fanciful manner. The true test is to see whether the applicant has acted with due diligence.

9. While exercising the discretion for setting aside the ex-parte decrees or condoning the delay in filing the application to set aside the ex-parte decrees, the court is competent to direct the defendants to pay a portion of the decretal amount or the cost. In [Tea Auction Ltd. Vs. Grace Hill Tea Industry and Another](#), this Court has held as under:

"15. ...A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non- appearance even on the date when the decree was passed, but also on other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to put the defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith....."

10. In [Vijay Kumar Madan and Others Vs. R.N. Gupta Technical Education Society and Others](#), this Court has held as under:

"8. Costs should be so assessed as would reasonably compensate the plaintiff for the loss of time and inconvenience caused by relegating back the proceedings to an earlier stage. The terms which the court may direct may take care of the time or mode of proceedings required to be taken pursuant to the order under Rule 7.the court cannot exercise its power to put the defendant-applicant on such terms as may have the effect of prejudging the controversy involved in the suit and virtually decreeing the suit though ex parte order has been set aside or to put the parties on such terms as may be too onerous..... That condition in the order of the

trial court having been set aside by the High Court, we are inclined to sustain the order of the High Court but subject to certain modification. In our opinion the High Court was justified in setting aside the condition imposed by the trial court in its order which was too onerous, also vague, uncertain and suffering from want of clarity. The order of the High Court to the extent of setting aside the ex parte proceedings and directing the expeditious trial of the suit has to be sustained as it serves the ends of justice...." The same view was reiterated in V.K. Industries case (supra)."

9. In [Rabindra Singh Vs. Financial Commissioner, Cooproration, Punjab and Others](#) , while interpreting the Order 5 Rule 20 of Civil Procedure Code which governs the substituted mode of service, Hon"ble the Supreme Court observed that when the defendant was residing in America he could not be served through substituted mode of service. In paragraphs 14 & 18, Hon"ble the Supreme Court observed as under:

"14. The Act had been enacted at a point of time when agriculturists ordinarily used to reside in the village. The provisions laying down the mode of service of summons as contained in Sections 20 , 21 and 22 of the Act must, therefore, be construed having regard to the state of affairs as was obtaining during the relevant period. Substituted mode of service is permissible in law but such substituted mode of service in the changed context of a member of a family residing abroad for a number of years, cannot be held to be sufficient, particularly when the plaintiff himself took recourse to suppressio veri and suggestio falsi. A purported service by beat of drum or publication of a notice in a local newspaper which has no circulation in the United States of America etc. cannot be said to be an effective service. With the development of science and technology the on-going statues cannot be construed in such a manner so as to take the society backwards and not forwards. [See [State of Punjab and Others Vs. Amritsar Beverages Ltd. and Others](#),

18. A substituted service furthermore is meant to be resorted to serve the notice at the address known to the parties where he had been residing last. Appellant had been residing in the United States of America for the last about 25 years. He, thus, ceased to stay for all intent and purport at Village Khotharan, Distt. Nawanshahr. Therefore, no substituted service could have been effected on him for service of notice at that address."

10. A Division Bench of this Court in the case of [Harinder Pal Singh Vs. Sukhwant Kaur](#), held that the Court cannot take a pedantic or hyper technical view of the matter while considering the case of condonation of delay in an application under Order 9 Rule 13 of Civil Procedure Code. Explanation furnished by a party to show sufficient cause should not be rejected when stakes are high or arguable points of fact and law are involved. Ex parte decree passed in such circumstances cannot be allowed to sustain. Counsel for the respondent died. Respondent went abroad after engaging his counsel and remained stranded there due to terrorist action. The

events were sudden which could not be foreseen. The explanation was accepted as sufficient cause for condoning the delay. In paragraph 5 of the judgment, it was observed as under:

"5. Section 5 of the Limitation Act, 1963 empowers the appellate court to admit an appeal after the prescribed period if the appellant satisfies the Court that he had sufficient cause for not preferring the appeal within such period. The expression sufficient cause, has received a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. It has been held that the Court should not take a pedantic or hyper-technical view of the matter and the explanation furnished by a party to show sufficient cause should not be rejected when stakes are high and/or arguable points of facts and law are involved, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and deprives such party to have the decision on merits. It has also been held that acceptance of explanation furnished by a party to show sufficient cause should be the "rule" and the refusal an "exception", more so, when no negligence or inaction or lack of bona fide is shown. However, the Court cannot lose sight of the fact that by not taking steps within the time prescribed, a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine manner. There cannot, thus, be a strait-jacket formula for accepting or rejecting the explanation furnished for the delay caused in taking steps as it will always depend upon facts of each case. (Ref: (i) Sita Ram Ram Charan v. M.N. Nagarshama; (ii) Ram Lal v. Rewa Coalfields Ltd.; (iii) [Ram Nath Sao @ Ram Nath Sahu and Others Vs. Gobardhan Sao and Others](#), ; and (iv) Apangashu Mohan Lodh v. State of Tripura."

11. Recently, a Co-ordinate Bench of this Court in the case of Balbir Singh v. Balwinder Singh and others decided on 18.8.2015 (CR No. 3563 of 2014) had set aside the ex parte proceedings order passed by the trial Court where the plaintiff deliberately gave the Indian address i.e Village Khokhewal, Tehsil Phillaur, District Jalandhar of defendant who was actually residing in Canada. Substituted service was effected on the above said address and the defendant was proceeded ex parte. The plaintiff and the defendant were real brothers and he was aware that his brother was an NRI serving in Canada. It was held that substituted service cannot be called proper service and the ex parte proceedings were set aside and the defendant was permitted to file written statement.

12. In the present case, petitioner-defendant No. 4 as per Annexure P-7 was residing in England and was proceeded ex parte on 17.9.2009 on the basis of publication effect in a newspaper. No affixation, Munandi was ever conducted in her village. She never refused to accept the summons nor she received any summons from the Court in England. Respondents No. 1 & 2-plaintiffs got false report from the process server. In view of all that has been discussed above, order dated 20-10-2014 is illegal, null and void and is hereby set aside. Present revision petition is allowed.

Liberty is granted to the petitioner-defendant No. 4 to file written statement and lead her evidence subject to payment of Rs. 20,000/- as costs.