

(2010) 02 P&H CK 0150
In the Punjab And Haryana At Chandigarh
Case No : C.R. No. 54 of 2010 (O and M)

S.N. Hotels and Resorts (P) Ltd. and Another	APPELLANT
Vs	
Shri Sanjeev Kumar and Others	RESPONDENT

Date of Decision : 24-02-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20, Order 9 Rule 7
Constitution of India, 1950 — Article 227

Citation : (2010) 2 CivCC 673 : (2010) 158 PLR 352

Hon'ble Judges : Mahesh Grover, J

Bench : Single Bench

Advocate : Amit Rawal, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

Mahesh Grover, J.—The petitioners have filed this revision petition under Article 227 of the Constitution of India for setting aside order dated 10.12.2009 passed by the Additional Civil Judge (Senior Division), Fatehabad (hereinafter described as `the trial Court') by which the application moved by them under Order 9 Rule 7 of the C.P.C. was dismissed.

2. Notice of motion was issued on 8.1.2010. The plaintiff-respondent No. 1 was duly served for 18.2.2010, but no one put in appearance on his behalf and, therefore, the matter was adjourned to today in the interest of justice.

3. Today also, when the matter was taken up during the course of the day, no one appeared on behalf of respondent No. 1. As a result thereof, this Court is left with no other option, but to proceed on the basis of what has been stated before it without any assistance on behalf of respondent No. 1.

4. Learned Counsel for the petitioners has contended that there was no proper service upon the petitioners and this fact itself had prevented them from appearing before the trial Court. He further contended that from a perusal of the zimini orders which have been reproduced in the grounds of revision, it cannot

positively be concluded that the petitioners were served so as to enable them to contest the suit. A specific reference was made to zimni order dated 18.9.2007 wherein the trial Court, upon having received the suit by way of transfer, noticed that the registered covers issued to the defendants (petitioner No. 1 and proforma respondent Nos. 2 & 3 herein) had not been received back, either served or unserved. On that date, an application was moved for ad interim injunction, but the trial Court further noticed that the property in dispute was situated at Ajnala Road, Amritsar and adjourned the matter to 19.9.1997 to satisfy itself regarding the fact as to whether it had territorial jurisdiction to entertain the plea in the suit or not. On 19.9.1997, the matter was adjourned to 25.9.2007 on the request of the counsel for the plaintiff. On that date, the trial Court, after hearing the arguments on the issue of jurisdiction, passed the following order:

Heard. The learned Counsel for the plaintiff has argued that the Court at Fatehabad has the territorial jurisdiction to entertain the present suit. He has argued that the relief of possession has not been claimed by him. The suit is with regard to the specific performance of the agreement. The suit can be instituted where the agreement was executed. He has alleged that the agreement was executed within the territorial jurisdiction of Fatehabad. For this purpose, he has placed reliance upon *Karan Mahendru and Ors. v. Vatika Plantations (P) Ltd.* 2004 (3) CCC 606 (Delhi) and *Sovarani Gohse v. Bengal Steel Industries Ltd.* 1989 CCC 48 (Calcutta).

I have given considered thought to this argument advanced by the learned Counsel for the plaintiff and have gone through the case file very thoroughly and carefully. The plaintiff has based his suit upon a receipt, which has been placed on record as Annexure-1. The place of execution of the receipt has not been mentioned in the said receipt. However, the same has been issued on the letter pad of the defendant. The plaintiff has alleged the execution of the receipt at Fatehabad. Without commenting on the merits of the case, till the defendants version comes on the file, the stand of the plaintiff is pleaded to be correct and accordingly the proceedings are taken further. Registered covers issued to the defendants not received back either served or unserved. Since the defendants are residents of Amritsar, Punjab and the plaintiff is claiming the relief of permanent injunction directing the defendants to execute the agreement further. Therefore, in these circumstances, let the defendants be served through publication in newspaper "Chardhi Kalan, Bhiwani for 3.11.2007. Publication charges, if any, be deposited within a week. Any alienation during this period will be subject to lis pendense.

5. On 3.11.2007, the trial Court passed the following order:

Present: Sh. K.K. Jangra, proxy counsel for Sh. S.K. Batra, Adv. for the plaintiff.

Shri D.S. Bhattu, Adv. for the defendants.

Memo of appearance filed on behalf of the defendants. To come up for filing of

power of attorney, written statement and reply to the stay application on behalf of the defendants on 7.11.2007.

Sd/- CJ(JD),Fatehabad. 3.11.2007

6. On 14.11.2007, the power of attorney was filed by Shri D.S. Bhattu, Advocate only on behalf of defendant No. 3, even though he was marked present for defendant Nos. 1 to 3. It is pertinent to mention here that petitioner No. 1 was arrayed as defendant No. 1 in the suit and the time was granted for filing power of attorney on behalf of the remaining defendants on the said date. On 19.11.2007, Shri D.S. Bhattu, Advocate appeared, but did not file power of attorney on behalf of the petitioners. On 20.11.2007, again no power of attorney was furnished on behalf of the petitioners and no written statement was filed on behalf of defendant No. 3. Consequently, defendant Nos. 1 and 2 were proceeded against ex parte and time was granted for filing written statement on behalf of defendant No. 3. Since written statement was not filed on behalf of respondent No. 3, his defence was struck off vide order dated 7.2.2008. On 20.3.2008, defendant No. 3 filed an application for setting aside order dated 7.2.2008. The matter was adjourned to two days and ultimately, a reply to the application for setting aside order dated 7.2.2008 was filed on 5.8.2008 and the proceedings were adjourned to 28.8.2008.

7. In the meanwhile, the trial Court proceeded to examine the witnesses of the plaintiff and the matter was being adjourned repeatedly for the purpose.

8. On 4.9.2009, the present application under Order 9 Rule 7 of the C.P.C. was moved by the petitioners, which has been dismissed by the impugned order.

9. Learned Counsel for the petitioners has contended with specific reference to the orders dated 25.9.2007, 3.11.2007 and 14.11.2007 passed by the trial Court that publication to effect service upon the petitioners was carried out in a newspaper by the name of "Chardi Kalan, Bhiwani" and subsequent thereto, the power of attorney was filed only on behalf of defendant no. 3 and no power of attorney was filed on behalf of the petitioners. It was further contended by him that prima facie from the facts of the case, it appears that no proper publication was carried out and, therefore, the petitioners, who reside in Amritsar, could not have the knowledge of the proceedings because the publication was carried out in a newspaper which was not having any circulation in the area in which they resided. He has, thus, contended that the impugned order be set aside and the petitioners be permitted to join the proceedings in order to enable them to contest the suit.

10. As noticed above, no one has put in appearance on behalf of the plaintiff despite the fact that the matter was adjourned on one date solely on the ground that none was present on his behalf.

11. After hearing the learned Counsel for the petitioners and perusing the impugned order, as also the relevant material on record, I am of the opinion that

there is substance in the grievance of the petitioners. The provisions of Order 5 Rule 20 of the C.P.C., enables a Court to effect service upon the unserved defendant or respondent by way of alternate means which also include service by way of publication in a newspaper. These provisions are extracted below for ready reference:

20. Substituted service.- (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Courthouse, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(1-A) Where the Court acting under Sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

(2) Effect of substituted service.- Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed.- Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

12. It is clear from the aforesaid provisions of law that where the Court resorts to effect service upon a defendant by way of publication, it has to specify the newspaper which shall be a daily newspaper circulating in the locality in which the said defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain. It has not been disputed before this Court that the petitioners reside at Amritsar. It has also not been controverted that the publication was carried out in the newspaper by the name of "Chardi Kalan, Bhiwani". The plaintiff has not put in appearance to say that this newspaper has some circulation in Amritsar. Prima facie, it appears that the newspaper by the aforesaid name, in all probability a local newspaper, would not be having any circulation in an area outside District Bhiwani, much less a district situated in Punjab. It has also to be seen that a person, who is desirous of joining the proceedings, ordinarily should be permitted to join the proceedings, provided he shows that his absence was for reasons which could sufficiently be explained and such absence was not motivated or guided by considerations which can be termed to be mala fides.

13. However, in the instant case, on a perusal of the various zimini orders passed by the trial Court, some of which have been reproduced above, a limited doubt does come in the mind of the petitioners were not duly served, although there are factors to indicate to the contrary as well because at least two or three zimni

orders show that a counsel had appeared for the petitioners as well and subsequently, defendant No. 3, even though put in appearance through some counsel, defaulted by not filing written statement. In such an eventuality, this Court is of the considered opinion that the impugned order as well as order dated 20.11.2007 whereby the defendant Nos. 1 and 2 (petitioner No. 1 and proforma respondent No. 2 herein) were proceeded against ex parte, deserve to be set aside. Ordered accordingly.

14. Consequently, the petitioners are permitted to join the proceedings in the suit subject to the condition that they appear and file written statement on the same very day. It has been informed that the proceedings in the suit are fixed before the trial Court on 25.2.2010. In this eventuality, the petitioners shall appear before the trial Court tomorrow and file written statement within three days thereafter in order to preclude any further delay in the proceedings. They shall also compensate the other side for the delay that they have caused, by paying a costs of Rs. 20,000/-.

15. The revision petition is allowed in the aforesaid terms.