

with by the State in its return and the reasons of retention of each of the persons named by those petitioners have been ascribed in the written statement. I am unable to find any invalidity in those reasons.

(10) For the foregoing reasons Raghbir Parshad's petition (Civil Writ 69 of 1968) is allowed, and all the remaining six petitions are dismissed though without any order as to costs in any of the cases. Nothing stated in this judgment will effect the rights of the six unsuccessful petitioners to continue in service as Patwaris or to be confirmed as such with effect from any particular date if it is found that no case is made out for reverting them again at this stage.

N.K.S.

REVISIONAL CIVIL

*Before Prem Chand Pandit, J.*

CHARAN SINGH,—*Appellant.*

*versus*

DEWAN SINGH, ETC.,—*Respondents.*

Civil Revision No. 151 of 1971.

January 31, 1972.

*Code of Civil Procedure (Act No. V of 1908)—Section 99—Order 5, Rules 12, 14 and 28—Order 9, Rule 13—Defendant in a suit serving in the Army—Service on such defendant—Whether has to be under Order 5, Rule 28—Requisites for effecting service under order 5, rule 14—Stated—Ex parte decree passed against a defendant not properly served—Court—Whether bound to set it aside on that score alone.*

*Held*, that the moment the trial Court is made aware of the fact that a defendant in a suit is serving in the Army, it should take recourse to the provisions of Order 5, rule 28 of the Code of Civil Procedure which is a specific provision meant for effecting service on a defendant who is a soldier, sailor or airman. Serving such a defendant under order 5, 14 is improper.

Charan Singh v. Dewan Singh, etc. (Pandit J.)

*Held*, that the first requirement of rule 14 of Order 5 of the Code is that service on a defendant in a suit relating to immovable property cannot be made in person under rule 12. The other requisite is that the said defendant has no agent empowered to accept the service. After these two conditions are satisfied, the Court is empowered to effect service on "any agent of the defendant in charge of the property". It is not enough that the person on whom the service is effected is merely "in charge of the property". A further fact has to be established that that person is also an agent of the defendant. If the trial Court wants to effect service under order 5, rule 14 of the Code on a particular defendant where there are more than one defendant in a case, notices to the other defendants have to be issued and then efforts made to find out the person who can be called an agent of the unserved defendant in charge of the property in suit so that service be effected on him.

*Held*, that where a defendant has not been properly served and an *ex parte* decree has been made against him, the only course open to the Court is to set aside the decree, if he can show to the Court that he was not duly served. If a defendant is found not to have been served properly, it cannot be said that this is merely an irregularity in procedure not affecting the merits of the case, and therefore, the decree can neither be reversed nor modified in view of the provisions of section 99 of the Code.

*Petition under section 115 C.P.C. for revision of the order of Shri H. S. Ahluwalia, Senior Subordinate Judge with enhanced appellate powers, Ludhiana dated 16th November, 1970 affirming that of Shri Gurjit Singh Sandhu, Sub Judge 1st Class, Ludhiana dated 4th December, 1969 dismissing the application and leaving the parties to bear their own costs.*

M. L. Sethi, Advocate, for the petitioner.

T. S. Mangat, Advocate for Respondent No. 1.

#### JUDGMENT

PANDIT, J.—The facts giving rise to this revision petition No. 151 of 1971 and the connected Regular Second Appeal No. 218 of 1971 are these. On 4th May, 1966, one Gurnam Singh sold, by a registered-deed, agricultural land, measuring 10 Kanals and 2 Marlas, situate in village Rachhin, District Ludhiana, to Joginder Singh and his three brothers Gurdial Singh, Mukhtiar Singh and Gurcharan Singh (sometimes called Charan Singh) for Rs. 4,000. On 1st May, 1967, Diwan Singh filed a suit for pre-emption on the ground that he was the uncle of the vendor and, therefore, had a preferential right to

purchase this land. It appears that out of the vendees, Mukhtiar Singh and Gurcharan Singh were employed in the Army. During the pendency of the suit, on 27th January, 1968, an application was sent by Mukhtiar Singh from the place where he was serving in the Army, through his Commanding Officer, to the learned Sessions Judge, Ludhiana, saying that a case had been filed against him by Diwan Singh and proceedings in the same be stayed under the Soldier's Litigation Act. This application was first placed before the Sessions Judge, on 31st January, 1968, and it then came up before the trial Judge on 2nd February, 1968, who directed that it should be placed on the file for necessary orders. But it appears that no orders were ever passed on this application. Twice efforts were made to serve Mukhtiar Singh and Gurcharan Singh—first on 31st July, 1967, and then on 1st September, 1967. On the first occasion, it was reported by the process-server that Gurcharan Singh was employed in the Army at Chandigarh and likewise Mukhtiar Singh was in Ferozepore. A similar report was made on 1st September, 1967. The fact remains that both of them were not duly served. On 5th December, 1967, an application under Order 5, rule 14, Code of Civil Procedure, was made by Diwan Singh that these two defendants be served through their brother Joginder Singh, defendant No. 1. It was stated that no proper service could be effected upon them and their correct addresses were not known to the plaintiff. Besides, they had no agent in the village and their brother Joginder Singh was incharge of their property. On the same day, the trial Judge ordered that service on the said two defendants be effected under the provisions of Order 5, rule 14, Code of Civil Procedure, through their brother Joginder Singh, defendant No. 1. It was also directed that "summons in registered cover for defendants Nos. 3 and 4 be issued for 5th January, 1968". It is not quite clear from the order as to whether the learned Judge wanted that the summons be sent by registered cover to defendants Nos. 3 and 4 directly as well. In any case, that was not done and they were served through defendant No. 1, who, on 5th January, 1968, was directed by the trial Judge to file a written statement on their behalf on 15th January, 1968. But admittedly, no such written statement was put in and after trial, the suit was decreed on 25th April, 1968, on payment of Rs. 4,295 to the vendees. On 14th May, 1968, an application under Order 9, rule 13 and section 151, Code of Civil Procedure, was filed by Gurcharan Singh for setting aside this *ex parte* decree passed against him. His

case was that he was in Army service and had not been duly served. He had no knowledge about the suit.

(2) This application was opposed by Diwan Singh, who pleaded that the applicant had been properly served in accordance with the provisions of Order 5, rule 14, Code of Civil Procedure. The application had been given to delay the execution of the decree.

(3) After evidence was led on the only issue framed in the case, namely, whether the applicant was not duly served, the trial Judge dismissed the application, holding that proper service had been effected on Gurcharan Singh through his brother Joginder Singh under Order 5, rule 14, Code of Civil Procedure.

(4) Against this order, Gurcharan Singh went in appeal before the learned Senior Subordinate Judge, Ludhiana. He also held that Gurcharan Singh had been properly served under Order 5, rule 14, and had knowledge about the suit. He also came to the conclusion that Joginder Singh was in charge of the property of all his brothers and, therefore, if service was effected on Gurcharan Singh through him, it was good service. On these findings, the appeal was dismissed. Against this order, the present revision petition had been filed by Gurcharan Singh.

(5) It may be stated that an appeal was also filed by Joginder Singh, Gurdial Singh and Gurcharan Singh against the decree dated 20th April, 1968, passed by the trial Judge. This appeal was dismissed by the learned Senior Subordinate Judge, on 8th December, 1970. Regular Second Appeal No. 218 of 1971 has been directed against that decision.

(6) As regards Civil Revision No. 151 of 1971, it would be seen that Gurcharan Singh had made an application under Order 9, rule 13, Code of Civil Procedure, for setting aside the *ex parte* decree made against him and the only point to be considered was whether the summons had been duly served on him or not.

(7) It is common ground that the trial Court did not take any action under the provisions of Order 5, rule 28, Code of Civil Procedure. The report of the process server, referred to above, had made

it clear that both Mukhtiar Singh and Gurcharan Singh were serving in the Army. Under that situation, it is not understood as to why the trial Judge did not adopt the procedure mentioned in rule 28 of Order 5 which is meant specifically for such cases. It lays down that where the defendant is a soldier, sailor or airman, the Court shall send the summons for service to the Commanding Officer together with a copy to be retained by the defendant. Rule 29 of this very Order then says that where a summon is delivered or sent to any person for service under rule 28, such person shall be bound to serve it if possible and to return it under his signature, with the written acknowledgement of the defendant, and such signature shall be deemed to be evidence of service. Sub-rule (2) of rule 29 goes on to say that where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

(8) As I have said, the moment the trial Court was made aware of the fact that Gurcharan Singh was serving in the Army, it should have taken recourse to the provisions of Order 5, rule 28, Code of Civil Procedure. That admittedly was not done. Action was, however, taken under Order 5, rule 14, which says that where in a suit to obtain relief respecting immovable property, service cannot be made on the defendant in person and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property. The first requirement of this rule is that service on the said defendant cannot be made in person. It has been laid down that this rule has no application, unless it is shown that rule 12 cannot be complied with. (See in this connection *Bengal Chand Co. v. Durga Shankar Gouri Shankar* (1). According to rule 12, wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

(9) It is not disputed that Gurcharan Singh had not empowered any agent to accept the service on his behalf. Therefore, efforts should have been made to serve him personally according to law and for that, as I have said, the provisions of rule 28 of Order 5, Code of Civil Procedure, should have been availed of, since Gurcharan Singh

(1) I.L.R. 1955 (1) Cal. 119.

was employed in the Army. That concededly was not made and, therefore, it cannot be said that service on this defendant could not be made in person.

(10) Then again, under rule 14, Order 5, the other requisite is that the said defendant had no agent empowered to accept the service. This condition was obviously satisfied in this case, because it is nobody's case that Gurcharan Singh had appointed any agent to accept the service.

(11) After the abovementioned two conditions are satisfied, then the Court under Order 5, rule 14, is empowered to effect service on "any agent of the defendant incharge of the property". Obviously, it is not enough that the person on whom service is effected, is merely incharge of the property. A further fact has to be established, namely, that person was also an agent of the said defendant. In my opinion, if the trial Judge wanted to effect service under this rule, he should have at least issued notice on this application to the other defendants and then tried to find out the person, who could be called an agent of the defendant incharge of the property, so that service be effected on him. But, admittedly, neither any notice of this application was given nor was any inquiry made by the Court *suo motu* to determine this matter. On that very day, the learned Judge passed an order that service be effected on Gurcharan Singh through his brother Joginder Singh, defendant No. 1. Be that as it may, the fact remains that it has not been shown as to why recourse to this provision of law had to be taken in this case and I am also not satisfied that proper service had been effected even under this rule.

(12) The trial Judge had, as I have already stated, ordered defendant No. 1, after he had been served on behalf of Gurcharan Singh and Mukhtiar Singh, that he should file a written statement on their behalf as well, but it is common ground that he did not do so.

(13) The learned Senior Subordinate Judge, while upholding the order of the trial Court, has taken into consideration several matters, which were quite irrelevant and had no bearing on the point in issue. For instance, he had stated that after the application for setting aside the *ex parte* decree was filed on 14th May, 1968, Gurcharan Singh along with his other two brothers, Joginder Singh and Gurdial Singh, jointly filed an appeal against the order decreeing the plaintiff's suit on 25th April, 1968, and in that appeal Joginder

Singh was conducting the case for all the appellants. It is not understandable as to what effect will this circumstance have on the question as to whether in the main suit, Gurcharan Singh had been properly served or not. Further, it will also not prove that Joginder Singh could be termed as the agent of Gurcharan Singh for the purpose of Order 5, rule 14, Code of Civil Procedure.

(14) Then again, the learned Senior Subordinate Judge, after having referred to the provisions of section 99, Code of Civil Procedure, observed that if there was any irregularity in effecting the service on Gurcharan Singh, it should not be a ground for setting aside the *ex parte* decree, if it had not affected the merits of the case and "a perusal of all the circumstances of this case would show that the merits had not been affected." This proposition, in my view, is somewhat strange. If a defendant has not been properly served and an *ex parte* decree has been made against him, if he can show to the Court that he was not duly served, the only course open to the Court is to set aside the decree. It cannot, in those circumstances, be said that this is merely an irregularity in procedure not affecting the merits of the case, and therefore, the decree can neither be reversed nor modified in view of the provisions of section 99, Code of Civil Procedure.

(15) The learned Senior Subordinate Judge also referred to the fact that the sale-deed in this case showed that it was a joint sale in favour of all the four brothers without specification of any shares. He also mentioned the fact that Joginder Singh alone appeared on behalf of the vendees before the Sub-Registrar and got back the sale-deed from him after its registration. Surely, it was not suggested that if there was a joint sale and one of the vendees was taking active interest in getting the sale-deed registered, he alone could represent the other vendees in the pre-emption suit, without obtaining a regular power of attorney from them.

(16) I may also mention that during the trial of the suit, as I have already stated above, an application on behalf of Mukhtiar Singh under the Soldiers' Litigation Act was made to the trial Judge and in spite of the fact that he had said that it would be dealt with later on, no orders were ever passed thereon.

(17) For all these reasons, I am satisfied that proper service was not effected on Gurcharan Singh and he had, therefore, sufficient

Tokha, etc. v. Smt. Samman, etc. (Mahajan, J.)

cause for not appearing in the Court. Under these circumstances, *ex parte* decree could not have been passed against him.

(18) I would, therefore, accept this revision petition, reverse the orders of the learned Senior Subordinate Judge as well as the trial Court, accept the application of the petitioner under Order 9, rule 13, Code of Civil Procedure, and set aside the *ex parte* decree passed against him on 25th April, 1968. In the circumstances of this case, however, I will leave the parties to bear their own costs.

(19) It has been conceded by the learned counsel for the parties before me that in view of my above decision in the Civil Revision, the connected Regular Second Appeal is automatically accepted and the judgments of the Courts below are set aside. Parties have been directed to appear before the trial Court on 1st March, 1972, for further proceedings in the case.

B.S.G.

APPELLATE CIVIL

Before D. K. Mahajan, J.

TOKHA ETC.,—Appellants.

*versus.*

SMT. SAMMAN ETC.,—Respondents.

Regular Second Appeal No. 295 of 1961.

February 3, 1972.

*Hindu Succession Act (XXX of 1956)—Sections 4 and 14—Punjab Tenancy Act (XVI of 1887)—Section 59(3)—Widow holding occupancy tenancy rights in land inherited from her husband—Gift of the land made by her after coming into force of Hindu Succession Act—Whether void.*

*Held*, that the rights of an occupancy tenant are "property" and a widow inheriting these rights from her husband holds them for lifetime. On her death they do not pass on to her heirs but to the heirs of her husband under section 59 of the Punjab Tenancy Act. However, after the coming into force of the Hindu Succession Act and by reason of section 14(1) she becomes the absolute owner of those rights and the limited estate she held no longer