CIVIL MISCELLANEOUS

Before R. S. Narula, Chief Justice.

BISHAN SINGH,—*Petitioner.*

versus

AMARJIT SINGH (MINOR) and others,—*Respondents.*

Civil Revision No. 200 of 1971.

July 15, 1975.

The Code of Civil Procedure (V of 1908)—Order 5 Rule 14—Requirements of—Stated—Service ordered under Order 5 Rule 14 without any attempt to effect personal service on defendant—Whether proper.

Held, that the conditions precedent for applying Rule 14 of Order 5 of the Code of Civil Procedure 1908 are that:—

(1) the suit in which that rule is invoked must be a suit to obtain relief respecting immovable property (or compensation for wrong to such property);

(2) the Court should be satisfied that service cannot be made on the defendant in person; and

(3) the Court should be satisfied that the defendant has no agent empowered to accept service of summons or notice on behalf of the defendant.

If all the abovementioned three ingredients of Rule 14 of Order 5 are satisfied, it is open to the Court to direct service being made on any person in charge of the property in question, who is the agent of the defendant though he is not specifically empowered to accept notices and summonses. Thus, in order to be effective and legal service on a defendant under Order 5 Rule 14 of the Code, the person on whom actual service is made must have both the qualifications, namely that of being an agent of the defendant and being in charge of the property. (Para 3).

Held, that the procedure of ordering service under Order 5 Rule 14 of the Code without making any serious effort to effect personal service on the defendant has to be deprecated. Every effort should be made to effect personal service in the first instance and the process server should go again for that purpose before the provisions for effecting substituted service are invoked. (Para 3).

Petition under Section 115 of Civil Procedure Code for revision of the order of Shri Jagwant Singh, Ex-officio Additional District Judge, Jullundur, dated 13th August, 1970 affirming that of Shri G. D. Hans, Sub-Judge Ist Class, Nakodar, dated 13th November, 1967 dismissing the petition with costs.

Gurcharan Singh, Advocate, *for the Petitioner.*

Rajinder Krishan Aggarwal, Advocate, *for Respondent No. 2.*

JUDGMENT

NARULA, C. J.—(1) A bird's eye view of the facts leading to the filing of this petition for revision for setting aside the order of the Court of Shri Jagwant Singh, Additional District Judge, Jullundur, dated August 13, 1970 upholding the order of the trial Court refusing to set aside the *ex-parte* decree that had been passed against the defendant-petitioner, may first be taken. One Updaman Singh gave away his property in exchange to Om Parkash respondent by a registered deed of exchange on July 18, 1959. The present petitioner purchased the property from Om Parkash by registered sale-deed, dated August 27, 1959. In February, 1961, Amarjit Singh, son of Updaman Singh and one Lachhman Singh, a collateral of Updaman Singh, filed the usual suit for a declaration to the effect that the transfer of the property in question by Updaman Singh to Om Parkash by way of exchange would not bind the reversionary interest of the plaintiff as the property was ancestral and the transfer was made without legal necessity. Though the petitioner was not originally impleaded as a party to the suit, he was later added to the array of defendants on an objection taken up by Om Parkash in his written statement for annulling the onward transfer of the property by him to the petitioner. It is admitted on both sides that at the time of the institution of the suit till the time of the passing of the *ex-parte* decree therein, the petitioner was living in Kenya (East Africa). The plaintiff-respondents made an application to the trial Court under Order 5, Rule 14 of the Code of Civil Procedure for effecting service of summons of the suit on the present petitioner through his father Naranjan Singh, said to be in charge of the property in question. The application was allowed, and it is alleged that the summons addressed to the defendant-petitioner was served on his father Naranjan Singh. No contest was made by the petitioner and an *ex parte* declaratory decree was granted by the trial Court on March 27, 1962. It is again not disputed that the father of the petitioner died in 1962, whereupon the

petitioner came to India in that connection on November 2, 1962. The petitioner claims that he came to know of the *ex-parte* decree for the first time when he came to India on the above-mentioned occasion. It was within a few days thereafter, that is on November 5, 1962, that the petitioner made an application to the trial Court under Order 9, Rule 13 of the Code, for setting aside the *ex parte* decree. The sufficient cause pleaded for setting aside the decree was that no proper service of the summons was effected on the petitioner. The application of the petitioner was dismissed by the Court of Shri G. D. Hans, Subordinate Judge, Nakodar, on November 13, 1967. The petitioner's appeal having been dismissed by the learned Second Additional District Judge (as already referred to), the petitioner approached this Court by way of this revision petition.

(2) In the proceedings under Order 9 Rule 13 of the Code, the trial Court framed the following issues :—

(1) Whether the application is within limitation ?

(2) Whether the petitioner was not validly served ?

(3) Whether there is a sufficient cause for setting aside the *ex parte* decree ?

(4) Relief.

Neither the trial Court nor the first appellate Court recorded any finding on issue No. 3. Issues Nos. 1 and 2 were decided against the petitioner by the first appellate Court on the basis of the following findings :—

(i) Although the original summons which is alleged to have been served on the petitioner's father was not available, the order of the Court clearly goes to show that service had been duly effected on Bishan Singh under Order 5 Rule 14 of the Code of Civil Procedure;

(ii) the record shows that a counsel appeared for Bishan Singh and prayed for an adjournment to file his power of attorney, but subsequently he did not turn up; and

(iii) the plaintiff had filed a replication to the effect that Bishan Singh was residing in a foreign country and his address was not known, and his father Naranjan Singh

was in possession of the property, and service should be effected on him, and though the summons was issued to him, the defendant remained absent.

(3) Mr. Gurbachan Singh, learned counsel for the petitioner, has firstly contended that both the orders of the Courts below are vitiated on the ground that no finding had been recorded on issue No. 3, which was the crucial issue on which the fate of the application depended. I am unable to agree with him on this contention. If the trial Court found that the application for setting aside the decree was beyond limitation, he would not be legally called upon to decide the other issues. If, however, the application was held to be within time, and it was found that the petitioner had been validly served there would on the facts and circumstances of this case be no sufficient cause for setting aside the *ex parte* decree. In the view I am taking of the matter in this case on merits, it is unnecessary to pursue this point any further. It appears to me that the Courts below have wholly misconstrued, misunderstood and misapplied the provisions of Order 5 Rule 14 of the Code. The conditions precedent for applying Rule 14 of Order 5 are that :—

(1) the suit in which that rule is invoked must be a suit to obtain relief respecting immovable property (or compensation for wrong to such property);

(2) the Court should be satisfied that service cannot be made on the defendant in person ; and

(3) the Court should be satisfied that the defendant has no agent empowered to accept service of summons or notice on behalf of the defendant.

If all the above-mentioned three ingredients of Rule 14 of Order are satisfied, it is open to the Court to direct service being made on any person in charge of the property in question, who is the agent of the defendant though he is not specifically empowered to accept notices and summonses. All this is apparent from the plain language of the rule which is reproduced below :—

"*Service on agent in charge in suits for immovable property.*— Where in a suit to obtain relief respecting, or compensation for wrong to, 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."

In the present case all that the plaintiff had stated in his application, dated October 15, 1961, (the date of hearing of the case), was that Bishan Singh, son of Naranjan Singh defendant lived in a foreign country, and he had no agent or special attorney, but his father Naranjan Singh was in occupation of the house, and, therefore, Naranjan Singh should be declared to be the *karkun* of the property of the defendant. The plaintiff did not even allege that service could not be made on the defendant-petitioner in person. Nor did he allege that the petitioner's father Naranjan Singh was an agent of the defendant who was in charge of the property. The only order passed by the trial Court on that application was in the following words:—

> "Present : Counsel for the applicant. The defendant to be served under Order 5 Rule 14 C.P.C. for the date fixed. Process-fee be put in."

It seems that the trial Court passed the above-mentioned order as a matter of routine without adverting to the requirements of the relevant rule, and without realising the risk and seriousness involved in effecting substituted service under Rule 14 of Order 5. Whether the order passed at that time was correct or not is, however, of no concern to me. The only thing which is to be seen in the present proceedings is whether on proven facts service of the summons of the suit had been effected on the defendant-petitioner in accordance with law. Service under Order 5 Rule 14 was ordered without making any serious effort to effect personal service on the defendant. Such a course has been deprecated by this Court (Dua, J. as he then was) in *Arjan Singh and others* v. *Hazara Singh and others*, (1). The learned Judge observed in that case that every effort should be made to effect personal service in the first instance and the process-server should go again and again for that purpose before the provisions for effecting substituted service are invoked. In the instant case, on the showing of the plaintiff-respondent himself, he knew that the defendant was not in India, he did not know the address of the defendant in Africa, and, therefore, there could be no occasion for trying to effect personal service on the defendant. It was neither shown in the main suit nor even alleged or proved in the present proceedings that the father of the petitioner who was no doubt living in the property was an agent of the defendant. In order to be effective and legal service on a defendant under Order 5 Rule 14

(1) 1965 P.L.R. 643.

of the Code, the person on whom actual service is made must have both the qualifications, namely that of being an agent of the defendant and being in charge of the property. There was neither any allegation nor any proof, nor any finding about the satisfaction of the first condition.

(4) The next question that arises is that even if the order under Order 5 Rule 14 is treated as a valid and legal order, is there anything to show that service was actually effected on the father of the petitioner. This could be easily proved from the original summons signed or thumb-marked by the father of the defendant and from the affidavit of the process-server about having effected service on him. Such documentary evidence could be supplemented and corroborated by the statements of the process-server and the attesting witness of the endorsement of service, if any. Neither the process-server nor any such attesting witness has been produced in this case. The original summons and the affidavit of the process-server should, according to the requirements of rule 3(18) of Chapter 16-F of Volume IV of the Rules and Orders of this Court, be contained in Part A (*Nathi Alf*) of the record of the trial Court. Neither any such document is available in *Nathi Alf*, nor is there any mention of any such document in the index of *Nathi Alf*. Whole of Part A of the file from pages 1 to 84 is intact. What has been believed by the Courts below is that the documents in question must by mistake have been attached to *Nathi Be* which is claimed to have been destroyed. If any such thing has happened, it must be due to the mistake of the office of the Court, and it is settled law that no litigant should suffer on account of the mistake of the Court.

(5) The only other thing on which reliance (as already stated) has been placed by the Courts below and on which they have decided this case against the defendant-petitioner is that some counsel appeared on the date of hearing of the case and stated that he would appear for the defendant on the next hearing after obtaining the power of attorney from him. The defendant was admittedly not in India. He could not possibly have instructed any counsel to make a statement of the type attributed to the counsel. If anyone else had set up an advocate for that purpose, no liability can be attached to the defendant on that account. So long as he did not have a power of attorney, he could not represent the defendant. Admittedly he never appeared again and never filed the power of attorney. It is strange that

even the lower appellate Court has placed reliance on that fact for deciding the case against the defendant-petitioner. None of the grounds on which the order of the Courts below is based, therefore, survives. Mr. Gurbachan Singh has contended that even if some findings of the Courts below had been upheld, he was entitled to obtain a finding on issue No. 3 read with his application under section 5 of the Limitation Act for extending the time for moving the Court for setting aside the decree. It is unnecessary to travel into the field covered by that proposition.

(6) Mr. R. K. Aggarwal, learned counsel for the plaintiff-respondent, has contended that setting aside of the *ex parte* decree at this stage would result in irretrievable hardship and loss to the plaintiff as in view of the amendment of section 7 of the Punjab Custom (Power to Contest) Act, 1920, by section 3 of the Punjab Custom (Power to Contest) Amendment Act (12 of 1973), a suit for the usual declaration if once revived cannot now succeed and has to be dismissed. That may indeed be so, but the mere fact that certain legal consequences detrimental to the interest of the plaintiff-respondent have to ensue as a result of doing justice to the defendant in accordance with law, is no reason for refusing justice to the defendant. Mr. Aggarwal then submitted that this is not a cast where an *ex parte* decree was straightaway passed after manoeuvring service on the defendant as Om Parkash actually contested the suit tooth and nail and the decree was passed after a contest by the other defendant for a long time. That is again in irrelevant consideration and does not touch the merits of the controversy involved in proceedings under Order 9 Rule 13 of the Code.

(7) No other point has been argued before me by either of the counsel for the parties. For the foregoing reasons I allow this petition, set aside and reverse the judgments and orders of the Courts below, allow the application of the defendent-petitioner under Order 9 Rule 13 of the Code of Civil Procedure, set aside the *ex parte* decree passed in favour of the plaintiff-respondent against the defendants to the suit on March 27, 1962, and direct the trial Court to dispose of the suit as expeditiously as possible in accordance with law. The parties have been directed to appear before the trial Court on August 4, 1975.

N. K. S.