

Before Nirmaljit Kaur, J.

KHUSDIL—Petitioner

versus

VIRENDER @ BIRENDER—Respondent

CR No.5306 of 2019

October 04, 2019

A. Code of Civil Procedure, 1908—O.9 RL. 13, O.5 RL. 19—Constitution of India, 1950—Art.227—Limitation Act, 1963—Revision petition filed against order dismissing application under Order 9 Rule 13 CPC by Trial Court as well as the Appellate Court—Against setting aside *ex parte* judgment and decree

B. Order 5 Rule 19 CPC—Mandatory provisions not followed—No affidavit of serving officer came on record qua service of applicant—Report of Process Server contradictory—Report mentioning that no witness available, whereas one witness shown to have duly signed the same—Such witness not examined before the Trial Court—Held, report itself is surrounded with doubts.

C. Limitation Act—Period of limitation would start from the date of knowledge of *ex parte* proceedings, not from the date of passing of judgment and decree of the suit— Thus, *ex parte* judgment and decree set aside—Applicant/defendant given time to file written statement and lead evidence and conclude suit within span of six months.

Held that, in order to adjudicate, first and foremost, it would be appropriate to see the report of refusal as submitted by the Process Server. A perusal of the same, which is in vernacular, shows that it is contradictory. It is specifically mentioned that no witness is available, whereas, one witness, Pardeep has duly signed the same. In fact, the address of this witness is also mentioned. In spite of the same, no such witness has been examined. Neither of the parties could establish the existence or nonexistence of said Pardeep. Therefore, the report itself is surrounded with doubt. While disputing the argument of learned counsel for the petitioner that Process Server did not observe the mandatory provisions of Order 5 Rule 19 CPC and that the summons returned under Rule 17 should be verified by the affidavit of the Serving Officer, learned counsel for the respondent-plaintiff referred to the endorsement on the summons by the Process Server as being the

affidavit. However, the said endorsement does not meet the necessary ingredients laid down in the CPC for verification of the affidavit. Even the name of the Process Server is not clear. The same is not even on oath. Even if the said discrepancy is ignored, the fact remains that failure to establish the identity of one Pardeep, the alleged independent witness, coupled with the specific averment in the report by the Process Server that no independent witness was available, being contradictory, has cast a shadow of doubt on the service of the summons.

(Para 7)

Further held that, the next argument of learned counsel for the respondent/plaintiff that application under Order 9 Rule 13 CPC was hopelessly time barred will, therefore, be of no help, once the Court concludes that the petitioner did not know about the pendency of the suit as it is not disputed that the delay commences from the date of knowledge. In the present case, the date of knowledge is the date his mother received the summons in the execution petition and she refused to accept the summons in the execution petition. The argument that no date of knowledge is mentioned in the application under Order 9 rule 13 to allow the Court to know about the date of knowledge from which the limitation can be counted, too, does not help as the petitioner filed the application under Order 9 Rule 13 CPC within the limitation period from the date of the alleged report of refusal of the summons in the execution petition.

(Para 10)

Kunal Dawar, Advocate
for the petitioner.

Vikas Bahl, Sr. Advocate with
Sarvesh Kumar Gupta, Advocate
for the respondent.

NIRMALJIT KAUR, J.

(1) The present revision petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 30.05.2017 passed by the Additional Civil Judge (Sr.Division), Faridabad, dismissing an application under Order 9 Rule 13 CPC filed by the petitioner, who was defendant No.3 in the suit, seeking the setting aside the ex parte judgment and decree dated 03.09.2014 as well as the judgment and order dated 19.08.2019 passed by the Additional District Judge, Faridabad, dismissing appeal of the petitioner against

the order dated 30.05.2017 with a further prayer to allow the application of the petitioner under Order 9 Rule 13 CPC.

(2) Brief facts, in short, which has necessitated the filing of the present revision petition commence when the respondent-plaintiff instituted a suit for possession by way of a specific performance of agreement to sell against the defendants in the said suit alleging that Shri Ashok Kumar Sharma and Sumit Chanana, defendant Nos.1 and 2 in the said suit, had entered into an agreement to sell dated 10.07.2008 with the respondent-plaintiff for a total sale consideration of Rs.60.00 lacs and out of which, the respondent-plaintiff had paid earnest money of Rs.20.00 lacs. Thereafter, the above-mentioned owners sold the property to the present petitioner-Khushdil, who was defendant No.3 in the suit, vide sale-deed dated 19.03.2010. The present petitioner and defendant Nos.1 and 2 were proceeded ex parte and the suit was decreed vide judgment and an ex parte decree dated 03.09.2014 on the ground that notice issued to petitioner-defendant No.3 was received back with the report of refusal. After passing of the aforesaid decree, the respondent-plaintiff filed an execution application on 17.01.2015. A notice of the said application was issued on 04.03.2015 for 01.04.2015 and once again the same was issued for 23.04.2015. It is alleged that the said summons were received by mother of the present petitioner, but since she refused to accept the same once again, report of refusal was given. However, the petitioner-judgment-debtor appeared in the execution proceedings on 23.04.2015. Thereafter, the petitioner-judgment debtor filed an application under Order 9 Rule 13 CPC for setting aside the ex parte judgment and decree dated 03.09.2014 on 11.05.2015. However, the said application was dismissed vide order and judgment dated 30.05.2017. The petitioner-defendant No.3 accordingly filed appeal against the order dated 30.05.2017, which too was dismissed on 19.08.2019. Hence, the present revision is filed against the order and judgment dated 30.05.2017 as well as the order dated 19.08.2019.

(3) While praying for setting aside the impugned orders, learned counsel for the petitioner-defendant No.3 submitted that the said orders are passed in total non-compliance of the mandatory provisions of Order 5 Rule 19 CPC. No affidavit of the Serving Officer has come forth on record qua the alleged service verification and nor is there any report of the service of the petitioner. The Process Server failed to observe the mandatory provisions of Order 5 Rules 17 & 19 of the CPC. The report is contradictory. On the one hand, it is stated that there

is no independent person available and on the other hand one Pardeep has signed, who was not produced. No summons were sent by registered post at proper address with acknowledgement due. The Court has wrongly recorded that there was delay. The delay starts from the date of the knowledge and the petitioner came to know only after the summons were received by his mother and a copy of the execution petition was left with his mother. It was further contended that case of the petitioner is good on merits and, therefore, he should not be condemned unheard. As per the learned counsel for the petitioner, the property was purchased by his father, who is an Ex-Serviceman in the Indian Air Force, and who has invested his life-time savings in buying the said property so as to settle after his retirement. The owners of the house Ashok Kumar Sharma and his son Sumit Chanana have entered into full and final agreement in favour of their mother, namely, Shakuntala on 21.08.2009 and all documents like Possession Certification, Will etc. were executed in the favour of their mother. The said transaction was facilitated by Sumit Arora and R.K.Chawla, who have also witnessed the documents. Thereafter, mother of the petitioner executed the sale deed in favour of the petitioner. Copies of the general power of attorney as well as the sale deed have been placed on record of this revision of the petitioner had paid Rs.15.00 lacs by way of two cheques besides the amount of Rs.22.00 lacs having been given in cash, which were drawn by their father from his account. On the other side, the agreement to sell with the respondent-plaintiff is dated 10.07.2008 for a consideration of Rs.60.00 lacs, out of which Rs.28.00 lacs was to be paid with the registration of the sale-deed.

(4) Accordingly, civil suit was filed by respondent-plaintiff, namely, Virender alias Birender for the execution of the sale deed qua the agreement to sell of the complete house, which was allowed vide an ex parte decree dated 03.09.2014.

(5) Learned counsel for the respondent-plaintiff while vehemently opposing the revision petition raised the following arguments:

(a) notice of suit issued to petitioner-defendant No.3 was received back unserved with the report of refusal and he was proceeded ex parte by the Court only after waiting and after the case was called out several times.

(b) The fact that the petitioner is in the habit of refusing is evident from the fact that even the subsequent notice in the

execution petition was received back with the report of refusal but in spite of the same, the petitioner appeared. Meaning thereby that the petitioner was aware of the suit for specific performance but he chose to remain away only to delay the proceedings as he is in possession of the property but appeared in the execution proceedings even though once again the report was of refusal.

(c) It was further contended that this is the normal method and strategy followed in a number of suits of specific performance to delay and frustrate the plaintiff.

(d) The witness produced by the petitioner as AW2 Tony K. Joseph to prove that no person by the name of Pardeep son of Ramdass was residing in the premises was disbelieved and that there is always the presumption of truth and correctness to the report of the Process Server.

(e) Further, the application under Order 9 Rule 13 CPC was time-barred having been filed almost a lapse of five years and without any application for condonation of delay. Reliance was placed on the judgments rendered in the cases of *Union of India and others vs Ram Prasad Pandey and others* 2006(6) ADJ 635 and *Mool Chand Yadav @ Ashok vs Phool Singh and another* 2010(5) RCR (Civil) 8 to contend that in the absence of application for condonation of delay, the matter cannot be entertained on merits.

(f) The fact that the petitioner intentionally did not appear in the suit was also evident from the fact that he was also proceeded ex parte vide order dated 05.12.2015 in the execution application but was restored subject to the payment of Rs.1000/- as costs vide order dated 11.09.2019.

(g) The suit property was mortgaged with the bank and heavy loan of Rs.65 lacs stood outstanding against it. The entire amount was paid by the respondent-plaintiff. While doing so, he had also approached the petitioner to pay some amount towards the loan and hence, the petitioner knew the pendency of the suit filed by the respondent-plaintiff. He was residing in the same building, so he is bound to know about the pending litigation when parallel proceedings for recovery of loan are also going on.

(h) Number of years have passed. To set aside the ex parte order, at this stage, will cause grievance and hardship.

(6) Learned counsel for the parties were heard at length.

(7) In order to adjudicate, first and foremost, it would be appropriate to see the report of refusal as submitted by the Process Server. A perusal of the same, which is in vernacular, shows that it is contradictory. It is specifically mentioned that no witness is available, whereas, one witness, Pardeep has duly signed the same. In fact, the address of this witness is also mentioned. In spite of the same, no such witness has been examined. Neither of the parties could establish the existence or non-existence of said Pardeep. Therefore, the report itself is surrounded with doubt. While disputing the argument of learned counsel for the petitioner that Process Server did not observe the mandatory provisions of Order 5 Rule 19 CPC and that the summons returned under Rule 17 should be verified by the affidavit of the Serving Officer, learned counsel for the respondent-plaintiff referred to the endorsement on the summons by the Process Server as being the affidavit. However, the said endorsement does not meet the necessary ingredients laid down in the CPC for verification of the affidavit. Even the name of the Process Server is not clear. The same is not even on oath. Even if the said discrepancy is ignored, the fact remains that failure to establish the identity of one Pardeep, the alleged independent witness, coupled with the specific averment in the report by the Process Server that no independent witness was available, being contradictory, has cast a shadow of doubt on the service of the summons.

(8) The argument of learned counsel for the respondent-plaintiff that there is a general trend to allow the ex parte proceedings to be initiated and allow the ex parte decree passed in order to cause delay cannot be made applicable to every case or be generalized.

(9) The next argument of learned counsel for the respondent-plaintiff that the petitioner was in the habit of refusing was evident from the fact that he appeared in the executing proceedings in spite of the fact that both the reports of the notices issued in the civil suit and the execution petition were same of 'refusal' but he appeared in the execution proceedings, does not cut any ice. It is the stand of petitioner-defendant No.3 that copy of the execution petition had been left behind with his mother, who is alleged to have refused the summons and thereafter, on seeing the copy of the execution petition, he wasted no time in filing the application under Order 9 Rule 13 CPC. In any case,

it is hard to believe that anyone would take the risk of allowing an ex parte decree to be passed intentionally and purposely and that too after a report of refusal, which is always considered as 'served' knowing fully well that in such a situation he will always run the risk of the application under Order 9 Rule 13 CPC being dismissed.

(10) The next argument of learned counsel for the respondent-plaintiff that application under Order 9 Rule 13 CPC was hopelessly time barred will, therefore, be of no help, once the Court concludes that the petitioner did not know about the pendency of the suit as it is not disputed that the delay commences from the date of knowledge. In the present case, the date of knowledge is the date his mother received the summons in the execution petition and she refused to accept the summons in the execution petition. The argument that no date of knowledge is mentioned in the application under Order 9 rule 13 to allow the Court to know about the date of knowledge from which the limitation can be counted, too, does not help as the petitioner filed the application under Order 9 Rule 13 CPC within the limitation period from the date of the alleged report of refusal of the summons in the execution petition.

(11) The next argument of learned counsel for the respondent-plaintiff is that the petitioner did not file application for condonation of delay and that the application under Order 9 Rule 13 CPC cannot be entertained without the application for condonation of delay. However, the learned counsel is not able to dispute that once it is accepted that the application is within time from the date of the knowledge according to Article 123 of the Limitation Act, as held above by this Court, no application for condonation of delay is required to be filed. Therefore, the judgments relied upon by the learned counsel for the respondent does not apply to the facts of present case, whereas in the case of *P.Krishna Kumari* versus *A.Kandasamy*¹, wherein, no application for condonation of delay was filed, the learned Single Bench of the Madras High Court held that the same was not required to be filed in case the application under Order 9 rule 13 was from the date of the knowledge. Para 17 of the said judgment reads as under:-

“17. The Family Court appears to have been swayed by two extraneous considerations (i) that the ex parte order was passed on 09.11.2004 and petition was filed on 14.05.2008 nearly after four years and that it was not accompanied by

¹ 2010(24) RCR (Civil) 807

any petition to condone delay. (ii) in the mean time, the respondent got married on 01.02.2008 and begot a child on 12.07.2009. In our considered view, both the above grounds are unsustainable. In the supporting affidavit, the appellant has clearly averred that after she left the matrimonial house, she was in the fond hope of re-joining her husband and only on 12.05.2008 when the common friend – Velu informed her about the ex parte divorce decree she came to know about the same and thereafter filed the petition to set aside the ex parte decree. When the appellant was not duly served with notice, she has filed the application within 30 days from the date of her knowledge. As the petition was filed within time from the date of knowledge, the Family Court was not right in saying that the petition was not accompanied with application for condonation of delay.”

(12) Similar view was also held by learned Single Judge of Allahabad High Court in the case of ***Ram Autar and 2 others*** versus ***Board of Revenue Allahabad and 4 others***².

(13) The next argument raised by learned counsel for the respondent-plaintiff is that the petitioner was habitual in remaining absent and his intention and conduct to purposely allow an ex parte order to be passed was only to delay is also evident from the order dated 05.12.2015 passed by the Executing Court vide which he was proceeded ex parte and thereafter vide the order dated 11.09.2019 the said order was set aside by the Executing Court on an application moved by the petitioner. While replying to the same, learned counsel for the petitioner has pointed out that on the said date, the petitioner-judgment debtor was proceeded ex parte as on the said date, his application under Order 9 Rule 13 was also running side by side and was fixed for the same date. He had to choose his priority and it was important for him to appear in the application filed under Order 9 rule 13 and since he could not be present for both the cases, he was proceeded against ex parte on 05.12.2015 in execution petition, which was ultimately set aside by Additional Civil Judge (Sr.Divn.) on 11.09.2019 taking note of this very fact. Hence, the respondent-plaintiff cannot take advantage of the same or hold the same against the petitioner to refer to his conduct.

² 2016(sup) CivCC 787

(14) It is also the stand of learned counsel for the respondent-plaintiff that he had paid the entire amount of Rs.65.00 lacs to settle the account with the bank with whom the property was mortgaged and therefore, it is hard to believe that the petitioner-defendant No.3 was not aware of the pendency of the civil suit when he is staying in the said building itself and the respondent-plaintiff had also approached him to repay the loan. The said argument cuts both ways. It is not understood as to how the respondent-plaintiff knew about the mortgage who is not staying in the building, whereas, the petitioner, who is in the same building does not know about it. Hence, at this stage, it cannot be ruled out as also argued by the learned counsel for the petitioner that the other respondents-vendors and the respondent-plaintiff may be in hand and glove. Accordingly, it would not be safe to uphold the ex parte decree. The petitioner must be given an opportunity to defend himself.

(15) The last argument that it has taken years for the respondent-plaintiff to succeed and he has invested a lot without getting the possession can always be safeguarded by directing the trial Court to decide the suit afresh after granting opportunity to the petitioner-defendant to file the written statement and lead his evidence in accordance with law within a span of six months even if day-to-day hearing to take place.

(16) In view of the above, the revision petition is allowed and the orders dated 30.05.2017 and 19.08.2019 are set aside. Parties to appear before the learned Trial Court on 22.10.2019. The Trial Court shall proceed to decide the suit on merits as expeditiously as possible preferably within six months from the date parties appear before it on 22.10.2019.

Inder Pal Singh Doabia