

Before Hon'ble Jawahar Lal Gupta, J.
 THE PUNJAB STATE CO-OPERATIVE BANK LTD. AND
 ANOTHER,—Petitioners.

versus

SHRI BALDEV KRISHAN,—Respondent.

C.R. No. 3377 of 1993

18th November, 1993.

Code of Civil Procedure—(V of 1908)—O. 9 rule 13—setting aside of ex parte proceedings—In case party does not appear despite due service—Would be an abuse of process of law if ex parte proceedings are set aside mechanically.

Held, that it is undoubtedly correct that normally the courts should decide cases after giving due and reasonable opportunity to the parties to plead and substantiate their respective contentions. However, in a case where a party to a case does not even care to appear in spite of the notice having been duly served, it would be an abuse of the process of law if the order passed at the end of ex parte proceedings is mechanically set aside. It is only when it is satisfactorily established on the record that the notices had not been duly served that the ex parte order can be set aside.

(Para 8)

Code of Civil Procedure—(V of 1908)—O. 43 R. 1(d)—order rejecting application to set aside ex parte proceedings is appealable—Petitioners failed to file appeal against order—Order of Rent Controller upheld.

Held, that under the provisions of Order 43 Rule 1(d) of the Code of Civil Procedure, an order rejecting an application under Order 9 Rule 13 is appealable. However, for the reasons best known to the petitioners, no appeal was filed. So far as this revision petition is concerned, the order of the Rent Controller does not suffer from any illegality or impropriety which may call for any inference.

(Para 14)

Manmohan Lal Sarin, Sr. Advocate with Ajay Mahajan, Advocate,
 for the Petitioner.

Nemo, for the Respondent.

JUDGMENT

(1) The Punjab State Co-operative Bank Ltd. and its Managing Director, the petitioners in this Civil Revision filed an application on

April 11, 1991, under Order 9, Rule 13 of the Code of Civil Procedure before the Rent Controller, Chandigarh, for setting aside the *ex parte* ejectment order dated February 1, 1991. The application having been dismissed by the learned Rent Controller, they have approached this Court with the present revision petition. A few facts may be noticed.

(2) The Bank is occupying the premises described as Shop-cum-office No. 18, Sector 26, Chandigarh. The respondent-landlord filed a petition under section 13 of the East Punjab Urban Rent Restriction Act, 1949, (hereinafter referred to as the Act) for eviction of the petitioners. *Vide* order dated December 15, 1989, the learned Rent Controller directed "petition be registered. Notice to the respondent be issued for 31st January, 1990 on P.F. Service be effected through registered post on filing registered A.D. cover." On January 31, 1990, the learned Rent Controller noticed that no one had appeared on behalf of the present petitioners inspite of service. He passed the following order :—

"Respondents have been served. Case called several times. None has put in appearance on behalf of the respondents. It is already 2-30 P.M. Hence the respondents are proceeded *ex parte*. For *ex parte* evidence case to come up on 28th February, 1990."

Finally, after recording *ex parte* evidence, the Rent Controller ordered the ejectment of the Bank from the premises in dispute.

(3) More than two months later, on April 12, 1991, the petitioner filed an application under Order 9 Rule 13, CPC. It was *inter alia* averred that "the respondent-Bank was never served in the case and it appears that the *ex parte* orders have been procured by the petitioner Shri Baldev Krishan by practising fraud on the Bank. The Bank never received any summons either in the ordinary course or through registered post or by any other mode of service and as such the applicant-bank through its Managing Director was not in a position to appear before this Hon'ble Court and defend the case. There is no due and proper service on the applicant-respondents". This application was moved by the Bank through its Managing Director petitioner No. 2. It appears from the record of the learned trial court that notice of this application was given to the respondent-landlord. A reply to this application was filed. It was *inter alia* averred that "despite the fact that service of summons, which were issued by this Hon'ble Court on 4th January, 1990 for the date 31st January, 1990,

along with the photostat copy of the petition under section 13 of the East Punjab Urban Rent Restriction Act, 1949, dated 11th December, 1989 stood duly effected upon the Judgment Debtors separately on 8th January, 1990, as per the endorsement appearing on the front of the said summons, yet when no appearance was put in on 31st January, 1990 in this Hon'ble court by either of them, this Hon'ble Court, after repeatedly calling the case several times till 2.30 P.M. was pleased to proceed against them *ex parte*,—*vide* order dated 31st January—”. It has also been averred that the petitioners had “wilfully and intentionally avoided putting in appearance—”. It has also been pointed out that even though the orders for recording *ex parte* evidence had been passed on January 31, 1990, evidence had in fact been recorded on January 23, 1991 and the case was adjourned to January 28, 1991 for arguments. The final order was passed on February 1, 1991. The court had granted the petitioners two months' time for vacation of the premises. When the demised premises were not vacated till April 1, 1991, the decree-holder (present respondent) had to file an application under Order 21, Rule 35 of the C.P.C. for the issuance of warrants of possession. On April 10, 1991, the warrants were issued. The Bailiff visited the premises on April 11, 1991. The warrants were returned to the court by the Bailiff with his report dated April 11, 1991. The averment of the present petitioners that they had not been served was categorically denied.

(4) On the pleadings of the parties, the learned Rent Controller framed the following issues :—

1. Whether there are sufficient grounds for setting aside the *ex parte* ejectment order dated 1st February 1991 ? OPA
2. Whether the application is not maintainable ? OPA
3. Relief.

The learned Rent Controller found that “the summons were duly received by the official of the Bank—well in advance and the applicant-Bank did not put in appearance deliberately and intentionally and the allegations in the application that the bank was never served are totally false and against the record of the bank itself.” Consequently, it found issue No. 1 against the petitioners. Under issue No. 2 it was held that the application was barred by limitation and had been filed just to delay the proceedings. Accordingly, the application was dismissed. Aggrieved by this order, the petitioners have filed the present revision petition.

(5) Mr. M. L. Sarin, learned counsel for the petitioners has contended that the petitioners having not been duly served, the learned Rent Controller has erred in dismissing the application.

(6) This case had originally come up for hearing on October 22, 1993. In view of the grounds raised in this petition, the records of the case were sent for. These were duly received. I have perused the records with the help of the learned counsel. A perusal of the records shows that both the petitioners were served on January 8, 1990. The duplicate copies of the summons sent to the petitioners are on record. A copy of the notice sent to the Managing Director is Ex. R-2. It bears the stamp of the Bank. The notice appears to have been received by some officer of the Bank on January 8, 1990. Similarly, the copy of the notice served on the Bank is Ex. R-3. This notice also appears to have been served on January 8, 1990. Furthermore, both the notices not only give the particulars of the petition but also contain an endorsement—"copy attached". Not only this, even the receipt register of the office of the petitioners was summoned. The relevant extract from this register is Ex. R-1. In this register, the receipt of these summons is duly entered at serial Nos. 231 and 232. Furthermore, it appears that Mr. R. K. Nayyar, Assistant General Manager of the Bank was the solitary witness who appeared on behalf of the petitioners. He *inter alia* stated that the Bank was never served in accordance with law and that the *ex parte* order had been procured by respondent by practising fraud. He further stated that "no summons were received by the respondent-Bank either in the ordinary course or through registered post through its Managing Director—". In cross-examination, however, he admitted that whatever communication is addressed to the Bank or its officers, is received by the diary-clerk who makes the entries in the diary-register maintained by the Bank. He admitted that "Ex. R-3 bears the rubber stamp of our Bank". He further stated that "Ex. R-2 and Ex. R 3 were received in the Bank but never put up before the authorities concerned." This is all the evidence led by the petitioners. The respondent-landlord had himself appeared as RW-1 and reiterated the position taken by him in the written statement. It is in the back ground of this evidence that the claim made on behalf of the petitioners has to be examined. ③

(7) A perusal of the oral and documentary evidence on record clearly shows that the summons, copies of which are Exs. R-2 and R-3 on the record, were duly served on the Bank. The dairy clerk had duly entered these summons in the receipt-register. These notices indicate that the copy of the petition was attached thereto.

The respondent-landlord has in his written statement categorically stated that photo copy of the petition were duly served on the present petitioners along with the summons issued by the Court. In spite of that, Mr. Nayyar did not even remotely suggested that the copy of the petition was not attached to the summons served on the Bank. In this situation, the contention raised on behalf of the petitioners that the notices had not been duly served cannot be accepted. The learned trial court rightly rejected it.

(8) (It is undoubtedly correct that normally the courts should decide cases after giving due and reasonable opportunity to the parties to plead and substantiate their respective contentions. However, in a case where a party to a case does not even care to appear in spite of the notice having been duly served, it would be an abuse of the process of law if the order passed at the end of *ex parte* proceedings is mechanically set aside. It is only when it is satisfactorily established on the record that the notices had not been duly served that the *ex parte* order can be set aside). Such is not the position in the instant case).

(9) Mr. Sarin was at pains to contend that the notices had not been 'duly served' as according to the orders passed by the Rent Controller on December 15, 1989, the notices could have been sent only by registered post. The order passed by the learned Judge has been noticed above. It contemplated the issue of notices on payment of process fee. It also directed the issuing of notices by registered post. Even if it is assumed that the notice was not sent by registered post, it caused no prejudice to the petitioners as it is established on the record that they were duly served in the normal course. The position could have been different if the notices had been alleged to have been refused by the petitioners. One could have imagined that the report may have been manoeuvred. However, in the present case, the records of the Bank clearly show that the summonses were duly received. Even the officer of the Bank who appeared as AW-1 clearly admitted the receipt of the notices. The only explanation given by him was that the notices were not put up before the 'authorities concerned'. That is not the fault of the landlord. He cannot be blamed for the lapse, if any, on the part of the officials/officers of the Bank. Furthermore, no records have been produced by the petitioners to show as to what action had been taken on the notices after these were received in the office of the Bank. The file could have indicated as to whether or not it was put up to the 'authorities concerned'. No reason has been assigned for the failure to produce the record. Consequently, the grievance made on behalf of the petitioners is wholly unfounded and misconceived.

(10) It also deserves notice that in the application filed under Order 9 Rule 13, the plea of the petitioners was not that the notice was not accompanied by a copy of the petition or that it had not been put up to the authorities concerned. On the contrary, the specific plea was that notice had not been served on the Bank "either in the ordinary course or through registered post or by any other mode of service.....". This plea was apparently false. It is belied by the record of the Bank. The petitioners did not come to the Court with clean hands. The grievance now sought to be made is thus misconceived.

(11) Mr. Sarin also contended that the learned trial court has erred in holding that the application was barred by limitation as no issue had been framed in that behalf. This contention also cannot be sustained. Firstly, it had been specifically pleaded by way of a preliminary objection by the respondent-landlord that "the present application under order 9 Rule 13 respondent read with under section 151 of the Code of Civil Procedure, 1980 as amended, dated 11th April, 1990, being not only totally misconceived but so also being hopelessly barred by limitation, merits outright dismissal for want of maintainability as such." It was in view of this specific plea that the issue regarding the maintainability of the petition was framed. Apparently, there is nothing wrong with the finding recorded by the learned Rent Controller. However, even if this finding is ignored, the application of the petitioners was still liable to be rejected in view of the finding on issue No. 1.

(12) Mr. Sarin then attempted to show that the statement of respondent-landlord was unworthy of any credence inasmuch as he had made contradictory statements during his cross-examination. Learned counsel pointed out that initially the respondent had stated that he had accompanied the process-server but later on, he had denied it. Similarly, he had even contradicted himself with regard to the sending of the notices by registered post. The contention is of no consequence. Once the notices had been duly served on the petitioners, the minor contradictions in the statement of the landlord lose all meaning. One cannot also lose sight of the fact that the notice was sent in January, 1990. The statement in question was recorded on September 22, 1993. Such lapses of memory on account of lapse of time cannot efface the factual position as established on the record.

(13) Learned counsel had also referred to certain decisions of this Court reported as *Sukhdev Singh and another v. Santokh Singh and another* (1) and *Shrimati Chhanno v. Bachan Singh* (2). These were

(1) 1987 R.L.R. 497.

(2) 1988 (2) P.L.R. 598.

cases clearly distinguishable on facts. In these cases, service was assumed to have been effected when it was reported that the respondent had 'refused' to receive the summons. The Court had then proceeded to pass *ex parte* orders. This was not accepted by the Courts. Such is not the position in the present case. These decisions are thus of no relevance and, therefore, require no elaborate consideration.

(14) It may also be noticed that under the provisions of Order 43 Rule 1(d) of the Code of Civil Procedure, an order rejecting an application under Order 9 Rule 13 is applicable. However, for the reasons best known to the petitioners, no appeal was filed. So far as this revision petition is concerned, the order of the Rent Controller does not suffer from any illegality or impropriety which may call for any inference. Accordingly, it is dismissed in limine.

J.S.T.

Before Hon'ble V. S. Aggarwal, J.

NACHHATTAR SINGH,—Petitioner.

versus

HARJINDER KAUR & ANOTHER,—Respondents.

Crl. R. No. 230 of 1993

17th February, 1995.

Code of Criminal Procedure, 1973—Section 125 (2)—Maintenance—Whether to be granted from date of order or from date of application—Judicial discretion to be exercised.

Held, that the jurisdiction is vested in the trial Court to award the maintenance from the date of the order or from the date of the application. It has to be exercised in a reasonable manner keeping in view the facts and circumstances of the case. It is judicial discretion which is to go not by humor, but in the light of the material before the Court. Special reasons need not be recorded but reasons for arriving at the conclusion have to be given.

(Para 10)

G. S. Punia, Advocate, for the *Petitioner*.

Inderjit Malhotra, Advocate, for the *Respondent*.