

Before Paramjeet Singh, J.

**BISHWEDARAN SHAMLAT PATTI TEK CHAND,
TEEKLI AND OTHERS—Petitioners**

versus

CHANDER BHAN AND OTHERS—Respondents

CR No.4326 of 2006

July 31, 2013

Code of Civil Procedure, 1908 - Order 9 RL 13 - Order 1 RL 8 - Ex parte judgment and decree passed against Petitioners - Application under O.9 RL.13 CPC dismissed - Appeal also dismissed - Revision filed - Petitioners members of proprietary body - Permission under O.1 RL 8 was granted by trial Court - Held, under Order 1 RL 8 (2) CPC personal notice is required to be given - Under Order 1 RL 8(5) court may substitute a person who is not suing or defending diligently - Public advertisement is necessary - Object is to make aware large number of interested persons - Non-compliance of O.1 RL 8 CPC - Judgment and decree set aside.

Held, that from the perusal of above provisions, it is clear that when the permission under Order 1 Rule 8 of the CPC was granted on 25.02.1991, the Court is also required to give personal notice in view of Order 1 Rule 8 (2) of the CPC. It is pertinent to mention that Order 1 Rule 8 (5) of the CPC provides that where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(Para 8)

Further held, that as per Order 1 Rule 8 (2) of the CPC, public advertisement is necessary. Now, it is to be seen whether in the present case, proper public advertisement was made by the Court in letter and spirit. In this case, learned counsel for the respondents has failed to show that notice was published in any newspaper circulating in the area or the public notice was displayed at the conspicuous places in village in which the alleged proclamation was made. From the perusal of Order 1 Rule 8 (2) of the

CPC, it is clear that proper public advertisement in such cases is necessity. The object of Order 1 Rule 8 (2) of the Code is to make aware the large number of persons, who are interested, may appear and assert their rights. In this case, it appears that the defendants in the said suit had not appeared to defend the suit properly and ex parte decree has been passed, meaning thereby no one was there to defend the suit. As per Order 1 Rule 8 (5) of the CPC where any person suing or defending a suit in a representative capacity does not proceed with due diligence, the Court may substitute any other person having the same interest in the suit, since such a decree becomes binding on all the persons, who are not being impleaded as party. When none appeared to defend the suit, the Court should have substituted the person. In this case, even the Court had failed to look into this aspect as this is one of the conditions prescribed under Order 1 Rule 8 (5) of the CPC.

(Para 9)

Further held, that in view of above discussion, this Court is of the view that there is a complete non-compliance of Order 1 Rule 8 of the CPC specifically sub-rules (2) and (5). As such, the ex parte judgment and decree is not in consonance with the provisions of the CPC and is not sustainable in the eyes of law.

(Para 13)

Himanshu Aggarwal, Advocate, for Mr. C.B. Geol, Advocate, *for the petitioners.*

Amit Jain, Advocate, *for the respondents.*

PARAMJEET SINGH, J.

(1) Instant revision petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 01.03.2002 (Annexure P-2) passed by learned Additional Civil Judge (Sr. Divn.), Gurgaon whereby application filed by the petitioner under Order 9 Rule 13 of the Code of Civil Procedure (in short "the CPC") has been dismissed and the order dated 06.03.2006 (Annexure P-3) whereby appeal preferred by the petitioner against order dated 01.03.2002 has also been dismissed.

(2) Shorn of unnecessary details, the facts relevant for disposal of the present petition are to the effect that a civil suit captioned "Chander Bhan and others vs. Biswedaran Shamlat Patti Tek Chand and others" was filed in the Court of learned Sub Judge, Gurgaon whereby *ex parte* judgment and decree dated 09.05.1994 was passed. The said decree came to the knowledge of petitioners, who happened to be the proprietors of said patti and they moved application on 24.10.1994 under Order 9 Rule 13 of the CPC for setting aside the *ex parte* decree. The said application was dismissed vide impugned order dated 01.03.2002 and the appeal preferred by the petitioners was also dismissed vide impugned order dated 06.03.2006. Hence, this revision petition.

(3) I have heard learned counsel for the parties and perused the record.

(4) Learned counsel for the petitioners has vehemently contended that the *ex parte* judgment and decree dated 09.05.1994 has been obtained by playing a fraud, concealing the material facts and without effecting service upon the petitioners and as such is not sustainable in the eyes of law. The learned counsel has further contended that the petitioners are the members of proprietary body of Patti Tek Chand. Neither they were served personally nor copy of plaint was supplied to them. The learned counsel has further contended that the petitioners came to know three days prior to the filing of application about the *ex parte* judgment and decree dated 09.05.1994 from the Circle Patwari, as they visited him regarding their personal work. The learned counsel has further contended that earlier also, Gheesa Ram filed civil suit no.209 of 1972 titled 'Gheesa Ram vs. Manohar Lal and others' wherein a decree was obtained on 27.06.1972 without effecting service upon the proprietors of Shamlat Patti. The said decree dated 27.06.1972 was set aside vide judgment and decree dated 03.12.1974 passed in civil suit titled 'Har Chand etc. as proprietors of Patti Tek Chand vs. Gheesa Ram etc.' The learned counsel has further contended that again same very persons had fraudulently got the *ex parte* decree dated 09.05.1994 by obtaining a fictitious munadi (proclamation) report and without effecting any service on the proprietors of the Patti Tek Chand. Neither any public notice/advertisement was made, nor the publication was displayed at the conspicuous place of village so that the residents of village could become aware of the suit in question wherein *ex parte* decree dated 09.05.1994 was obtained. The learned counsel has further contended that earlier the suit filed by Har Chand and others titled "Har Chand etc. as proprietors of Patti Tek

Chand vs. Gheesa Ram and others' for setting aside the decree dated 27.06.1972 was decreed vide judgment and decree dated 03.12.1974. The appeal preferred against the judgment and decree dated 03.12.1974 was also dismissed and the regular second appeal was also met with the same fate. The learned counsel has further contended that the petitioners being members of the proprietary body of Patti Tek Chand have major share as 18 HALS (plough) out of 20 HALS and they are in possession as co-sharers of the land of proprietary body. Some of the persons have expired and their legal representatives have been brought on record. Even provision of Order 1 Rule 8 of the CPC has not been complied with. The *ex parte* judgment and decree dated 09.05.1994 is result of fraud and not sustainable in the eyes of law.

(5) Per contra, learned counsel for the respondents has vehemently opposed the contentions raised by the learned counsel for the petitioners and submitted that both the courts below have recorded categoric finding that service was duly effected on the members of proprietary body of Patti Tek Chand and they were duly served by way of munadi (proclamation) which was effected through the process-server, who appeared as RW 1 and proved the munadi (proclamation) report Ex.R-1. The learned counsel has further contended that out of 250 proprietors, only four approached the Court for setting aside the *ex parte* decree. The learned counsel has further contended that permission under Order 1 Rule 8 of the CPC was granted on 25.02.1991. The finding of fact recorded by the courts below cannot be set aside by this Court under Article 227 of the Constitution of India.

(6) I have considered the rival contentions of learned counsel for the parties and perused the record.

(7) Before I proceed to consider the contentions of learned counsel for the parties, it would be appropriate to discuss Order 1 Rule 8 of the CPC which reads as under:

“Order 1 : Who may be joined as plaintiff All persons may be joined in one suit as plaintiffs where -

- (a) any right to relief in respect of, or arising out, the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative; and

(b) If such persons brought separate suits, any common question of law or fact would arise.

2. xxxx

3. xxxx

4. xxxx

5. xxxx

6. xxxx

7. xxxx

8. One person may sue or defend on behalf of all in same interest. - (1) where there are numerous persons having the same interest in one suit, -

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended, under sub-rule (1), may apply to the Court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of Rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be .

Explanation - For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be."

(8) From the perusal of above provisions, it is clear that when the permission under Order 1 Rule 8 of the CPC was granted on 25.02.1991, the Court is also required to give personal notice in view of Order 1 Rule 8 (2) of the CPC. It is pertinent to mention that Order 1 Rule 8 (5) of the CPC provides that where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(9) As per Order 1 Rule 8 (2) of the CPC, public advertisement is necessary. Now, it is to be seen whether in the present case, proper public advertisement was made by the Court in letter and spirit. In this case, learned counsel for the respondents has failed to show that notice was published in any newspaper circulating in the area or the public notice was displayed at the conspicuous places in village in which the alleged proclamation was made. From the perusal of Order 1 Rule 8 (2) of the CPC, it is clear that proper public advertisement in such cases is necessity. The object of Order 1 Rule 8 (2) of the Code is to make aware the large number of persons, who are interested, may appear and assert their rights. In this case, it appears that the defendants in the said suit had not appeared to defend the suit properly and *ex parte* decree has been passed, meaning thereby no one was there to defend the suit. As per Order 1 Rule 8 (5) of the CPC where any person suing or defending a suit in a representative capacity does not proceed with due diligence, the Court may substitute any other person having the same interest in the suit, since such a decree becomes binding

on all the persons, who are not being impleaded as party. When none appeared to defend the suit, the Court should have substituted the person. In this case, even the Court had failed to look into this aspect as this is one of the conditions prescribed under Order 1 Rule 8 (5) of the CPC.

(10) It would be appropriate to mention here that munadi (proclamation) has not been effected in consonance with the provisions of law and the *ex parte* order dated 12.06.1991 cannot be sustained on this ground alone. The order dated 01.03.2002 (Annexure P-2) reveals that on 16.04.1991, the munadi (proclamation) notice was not issued by the Ahlmad and the case was adjourned to 12.06.1991. On 12.06.1991, the munadi (proclamation) was not effected and the same was again ordered to be issued for 14.08.1991, but the file was again taken up because the munadi notice had been received back duly effected and defendants no. 1 to 4 were proceeded against *ex parte* at 3.20 P.M on 12.06.1991. It is beyond imagination that how defendants no. 1 to 4 were proceeded against *ex parte* on 12.06.1991, when the case was already stood adjourned for 14.08.1991. This is apparently clear that adequate munadi (proclamation) was not effected. At least, the trial Court should have waited for appearance of defendants no. 1 to 4 on 14.08.1991 for which the case was adjourned. It has been brought to the notice of this Court by the learned counsel for the petitioners that at the relevant point of time i.e. 12.06.1991, the working hours in the Subordinate Courts in Haryana started from 7.30 A.M to 2.00 P.M, therefore, the question of proceeding against *ex parte* qua defendants no. 1 to 4 at 3.20 P.M does not arise. However, I am not considering this aspect, but judicial notice of the fact can also be taken.

(11) In addition to the above finding, it would be appropriate that regarding the same very land, a civil suit titled 'Gheesa etc. vs. Manohar Lal etc. was filed which was got decreed on 27.06.1972 by concealing the material facts. The said decree was challenged by the proprietors/biswedaran of Shamilat Patti Tek Chand in a representative capacity by filing civil suit titled 'Har Chand Singh etc. vs. Gheesa Ram etc.' and the said decree dated 27.06.1972 was set aside, vide decree dated 03.12.1974. The decree dated 03.12.1974 attained finality upto to the Hon'ble High Court. Once there is an earlier decree, no fresh suit could have been instituted on the same cause of action in respect of same land.

(12) In such circumstances, it is necessary that both the courts below should have allowed the application and should not have dismissed the same on the ground of limitation. The Hon'ble Apex Court in '*Bhagmal and others versus Kunwar Lal and others (1)*', has categorically held that separate application for condonation of delay is not required when all the ingredients of the application for condonation of delay are mentioned in the application under Order 9 Rule 13 of the CPC to set aside the *ex parte* decree.

(13) In view of above discussion, this Court is of the view that there is a complete non-compliance of Order 1 Rule 8 of the CPC specifically sub-rules (2) and (5). As such, the *ex parte* judgment and decree is not in consonance with the provisions of the CPC and is not sustainable in the eyes of law. I accordingly hold that the impugned orders dated 01.03.2002 (Annexure P-2) and dated 06.03.2006 (Annexure P-3) are patently illegal, perverse, against the provisions of law and not sustainable in the eyes of law. Hence, the impugned orders dated 01.03.2002 (Annexure P-2) and dated 06.03.2006 (Annexure P-3) are set aside. Consequently, the judgment and decree dated 09.05.1994 passed in Civil Suit No. 170 of 1991, titled 'Chanderbhan etc. vs. Bishwedaran of Shamlat Patti Tek Chand and others' is also set aside. The application moved by the petitioners for setting aside the *ex parte* judgment and decree dated 09.05.1994 is allowed and the order dated 12.06.1991 whereby defendants no.1 to 4 were proceeded against *ex parte*, is set aside. The trial Court is directed to proceed in accordance with the provisions under Order 1 Rule 8 (5) of the CPC in Civil Suit No. 170 of 1991 and to allow the petitioners herein before this Court, who happen to be defendants in the said suit to file the written statement. Parties through their counsel are directed to appear before the trial Court on 01.10.2013.

(14) Instant revision petition is allowed in the aforementioned terms.

J.S. Mehndiratta