



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CMPMO No. 305 of 2022

Reserved on: 19.06.2025

Decided on: 01.07.2025

Devi Dass

.....Petitioner

Versus

M/s Ginni Global Pvt. Ltd. and another

.....Respondents
-----**Coram****The Hon'ble Mr. Justice Satyen Vaidya, Judge****Whether approved for reporting?¹ Yes**For the Petitioner : Mr. Sanjeev Bhushan, Senior Advocate,
with Mr. Sparsh Bhushan, Advocate.For the Respondents : Mr. Vikas Chauhan, Advocate.
-----**Satyen Vaidya, Judge**

This petition has been filed under Article 227 of the Constitution of India against order dated 19.03.2022 passed by learned Senior Civil Judge, Chamba, District Chamba, H.P. in CMA No.507/2017 whereby the applications of the respondents under Order 9 Rule 13 of CPC and Section 5 of the Limitation Act, have been allowed.

2. The petitioner herein is the plaintiff in Civil Suit No. 632 of 2014 pending on the files of learned Senior Civil Judge, Chamba. He has sought a decree of Rs.20,00,000/-

¹ Whether reporters of print and electronic media may be allowed to see the order?

alongwith interest against the respondents herein. The parties hereafter shall be referred to by the same status as they hold before learned trial Court.

3. The defendants were proceeded against *exparte* in Civil Suit No. 632 of 2014 on 17.04.2015. Thereafter, the learned trial Court passed an *exparte* decree dated 12.06.2017 in favour of the plaintiff and against the defendants.

4. The defendants by separate applications filed under Order 9 Rule 13 of CPC and Section 5 of the Limitation Act before learned trial Court prayed for setting-aside the *exparte* decree after condonation of delay. The applications were filed on 01.11.2017.

5. As per the case of the defendants, they were never served with the process, if any, issued by the Court in Civil Suit No. 632 of 2014. It was stated that the defendants came to know about the filing of the suit and consequent *exparte* decree passed therein on 27.10.2017 and 30.10.2017 whereafter the relevant documents including certified copy of decree were procured and the applications

for setting aside exparte decree as also for condonation of delay were filed on 01.11.2017.

6. The defendants further alleged that from the records it was revealed that the summons issued to the defendants were served on the defendants on 27.03.2015 by way of affixation and thereafter on 17.04.2015 they were proceeded exparte on the basis of report submitted by the Process Server. It is alleged that no such proceeding was conducted by the Process Server and the reports submitted by him was not correct.

7. On notice, the plaintiff contested the applications by filing the reply.

8. On the pleadings of the parties, the following issues were framed on 26.09.2019:-

- “1. Whether the applicant is entitled for setting aside the ex-parte decree dated 26.09.2015, as prayed? OPA*
- 2. Whether the application is not maintainable, as alleged? OPR.*
- 3. Relief.*

9. Learned trial Court decided the issue No.1 in affirmative, whereas issue No.2 was negated. Accordingly,

the applications of the defendants for setting aside exparte decree and condonation of delay were allowed.

10. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

11. While allowing the applications of the defendants, learned trial Court has held that the defendants were not properly served because the Process Server had not filed any affidavit that he had affixed the summons under Order 5 Rule 17 of the Code and further that the Process Server was not examined by the Court as per the provisions of Order 5 Rule 19.

12. Noticeably, in the impugned order, learned trial Court has also recorded that *prima-facie* it looked that Process Server RW-3 duly served the notice in accordance with law.

13. Thus, the findings returned by the learned trial Court are contradictory.

14. The sole ground of defendants for seeking setting aside of exparte decree was that they had no knowledge about the filing of the suit because they were not served in the case at any point of time. Simultaneously, the

defendants also alleged that the report submitted by the Process Server with respect to service effected on the defendants is not based on factual position.

15. The parties have led evidence before learned trial court. The defendant is a Company and its three officials namely Alok Malhotra (Director), Satish Singh (General Manager) and Vikram Rathore (Manager Administration) were examined as AW-1 to AW-3. They submitted their respective examination-in-chief by way of affidavits, which were exhibited as Exts. AW-1/A, AW-2/A and AW-3/A respectively. The statements of AW-1 and AW-2 while tendering examination-in-chief are substantially identical. It was stated that the office of defendant-Company was in Village Kalhuien P.O. Bairagarh, Tehsil Churah, District Chamba, H.P. The Company or its officials had not received any summon or notice from the Court in the suit filed by the plaintiff. The decree was obtained by the plaintiff by making wrong statement and by procuring a false report from the Process Server. They came to know about the decree passed in suit on 27.10.2017 when the notice was received from the Court in execution proceedings.

16. In cross-examination, AW-1 Alok Malhotra admitted that he had been visiting the office off and on and then volunteered that he was visiting Tissa once or twice in a year. He further admitted that AW-2 Satish Singh was permanently stationed in the office at Kalhuien. Similar admission was made with respect to permanent stationing of AW-3 at Tissa. He also admitted that two panel lawyers of defendant-Company were looking after the court work. It was further admitted that security guards were deployed in Kalhuien office and many other persons were employed in the project. He denied the suggestion that he was aware about the affixation of summon on the orders of the Court and despite that he did not attend the court intentionally.

17. Similarly, AW-2 Satish Singh was cross-examined. He admitted that the office of the Company was in Tissa, Kalhuien village and five people were working in the said office. The project area was in a radius of about 2½ - 3 kilometres. It was admitted that the residences of the officials of the Company were also in the same village, rather in the same building where the office was situate. He admitted that security officials were deployed in the office campus.

18. AW-3 Vikram Rathore also deposed on the same lines as AW-1 and AW-2.

19. On the other hand, the plaintiff Devi Dass examined himself as RW-1 and tendered his examination-in-chief by way of affidavit Ext.RW1/A. Narinder Kumar, who had served the process in the office of defendant-Company on 27.03.2015 has been examined as RW-3. He stated about the mode and manner in which the service was effected and proved the reports submitted by him as Ext. RW-3/B and RW-3/C. The reports submitted by RW-3 read as under:

RW-3/B

Sir,

I went to serve summons on Alok Malhotra but he was not in the office. His employee Kuldip informed that Alok Malhotra used to visit the office off and on. The summon alongwith copy of plaint was affixed on the main door of the office in presence of Kuldip. Kuldip has refused to sign as witness. Except for employees none other witness was available. Hence, the report of affixation is presented.

RW-3/C

Sir

I went to serve summons on Satish Kumar but he was not in the office. His employee Kuldip informed that Satish Kumar was on the site. The summon alongwith copy of plaint was affixed on the main door of the office in presence of Kuldip. Kuldip has refused to sign as witness. Except for employees none other witness was available. Hence, the report of affixation is presented.

20. Another Process Server named Dev Raj, who had attempted to serve the summons on the defendants on 19.03.2015 has been examined as RW-4.

21. RW-3 Narinder Kumar while being cross-examined stated that he is not aware about the name of father of Kuldip whose name was mentioned by him in his reports Ext.RW-3/B and Ext.RW-3/C. He clarified that the person Kuldip was wearing uniform and the name was read from his name-plate. He had not made attempt to enquire about the designation of Kuldip. He denied that the houses of Lal Chand, Bittu and Hoshiar were adjoining the office of Company. He admitted that he did not have any orders from the Court to affix the summons. He volunteered that

the affixation was done under Order 5 Rule 17 of the Code for which he was competent. He did not remember the storeys of the building in which the office of Company was there. He admitted that there was a gate outside the office of the Company where entry of every visitor was made. He stated that the affixation was done by him on the main gate of the office on the ground floor.

22. Copies of summons affixed in the office of defendants have been exhibited as AW-1/B and AW-1/C, respectively. These documents reveal that summons issued to both the defendants in the suit were taken for service for the first time on 19.03.2015 by RW-4 but the service could not be effected as both the officials were not found in office. Then the second attempt was made on 27.3.2015. Since the officials of defendant company, through whom the defendant was sued, were again not found in the office as reported by Kuldip, the Process Server made the reports after affixation of summons, as noticed above.

23. Since the original record is available, I had the opportunity to look into the originals of these documents. It is visible that RW-3 has annexed verifications to the

contents of the reports on solemn affirmation that the reports were correctly scribed by him, which were further verified by the Superintendent of the Court.

24. Acting upon such reports, learned trial Court on 17.04.2015 had proceeded against the defendants *ex parte*.

25. The evidence on record does not suggest that the report Ext.RW-3/B and Ext. RW-3/C were false and not based on correct facts. It is a report submitted by a public servant in discharge of his official duties. Except for a bald assertion by AW-1 and AW-2 that report was procured, nothing tangible has been placed on record from which such an inference may be drawn. Rather, the cross-examination of plaintiff as RW-1 reveals that he was not cross-examined on the aspect of his connivance, if any, with RW-3 for the purpose of procurement of reports Ext.RW-3/B and Ext.RW-3/C. If at all, RW-3 would prepare the report for the benefit of the plaintiff, RW-1. Since, the defendants while cross-examining RW-1 has not questioned him on the aspect, it has to be held that the plea raised by the defendants was without any basis.

26. Order 5 Rule 17 of the Code authorises the service of process by affixation in case the serving officer after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be effected. The serving officer has then to return the original summon to the issuing court with the report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person, if any, by whom the house was identified and in whose presence the copy was affixed.

27. The requirement of Rule 17 of Order 5 stands satisfied in the case. However, learned trial Court has held the service to be not proper for non-compliance of Rule 19 of Order 5 of CPC. In my considered view, the findings returned by learned trial Court to this effect cannot be sustained for the reason that the Court is mandated to examine the serving officer on oath and to hold further

inquiries in the matter as it thinks fit, in case where the returned summons have not been verified by the affidavit of the serving officer. In other case where the summon is returned under Rule 17 CPC, after verification by the serving officer, the requirement is merely directory. Since in the instant case, the report of serving officer was verified, it was not mandatory for the Court to have examined the serving officer or to hold any other further inquiry. The absence at the most can be construed as an irregularity.

28. Order 9 Rule 13 of the Code provides that *ex parte* decree can be set-aside if the applicant satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. In the instant case, the defendants have taken both the pleas which are inter-related. It is the case of defendants that the summons were not duly served and it was for such reasons that they had no knowledge about the filing of the suit by the plaintiff. The second proviso appended to Rule 13 of Order 9 of the Code carves out an exception that no Court shall set-aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is

satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim. Thus, for application of second proviso to Rule 13, two things are required. Firstly, the mere irregularity in service is not sufficient and secondly, the Court should be satisfied that the defendant had notice of date of hearing and had sufficient time to appear and answer the plaintiffs claim. If both the conditions are satisfied the court is mandated, by the use of term 'shall', not to set aside the ex parte decree.

29. As held above, the service of summons was proper and alternatively it can be said that it was a case of mere irregularity in service of summons. The serving officer had tried to associate the witnesses, who being employee of the defendant-Company, did not agree. The affixation was done when even on the second visit of the process server, the service was not being effected. Reference can also be made to Order 29 of the Code, which provides for suit by or against the Corporations. The defendant is a Company and will be covered by the provisions of Order 29. Rule 2 (b) of Order 29, provides that where the suit is against a company the summons may be served by leaving it or sending it by

post address to the Corporation at the registered office or if there is no registered office, then at the place where the Corporation carries on business. It is not denied that the defendant has its office at Village Kalhuien, nothing has been shown to prove that the plaintiff was aware about the registered office of the defendant-Company. Rather, the plaint shows that the defendant-Company was sought to be served at its office at Village Kalhuien.

30. Thus, when the summons alongwith a copy of plaint issued by the court was affixed on the main gate of the office of defendants, it is hard to assume that no one had come to know about the fact of such affixation or the filing of the suit. AW-2 and AW-3 as per their own admission are permanently stationed at office in village Kalhuien. They even had their residences in the same complex. In such circumstances, it will not be unreasonable to infer that the defendants had due notice of the filing of the suit and date of hearing.

31. The affixation was made on 29.03.2015 and the next date of hearing was 17.04.2015. The defendants had sufficient time between the affixation and date of hearing. It

is not the case of defendants that their office was closed for considerable time during the relevant period or none of the officers or employees of the Company were available.

32. In view of what has been held above, the findings recorded by learned trial Court cannot be sustained being result of failure to exercise jurisdiction in accordance with law. Further, the findings recorded by learned trial court are not borne from the material on record.

33. In result, the petition is allowed and order dated 19.03.2022 passed by learned Senior Civil Judge, Chamba, District Chamba, H.P. in CMA No.507/2017 is set-aside and the applications of the defendants under Order 9 Rule 13 of CPC and under Section 5 of the Limitation Act are dismissed.

34. The petition stands disposed of in above terms, so also the pending miscellaneous application(s) if any.

1st July, 2025
(GR)

(Satyen Vaidya)
Judge