

**IN THE COURT OF SH. HARISH KUMAR : ADDL. DISTRICT  
JUDGE -13 : CENTRAL DISTRICT ; TIS HAZARI COURTS : DELHI**

**CS No.: 12934/16**

**In re:**

**Gurcharan Singh**

**..... Plaintiff**

**versus**

**Inderjeet Singh**

**..... Defendant**

**02.08.2016**

**Order**

By this order application under Order 9 Rule 13 read with Section 151 CPC filed by defendant no. 5 shall stands disposed of.

1. By way of present application, it has been prayed that preliminary decree vide order dated 28.04.2000 passed in the present suit be set aside as applicant was not served at all in the case.

2. It has been contended in the application that Hon'ble High Court (as the matter then was pending before the Hon'ble High Court) was pleased to pass preliminary decree dated 28.04.2000 between Sh. Gurbachan Singh and Inderjit Singh and Devender Singh on the basis of fraud played by the aforesaid persons upon the Hon'ble Court. It has been contended that defendant no. 5 applicant have never been served in the present suit.

3. It has been mentioned in the application that the suit property was purchased by Sr. Sohan Singh for the benefit of entire family in the name of his wife namely Smt. Parmeshwari Devi. The said property was never an HUF property and

applicant is the co-owner of the said property being class I legal heir of Sr. Sohan Singh as well as of Smt. Parmeshwari Devi. It has been contended that both Sr. Sohan Singh and Smt. Parmeshwari Devi died intestate.

4. It has been contended that applicant came to know about the present case on 28.03.2014 when applicant alongwith her daughter was apprised by a close friend of applicant's son that the brothers and LRs of applicant are disposing of the suit property and there has been a case pending in Tis Hazari Court which is likely to be compromised with each other.

5. Applicant confronted her brother Devender Singh but he did not give satisfactory answer. She even tried to confront other legal heirs of Late Gurcharan Singh but all avoided to answer the query of the applicant. Applicant became more suspicious that her share may be sold. Applicant having no option contacted a counsel through her close friend and apprised the counsel that she was living outside the country and she had share in the property but did not know any detail about the case as she had no knowledge and she knew only that there may be a case pending in Delhi High Court or District Courts. The applicant gave names of her three brothers and the names of her sisters, the counsel searched the particulars from Hon'ble High Court as well as from District Court and through facilitation Centre of Tis Hazari Court came to know that present case is pending. The applicant thereafter immediately got moved an application through counsel for inspection on 01.04.2014 and was shocked to know that all brothers and counsels colluded together and never got served the applicant in the said suit. In the application thereafter she has narrated the proceedings of different dates so as to highlight that defendant no.5/applicant was not served at all. Applicant has also mentioned all dates starting w.e.f 16.08.1985 till 18.02.2013 to show that defendant no. 5 was never served. It has

been further contended that applicant has been living abroad for last more than 45 years and she used to regularly visit the suit property but none of the brother ever stated that they were litigating with each other before the Court qua the suit property. She had visited Delhi several times but she was never apprised about the said fact. Only on 01.04.2014, she got knowledge that present suit is pending on the aforesaid ground it has been prayed that preliminary decree 28.04.2000 be set aside.

6. The aforesaid application has been filed along with application u/s 5 of Limitation Act wherein aforesaid facts have been mentioned qua explaining the delay in moving the application.

7. Plaintiff no. 1(b) has filed reply wherein objection has been raised that applicant has not explained the inordinate delay of 31 years since the filing of the suit or 14 years since the passing of the preliminary decree. It has been further objected on the ground that on the basis of applicant's pleading she had cause of action for inheritance in the year 1981 on 03.05.1981 when her mother died. It has been further objected that allegation of fraud has not been substantiated.

8. With regard to service of summons, it has been stated that summons were sent by Court at the address of the applicant as she was residing outside India. It has been further submitted that other two daughters of Late Smt. Parmeshwari Devi who were served by summons had also not appeared in the present suit. It has been further contended that applicant was having knowledge about the pendency of the present suit. It has been further contended that since defendant no. 1 & 2 were claiming right over the suit property by propounding two separate Will in their favour and because of this reason applicant was not contesting the present suit. It has been further contended that in view of issuance of summons and sending it to

correct address of the applicant Court should presume service upon the applicant. It is contended that there is presumption of service when the summons had been sent at correct address. It was the applicant who is required to show that summons were not served at all. Applicant had not given any detail or proof about her residential address in the year 1984 and year 1985, so as to show whether her address is different from what has been mentioned in the suit.

9. It has been further contended that the preliminary decree was passed on the basis of compromise arrived between her brothers which happened in different proceedings. The agreement which was the basis of passing of preliminary decree dated 28.04.2000 was arrived in the year 1998 in CM(M) No. 95/1991 before the High Court of Delhi between the co-owners. It has been further contended that Late Sh. Inderjeet Singh had filed probate case No. 52/1982 and defendant no. 2 filed probate case No. 236/1984. This proceedings were contested by applicant's brother and which fact is in the knowledge of applicant and the allotment of share between parties was on the basis of this agreement and this fact is also mentioned in preliminary decree dated 28.04.2000. On the basis of aforesaid, it has been prayed that application under consideration be dismissed. It has been further prayed that already 33 years have gone by, allowing of present application amounts to putting the clock back to position existing i.e 33 years ago.

10. Arguments of the Counsels for parties were heard at length.

11. Ld. Counsel for applicant /defendant no. 5 has argued on the lines of contents of the application and has specifically pointed out that nowhere court has recorded satisfaction of service of summon upon the applicant/defendant no. 5.

12. Per contra it has been argued by Ld. Counsels for plaintiffs that summons have been sent to defendant no. 5 repeatedly and summons sent to defendant no. 5 at correct address must be presumed to be served upon her if the same did not come back. It has been further contended that even summons were sent at her matrimonial address i.e A/24, Moti Nagar, Double Storey, Delhi. It has been further contended that if there had been any intention of playing fraud then plaintiffs would not have sent summoned for so many times.

13. This court have perused the entire order sheet and service report. There is no service report from abroad. The report on the summons sent at Moti Nagar address is to the effect that on each visits addressee i.e. the applicant was not found and a lady had reported that the addressee/ applicant had gone out.

14. It is equally true that in the entire order sheets court has not recorded its satisfaction about the service of applicant/defendant No.5. Even presumption of service has not been done by the Court at any stage of the case. Every time awaiting service report, fresh summons were directed to be issued upon the applicant meaning thereby that court has not recorded satisfaction about or presumed service of summons upon applicant/defendant no. 5.

15. It has been further contended that applicant was aware of the proceedings but the applicant/defendant No.5 denies the same. Whether the applicant was aware of the proceedings or not can not be gone into without affording opportunities to the parties to lead evidence on this aspect but that will open up a mini trial within a trial.

16. But since Court has not recorded its satisfaction with regard to service

of defendant no. 5 at any stage of the proceedings, therefore applicant's application under Order 9 Rule 3 CPC and U/s 5 of Limitation Act is deserved to be allowed. Apart from this, it is also a reality that despite passing of consent preliminary decree on 28.04.2000, final decree has not been passed in the next 14 years and, therefore, to say that allowing of applicant's application will delay the disposal do not appears to be reasonable. If parties to the consent preliminary decree had been serious to solution, partition would have taken place immediately after the preliminary decree but unfortunately it has not taken place till date.

17. Since the preliminary decree dated 28.04.2000 was passed with consent of parties to the decree, therefore, same will remain binding between the consenting parties except to the extent of share of the applicant/defendant No.5, if applicant/defendant No.5 is found entitled for share in the property.

In view of the above, both the application of the applicant is allowed, consequently preliminary decree dt 28.04.2000 is set aside only against the defendant No.5 to the extent noted above.

**Announced in the open Court.  
(Order contains 6 pages)**

**(Harish Kumar)  
ADJ-13( Central)/THC  
Delhi/02.08.2016**