

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT
CHANDIGARH

C.R. No.2066 of 2015

Date of Decision.30.03.2015

Shiv Dutt and others

.....Petitioners

Versus

Chunni Lal (now deceased) through LRs

.....Respondent

Present: Mr. Shiv Kumar, Advocate
for the petitioners.

CORAM:HON'BLE MR. JUSTICE K. KANNAN

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

-. -

K. KANNAN J. (ORAL)

1. The revision petition is against the order dismissing an application to set aside an ex parte decree passed by the trial Court and affirmed by the Court in appeal. In a suit for injunction filed against the petitioner, the petitioner had engaged the counsel and had filed the written statement contesting the plaintiff's plaint. After he did not come present on the day when the case was posted for trial of the suit which was instituted in the year 1996 and decreed on 21.02.2005, the Court, while passing the decree, has stated that although the suit was for injunction there was a report of the local commissioner that there had been a trespass in the property and a construction built by the defendant and therefore, the Court was taking note of subsequent event as well and directed the removal of the construction. The decree was put in execution several years later and the defendant when he was served with summons in execution filed an application to set aside the ex parte decree under Order 9 Rule 13 CPC. The contention is that the Court

could not have passed any direction for possession when the suit itself was only for injunction and if it was stated that counsel who had appeared to instruct him about the ex parte decree and he had reported no instruction, the Court could not have passed decree without serving notice on the petitioner.

2. The Court below found that the petitioner had been actually served with summons in Court and he could not have filed an application for setting aside the ex parte decree only at the time of execution which was levied more than six years later. The Court also considered the fact that in respect of the very same subject matter, there was yet another suit instituted against the petitioner in Civil Suit No.536 of 2004 titled “Navrattan Vs. Shiv Datt” before the Court at Palwal and he ought to have therefore taken notice of the fact of pendency of the case or must have secured information about the status of the suit which had been filed earlier.

3. Learned counsel for the petitioner refers to a judgment of the Supreme Court in Malkiat Singh Vs. Joginder Singh 1998(2) SCC 206 where the Supreme Court held that the trial Court which had admittedly not issued any notice to the appellants after their counsel had reported no instruction should have proceeded in the case from the stage when the counsel reported no instruction and the appellant cannot in the facts and circumstances of the case be said to be at fault and they should not suffer. This judgment does not address the situation of a person who was served with summon and who was appearing through counsel and filed the application setting aside the ex parte decree without any application for condonation of delay. Article 126 of the Limitation Act

requires any response within 30 days from the date of knowledge of the decree when he was not served with summons and where he was served with summons within 30 days from the date of the decree. In a case where the petitioner had been served with summons, he could not have filed an application more than 30 days after the date of the decree. If there was ever a contention to be taken by the petitioner to come by the advantage of the decision of the Supreme Court in Malkiat Singh Vs. Joginder Singh's (supra), it should have been at least set forth in the application as to when he came to know and made that as basis for an application to condone the delay. The explanation given by him that he came to know about the case only after the execution petition was filed cannot be accepted at all. The trial Court has reasoned, which in my view, is correct that the petitioner was attending to yet another proceeding of the same subject matter in the Court at Palwal in Civil Suit No.536 of 2004 and he ought to have apprised himself about the nature of the stage of the proceedings if he had even applied the minimum of care about the pendency of proceedings. There was no justification for the petitioner to file an application to set aside the decree only at the stage of execution without even a prayer for condoning the delay in filing the petition.

4. Learned counsel for the petitioner would argue that the Court had no power to direct possession in the suit for injunction. I am not here to decide on the merits of the case in the first place but even if such a contention must be taken, I would find that the Court is not without power to take notice of the subsequent event as pleaded by party and when the defendant allowed the proceedings to go ex parte, it

must only be taken that the plaintiff's own assertion that the defendant had taken possession of the property during the pendency of the proceedings was not refuted in any legal sense and the Court was justified, therefore, to provide for also recovery of possession taking note of the alleged subsequent event.

5. Learned counsel for the petitioner also relies before me on a judgment of the Supreme Court in *Shantilal Gulabchand Mutha Vs. Tata Engineering and Locomotive Co. Ltd. and another* 2013(4) SCC 396 where the Court was considering the fact of a defendant not filing a written statement and the Court would not pass decree under Order 8 Rule 10 blindly. The Court was required to examine the case prima facie and must give reasons for passing the judgment. The Court is to see whether the suit was also within limitation and averment made in the plaint was established by the plaintiff. In this case the Court while passing the decree had taken note of a subsequent event by reference to a report of the local commissioner and therefore, it had a basis to give suitable directions for recovery of possession and I cannot take the decision to have been rendered ex parte blindly. It is on the other hand a consideration of what was brought before the Court. I will find no use for application of the judgment of the Supreme Court in case in *Shantilal Gulabchand Mutha* referred to above under the circumstances.

6. The order passed by the Court below is maintained and the civil revision is dismissed.

(K. KANNAN)
JUDGE

March 30, 2015
Pankaj*