

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

CR No.2586 of 2011

Date of decision: February 18, 2015.

JAGDISH SINGH

... **Petitioner**

v.

KULWINDER SINGH

... **Respondent**

CORAM: HON'BLE MR. JUSTICE DR. BHARAT BHUSHAN PARSOON

Argued by: Shri G.C. Dhuriwala, Advocate for the petitioner.
Shri Rajinder Kumar Singla, Advocate for respondent No.1.

Dr. Bharat Bhushan Parsoon, J.

Invoking supervisory powers of this Court under Article 227 of the Constitution of India, the petitioner/decreed holder Jagdish Singh has impugned order dated 17.1.2011 (Annexure P-7) passed by Civil Judge (Junior Division), Nakodar whereby his application under Order IX Rule 13 CPC, dated 17.4.2006, filed by respondent No.1 Kulwinder Singh JD/defendant in the court below, had been accepted and judgment and decree dated 1.12.2004 passed ex-parte against him was consequently set aside.

A suit for seeking a decree of possession by way of specific performance of agreement to sell dated 9.10.2002 qua the property in dispute and in the alternative for recovery of Rs.3,40,000/-, in absence of appearance of the defendant, was decreed ex-parte on 1.12.2004. When the applicant-defendant had learnt about the ex-parte judgment and decree, he had moved the court below under order IX Rule 13 CPC for setting aside the same.

Acceptance of the application of the JD whereby ex-parte judgment and decree passed in favour of the petitioner-plaintiff had been set aside, is the bone of contention.

It is claimed that when the contesting defendant/JD, respondent No.1 herein, had duly been served in the suit and had entered appearance through his counsel and had been appearing on many dates, his unexplained disappearance had resulted in ex-parte proceedings against him which ultimately resulted in passing of ex-parte decree dated 1.12.2004 against him.

It is further urged that when the defendants were duly appearing in the suit and were contesting proceedings through their counsel, it is highly unbelievable that they were not in the knowledge of pendency of the suit and of the decree dated 1.12.2004 which had been passed against them. Plea of the respondent/JD Kulwinder Singh that he came to know of the ex-parte judgment and decree only on 22.3.2006 is claimed to be of no merit.

While making an application for setting aside the ex-parte decree, respondent-JD had taken up the plea that his attendance through counsel in the trial court for various dates had been marked inadvertently by the court. It is canvassed by the petitioner that even this plea is completely untenable particularly when judicial record has presumption of genuineness

having been prepared in the regular course of business in the discharge of duties by the concerned officers/officials. It is also urged that the impugned order is not only illegal and erroneous but is perverse, sketchy, cryptic and non-speaking where the trial court has not given any finding with regard to plea of limitation raised by the petitioner-decree holder.

Seeking reversal of the impugned order of 17.1.2001 (Annexure P-7) acceptance of the revision petition has been sought.

Counsel for the respondent on the other hand has asserted validity and legality of the impugned order urging that the same is factually as also legally correct and there is no infirmity.

Hearing has been provided to Counsel for the parties.

Suit for possession by way of specific performance of agreement to sell dated 9.10.2002 in respect of the suit land measuring 9 kanal 17 marla situated within the area of village Khurampur, H.B. No.114, Tehsil Shahkot, District Jalandhar, as also detained in the jamabandi for the year 1996-97 and in the title of the plaint (Annexure P-1) was filed by the petitioner impleading Kulwinder Singh and Navjot Singh as defendants. Concededly, Kulwinder Singh, now respondent-JD, was the owner of the land in dispute. The land had been agreed to be sold @ Rs.2.75 lacs per killa; payment of Rs.2,25000/- as earnest money had been made by the respondent-plaintiff at the time of execution of the agreement to sell. Sale deed was to be executed on or before 11.4.2003. Claiming his readiness and willingness to perform his part of the contract, the petitioner-plaintiff had been knocking at all relevant nooks and corners.

It is worth mentioning that on the date of first appearance of the defendant as on 29.7.2003, defendant Kulwinder Singh, now respondent No.1, had been served and had made a statement on oath that he was not

willing to file written statement as per a compromise effected with the plaintiff and was rather to repay the amount to the plaintiff by 31.8.2003. He had also assured that in case of non payment by him, the suit should be decreed.

Record reveals that Kulwinder Singh defendant, now respondent-JD, did not honour his statement of 29.7.2003 vide which he was to repay the entire amount to the plaintiff by 31.8.2003. Plea of counsel for the defendant that the defendant had always been willing to pay back the amount of the plaintiff but the plaintiff had been avoiding receipt of payment, is a mere excuse and is unbelievable. If the plaintiff was not receiving the payment against receipt, the defendant was at liberty to deposit the same with the court concerned but nothing such happened. The defendant- respondent No.1 neither paid the amount by assured date of 31.8.2003 nor even sought extension in the payment of the subject amount. As per this statement of 29.7.2003, on non payment of the amount till 31.8.2003, the suit was to be decreed as per the settlement between the parties.

The lower court even then gave the plaintiff opportunity to lead evidence wherein oral as well as documentary evidence was produced and the suit was decided on merits. When the decree was passed on 1.12.2004 by Civil Judge (Junior Division), Nakodar, the balance sale consideration was ordered to be paid within a period of two months.

It would be of avail to mention about the conduct of the respondent-defendant during the period of his absence from the lower court. He had sold the land to Jaswinder Singh, Sukhwinder Singh and Hardev Singh vide registered sale deed dated 4.5.2004. In these circumstances, it is very difficult to digest the plea of defendant Kulwinder Singh that he had not been appearing in the court and his attendance through counsel was marked by the court only inadvertently. He thus has questioned validity and

genuineness of even the court record. In fact, it is a clear case of deliberate and intentional avoiding of appearance by the JD, respondent No.1 herein in the court. When the respondent No.1-defendant had suffered his statement of 29.7.2003 of his own and voluntarily without any inhibitions, it is presumed that he also understood the consequences as also evil effects of such statement, wherein he had clearly expressed his unequivocal intention for decreeing the suit of the plaintiff in case of his failure in making the payment to the plaintiff by 31.8.2003. When plea of respondent No.1 - defendant is taken into consideration, it is clear that if the respondent-defendant was genuine, why he had disobeyed the courts orders of 29.7.2003 which were based on his own statement.

At this stage, for ready reference, it would be relevant to mention Rule 13 of Order IX CPC:-

“Setting aside decrees ex parte

13. Setting aside decree ex parte against defendant— In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside;

and if he 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, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further 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 plaintiff's claim

Explanation.—Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.

If we analyze this provision, the defendant has to show that:-

- (i) he had not been served, or;
- (ii) if served, was prevented by fortuitous circumstances from making appearance before the court.

It is not a case where service was not effected. Rather, the

petitioner-defendant after service had appeared in the court and had made a statement clearly admitting the entire case of the plaintiff, respondent herein, and had even agreed to pay back the amount by 31.8.2003 and had further undertaken that in case of default, the decree of the suit of the plaintiff be passed against him.

Notwithstanding the said undertaking, the lower court calling upon the plaintiff to produce his evidence, had evaluated and appreciated the same and did not base his judgment and decree of 1.12.2004 only on the statement of the defendant.

Sequely, it is a clear case where the defendant did not cause his appearance after appearing through counsel for 5-6 dates.

The second point that emerges is whether the respondent-defendant was prevented by reasons beyond his control from attending the court. There is absolutely no explanation of any witness even on this score. It is a case of clear willful default made by the respondent-JD. The impugned order suffers not only from factual error but also from legal errors.

Finding merit in the revision and reversing the impugned order, application of the defendants filed before the court below for setting aside the ex-parte judgment and decree, is dismissed with costs.

[Dr. Bharat Bhushan Parsoon]
Judge

February 18, 2015.
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1. *Whether Reporters of local papers may be allowed to see the judgment ?*
2. *Whether to be referred to the Reporters or not ?*
3. *Whether the judgment should be reported in the Digest?*