

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

C.R. No. 5606 of 2011 (O & M)

Date of decision: 13.01.2015

Dhanraj and others

....Petitioner(s)

Versus

Sunita

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr. Chetan Mittal, Sr. Advocate,
with Mr. M.S. Nain, Advocate,
for the petitioners.

Mr. S.S. Dinarpur, Advocate,
for the respondent.

G.S.SANDHAWALIA, J.

Challenge in the present revision petition filed against the defendants is to the order dated 03.09.2011 (Annexure P-1) whereby, the Additional District Judge, Rewari in appeal has affirmed the order dated 14.06.2011 passed by the Civil Judge (Sr. Divn.), Rewari who had dismissed the application of the petitioners under Order 9 Rule 13 CPC. The setting aside of the ex parte decree dated 08.10.1992, thus, has been rejected which was for permanent injunction.

A perusal of the paper book would go on to show that suit for permanent injunction was filed on 09.10.1991 by the respondent-petitioner alongwith others restraining the present petitioners from raising construction on the property in question on the ground that the plaintiffs were owners of the suit property and the present petitioners wanted to take possession illegally. The petitioners were proceeded against ex parte on 17.07.1992. The said plaintiffs examined as many as 4 witnesses and the

Court after examining the revenue record, came to the conclusion that the plaintiffs were owners and accordingly, decreed the suit on 08.10.1992 (Annexure P-2). The petitioners filed objections to the application filed under Order 21 Rule 32 CPC dated 07.08.2003 (Annexure P-3) and never chose to file an application for setting aside of the ex parte decree or the ex parte proceedings. The Executing Court allowed the objections on 17.12.2008 (Annexure P-5) and dismissed the execution proceedings by holding that they were owners in possession and the decree holder had never remained in possession. This Court in C.R. No. 705 of 2009 filed by the respondent under Article 227 of the Constitution of India set aside the said order on the principle that the Executing Court could not go behind the decree and could not record a finding contrary to the one recorded by the Civil Court and rejected the contention that the execution was time barred. The application of the respondent under Order 21 Rule 32 CPC was allowed and the petitioners were directed to hand back the possession, failing which, they would be liable to be sentenced for civil imprisonment and costs of ₹25,000/- were also imposed. The relevant observations of order dated 10.09.2010 (Annexure P-7) read thus:-

“Learned senior counsel for the respondents also contended that the decree was not executable being time barred. This contention is also misconceived as a decree for injunction, become executable when the injunction order is disobeyed.

Consequently, the impugned order is set aside, the application moved by the petitioner under Order 21 Rule 32 of the Code of Civil Procedure is allowed, respondent-judgment-debtors are directed to forthwith comply with the decree and hand back the possession to

the decree-holder within 15 days of the receipt of the certified copy of this order.

In case the judgment-debtors fail to do so, in that event, besides taking coercive steps to enforce the decree, the judgment-debtors shall also be liable to be sentenced to civil imprisonment for 30 days, by the learned Executing Court.”

In the meantime, an application for setting aside the ex parte proceedings and judgment and decree was filed before the trial Court on 25.09.2010 (Annexure P-4) taking the plea that the petitioners had no notice of the suit. It was mentioned that objections had been taken in this Court that ex parte proceedings had not been moved and, therefore, the application was being filed.

The decision of this Court dated 10.09.2010 was challenged in the Apex Court wherein, there was interim stay and thereafter on 16.12.2010 (Annexure P-9) in view of the application having been filed under Order 9 Rule 13 CPC, SLP No. 29501 of 2010 was dismissed as withdrawn. The order reads thus:-

“Learned counsel for the petitioner submits that the impugned order challenged in the SLP is ex-facie wrong in so far as it directs the petitioners to deliver possession. He also submitted that he has challenged the ex-parte decree dated 8.10.1992 by filing an application for setting aside the same and the same is pending.

In view of the above, he seeks leave to withdraw this special leave petition and file appropriate application in the pending petition under Order 9 Rule 13, C.P.C. for interim protection. It is needless to say that any application filed under Order 9 Rule 13,

C.P.C. or any prayer therein for interim relief, has to be decided on its own merit without reference to the direction for delivery of possession.

The Special Leave Petition is dismissed as withdrawn accordingly.”

The application filed before the trial Court was objected on the ground of limitation and maintainability taking the plea that knowledge of the judgment and decree had been acquired in the execution proceedings in the year 2002 and the application had been filed on 25.09.2010. It was pleaded that this Court had decided in favour of the decree holder and the matter had been withdrawn from the Apex Court. The trial Court framed the following issues:-

“1. Whether the order dated 17.7.1992 and decree dated 08.10.1992 is liable to be set aside on the ground mentioned in the application? OPP

2. Whether the application is not maintainable? OPR

3. Whether the application is time barred? OPR

4. Relief.”

Two witnesses were examined by the petitioners whereas the respondents examined three witnesses in their support. It was noticed that the petitioners had been served in the civil suit and had been directed to appear. That petitioner no. 2-Daryao Singh had been served and had been directed to appear in the Court on 07.11.1991. Petitioner no. 1-Dhanraj had hidden himself on seeing the process server and counsel had appeared on their behalf on 07.11.1991 in the case. Thereafter, appearance had been put in on 11.12.1991 and on 07.05.1992, time had been taken to file the written statement. On 17.07.1992, counsel for the defendants did not appear and

neither filed written statement and was accordingly proceeded against ex parte. Accordingly, noticing that once appearance had been put in by the counsel Sh. Naresh Chauhan, they had knowledge about the case on 07.11.1991. The factum of the execution petition being instituted on 07.09.2002 and filing of objection in the same were also noticed and it was held that there was 19 years' delay in filing the application under Order 9 Rule 13 CPC and it was sufficient to reject the same. Reliance was placed upon the judgment of the Apex Court in ***Pundlik Jalam Patil (D) by L.Rs. vs. Executive Engineer, Jalgaon Medium Project and another, 2008 (17) SCC 448***. Accordingly, it was held, keeping in view the provisions of Order 9 Rule 13 CPC, that no sufficient cause had been shown for the non-appearance on 17.07.1992 and neither there was any sufficient reason for not filing the application under Order 9 Rule 13 CPC within the period of limitation. The application was accordingly dismissed vide order dated 14.06.2011. The Lower Appellate Court, while keeping in mind that the plaintiffs were the original owners of the land and the petitioners had only encroached upon a portion of land and raised construction and thus, were only lingering on the litigation. They having kept quiet for a long interval and the plaintiff being a widowed lady only having two daughters and keeping in view the fact that there was no sufficient cause upheld the order.

Thus, from the perusal of the above facts and circumstances, it would be clear that there is no dispute that the petitioners were well aware regarding the factum of pendency of the litigation and had been duly served and had engaged a counsel. They chose not to contest the suit and thereafter, a decree was passed against them more than two decades back.

Under Order 9 Rule 13 CPC, the defendant who is proceeded

against exparte has to satisfy the Court that the summons were not duly served or that he was prevented by any sufficient cause from appearing when the suit was called for hearing and the Court is to make an order upon such terms as it may think fit. The proviso further provides that no Court shall set aside the decree passed exparte on the ground that there is irregularity in service of summons and defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. Under Article 123 of the Limitation Act, 1963, 30 days time is provided for setting aside the exparte decree from the date of decree or from the date of knowledge if the applicant is not aware of the decree and had not been duly served. The trial Court in the present case has categorically noticed the fact that the initial exparte order was way back on 17.07.1992 when the ex parte order had been passed.

This Court in ***Smt. Dev Bala Sehgal Vs. Devinder Pal Sehgal*** **2002(1) PLR 775** has held that application which is patently time barred cannot be allowed in the absence of application supported under Section 5 of the Limitation Act, 1963.

“11. It is abundantly clear that the application in hand for restoration of the suit was not filed within 30 days from the date of dismissal of the suit in default. The Court could not extend the time of limitation by bringing it under the principle of "interest of justice" and bypassing the mandatory provisions of Article 122 of the Limitation Act, 1963. Article 122 of the Limitation Act, 1963 does not provide that the application has to be filed within 30 days from the day of knowledge of the suit having been dismissed in default. In fact, it is very specific and clear that it has to be counted from the date of dismissal. The application

having been filed beyond the prescribed period of limitation and the limitation having not been condoned on a written application or an oral request of the plaintiffs, the Court cannot restore the suit while invoking the inherent jurisdiction under section 151 Civil Procedure Code. It is well-established that the express provisions of law cannot be over-ridden by invoking inherent jurisdiction.

12. *Thus, in view of the aforesaid discussion, I am of the view that the impugned order has certainly caused failure of justice and defeated valuable right which has accrued to the other side by extending the period of limitation by exercising its inherent powers under Section 151 of the Code. Rather, it would not be out of place to mention here that the trial Court has not discussed the point of limitation while disposing of the impugned order, although in the reply a specific plea was taken that the application was liable to be dismissed being time barred. This aspect of the case has been totally ignored by the trial Court. Thus, the impugned order cannot be sustained, the same being perverse.”*

Similarly the Apex Court in ***Sneh Gupta Vs. Devi Sarup (2009) 6 SCC 194*** has held that in the absence of any application for condonation of delay the application for setting aside was not maintainable.

Relevant observations read as under:-

“Even otherwise, we do not think that any error has been committed by the High Court in arriving at the finding that the appellant had knowledge of the passing of the compromise decree much earlier. She did not file any application for condonation of delay. She filed two more applications for recall of the order dated 6.11.2004 in other enacted appeals. Those applications

were also filed after expiry of the period of limitation and none of those applications were also accompanied with an application for condonation of delay. In absence of any application for condonation of delay, the Court had no jurisdiction in terms of Section 3 of the Limitation Act, 1963 to entertain the application for setting aside the decree. (See [Dipak Chandra Ruhidas v. Chandan Kumar Sarkar](#) (2003) 7 SCC 66 and [Sayeda Akhtar v. Abdul Ahad](#) (2003) (7) SCC 52)."

This Court in ***Punjab State Cooperative Bank Ltd. Vs. Shri Baldev Krishan* 1994(1) PLR 627** has held that the exparte proceedings are not to be set aside mechanically without other party establishing satisfactorily on record that they were not aware of the proceedings. It was held that where party did not choose to appear in spite of notice having been duly served, there would be an abuse of process of law if the exparte proceedings have to be set aside. The relevant observations read as under:-

"It is undoubtedly correct that normally the court should decide case after giving due and reasonable opportunity to the parties to plead and substantiate their respective contentions. However, in a case where a party to a case does not even care to appear in spite of the notice having been duly served, it would be an abuse of the process of law if the order passed at the end of ex-parte proceedings is mechanically set aside. It is only when it is satisfactorily established on the record that the notices had not been duly served that the ex-parte order can be set aside. Such is not the position in the instant case."

The Apex Court in ***Sunil Poddar & others Vs. Union Bank of India* (2008) 2 SCC 326** has also held that where the defendant was actually served and he had sufficient time to appear and answer the claim then he

cannot come forward on account of fact that there was irregularity in service of summons. The relevant observations read as under:-

“19. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiffs claim, he cannot put forward a ground of non service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code. Since the said provision applies to Debt Recovery Tribunals and Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before the DRT, they had no sufficient time to appear and answer the claim of the plaintiff-bank and on that ground, ex parte order deserves to be set aside.”

Thus, keeping in view the above settled position and the factum that the petitioners had adequate knowledge of the pendency of the litigation and in the absence of any satisfactory explanation having been rendered. The failure to appear from 17.07.1992 onwards and thereafter no sufficient cause having been shown for setting aside the ex parte

proceedings from the year 2002 till 25.09.2010 when the application was filed under Order 9 Rule 13 CPC only when revision was decided against them on 10.09.2010, the petitioners have thus failed to prosecute their case in a proper manner and now cannot challenge the orders whereby, their application under Order 9 Rule 13 CPC has been dismissed. In the absence of any illegality or irregularity, this Court would be loath to interfere under the supervisory powers, accordingly the present revision petition is dismissed.

13.01.2015
shivani

(G.S. SANDHAWALIA)
JUDGE