

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

CR-5947-2015 (O&M)

Date of decision: 11.12.2015

Subhash Mehta

...Petitioner

Versus

Punjab Wakf Board Ambala Cantt.

...Respondent

CORAM: HON'BLE MRS.JUSTICE SNEH PRASHAR

Present: Mr.Atul Lakhanpal, Sr. Advocate with
Mr.Jasmeet Singh, Advocate for the petitioner

SNEH PRASHAR, J.

The present petition under Article 227 of the Constitution of India has been filed for setting aside the judgment dated 10.10.2012 passed by learned trial Court dismissing the application under Order IX Rule 13 of the Code of Civil Procedure (for short 'the Code') as well as the judgment dated 1.7.2015 passed by learned First Appellate Court vide which the appeal filed by the petitioner was dismissed.

The facts which need recapitulation are as under:-

A suit for possession by way of ejectment was filed by the Punjab Wakf Board- respondent against petitioner Subhash Mehta (defendant No.2) and one Ramesh Kumar (defendant No.1)

s/o Satya Pal qua the property measuring 1865 Sq. Yards

compromised in Khasra No. 311 min, situated at Patti Jattan, Ambala City. On notice of the suit, the petitioner appeared through his counsel, filed his written reply and participated in the trial, but subsequently he had committed a default in appearance and was proceeded against ex-parte vide order dated 27.3.2001. Thereafter, an ex-parte judgment and decree dated 8.6.2001 was passed in the suit in favour of the Punjab Wakf Board.

On 4.1.2005, the petitioner (defendant No.2) filed an application invoking the provision of Order IX Rule 13 of the Code for setting aside the ex-parte judgment and decree dated 8.6.2001 and the ex-parte order dated 27.3.2001. He alleged that he was appearing regularly through his counsel during the proceeding in the suit and was in touch with his counsel. Later, due to illness of his mother, he could not contact the counsel and was proceeded against ex-parte. He also alleged that no court notice was ever issued or was received by him and his absence was not intentional. He pleaded that he is running his business in the suit property and is completely dependent on the said business for supporting a large family.

The respondent-plaintiff contested the application. Besides taking various legal preliminary objections, it was averred on merits that when the case was fixed for evidence of the plaintiff-Wkf Board, its witness Mohd Usman PW1 appeared on 14.1.1998

and 10.2.1998 for recording of his statement but on all the dates, the case was adjourned on request of counsel for the petitioner (defendant No.2). On 22.11.2000, the examination in chief of PW1 Mohd. Usman was recorded and on request of counsel for the petitioner (defendant No.2), the case was adjourned to 30.11.2000 for his cross-examination. He appeared on 30.11.2000, 30.12.2000 and 14.2.2001 for his cross-examination, but counsel for the petitioner repeatedly sought adjournments on one pretext or the other and ultimately when the case was fixed for 24.2.2001, none appeared on behalf of the petitioner. In the interest of justice, a notice was issued to the petitioner for 27.3.2001 by the court, which was served on the petitioner through his wife yet on the date fixed i.e. 27.3.2001, neither the petitioner (defendant No.2) nor defendant No.1 appeared in person or through counsel and hence, they were proceeded against ex-parte. It was further submitted that the petitioner (defendant No.2) and Ramesh Kumar (defendant No.1) were well aware of the ex-parte order dated 27.3.2001 and ex-parte judgment and decree dated 8.6.2001, but had deliberately and with malafide intention remained mum for five long years. It is only when the warrants of possession were issued in the execution proceedings that the petitioner filed the present application.

On the rival contentions of the parties, issues were

framed and both the parties adduced their evidence. Finding the application to be hopelessly time barred and not maintainable, learned trial Court dismissed the application of the petitioner.

Feeling aggrieved by the said order, the petitioner preferred an appeal, which was also dismissed by learned First Appellate Court vide judgment and decree dated 1.7.2015. Feeling dissatisfied, the present revision petition has been filed.

As the matter was opened for arguments, learned counsel for the petitioner submitted that it has been indicated in the judgment and decree dated 8.6.2001 passed by learned trial Court that the petitioner had deposited the rent for the period claimed by the respondent-plaintiff. The ground on which, the respondent had sought eviction of the petitioner and other defendant was that the premises had been sub-let by defendant No.1 Ramesh Kumar in favour of the petitioner (defendant No.2), whereas according to the rent deed Ex.P5 (Annexure P-1), the premises were let out to both the defendants jointly and there was no question of subletting. Accordingly, the petitioner had a very good case in his favour and there was no reason for him to commit default in appearance during the trial of the case. He had engaged a counsel, who was representing him and adjournments, if any, for examination of the witnesses of the plaintiffs were taken by the counsel and the

petitioner was not at fault in that regard. Counsel for the petitioner never informed him about the proceedings being held in the case. Neither his counsel nor he had appeared and ultimately, an ex-parte order dated 27.3.2001 and ex-parte judgment and decree dated 8.6.2001 was passed in the case.

As regards the court notice issued to the petitioner, which was found to be served on his wife, learned counsel for the petitioner contended that summons were issued on a wrong address and were never received by any member of the family of the petitioner. On account of fault on part of his counsel, who did not appear in the court, the petitioner cannot be made to suffer. He was never communicated the date of hearings by the counsel and also had no notice of the ex-parte order or the ultimate ex-parte judgment and decree passed against him. To support his arguments, learned counsel relied upon **Sushil Kumar Sabharwal vs. Gurpreet Singh 2002(3) RCR (Civil) 431** and **Lal Devi and another vs. Vaneeta Jain and others 2007(3) RCR (Civil) 153**.

As in the above cited cases, the present case is not where the summons of the suit issued to the petitioner and other defendant had not been served on him or he had refused to accept the same and the process server did not comply with the provisions of law of affixation of summons and a copy of plaint on the demised premises or that on the date fixed for hearing, counsel for

the petitioner did not appear as he was busy in some other case and subsequently he appeared but his prayer for setting aside the ex-parte proceedings was not allowed by the court.

The facts in hand are on a completely different footing as noted by learned First Appellate Court in para No.11 of the judgment dated 1.7.2015:-

“11. It can be ascertained from the perusal of file that, civil suit no.394 was filed by Punjab Wakf Board, Ambala Cantt., against Ramesh Kumar and another, on 07.02.1994 and after due service, the defendants no.1 and 2 had filed written statement, dated 14.08.1995. It is clear from the perusal of zimni order dated 14.01.1998 passed by learned lower court that, cross-examination of plaintiff's witness was deferred, as counsel for defendants was not available. On 22.11.2000, cross-examination of Mohd. Usman, the plaintiff's witness, was not recorded on the request of counsel for defendants. Again on 30.11.2000, 13.12.2000, 14.02.2001 and 24.02.2001, plaintiff's witness was not cross-examined and on 24.02.2001, as none had appeared for defendants; court notice was ordered to be issued to the defendants for 27.03.2001 and it is clear from the zimni order dated 27.03.2001 that, defendant no.2 was served through his wife; whereas the wife of defendant no.1 refused to accept the summons; hence they were proceeded

against ex parte and ultimately, ex parte judgment and decree were passed on 08.06.2001. On 24.12.2004, an application was moved by defendant no.1 to set aside the ex parte order dated 27.03.2001 and ex parte judgment and decree dated 08.06.2001 averring that, he had been appearing before the court regularly through his counsel, but due to illness of his mother, could not contact his counsel. It was further averred that, absence of applicant was neither intentional nor mala fide, but due to the illness of his mother and with these submissions, prayer to set aside the ex parte order and ex parte judgment and decree was made.

It is apparent from the above findings that the petitioner had due notice of the suit and had engaged a counsel to represent him. He had filed his written reply and after the issues were framed, the case had been fixed for evidence of the respondent-plaintiff. After taking numerous dates for examination of the witnesses of the respondent-plaintiff, he abruptly committed default in appearance. He alleged that he could not contact his counsel due to illness of his mother, but produced no evidence worth in its name to substantiate his plea. As far as intimation of the proceedings being conducted in the case by his counsel is concerned, it was for him to contact his counsel and take information about the same and was not for his counsel to inform him about each and every date of hearing. When

the counsel for petitioner did not appear on 24.2.2001, there was no necessity for the Court to issue fresh notice to the petitioner, yet in the interest of justice, learned trial Court had issued a notice, which was served upon the wife of the petitioner. In his deposition, the petitioner denied that the notice was received by his wife but he did not examine his wife to deny the signatures on the summons.

On the other hand, respondent-plaintiff examined RW2 Chander Shekhar, Process Server, who proved his report dated 20.3.2001 Ex.R1 on the summons issued by the court for 27.3.2001 and stated that Smt. Vinod Mehta, wife of Subhash Mehta had received the summons on behalf of her husband. Service on other defendant Ramesh Kumar was also duly effected as it was reported by the process server that wife of Ramesh Kumar had refused to receive the summons. The testimony of the process server was sufficient to prove the service of the court notice on the petitioner and his co-defendant. The ex-parte judgment and decree was passed on 8.6.2001. The plea of the petitioner that he had no notice of the ex-parte order dated 27.3.2001 is of no avail as it has already been observed above that the petitioner was not only having notice of pendency of the suit but had also appeared and participated in the proceedings by filing written statement and by depositing the rent etc. if at all, it was he, who deposited the rent. After the issues were

framed, the case was repeatedly adjourned for plaintiff-respondent's evidence and the petitioner was represented by counsel till 24.2.2001, the date on which, neither he nor his counsel appeared and the court passed an order for issuing notice for 27.3.2001 to him (petitioner) and his co-defendant.

No evidence ocular or documentary could be produced by the petitioner to prove that ever after deposit of rent in the present suit, he or his co-defendant had made any effort to pay rent to the landlord/ respondent for more than three years. His plea is that his counsel did not inform him about the proceedings being conducted in the case, but it was in his knowledge that he was in occupation of the premises as a tenant and had to pay the rent for the period claimed by the respondent in the suit and was further under obligation to pay the rent for the subsequent period also. However, what to say of payment during the proceedings of the suit, there was also nothing to indicate that he ever made any effort to pay the rent to the landlord. His silence on that matter is another important factum which proves that he had deliberately walked out the proceedings of the case. Substantive delay in filing the application for setting aside the ex-parte order and ex-parte judgment and decree has remained completely unexplained and as discussed above there is neither any truth nor any merit in the pleas

raised by the petitioner.

Thus, finding no illegality or perversity in the impugned judgment and order warranting intervention, the present petition is dismissed.

11.12.2015
gsv

(SNEH PRASHAR)
JUDGE