
IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Civil Revision No.6725 of 2011(O&M)
Date of decision: 06.1.2015

Kali Ram

....Petitioner

Versus

Shanti and others

...Respondents

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

Present: Mr. R.S.Malik, Advocate for the petitioner.

Mr. Rakesh Lathwal, Advocate for the respondents.

G.S.Sandhawalia J.(Oral)

1. Challenge in the present revision petition filed under Article 227 of the Constitution of India by the petitioner-plaintiff No.2 is to the order dated 13.9.2011 passed by the Additional District Judge, Sonapat whereby the appeal of defendants nos. 28 to 32 and 34 to 42 was allowed and the matter was remitted to the trial Court to decide the application under Order 9 Rule 13 CPC after framing of issues and after affording one effective opportunity to each of the parties.

2. Counsel for the petitioner has argued on the strength of the judgment of the Apex Court in **Fiza Developers & Inter-Trade P. Ltd. Vs. AMCI (I) Pvt. Ltd. and another** 2009(17) SCC 796 to submit that it is not necessary for the trial Court to frame issues once there was sufficient material to show that the said defendants had been served and chosen to stay away from the proceedings. It is further submitted that the application under Order 9 Rule 13 CPC was time barred and the application was rightly dismissed by the trial Court vide order dated 16.8.2010 and the appeal was wrongly allowed by the Lower Appellate Court.

3. Counsel for the respondents on the other hand has submitted that no prejudice would be caused to the petitioner since the matter would be

thrashed out after taking into consideration the evidence which would be recorded to find out whether the defendants/applicants had been duly served or not and thus supports the order of the Lower Appellate Court.

4. A perusal of the paper book would go on to show that petitioner-plaintiffs had filed a suit for partition which was decided exparte on 15.12.1995 and preliminary decree had been passed. Thereafter, the Local Commissioner was appointed before preparing final decree and another exparte order dated 15.6.2005 was passed and the final decree was prepared on 3.8.2006. The applicants filed an application dated 14.5.2007(Annexure P/1) for setting aside the exparte judgment and decree on the ground that they were not personally served and no copy of the plaint had been supplied to them with the summons. No satisfaction had been recorded by the trial Court and Munadi had not been effected in the village. The date of knowledge was alleged to be 20.4.2007 when possession was sought to be taken and resultantly the application had been filed and the exparte decree dated 3.8.2006 was sought to be set aside.

5. In reply (Annexure P/2) to the application, the petitioner-plaintiff took the plea that the possession of the plots had been given by the Bailiff on 13.1.2007 and 18.4.2007 and therefore, the applicants were well aware and had knowledge of the preliminary decree and no appeal had been filed against the same and the application was time barred. The final decree had been passed of all the Khasra Nos. which were included in the preliminary decree and the applicants had chosen not appear.

6. The trial Court noticed that the applicants were all residents of village Kheri Manajat and the exparte proceedings were dated 15.6.2005. The Process Server's report was perused and it was noticed that the applicants had refused to receive the summons and copy of the summons had been pasted at the door of the addressees/applicants and report dated 3.3.2005 was taken into consideration whereby the Chowkidar of the village namely Suresh had

witnessed the service. Reliance has been placed upon the judgment of this Court in **Gurinder Singh Sodhi Vs. Ramesh Kumar 1997(2) Civil Court Cases 23** and it has been held that service had been properly effected. It was noticed that the case had been adjourned for 28.5.2005 when Munadi was not effected for the said purpose and the same was ordered for 15.6.2005 and the Munadi had been effected on the said date in the presence of the wife of the village Chowkidar and copy of the Munadi had been affixed at the Chaupal of the village. The report being attested by the witness and the affidavit of the Process Server was also attested by COC of the office of Civil Judge (Senior Division) and eventually none had appeared and the exparte order was passed on 3.8.2006. It was thus noticed that the application was time barred as the applicants had knowledge of the pendency of the case as on the first date they refused to receive summons, secondly Munadi was effected and thereafter thirdly, possession of the plot was given. Accordingly, the application was held to be time barred and was dismissed.

7. The appeal had been filed by the applicants/respondents which as noticed above has been allowed on the ground that the report of the Process Server was that they had refused to receive the summons and there was affixation out side the house. Summons did not bear copy of the plaint and therefore, examination of the Process Server was necessary. It was accordingly held that issues should have been framed and reliance was placed upon the judgment of this Court in **Anuraj Vs. M/s Sheel Buildcon Private Ltd. and another 2009(2) PLR 203** in support of the reasoning given.

8. 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, 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 had categorically noticed the fact that the initial exparte order was way back on 15.12.1995 when the preliminary decree had been passed. The Local Commissioner was appointed for preparing the final decree and the exparte order in the final decree was passed on 15.6.2005 and the final decree was passed on 3.8.2006. The possession of one of the plot was handed over as pleaded by the petitioner-plaintiffs on 13.1.2007 and another on 18.4.2007. The application was only filed on 14.5.2007 alleging that date of knowledge was 20.4.2007. Thus, application was patently time barred firstly from the date of final decree dated 3.8.2006 and also from the date of possession of the first plot which had been taken on 13.1.2007.

9. 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.”

10. 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](#)).”

11. Admittedly no application for condonation of delay was also filed and it is not denied that the possession of 1st plot was taken on 15.12.2007 in the

absence of same, the Appellate Court was not justified in remanding the matter back solely on the ground that there was irregularity in the service. The applicants were residents of the same village and the matter pertained to partition proceedings and in such circumstances for them to contend that they were not aware of the proceedings which were pending since 1995 is not tenable.

12. 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.”

13. 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.”

14. In **Anuraj's case** (supra) this Court held that there was no finding recorded by the trial Court that the defendant had evaded service, before it had ordered substituted service and accordingly had ordered that issues be framed. In the present case, the finding is otherwise, therefore, the said judgment is not applicable.

15. Accordingly, keeping in view the fact that the defendants had refused to receive summons, had been served by way of affixation, and thus were well aware of the pending proceedings. Thereafter, they had been served by way of Munadi and factum of pendency had also affixed at the Chaupal of the village, which eventually led to the passing of an exparte decree on 3.8.2006 against them. In such circumstances, it was not justified for the Appellate Court to set aside the well reasoned order passed by the trial Court

dated 16.8.2010. Keeping in view the provisions of Order 9 Rule 13 CPC since it is apparent that defendants had adequate notice of the date of hearing and had time to appear and answer the plaintiff's claim and as noticed above, the application was also patently time barred. Resultantly the order passed by the Lower Appellate Court is not justified. Accordingly, the impugned order dated 13.9.2011 passed by the Lower Appellate Court is set aside and the present revision petition is allowed restoring the order dated 16.8.2010 dismissing the application under Order 9 Rule 13 CPC.

06.1.2015
Pka

(G.S.SANDHAWALIA)
JUDGE