

IN THE HIGH COURT OF PUNJAB AND HARYANA

AT CHANDIGARH

FAO-6434-2012 (O&M)

Date of decision: 28.05.2015

Bharpai

..... Appellant

versus

Hoshiara and and others

..... Respondents

CORAM: Hon'ble Mr. Justice Kuldip Singh

Present: Mr. Munish Kumar Garg, Advocate for the appellant
Mr. Ajay Kansal, Advocate for respondent No. 1

1. *Whether Reporters of Local Newspapers 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?*

Kuldip Singh, J. (Oral)

CM No.31067-CII of 2012

This application has been filed for condonation of 318 days delay in filing the appeal. The application is accompanied by an affidavit. For the reasons mentioned therein, it is allowed and 318 days delay in filing the appeal stands condoned.

FAO-6434-2012 (O&M)

LCR as well as the record of the original appeal received. Challenged in the present appeal is the order dated 2.11.2011, passed by the learned Additional District Judge, Jind, vide which, application of the appellant under Section 9 Rule 13 CPC was dismissed.

The brief facts of the case are that Hoshiara-plaintiff filed

a civil suit No.286 of 19.9.1997 titled as *Hoshiara v. Smt.Shanti etc.* against the defendants-respondents, seeking declaration that he along with proforma defendants are owners in possession of share in the agricultural land measuring 140 kanals 18 marlas, situated in the revenue estate of village Kharak Ramji. Before the trial Court, defendants were proceeded against ex-parte. Suit was dismissed by the learned Civil Judge (Junior Division), Jind. Plaintiff preferred Civil Appeal No.18 of 14.2.2003. In the appeal, judgment of the trial Court was reversed vide judgment dated 7.1.2004. It is not denying fact that in the appeal, notice to the respondents – defendants was dispensed with on the ground that they were ex-parte before the lower Court. When the respondents-defendants came to know about the decree against them, they preferred the present application which was also dismissed.

I have heard learned counsel for the parties and have also carefully gone through the file.

Learned counsel for respondent No.1 has relied upon the authority titled as *Kewal Ram v. Smt.Ram Lubhai*, AIR 1987 Supreme Court 1304 and has relied upon the following observations of the Apex Court:-

“10. A feeble contention was put forward that fraud was practised upon these two persons in not getting service effected on them. We do not propose to consider this aspect of the case since this case was not properly pleaded or proved. For the purpose of this judgment we accept the conclusions arrived at by the Court below that these two persons were not served either in the suit or in the appeal. If so, what is the position. It is well settled

that when a decree of the trial Court is either confirmed, modified or reversed by the appellate decree, except when the decree is passed without notice to the parties, the trial Court decree gets merged in the appellate decree. But when the decree is passed without notice of a party, that decree will not, in law, be a decree to which he is a party. Equally so in the case of an appellate decree. In this case these two persons were not served in the suit. A decree was passed ex parte against them without giving them notice of the suit. In law, therefore, there is no decree against them. In the appeal also they were not served. If they had been served in the appeal, things would have been different. They could have put forward their case in appeal and got appropriate orders passed. But that is not the case here. That being so, there is no bar for an application by them before the trial Court under O.IX, R.13 to set aside the ex parte decree against them. This is the only point that arises in the appeal filed by the plaintiff. The appeal has to fail and is dismissed.”

I am of the view that the facts of the present case and the said case are different. Here, in the lower Court decree was passed in favour of the defendants by dismissing the suit of the plaintiff. When the appeal was found to be arguable and the appellate Court proposed to reverse the decree passed in favour of the defendants-respondents, it was imperative upon it to issue a fresh notice to the defendants. For that purpose, when no notice was issued, the defendants were justified in approaching the appellate Court in setting aside the decree passed by it. There was no occasion for them to seek setting aside of the ex-parte decree passed by the learned Civil Judge (Junior Division), Jind, which was passed in their

favour. In this way, the present appellant -defendant No.3-respondent has been condemned unheard. It is not that appellant/ defendant No.3 refused the notice or she did not appear despite notice, but the notice to her was dispensed with by the Court, which is not the correct approach.

Accordingly, the impugned judgment is set aside. The Civil Appeal No.18 of 14.2.2003 filed by Hoshiara -plaintiff is restored and is ordered to be decided on merits after hearing both the parties. Notice to other defendants shall also be issued. Since it will be one of the oldest appeals, same is ordered to be decided within six months.

The appeal is accordingly allowed.

28.05.2015
gk

(Kuldip Singh)
Judge