

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

**SAO No.79 of 2011 (O&M)
Date of Decision: 18.09.2015**

Fariad Singh

....Appellant

Vs

Balwinder Singh

....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Akshay Bhan, Senior Advocate with
Mr. Santosh Sharma, Advocate
for the appellant.

Mr. J.S. Brar, Advocate
for the respondent.

1. *Whether Reporters of local papers 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?*

RAJ MOHAN SINGH, J.

[1]. In this second appeal against order prayer has been made to set aside order dated 19.07.2011 passed by Additional District Judge, Ferozepur, whereby application under Section 5 of the Limitation Act has been dismissed, and resultantly an appeal has also been automatically dismissed.

[2]. This case has checkered history. Respondent-plaintiff filed a civil suit for specific performance of agreement to sell dated 22.07.2002 in respect of 22 *Kanals* 15 *Marlas* of land. Suit was decreed ex parte by the trial Court on 10.03.2004. Appellant claimed

that he came to know about *ex parte* judgment and decree when he received summons dated 26.10.2004 from the executing Court.

[3]. Appellant filed an application under Order 9 Rule 13 CPC for setting aside *ex parte* judgment and decree dated 10.03.2004 on 29.10.2004. Respondent contested the application. On 25.04.2008, none appeared on behalf of appellant and the application under Order 9 Rule 13 CPC was dismissed in default. It was claimed that some wrong date was noted with the Advocate by the appellant.

[4]. Appellant came to know about dismissal of the application under Order 9 Rule 13 CPC and thereafter he filed application for restoration of the same before Additional Civil Judge (Sr. Divn) Zira. The said application was dismissed on 09.11.2009. Appellant filed Civil Revision No.7318 of 2009 against the said order before the High Court which was dismissed as withdrawn on 10.12.2009. Later on an application for recalling of the order dated 10.12.2009 was filed which was also dismissed by this Court on 19.07.2010.

[5]. Thereafter appellant filed Special Leave Petition before the Hon'ble Supreme Court and the same also got dismissed as withdrawn on 01.09.2010. Appellant filed appeal against judgement dated 10.03.2004 before the Additional District Judge, Ferozepur along with application under Section 5 of the Limitation Act for condonation of delay in filing the appeal. The said application for condonation of delay was dismissed vide order dated 19.07.2011 by Additional District Judge, Ferozepur.

[6]. Against the aforesaid order, initially appellant filed revision petition No.5817 of 2011. Said revision petition came up for hearing before this Court on 22.09.2011 and the learned counsel appearing on behalf of appellant withdrew the revision petition with a liberty to file appeal. That is how the present appeal has been filed.

[7]. Learned Senior counsel for the appellant cites **(2009)2 SCC 205, Mahesh Yadav and Anr. v. Rajeshwar Singh and Ors.** in the context of interpretation attached to proviso appended to Order 9 Rule 13 CPC. Perusal of the aforesaid citation reveals that the said judgment does not advance the case of the appellant. In view of the fact that both the remedies available to the appellant have been inadequately exhausted by the appellant himself in the circumstances as mentioned above.

[8]. The perusal of events and filing of the present appeal shows that even the appeal is not maintainable. Lower appellate Court while dismissing the application for condonation of delay also dismissed the appeal without drawing any decree. In such situation revision is maintainable before this Court. In fact remedy of revision was availed at one point of time but the same was got withdrawn.

[9]. In case of *ex parte* decree, the defendant has two options. He may apply to the Court by which the decree was passed for order to set it aside and if he satisfies the Court that he was prevented by means of sufficient cause from appearing in the case on the date fixed, the Court can make an order setting aside the decree on such

terms and conditions. Secondly, he can also file appeal against the decree passed *ex parte* under this Rule, where there has been an appeal against decree passed *ex parte* under this Rule and if the appeal is disposed of on any other ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this Rule for setting aside *ex parte* decree.

[10]. In the present case, the appellant has exhausted the remedies under Order 9 Rule 13 CPC right upto the Apex Court, then he filed the appeal against the *ex parte* decree dated 10.03.2004. Even revision filed against order of dismissal by the Appellate Court was withdrawn and the present appeal has been filed which is apparently not maintainable. It appears that on crucial juncture either the case of the appellant has been dismissed or the same has been withdrawn by the appellant for no obvious reasons.

[11]. In view of these facts on record, no indulgence can be granted in the present appeal, however appellant would be at liberty to assail the order dated 19.07.2011 passed by the lower appellate Court in accordance with the law.

[12]. Dismissed with the aforesaid observation.

September 18, 2015
Atik

(RAJ MOHAN SINGH)
JUDGE