

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

COCP No. 2211 of 2015 (O&M)

Date of decision : 25.4.2016

Smt. Kamla Devi

.. Petitioner

versus

Dr. Nandita Kaushik

.. Respondent

Coram: Hon'ble Mr. Justice Rajesh Bindal

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

Rajesh Bindal, J.

This is an unfortunate avoidable situation, which has been created by the respondent by not complying with the order passed in its letter and spirit.

Learned counsel for the petitioner submitted that the petitioner filed a civil suit for specific performance on the basis of agreement to sell on 16.3.2004. Despite service, the defendant did not appear. He was proceeded against ex-parte and finally the suit was decreed by the trial court on 15.6.2005. In execution, the sale-deed was also executed in favour of the petitioner on 13.3.2007. Thereafter, the defendant filed application on 29.10.2011 under Order 9 Rule 13 CPC for setting aside of ex-parte decree dated 15.6.2005 i.e. after a delay of more than 5 years and 4 months. Along with the application, another application seeking condonation of delay in filing thereof was also filed. Though in terms of settled law, firstly the Court was required to consider the application for condonation of delay in filing the application for setting aside the ex-parte decree but when all the issues framed were sought to be tried together, the petitioner challenged the order dated 12.6.2012 by filing Civil Revision No. 5424 of 2012, which was disposed of by this Court on 15.10.2012, directing that issue nos. 1, 2 and 4 be decided first and thereafter, if necessary, issue no. 3 be decided. Despite this specific order passed on consent of learned counsel for the parties, still the learned Court below is proceeding further to decide all the issues together. Hence, there is violation of the directions issued by this Court.

On 23.9.2015, this Court sought report from the respondent on the issues raised in the petition. The same has been received and perused.

The undisputed facts on record are that in a suit for specific performance on the basis of agreement to sell filed on 16.3.2004 by the petitioner, the defendant was proceeded against ex-parte. Finally ex-parte decree was passed on 15.6.2005. In execution even the sale-deed was also executed in favour of the petitioner on 13.3.2007. The application for setting aside of ex-parte decree was filed on 29.10.2011 along with an application seeking condonation of delay of more than 5 years and 4 month in filing thereof. In response, the stand of the petitioner was that the defendant was duly served and even represented by a counsel initially, however, thereafter none appeared, hence, the Court had no other option but to proceed the defendant ex-parte.

The learned court below after considering the pleadings of the parties and also considering the contention raised in application seeking setting aside of ex-parte decree and application seeking condonation of delay in filing thereof, on 12.6.2012 framed the following issues:-

1. Whether the applicant/ defendant has been able to furnish “sufficient cause” for not filing the application under Order 9 Rule 13 CPC within period of limitation? OPA
2. If issue no.1 is proved in affirmative, then whether delay in filing application under Order 9 rule 13 CPC is liable to condoned? OPA
3. Whether ex-parte judgment and decree dated 15.06.2006 and ex-parte order dated 28.07.2004 are liable to be set aside on the grounds set out in the application under Order 9 Rule 13 CPC? OPA
4. Whether application under Order 9 rule 13 CPC is barred by limitation? OPA
5. Relief.”

The prayer of the petitioner for deciding the application for condonation of delay in filing the application for setting aside the ex-parte decree first, was not considered vide order dated 12.6.2012. The petitioner filed Civil Revision No. 5424 of 2012 in this Court challenging the order

dated 12.6.2012 passed by the learned Court below in the aforesaid revision. This Court on 15.10.2012, disposed of the revision petition by passing the following order:-

“This petition has arisen against an order dated 12.06.2012 whereby the learned trial Court has framed four issues in two applications one under 5 of the Limitation Act and the other one under Order 9 Rule 13 C.P.C.

After arguing for some time, learned counsel are agreed that a direction be issued to the learned trial court to decide issues No. 1, 2 and 4 and thereafter, if necessary, take evidence and decide issue No. 3. Ordered accordingly. Petition stands disposed of in the above terms.”

Despite the aforesaid order passed by this Court, the case is being proceeded by the respondent in a strange manner. The learned court below presided over by the respondent, on 21.7.2015 passed the following order:-

“4. Perusal of the file reveals that issues in the present petition under Order 9 Rule 13 CPC have already been framed. The issue no.2 is very specific i.e. “If issue no.1 is proved in affirmative, then whether delay in filing application under Order 9 Rule 13 CPC is liable to condoned”. The onus of this issue is upon applicant i.e. Sultan Singh to discharge this burden. Therefore, when specific issue with regard to limitation is framed, then the court cannot proceed with deciding the application under Section 5 of the Limitation Act. Moreover, the court is complying with the order of Hon'ble High Court dated 15.10.2012. The trial court has been given direction to try issues no. 1, 2 and 4 and thereupon if necessary to take evidence and decide issue no.3. Therefore, as per the orders of Hon'ble High Court, the file should be fixed for the evidence to be led by both the parties. Moreover, issue no. 3 is that “Whether exparte judgment and decree dated 15.06.2006 and exparte order dated 28.07.2004 are liable to be set aside on the grounds set out in the application under

Order 9 Rule 13 CPC. Therefore, the parties are directed to lead entire evidence of the entire issues shall be decided simultaneously as the findings of issues no. 1 and 2 shall effect the issue no. 3 also. Moreover, there is specific issue no.4 with regard to limitation. Therefore, in view of the detailed discussion above, the present application under Section 5 of the Limitation Act is dismissed. Now, case is adjourned to 04.08.2015 for leading evidence.” (emphasis supplied).

A perusal of the aforesaid order shows that on the one hand, the application filed by the defendant under Section 5 of the Limitation Act was dismissed and on the other hand, the case was adjourned further for leading evidence on all the issues being inter-connected.

In the comments sent by the respondent, it has been stated that no observation has been made by this Court to decide the application for condonation of delay first. It is denied that the petitioner misinterpreted the order. Further it is claimed that the application for condonation of delay was decided on 21.7.2015 after discussing the order of this Court at length. It is claimed that the trial court had tried to implement the order of this Court, as interpreted by her after applying judicial mind. But the facts speak otherwise.

A perusal of the issues framed shows that the issue no.1 was, 'Whether the applicant/ defendant has been able to furnish “sufficient cause” for not filing the application under Order 9 Rule 13 CPC within period of limitation.' Connected therewith is the issue no. 3 i.e. in case there was sufficient cause, whether the delay in filing the application is liable to be condoned. In similar line is the issue no. 4 i.e. whether the application under Order 9 Rule 13 CPC was barred by limitation. Issue no.3 is whether the ex-parte judgment and decree deserves to be set aside on the grounds mentioned in the application. This Court, as already referred to above, on consent of both the learned counsel for the parties, directed that issues no. 1, 2 and 4 pertaining to limitation be decided first and thereafter, if necessary, take evidence and decide issue no.3. Though it is claimed by the respondent that she applied her judicial mind while interpreting the order, whereas the order passed was plain and simple where no interpretation was required by

the respondent, for which otherwise also she may not be competent to do so. The order passed by the learned court below on 21.7.2015 on the one hand directed that all the issues being interconnected will be decided together, as is evident from the order already extracted above, and on the other hand, in the next line, it is mentioned that application under Section 5 of the Limitation Act is dismissed. If the application under Section 5 of the Limitation Act was dismissed that means issue nos. 1, 2 and 4 stood decided and nothing remained to be decided as such in view of the clear observations made by this Court that issue no. 3 was to be decided thereafter, if necessary, by taking evidence.

For the reasons mentioned above, in my opinion, the Court below has not strictly complied with the directions issued by this Court, it is warned to be careful in future. The petition is disposed of accordingly.

Copy of the order be also placed before the Hon'ble Administrative Judge of Sessions Division, Kaithal.

25.4.2016
vs

(Rajesh Bindal)
Judge

(Refer to Reporter)