

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

CR No. 2640 of 2015 (O&M)

Date of decision: 21.01.2016

Amar Singh and another

... Petitioner

versus

Varinder Kumar Gupta

.... Respondent

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Gaurav Mohunta, Advocate for the petitioners.

Mr. Jasdev S. Mehndiratta, Advocate for the respondent.

K.Kannan, J. (ORAL)

The revision petition is against the dismissal of an application for setting aside the ex-parte decree before the Trial Court. The suit by the respondent was for specific performance of an agreement said to have been executed by the defendant on 25.06.2002. Admittedly, after the institution of the suit, the sole defendant had died and this was brought to the notice of the Court. The statement had already been filed by the defendant denying the agreement, but, the plaintiff instead of taking steps to implead the LRs, allowed the benefit of amendment under Punjab Amendment Order 22 Rule 4 that made possible for continuing the suit as if the deceased defendant was alive. After the decree was passed on 18.01.2008, the son filed an application on 02.06.2008 contending that he came to know that an ex-parte decree

had been passed at time when he was at Bank for some repayment of loan and when the plaintiff was giving out that he had obtained a decree. The application for setting aside the ex-parte decree brought at the instance of the son was contested on the ground that there was no necessity to implead the legal representatives and the statutory provision of Order 22 Rule 4 empowered the Court to grant a decree even without impleading the legal representatives. It was also contended that the plea of the defendant son that he came to know about the ex-parte decree on 13.08.2005 cannot be true because on that day the plaintiff was in a foreign country. It was also the contention that the agreement which was sued up on had been contested by the 2nd petitioner-husband and, therefore, he must have known about the agreement in the suit. These objections prevailed on the Presiding Officer to dismiss the petition. The Appellate court confirmed the same.

I find the reasoning of the Court below as erroneous and it has failed to exercise the discretion which he ought to have for a full-fledged contest. The Punjab state amendment that allows for deeming a dead person alive must be limited to a situation where the presence of deceased himself would not have made a difference. This is seen from the fact that even Order 22 Rule 4(5) the Court would examine whether there was merit to be canvassed if he had been alive for taking decision of whether the decree in spite of person being dead could be passed by deeming the person to be alive.

If the only defendant dies, it will be an utter travesty of justice if the plaintiff could march forth and secure a decree as though it was decided on contest. It will be wrong to presume that the defendant who has contested the plaintiff's claim by filing a written statement would have given up his right which he has asserted in the written statement even after he had been alive. Consequently, if on the defendant's death, a legal representative comes on record seeking to prosecute the case, the pre-dominant concern for the court must be to see whether there was anything particular on the record that could justify the non-impleadment or the legal representative of the defendant himself who ought to have been known about the pendency of the suit, did not implead himself which was possible by means of the state amendment. I cannot make any assumption that by the fact that the 2nd petitioner-husband knew about the agreement, he should also have known about the pendency of the suit against the defendant. It is stretching a logic little too far to force all LRs of the defendant to know about the burden on the case against the defendant and the deceased would have given up the defence already taken by him during his lifetime.

I will make no big issue about the fact that the defendant's assertion that he saw the plaintiff at the Bank was any substantial issue for consideration. The mis-conduct of the plaintiff in securing a decree even after knowing that the defendant was dead far outweighs than an alleged untruth in the defendant in stating that he had seen the plaintiff

on 30.05.2008 at the Bank.

The order passed is erroneous and it is set aside. The ex-parte decree is ordered to be set aside and the suit shall be taken up by the Court and disposed of in accordance with law after affording to the parties opportunity to give evidence. I had earlier directed the petitioners to deposit Rs. 25,000/- before the Court below at the time of ordering notice to prove his *bonafides*. The amount is directed to be refunded to the petitioner.

21.01.2016

kv

(K.KANNAN)

JUDGE