

CR-502-2014

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IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

CR-502-2014

Date of decision : 08.02.2016

Parmeshwari alias Panmeshwari

... Petitioner

Versus

Rajpal

... Respondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr.Sumit Sangwan, Advocate
for the petitioner.

Mr.Jorawar Singh, Advocate
for the respondent.

REKHA MITTAL. J.

The present petition, filed by invoking Article 227 of the Constitution of India, lays challenge to order dated 13.12.2013 (Annexure P1) passed by the Additional District Judge, Bhiwani, accepting the appeal of the respondent and setting aside the judgment dated 24.01.2013 passed by the Additional Civil Judge (Senior Division), Charkhi Dadri dismissing the application of the respondent under Order 9 Rule 13 of the Code of Civil Procedure (in short 'CPC') for setting aside the ex-parte judgment and decree dated 18.07.2003.

A brief backdrop of the case is that the petitioner filed a suit for recovery of ₹95,000/- along with interest against the respondent. The respondent was proceeded against ex-parte vide order dated 30.10.2002.

On conclusion of trial, ex-parte judgment and decree dated 18.07.2003 was passed in favour of the respondent.

The respondent filed an application under Order 9 Rule 13 CPC for setting aside ex-parte order dated 30.10.2002 as well as ex-parte judgment and decree dated 18.07.2003. The trial Court after seeking reply of the appellant and filing of rejoinder by the respondent, framed the following issues for determination :-

- 1. Whether the ex-parte judgment and decree dated 18.07.2003 is liable to be set aside on the grounds taken in the application? OPA*
- 2. Whether the petition is within limitation? OPA*
- 3. Whether the application is not maintainable in the present form? OPR*
- 4. Relief.*

After having heard counsel for the parties in the light of the materials on record, the learned trial Court determined issues No.1 to 3 against the respondent. As a consequence, the application filed by the respondent was ordered to be dismissed with costs.

Feeling aggrieved by the order passed by the trial Court, the respondent preferred an appeal which came to be decided by the Additional District Judge, Bhiwani and the order passed by the trial Court was set aside and the ex-parte judgment and decree dated 18.07.2003 were ordered to be set aside with a direction to the trial Court to give an opportunity to the respondent to file the written statement and thereafter to proceed with the case, in accordance with law.

Feeling aggrieved from the judgment passed by the Court in appeal, the present petition has been preferred by Smt.Parmeshwari (plaintiff in the suit).

The sole submission made by counsel for the petitioner is that the appellate Court committed a gross error in deciding the question of limitation in favour of the respondent by holding that in the attending circumstances, delay in filing the present application is liable to be condoned by invoking powers under Section 5 of the Indian Limitation Act 1963. It is vehemently argued that the petitioner filed an application for execution of ex-parte judgment and decree dated 18.07.2003 and in those proceedings, the respondent appeared through counsel on 16.10.2004, thus the respondent gained knowledge of ex-parte judgment and decree latest by 16.10.2004. The application filed by the respondent on 19.10.2005, more than one year from the date of knowledge is clearly barred by limitation.

The Court in appeal has misdirected itself by invoking the provisions of Section 5 of the Indian Limitation Act on the ground that there was no due and proper service of the respondent.

Counsel for the respondent has urged that technicalities of procedure cannot be allowed to stand in the way of substantial justice, therefore, the appellate Court has rightly condoned delay by invoking the provisions of Section 5 of the Indian Limitation Act 1963. In support of his contention, he has referred to judgment of the Allahabad High Court

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I have heard counsel for the parties and perused the records.

The order passed by the trial Court initiating ex-parte proceedings on 30.10.2002 merged in the ex-parte judgment and decree dated 18.07.2003 passed by the trial Court. Counsel for the petitioner has not challenged the findings of the Court in appeal that there was no due and proper service of the respondent. However, he has a serious grievance to express in regard to the Court in appeal deciding the question of limitation in favour of the respondent by invoking the provisions of Section 5 of the Limitation Act. Admittedly, no application was filed by the respondent for condoning delay by invoking Section 5 of the Indian Limitation Act. To bring the application within limitation, the same is required to be filed within 30 days from the date of passing of the decree or 30 days from the date of knowledge, whichever is latter.

The question that arises for consideration is whether the application filed by the respondent for setting aside ex-parte judgment and decree is within limitation. The answer, at the outset, appears in the negative. Counsel for the respondent has not disputed that the respondent caused appearance through his counsel in execution proceedings qua the ex-parte judgment and decree on 16.10.2004, meaning thereby that the respondent came to know about the ex-parte judgment and decree either on 16.10.2004 or prior thereto. The application for setting aside was filed

on 19.10.2005, more than one year after knowledge of the ex-parte judgment and decree. In the given circumstances of the case, the application filed by the respondent is clearly barred by limitation, as has been so held by the learned trial Court. Hence, the application being barred by limitation is liable to be dismissed even though the findings recorded by the Court in appeal that there was no proper or due service of the respondent are sustained.

In view of what has been discussed hereinabove, the petition is allowed, the impugned order dated 13.12.2013 is set aside and the application filed by the respondent for setting aside the ex-parte judgment and decree dated 18.07.2003 is dismissed with costs.

(REKHA MITTAL)
JUDGE

February 08, 2016.
Davinder Kumar