

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

CR No. 748 of 2015 (O&M)

Date of decision: 10.03.2016

Daljit Singh and others

... Petitioners

versus

Amar Kaur @ Amro and others

.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Sanjeev Pandit, Advocate and

Mr. Balbir Kumar Saini, Advocate for the petitioners.

Mr. Mansur Ali, Advocate

for respondent nos. 1 to 3, 5 to 8.

K.Kannan, J. (ORAL)

The suit for specific performance decreed on 30.04.2001 was sought to be set aside through defendant Nos. 4 to 8 on a plea that they had not been served. They were daughters and widow of deceased Jagga Singh. The defendant Nos. 1 to 3 who were the sons had been served and they had contested unsuccessfully the claim for specific performance.

The application for setting aside the decree was brought on a plea that they had been living away in their respective husband's houses and the 8th defendant-mother was living along with one of them. The Court found that the mother had actually been served in suit and her plea that she had not been served was not correct. As regards the other defendants namely, D4 to D7, the Court held that if they must have known about the decree in May 2007 when they had seen the *fard*

jamabandi entries and consequently the petition filed 66 days after the said date was barred by limitation.

The Appellate Court set aside the order and allowed for the decree to be set aside as regards the applicant's holding that D4 to D7 had not been admittedly served and consequently their own statement of when they came to know must give a justification for allowing for a contest on merits. It is against this order that this revision has been filed by the plaintiff-decree holder.

Learned counsel argued that the trial Court was justified in finding the point of limitation against the applicants and the defendant Nos. 1 to 3 who are the brothers had contested the case and lost in their defence. The applicants have been set up by the defeated defendants to prevent the plaintiff from enjoying the fruits of the decree peacefully. He pleaded for restoration of the trial Court's findings also with reference to the undisputed fact that the mother Balbir kaur had been served and there was no justification for setting aside the decree as regards her interest.

The counsel pointed out to me two other aspects which have not been dealt with by the Courts below, namely, the applicants who are the defendant Nos. 4 and 5 and the mother who is the 5th applicant have all expired during the pendency of the application and application for imleadment have been brought by the defendant Nos. 1 to 3 themselves as legal representatives claiming under some bequests. Since defendant Nos. 1 to 3 already suffered a decree whatever right

which they obtained from the deceased defendant Nos. D4, D5 and D8 will feed the title by estoppel in the manner stated under Section 43 of the Transfer of Property Act. It is also contended that defendant Nos. 4 to 8 will be bound by the fact that defendant Nos. 1 to 3 had actually signed the agreement and had promised to secure the conveyance from them. Consequently in terms of Section 13 of the Specific Relief Act, the enforcement will be available against defendant Nos. 4 to 8 by compelling defendant Nos. 1 to 3 to effect the sale. Indeed that was the purpose of impleading to D4 D8 also in suit and the benefit of decree cannot, therefore, be upset by any order setting aside the same.

The effect of death for desolution of interest of defendant Nos. D4, D5 and D8 during the pendency of the application, cannot be adjudicated now finally and whether the alleged acquisition of interest subsequently by defendant Nos. 1 to 3 will feed the title by the estoppel or not will be a matter of consideration only if the suit were to be tried again. Presently, the only relevant issue would be whether defendant Nos. D4 to D8 had been served and whether there was any justification for setting aside the decree passed ex-parte against them.

The 8th defendant-mother had been served in suit itself even before the decree but in the application to set aside the decree, it was made out as though she had not been served was clearly proved to be wrong. There was no justification for allowing an application filed at her instance. The trial Court's finding as regards the service of summon in suit has not been set aside even by the Appellate Court. The

application filed at her instance as the 5th applicant ought to have been dismissed. Since she has died, the action brought at the instance of the LR cannot also survive. However, with reference to the claim of D4 to D7 that they have not been served it was not assailed even by the Appellate Court. It was only trying to find that even if one of them had obtained *fard jamabandi* in the month of May 2007 she ought to have had the knowledge of the exparte judgment to treat the petitioners as barred by limitation.

To me it seems to be a non-sequeter that any entry in jamabandi could bring a knowledge of the decree at a particular date. She has stated that only in July 2007, she had sought the counsel to make enquiries in Court and after securing the copy of the decree and judgment she had moved an application in August 2007 within 30 days along with others. I would take this statement to be sufficient to sustain the application as within the time. In so doing, I mind the fact that D4 to D7 were admittedly not signatories to the agreement and if a decree had been obtained even against them, there is surely a tenable defence that is possible if the case were allowed to be decided on merits. The contention that defendant Nos. 1 to 3 have a duty to compel defendant Nos. 4 to 7 to join them in execution of sale cannot be decided now and it will be open to the plaintiff to adduce sufficient evidence of whether defendant Nos. 4 to 7 had at any time authorised defendant Nos. 1 to 3 to sell the property even as regards their share and vested in them any authority to agree to sell the property to bind their shares as well. The

Court will frame an appropriate issue for the applicability of Section 13 of the Specific Relief Act in the manner contended before me.

The order of the Lower Appellate court is modified only to the extent of setting aside the order in allowing for the 8th defendant and the legal representative to defend the suit by having the decree set aside. In the light of my finding that D8 had been served with notice, prior to the decree, the petition filed at her instance is ordered to be dismissed. The decree is set aside only as against defendant Nos. D4 to D7 and the surviving defendants amongst them namely D6 and D7 shall file the written statement, if not already done, within a period of 30 days from the date of the receipt of the copy of the order on the date fixed by the trial Court. If the statement is not filed, the Court is entitled to proceed to dispose of the suit in accordance with law including even an order to strike off the defence. The suit will also consider the effect of the so called bequest said to have been made to defendant Nos. 1 to 3 and the effect of Section 43 of the Transfer of Property Act.

The counsel for the petitioner refers me to the judgment of Division Bench in Smt. Dev Bala Sehgal Vs. Devinder Pal Sehgal, 2001 (4) RCR Civil 757 as supporting his plea that the application to set aside the decree is barred. The Court was holding that restoration of suit cannot be made by bypassing the law of limitation and I do not find any reason to apply this judgment, for, I have held that when the applicants had not been served with summons in suit, it is the

knowledge of the applicant to this material. I cannot presume that merely because the brothers have been served they must also know about the suit. The counsel has also referred to Yeshwant Govind Shivkar and others Vs. Bhaskar Chavan and others, 2011 (8) RCR Civil 55 that a mere irregularity in service cannot be a ground to set aside the ex-parte decree. I found no error in the service of summons. On the other hand, I have found it to be case of non-service and applied an averment regarding the knowledge of the decree as starting point for limitation for filing an application to set aside the ex-parte decree.

For the sake of completion, I must observe that a particular line of reasoning adopted by the trial Court that the application had been filed to set aside only an ex-parte decree and not against the judgment is not correct. The decree is a formal expression of what the judgment contains and even the language of Order 9 Rule 13 CPC makes only a reference to an application to set aside the ex-parte decree and does not make explicit an expression to set aside the ex-parte judgment. The application was correctly framed and the ground taken by the Court to decline the ex-parte judgments against defendant Nos. 1 to 4 and 4 to 8 was not correct.

The impugned order is modified only as regards the interest of the mother (D8). In other respects the civil revision is dismissed.

(K.KANNAN)
JUDGE

10.03.2016

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