

207

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-1797-2012 (O&M)
Date of decision : 27.05.2016

Gurbachan Singh

... Appellant

Versus

Namdar Singh (deceased through LRs) and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Neeraj Madan, Advocate
for the appellant.

Mr. S.K. Arora, Advocate
for respondent No.1.

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?

AMIT RAWAL, J. (ORAL)

The appellant-defendant No.1 is aggrieved of the *ex parte* judgment dated 10.11.2009, upheld by the lower Appellate Court, whereby the suit for specific performance of agreement to sell dated 04.11.2003 has been decreed.

Mr. Neeraj Madan, learned counsel appearing on behalf of the appellant-defendant submits that the aforementioned suit for specific performance was filed on 26.04.2005 and notice was issued on 10.05.2005. Without recording the satisfaction of service, appellant-defendant No.1 was proceeded *ex parte*. Though the judgment and decree is in respect of the area measuring 12 kanals against 16 kanals, for, a sale deed dated

27.05.2004 proceeded by an agreement to sell dated 09.05.2002 in favour of the father of defendant No.2 has been set aside and remaining area measuring 4 kanals has been upheld. This aspect has not been noticed by the lower Appellate Court.

Mr. S.K. Arora, learned counsel appearing on behalf of respondent No.1-plaintiff submits that the appellant-defendant No.1 is a very clever and a criminal minded person as he has also executed various other sale deeds and he was aware of the agreement to sell, much less, pendency of the suit and intentionally, he did not put his appearance despite the service effected upon his wife. No evidence has come on record, much less, additional evidence along with the appeal that Durgo Bai was not his wife and therefore, it tantamounts to putting clock back, thus, urges this Court for affirming the findings, under challenge.

Mr. Neeraj Madan, in rebuttal submits that the following substantial questions of law would arise for determination.

1. Whether order dated 10.05.2005 of the trial Court ordering the *ex parte* proceedings against the appellant-defendant No.1 is legal and justified in law.
2. Whether the judgment and decree of the Courts below is sustainable in the eyes of law.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is a merit in the submissions of Mr. Neeraj Madan. For the sake of brevity, the order dated 10.05.2005 reads thus:-

"Present : Counsel for the plaintiff.

Shri G.K. Jindal, Advocate for defendant No.2.

Defendant No.2 has been served for today. Shri G.K. Jindal, Advocate has appeared on behalf of defendant No.2 and filed vakalatnama. Summons of defendant No.1 Gurcharan Singh received back with the report that he was not available in the house and the summons were handed over to his wife Durgo Bai who was present in the house. Report bears the thumb impression of Durgo Bai. Therefore, it is valid service. Case called several times but none appeared on behalf of defendant No.1. Therefore, defendant No.1 is proceeded against ex parte. Now to come up on 17.05.2005 for filing the written statement by defendant No.2".

The order aforementioned reveals non-satisfaction of the avoidance of the service. Service upon Durgo Bai, in the absence of the attestation or any evidence, as to whether Durgo Bai was the wife, has been recorded to be valid one and in this regard, the appellant-defendant No.1 has been proceeded *ex parte*. The Code of Civil Procedure itself provides that before taking the steps for proceeding *ex parte*, there has to be a satisfaction with regard to the willful avoidance of refusal of the notice, I am of the view that the alleged reasoning given by the trial Court in passing the *ex parte* proceedings is neither here and there, much less, perverse.

During the course of arguments, Mr. Neeraj Madan, submits that the factum of the *ex parte* judgment and decree acquired immediately thereafter and the appeal was filed within the time frame. This aspect has not been noticed by the lower Appellate Court.

Mr. S.K. Arora, has informed that an application under Order 9 Rule 13 CPC has also been filed which is not permissible in law as the remedy is either to file appeal or file application.

I am of the view that the Courts below ought to have given an

opportunity by fixing the time line, to the appellant-defendant No.1 to contest the suit. Much time has been taken in the appeal and in this Court, therefore, I deem it appropriate to impose cost upon the appellant-defendant No.1 for allowing him to contest the suit on merits.

Accordingly, the judgment and decree of the Courts below and as well as the order dated 10.05.2005, are hereby set aside, subject to the payment of the cost of ₹ 25,000/-, in essence, the suit is restored to its original number.

The trial Court shall afford one opportunity to file written statement within a period of 15 days from the date of receipt of the certified copy of the order and another 15 days for rejoinder and thereafter, shall give four-four effective opportunities to the each parties to lead evidence and thereafter, decide the suit as expeditiously as possible, preferably within a period of 8 months.

Resultantly, the appeal disposed of in the aforementioned terms.

27.05.2016
yogesh

(AMIT RAWAL)
JUDGE