

In the High Court of Punjab and Haryana at Chandigarh

RSA No. 5060 of 2011(O&M)
Date of Decision:21.3.2016

Avtar Singh and another

---Appellants

vs.

Amarjit Singh and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr.R.L.Batta, Senior Advocate
with Mr. Nikhil Batta, Advocate
for the appellants

Mr. M.L.Saggar, Senior Advocate
with Mr. Gaurav Grover, Advocate
for the respondents

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

Rekha Mittal, J.

The present appeal has been directed against the consistent findings recorded by the courts below whereby suit filed by Amarjit Singh-respondent No. 1 was decreed by the trial court and the appeal preferred by Avtar Singh and Balwinder Kaur legal representatives of Kirpal Singh (defendant No. 1 in the suit), has been dismissed.

Amarjit Singh son of Kartar Singh filed a suit for specific performance of an agreement dated 4.7.1998 in respect of land measuring

60 kanals 8 marlas, detailed in the head note of the plaint alongwith all rights appurtenant thereto such as share in taur, chah, shamlat, passage and electric motor of 10 BHP and 5 BHP along with connection and security deposits etc. for a sale consideration of Rs. 7,50,000/- out of which an amount of Rs. 5,00,000/- was paid as advance money as per agreement dated 4.7.1998. The said agreement was alleged to be executed by Sh. Kirpal Singh through his attorney namely Manpreet Kaur wife of Sh. Gurpreet Singh, real brother of Amarjit Singh plaintiff.

Kirpal Singh (since deceased) filed the written statement vehemently contesting claim in regard to his liability to execute the sale deed on the basis of agreement to sell propounded by the plaintiff/respondent. It was pleaded that a fraud has been played upon the answering defendant by the plaintiff in connivance with defendant No. 2. He raised certain legal objections in regard to suit being barred under Order II Rule 2 of the Code of Civil Procedure (for short "CPC") and the plaintiff being guilty of concealing material facts from the Court. During pendency of the suit, Kirpal Singh was proceeded against ex parte on 5.3.2004 and eventually suit filed by the plaintiff-responent was decreed vide judgment and decree dated 28.4.2004 passed by the Additional Civil Judge, Khanna.

The judgment and decree passed by the trial court was challenged in appeal by Avtar Singh and Balwinder Kaur (son and daughter respectively of Sh. Kirpal Singh who passed away on 6.4.2004). The first appellate Court concurred with the findings recorded by the trial court and dismissed the appeal.

The substantial question of law which arises for adjudication is,

“whether it was incumbent upon the trial court to issue a notice to Sh. Kirpal Singh after counsel representing him pleaded no instructions on 5.3.2004, before initiating ex parte proceedings?”

Counsel for the appellants has submitted that the suit was instituted by the plaintiff on 24.4.1999 and the same was contested by defendant No. 1 tooth and nail who raised serious allegations that the agreement to sell propounded by the plaintiff is the result of fraud played upon him. It is further argued that as counsel for Sh. Kirpal Singh pleaded no instructions on 5.4.2003, the trial court was obligated to issue a notice to the contesting defendant before initiating ex parte proceedings. It is further argued that the appellate court committed a serious error rather illegality in rejecting plea of the appellants in this regard, in view of observations made in para 13 of the judgment, which cannot be allowed to sustain. In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court of India **Malkiat Singh and another vs. Joginder Singh and others AIR 1998 Supreme Court 258.**

Counsel for the contesting respondents would urge that counsel representing Sh. Kirpal Singh pleaded no instructions by making a statement qualified by the fact that despite various letters and messages, defendant has not turned up. He also placed on file a copy of letter dated 23.1.2004. It is further argued that the learned trial court after considering the statement made by Sh. S.K.Khanna, Advocate pleading no instructions, recorded its satisfaction in right perspective before initiating ex parte proceedings against the defendant. It is further argued that once the trial court has applied its mind and exercised its judicial discretion not to issue

further notice to the defendant, neither any fault can be found in the order dated 5.3.2004 passed by the trial court nor the appellants can derive any advantage to their contentions from the judgment in **Malkiat Singh and another's case (supra)**.

Another submission made by counsel is that the court in appeal, on a detailed consideration of this issue has rightly held against the appellants, therefore, plea raised by the appellants is without any merit and liable to be rejected. In addition, it is submitted that as Sh. Kirpal Singh defendant No. 1 passed away on 6.4.2004 during pendency of proceedings before the trial court, it was for the legal representatives to come forward to be impleaded as such and contest the proceedings.

I have heard counsel for the parties, perused the paper book particularly the order dated 5.3.2004 passed by the trial court and the judgment passed by the appellate court.

There is no dispute that the suit instituted in April 1999 was contested by Sh. Kirpal Singh through his counsel Sh. S.K.Khanna, Advocate. It is also an admitted fact that Kirpal Singh filed the written statement seriously contesting claim of the respondent-plaintiff and raised a plea that the agreement is the result of fraud played upon him. Sh. S.K.Khanna, Advocate made a statement pleading no instructions. A relevant extract from order dated 5.3.2004 passed by the trial court reads as follows:-

“Three Pws are present for cross examination. Sh. S.K.Khanna, Advocate has suffered statement pleading no instruction on behalf of the defendant. He has stated

that despite various letters and messages defendants have not turned up. He has also placed on file a copy of letter dated 23.1.2004. In view of such statement of Sh. S.K.Khanna, Advocate it appears that defendants are not interested in contesting the present suit. When defendant has not approached his counsel despite letters and messages, it will be futile and wastage of time of court to issue notice to defendants. As such they are proceeded against ex parte. To come upon 9.4.2004 for ex parte evidence of plaintiff.”

Though the trial court has made a reference that a copy of letter dated 23.1.2004 has been placed on record by Sh. S.K.Khanna, Advocate, but it is not clear as to by what means any such letter dated 23.1.2004 was sent by Sh. S.K.Khanna, Advocate to defendant Kirpal Singh. It is further not clear as to the date on which the letter was posted and the address at which the letter was sent. As the trial court did not bother to examine these material aspects, the alleged satisfaction recorded by the trial court that the defendant is not interested in contesting the suit, basis of initiating ex parte proceedings, cannot be upheld. There is nothing on record suggestive of the fact that after pleading no instructions by Sh. Khanna Advocate on 5.3.2004, he sent an intimation to his client with regard to his having pleaded no instructions and, therefore, not representing the defendant. One thing more to be noted is that on 5.3.2004, three witnesses of the plaintiff were present for cross examination but counsel for the defendant did not cross examine the witnesses and rather pleaded no instructions. There is no justification

as to why counsel for the defendant did not cross examine the witnesses when otherwise presence of the defendant was not required for the same on 5.3.2004. In this view of the matter, I find merit in contention of the appellants that initiation of ex parte proceedings against Sh. Kirpal Singh vide order dated 5.3.2004 in the given circumstances is illegal.

In **Malkiat Singh and another's case (supra)**, the appellants had engaged a counsel to defend them in the civil suit. Counsel for the appellants pleaded 'no instructions' but the court did not issue any notice to them who were admittedly not present on the date when their counsel reported no instructions in the court. It was noticed by the court that it is nobody's case that the counsel informed them after he had reported no instructions to the Court. The appellants only came to know about the order dated 18.11.1991 and the ex parte decree dated 8.12.1992 when they approached their counsel on 6.6.1992. They filed an application under Order XI Rule 13 CPC within four days thereafter. The Hon'ble Supreme Court in para 7 has held, quoted thus:-

“.....A perusal of the record also reveals that the appellants were neither careless nor negligent in defending the suit. They had engaged a counsel and were following the proceedings. In this fact situation, the trial court, which had admittedly not issued any notice to the appellants after their counsel had reported no instructions, should have, in the interest of justice, allowed that application and proceeded in

the case from the stage when the counsel reported no instructions. The appellants cannot, in the facts and circumstances of the case, be said to be at fault and they should not suffer. In taking this view, we are fortified by a judgment of this Court in *Tahil Ram Issardas Sadarangani & Ors. Vs. Ramchand Issardas Sadarangani & Anr.* (1993 (Supp.) 3 SCC 256) wherein the bench opined:-

"It is not disputed in the present case that on March 15, 1974 when Mr. Adhia, advocate withdrew from the case, the petitioners were not present in Court. There is nothing on the record to show as to whether the petitioners had the notice of the hearing of the case on that day. We are of the view, when Mr. Adhia withdrew from the case, the interests of justice required, that a fresh notice for actual date hearing should have been sent to the parties. In any case in the facts and circumstances of this case we feel that the party in person was not at fault and as such should not be made to suffer."

When the facts and circumstances of the present case are examined in the light of observations made in **Malkiat Singh and another's case (supra)**, I have no hesitation to hold that the trial court was

required to issue a notice to defendant Kirpal Singh as his counsel pleaded no instructions on 5.3.2004, the date on which the case was fixed for evidence of the plaintiff-respondent. It further appears to the Court that as Kirpal Singh passed away on 6.4.2004, there was less likelihood of his having received any communication from his counsel particularly in view of the observations made hereinbefore.

In view of what has been discussed hereinabove, the aforesaid question is answered in favour of the appellants. As a result, the appeal is allowed, the judgments and decrees passed by the courts below are set aside and the matter is remitted to the trial court for proceeding with the case from the stage, the ex parte proceedings were initiated against Sh. Kirpal Singh. The appellants may file an appropriate application for impleading them as legal representatives of Kirpal Singh that shall be decided by the court, in accordance with law.

(Rekha Mittal)
Judge

21.3.2016
paramjit