

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

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RSA 4733 of 2013

Date of decision: 11.01.2016

Ram Niwas

..... Appellant

Versus

Didar Singh and another

..... Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

-.-

Present: Mr. V K Jindal, Senior Advocate with
Mr. Amardeep Sheoran, Advocate
for the appellant

Mr. Ashish Aggarwal, Senior Advocate with
Mr. Kulwant Singh, Advocate
for the respondents

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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 lays challenge to the judgment and decree dated 11.10.2013 passed by the Additional District Judge, Karnal, affirming the ex-parte judgment and decree dated 21.05.2009 passed by the learned trial Court whereby suit filed by the respondents seeking specific performance of agreement dated 25.01.2007 has been allowed.

Facts relevant for disposal of the present appeal are that the respondents sought specific performance of agreement to sell dated 25.01.2007 qua the double storey shop-cum- house No. 21 (plot No. 16),

detailed in the plaint and in the alternative, prayed for recovery of Rs.17,90,000.00 along with interest @ 24% per annum from 25.01.2007 till recovery of the amount. The plea of the respondents is that the appellant vide writing dated 25.01.2007 on the letter pad of his firm namely M/s Kirori Mal Om Pal, Commission Agents in the presence of Gulzar Singh son of Gurbachan Singh, resident of Village Ballu, Gurbax Singh son of Raghbir Singh, resident of village Amupur had agreed to sell the suit property for a sale consideration of Rs.20,00,000.00 out of which Rs.12,90,000.00 towards the outstanding amount for the sale proceeds of crop sold by the respondents/plaintiffs to the appellant/defendant were adjusted and a sum of Rs.5,00,000.00 was paid by the respondents to the appellant in cash at the time of writing dated 25.01.2007 (hand written of the appellant). It was further averred that the appellant delivered possession of the suit property after getting a gift deed executed in his favour by other legal heirs, in the month of April, 2007 in the presence of said Gulzar Singh and Gurbax Singh. In July, 2007, when the respondents requested the appellant to get the sale deed executed, he started postponing the matter on one pretext or the other and rather filed a suit for permanent injunction just to grab the amount of Rs.17,90,000.00.

The suit filed by the respondents was decreed ex parte vide judgment and decree dated 21.05.2009 passed by the Additional Civil Judge, Karnal. Ram Niwas- appellant filed an application under Order 9 Rule 13 of the Code of Civil Procedure (in short, 'CPC') for setting aside the judgment and decree and the same did not find favour with the Court and

was disallowed. The appellant did not prefer an appeal against the order dismissing his application under Order 9 Rule 13 CPC, rather preferred the appeal against the ex-parte judgment and decree dated 21.05.2009 which has been disallowed by the impugned judgment and decree dated 11.10.2013 passed by the Additional District Judge, Karnal.

The sole submission made by counsel for the appellant is that the Court in appeal did not notice the contentions raised during the course of arguments nor adverted to contentions of the appellant in regard to challenge to the ex parte judgment and decree on the basis of merits. It is further argued that the learned appellate Court dismissed the appeal on the premise that after dismissal of the application filed by the appellant under Order 9 Rule 13 CPC and the said order having attained finality for want of challenge to the order dated 29.11.2010, the trial Court having not committed any error in dismissing the application under Order 9 Rule 13 CPC filed by the appellant and thus, findings of the lower Court are liable to be affirmed.

Mr. V K Jindal, Senior Advocate appearing on behalf of the appellant has invited attention of this Court to the grounds of appeal wherein the appellant has challenged the judgment and decree passed by the trial Court on merits as well though in the grounds of appeal there is also detailed reference to the ex-parte decree being not sustainable for want of opportunity to the appellant to defend his cause.

Mr. Ashish Aggarwal, Senior Advocate appearing on behalf of the respondents, on the other hand, has submitted that in the appeal

preferred by the appellant, it was prayed both in the head-note of the appeal as well as in the prayer clause that the judgment and decree passed by the trial Court be set aside and the matter be remitted to the trial Court for decision afresh after providing opportunity to the appellant to put up his defence and thereafter adduce evidence and thus entitling him to contest the suit on merits. It is vehemently argued that keeping in view the prayer made by the appellant before the appellate court, it can be safely inferred and accepted that the appellant challenged the judgment and decree passed by the trial Court only on the grounds available under Order 9 Rule 13 CPC. Another submission made by counsel is that the appellate court in para 18 has noticed that *‘no other point has been argued before me (the Court)’*, meaning thereby that the appellant or his counsel did not make any submission on merits of the case, thus, contention of the appellant that the Court did not advert to merits of the controversy is misconceived and liable to be rejected. In the alternative, it is argued that if the appellant has raised any contention on merits of the case to challenge the document/agreement dated 25.01.2007, the only course open to the appellant is to file an application for review before the very same court which has decided the appeal.

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

Before advertng to rival submissions made by counsel for the parties, it is appropriate to make a brief reference to certain admitted facts. Didar Singh and Gurcharan Singh sons of Natha Singh (respondents herein) filed a suit for specific performance of an alleged agreement to sell dated

25.01.2007. The said document has been marked as Ex.PW1/E and reads as under:-

Shri Ganeshya Namah

All subject to Karnal Jurisdiction

ST&CST No. KAR/IV/11506

Code: 01745

Dt 09.10.70

shop 94660

H.F.A. Lic No. 750

Resi 94582

M/s Karori Mal Om Pal

Commission Agents

Janta Mandi, NISSING (Karnal)

Ref.No.

Dated 25.01.07

*1790000.00= Didar Singh, Peont wale ke jama baaki rahe
hisab kiya 25.01.07 tak (sataran lakh nabbe hazar rupee
kewal*

Ram Niwas/25.01.07”

It is an admitted position of the case that the respondents had dealing with the appellant who was carrying on business of Commission Agent under the name and style of M/s Karori Mal Om Pal, Commission Agents, Janta Mandi, Nissing (Karnal). The appellant put in appearance in the suit but absented from the proceedings before submitting his defence. The suit filed by the respondents seeking specific performance of the aforesaid writing was decreed by the trial Court. The application filed by the appellant for setting aside the ex parte judgment and decree under Order 9 Rule 13 CPC was dismissed and the order in this regard has attained finality between the parties. The appeal was preferred by the appellant in December 2010 challenging the ex-parte order dated 15.05.2008 and ex parte judgment and decree dated 21.05.2009. The prayer made in the appeal is for setting aside the ex parte order dated 15.05.2008 and the ex-parte

judgment and decree dated 21.05.2009 thereby remanding the case to the trial Court, so that the same may be decided on merits. In the grounds of appeal in para 3, it has been averred that *the ex-parte order and ex parte judgment and decree under appeal is based upon surmises and conjectures and is not the result of correct appraisal of the pleadings, facts as well as documents pertaining the case before the learned lower Court.* In para 6 of grounds of appeal, the appellant has denied the factum of any agreement to sell between the parties and the relevant extract therefrom reads as follows:-

“6.it is very much clear from the face of the writing dated 25.01.2007 that it is not agreement to sell by any manner but it is strange on the part of the trial Court as to how the alleged writing dated 25.01.2007 was treated as agreement to sell of the shop-cum-house in question. It is further strange on the part of the trial court that writing dated 25.01.2007 has never been exhibited in the said case while the case was being decided by this Court.”

A plain reading of the judgment passed by the Court in appeal would show that in paras 1 to 4, there is reference to the facts on record in regard to the proceedings between the parties, the ex parte judgment and decree dated 21.05.2009, challenge to the said decree, dismissal of the application under Order 9 Rule 13 CPC, non challenge to the order dated 29.11.2010 whereby the application under Order 9 Rule 13 CPC was dismissed and further that the appellant has only challenged the ex parte order dated 15.05.2008 and the ex parte judgment and decree dated 21.05.2009. Thereafter in para 5 of the judgment, the Court has observed

that firstly the order dated 29.11.2010 is to be seen and until and unless that order is set aside, the case cannot be remanded to decide afresh. In para 6 to 8, there is reference to the pleadings of the parties in the proceedings under Order 9 Rule 13 CPC. Para 9 contains the issues framed in the said proceedings and in paras 10 and 11, there is reference to the evidence adduced in those proceedings. In para 12, reference has been made that the application under Order 9 Rule 13 CPC filed by the defendant/applicant was dismissed by the lower Court and feeling aggrieved with the impugned order passed by the learned trial Court, the appellant/defendant/applicant has filed this appeal. In paras 14 to 16, the Court has adverted to the issue if ex parte order dated 15.05.2008 and the ex parte judgment and decree dated 21.05.2009 are illegal, null and void. In para 14 in the opening lines, the Court has observed in the following terms:-

“After giving thoughtful consideration to the respective contentions of learned counsel for the parties, and careful perusal of judicial file and appraisal given to evidence, besides going through the documents relied upon by learned counsel for the parties, it has been observed that in the present case, appellant/defendant has claimed that ex-parte order dated 15.05.2008 and exparte judgment and decree dated 21.05.2009 are illegal, null and void.”

Thereafter in para 16, the Court has held that *‘the appellant has not challenged the order dated 29.11.2010 by virtue of which application under Order 9 Rule 13 CPC filed by the appellant/defendant was dismissed, rather he has assailed the impugned ex parte judgment and decree’*. In the

next line, it is mentioned that *‘until and unless, the order dated 29.11.2010 is set aside, case cannot be remanded back, but the order dated 29.11.2010 has not been challenged by the appellant/defendant/applicant and as such the appeal is not maintainable’*.

A reading of the observations made in paras 12 to 16 of the judgment makes it apparent that the Court has made inconsistent and contradictory observations. This fact alone is sufficient to show that while making observations in paras 14 and 15, the Court was not clear in its mind if the appellant has filed the appeal against the order dated 29.11.2010, vide which his application under Order 9 Rule 13 CPC was dismissed or he has filed the appeal challenging correctness and legality of the ex parte judgment and decree dated 21.05.2009. In the entire judgment, there is no reference to what was contended by counsel for the appellant or the respondents. There is no reference to challenge to the ex parte judgment and decree on merits as has been sought to be raised in para 16 of the grounds of appeal, reproduced herein before.

No doubt, the appellate Court in the opening lines of para 14, extracted above, has stated of giving thoughtful consideration to the respective contentions of learned counsel for the parties, but as a matter of fact, the Court has not referred to any of the contentions raised by the learned counsel. Once the Court has not made any reference to any contention, the observation made in para 18 that *‘no other point has been argued before me’* loses its relevance and significance. The learned appellate Court has disposed of the appeal without proper application of mind to the nature of challenge and without reference to the contention (s)

raised by learned counsel when admittedly, the Court has not adverted at all to challenge made in para 16 of the grounds of appeal.

The mere fact that the appellant has prayed for setting aside the ex-parte judgment and decree and remanding the matter to the trial Court for decision afresh is not sufficient to negate his contention that he also sought to challenge the ex parte judgment and decree on its merits in view of the averments set up in para 16 of the grounds of appeal. In the light of observations made herein-before, I find myself unable to accept the submissions of the respondents that keeping in view the observations made in para 18 notice hereinabove, the only course open to the appellant is to file an application for review before the Court that decided the appeal or the present appeal is not maintainable. As has been observed earlier, but for the sake of repetition, the learned appellate Court has adopted a very unique method of disposing of the appeal and virtually disposed of the appeal in view of findings recorded by the trial Court while disposing of application under Order 9 Rule 13 CPC when otherwise that order was not under challenge in appeal. As a consequence, the judgment and decree passed by the appellate Court cannot be allowed to sustain and accordingly set aside.

In view of what has been discussed herein-above, the appeal is allowed, the judgment and decree dated 11.10.2013 passed by the Additional District Judge, Karnal is set aside and the matter is remitted to the appellate Court to decide the appeal afresh, in accordance with law. However, nothing stated in this order shall prejudice either of the parties in making their respective submissions qua the appeal preferred by Ram

Niwas-appellant.

No order as to costs.

(Rekha Mittal)
Judge

11.01.2016
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