

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

**RSA No.6260 of 2014 (O&M)
Date of decision:28.04.2016**

Pawan Kumar

Vs.

... Appellant

Rana Partap Singh

... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

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

Present:- Mr. Ashish Aggarwal, Senior Advocate with
Mr. Ankit Choudhri, Advocate
for the appellant.

AMIT RAWAL J. (Oral)

C.M.No.14902-C of 2014

For the reasons stated in the application, duly supported by an affidavit, delay of 17 days in re-filing the appeal is condoned.

C.M. stands disposed of.

RSA No.6260 of 2014 (O&M)

The appellant-defendant is aggrieved of the judgment and decree rendered in a suit seeking specific performance of the agreement to sell dated 26.09.2007 in respect of house No.157 measuring 200 square yards against the alleged receipt of earnest money of ₹5,00,000/- agreed to be sold for a total sale consideration of ₹5,50,000/-.

Mr. Ashish Aggarwal, learned Senior Counsel assisted by Mr. Ankit Choudhri, Advocate appearing on behalf of the appellant-defendant submits that as per the zimni orders produced in the grounds of appeal, Mr.Rajesh Kamboj Advocate was engaged to contest the suit, but on three dates, he did not even inform the appellant for filing of the written statement and on one fine morning, after having appeared on the 4th date, was proceeded against ex parte vide order dated 23.09.2009. An application for setting aside the ex parte proceedings was filed on 02.02.2011, which was also dismissed for want of appearance on 10.04.2012. Both the counsel have breached the trust posed as relationship between client and counsel is fiduciary in nature and an ex parte decree dated 18.04.2012 has been passed. The aforementioned judgment and decree has been assailed and thus, the present Regular Second Appeal.

He further submits that in case, counsel had not appeared, the trial Court was enjoined upon an obligation to issue notice to the appellant-defendant as non-appearance of the counsel tantamounts to pleading no instructions. In support of his submissions, he relies upon the judgments rendered by the Hon'ble Supreme Court in **Tahil Ram Issardas Sadarangani and others vs. Ramchand Issardas Sadarangani and another AIR 1993 Supreme Court 1182** and **Malkiat Singh and another vs. Joginder Singh and others, Punjab Law Reporter (Vol.CXVIII) (1998-1) 271**. He

further submits that there is a recital in the agreement to sell qua handing over the possession, but it was alleged in the plaint that before the date, the same was forcibly taken by the appellant-defendant and no evidence has been led in this regard.

He submits that it is settled law that the Court cannot remain mute spectator to the ex parte evidence and pass ex parte judgment and decree passed in routine and mechanical manner. An obligation is enjoined upon the Court to examine the evidence threadbare and thereafter, after due application of mind, pass the order in accordance with law, but in present case, the respondent-plaintiff has failed to prove the contents of the agreement to sell, much less, payment of the earnest money. He further submits that against the total sale consideration, Rs.5,00,000/- has been paid as earnest money, yet the target date was fixed as 25.08.2008. In fact, it was a loan transaction as the appellant had litigation with his wife in a petition filed under Section 13-B of the Hindu Marriage Act. As per the documents, which are sought to be placed on record by invoking the provisions of Order 41 Rule 27 of the Code of Civil Procedure, a sum of Rs.7,00,000/- was to be paid to the wife and in this context, a loan of Rs.2.5 lacs was taken from the respondent-plaintiff and as security, he executed the agreement to sell. The date of decision of the petition, i.e., 12.01.2007, is co-related with the agreement to sell. He further submits that in case, ex parte judgment and decree is set aside and opportunity is granted, his client would be able to belie

and rebut the averments made in the plaint and there are chances that suit may be dismissed and urges this Court to frame the substantial questions of law as culled out in the memorandum of appeal.

I have heard learned counsel for the appellant-defendant and appraised the impugned judgments and decrees of the Courts below and of the view that there is no substance and merit in the appeal, as well as, in the submissions of Mr. Aggarwal, for, preceding to the filing of the suit, legal notice dated 01.09.2008 was sent. Nothing prevented the appellant-defendant to rebut the averment qua execution of the agreement to sell. Had it been loan transaction, no sane person would sit idle realizing that the documents executed in lieu of loan been converted into agreement to sell. He would run pillar to post to belie the stand of other party. It cannot be said that it is a matter of co-incidence that in both instances, the counsel did not appear, perhaps the appellant-defendant had not discharged his obligation in passing on the instructions to his counsel, who did not appear despite having been engaged. The entire fault/blame cannot be fastened upon the lawyer. It is the duty of the client to ascertain the status of the case, much less, visit the office of the lawyer for the purpose of filing of the written statement or any other proceedings. No explanation has come forth in this regard. Even at the appellate stage also, no effort was made to invoke the provisions of Order 41 Rule 27 of the CPC. It

is for the first time, application No.5431-C-2016 has been filed which is too late in a day to deal with the documentary evidence sought to be placed on record which would tantamount to unsettling the settled controversy.

There is no dispute with regard to the ratio decidendi culled out in the judgments cited (supra) but in the present case, as per the zimni orders reproduced in the memorandum of appeal, the counsel did not plead any instructions, therefore, the Court had no occasion to comply with the ratio decidendi culled out in the aforementioned judgments.

In view of the aforementioned observations, I do not intend to differ with the findings rendered by both the Courts below, which are based upon the appreciation of oral and documentary evidence, much less, no substantial question of law arises for determination of this Court.

Accordingly, the application under Order 41 Rule 27 of the Code of Civil Procedure, as well as, appeal are dismissed.

(AMIT RAWAL)
JUDGE

April 28, 2016
savita