

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR No.4480 of 2017

Date of Decision: 25.7.2017

Gurharbans Singh @ Harbans Singh

... Petitioner

Versus

Balwant Singh Dhillon and others

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Sagar Aggarwal, Advocate,
for the petitioner.

RAJIV NARAIN RAINA, J.

1. The challenge in this petition is to the order dated July 04, 2017 passed by the learned Additional Civil Judge (Senior Division), Tarn Taran in an application presented by the defendant judgment-debtor for staying the operation of the execution proceedings till final disposal of the pending application under Order 9 Rule 13 of the Code of Civil Procedure, 1908.

2. The application was contested by the opposite party/decreed holder has been dismissed as not maintainable. In the original Court passed the decree since stay of execution proceedings is dealt with under Order 21 Rule 26 CPC which can be moved only before the Executing Court to whom the execution has been sent for satisfaction of the decree. The trial Court has held that it is not empowered to stay execution proceedings in an application under Order 9 Rule 13 CPC.

3. The plaintiff filed a suit against the defendant/petitioner for gaining possession of the suit land described in the head note falling in the revenue estate of village Kasel, Tehsil Tarn Taran, Amritsar. The plaintiff

was a non-resident Indian and co-owner in the suit land. The plaintiff obtained an ex parte decree from the Civil Court on May 30, 2003. The sale deed executed in favour of the petitioner by proforma respondent No.2/defendant was declared void and also the subsequent sale deeds executed by the petitioner. Petitioner denies proper service of the suit and asserts he had no knowledge of the proceeding which led to ex parte decree. Neither was he served with proper summons in the execution proceedings. The petitioner avers that after 13 years on February 26, 2016 he visited the office of the Patwari Halqa of village Kasel for some official work and there was informed by the Patwari that one Balwant Singh-respondent had obtained an ex parte decree against him and is now trying to get possession of the disputed land through warrants of possession. He says that he inquired into the matter and obtained a certified copy of the judgment and decree dated May 30, 2003 and proceeded to file an application under Order 9 Rule 13 CPC for setting aside the ex parte judgment and decree. This application is pending adjudication in the court at Tarn Taran. The next date is October 05, 2017.

4. This led the petitioner to file an application for stay of execution proceedings pending decision on the application under Order 9 Rule 13 CPC. The application has been dismissed together with the objections filed by the petitioner to the execution by a common order dated May 15, 2017. This order decides the objections filed by the JD No.3, the petitioner. The application has been filed under Order 21 Rule 11 for execution of the decree in the Court of the Additional Civil Judge (Senior Division), Tarn Taran. The execution application was presented on February

04, 2011 and the same has been decided on July 04, 2017, the order which is under challenge in the present petition. It was argued by JD that the decree was obtained in a fraudulent manner by getting JD No.3 ex parte after giving his wrong name and address for which separate application under Order 9 Rule 13 CPC has been moved and is pending for recall of order proceeding ex parte.

5. On notice, the decree holder entered contest. He stated that petitioner had full knowledge of the proceedings in the Civil Court but he intentionally did not appear and has after many years applied for setting aside ex parte proceedings.

6. An important facet has surfaced in the order in para.6 where the learned Judge records an admitted fact that JD No.3, the present petitioner, has no right left in the suit land since he is neither owner nor in possession of the corpus as he has already sold the land to JDs No.5 to 7. Thus, no direct harm would be caused to JD No.3 in case the present execution proceedings are allowed to carry on to their logical end.

7. Ordinarily, in the presence of an application under Order 9 Rule 13 for setting aside the ex parte judgment and decree it may not be appropriate to put the execution in further motion till the decision on the application. Taking cognizance of the normal legal position lower court has taken the view that JDs 5 to 7 have filed objections which had been dismissed and those are final but JD No.3, the petitioner is still insisting to re-open the decree when he is no longer owner nor in possession of the suit land having sold his right, title and interest in the suit land. In such circumstances allowing the present application to proceed will not amount

to rushing with the execution. The decree holders are 14 years apart from the decree and are still kept away from enjoying the fruit of the judgment. I find nothing wrong with the line of reasoning.

8. There is another valid reason which has prevailed in the mind of the learned Additional Civil Judge (Senior Division), Tarn Taran in her order dated May 15, 2017 was that the only objection taken by the petitioner JD No.3 is that application under Order 9 Rule 13 is pending. No other objection on merits has been taken. One of the reasons which has weighed in the mind of the Court while passing the impugned order dated May 15, 2017 is that no stay order has been passed by the original civil court in the proceedings under Order 9 Rule 13 CPC and the pendency of the application in that court is not a bar on continuation of execution proceedings.

9. However, an observation has come from the Lower Court in para.8 of the order that prima facie it appears to it that JD No.3 has sufficient grounds to challenge the judgment and decree dated May 30, 2003 against him and, therefore, in absence of any stay order the decree holder should not be made to suffer. After the passing of this order, the impugned order dated July 04, 2017 has been passed which has given rise to this revision declining stay of operation of execution proceedings in the face of pending application under Order 9 Rule 13 CPC. The Court has even framed issues in the proceedings for setting aside ex parte decree. The question is whether there should be stay or not of the execution proceedings by this Court.

10. Prima facie it appears to me that the ex parte decree was passed

in 2003. The decree holder applied for execution of the decree through case No.EXE/3/2011 instituted on February 04, 2011. It has taken about six years for a decision on the matter which is still inconclusive as far as JD No.3 is concerned who is the present petitioner. If decree holders have waited for eight years to institute execution proceedings from 2003 then keeping in mind the time taken for deciding objections of JDs 5 to 7 and the observations made by the learned Additional Civil Judge (Senior Division) Tarn Taran in her order dated May 15, 2017 that prima facie it appears that JD No.3 has sufficient grounds to challenge the judgment and decree dated May 30, 2003 by reason of improper service on him being an NRI and the fact that issues have been framed in the application under Order 9 Rule 13 CPC and still further the fact the JD No.3 has sold his interest to JDs 5 to 7 who have lost their case in the objections in the execution proceedings then justice may demand that the decree holders can claim possession of suit land even while the proceedings under Order 9 Rule 13 CPC are pending at the hands of JD No.3 after JDs 5 to 7 stepped into the shoes of JD No.3.

11. Therefore, I feel that the direction issued by the Additional Civil Judge (Senior Division), Tarn Taran may not be wrong when it is observed that if at any later stage, the judgment and decree is set aside, the JD No.3 will have option to file an application under Section 144 CPC for restitution and Court shall have power to cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified, and, for this purpose, the Court may make any orders including orders for the refund of cost or for the payment

of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order. Section 144 (2) contains a practical solution and bars a suit to be instituted for the purpose of obtaining any restitution or other relief which could be obtained by an application under sub-section (1) of Section 144. The interests, if any, of the petitioner are well guarded by the Court below in the event he succeeds in re-opening of his case and secures a favourable decision.

12. With these observations, the challenge to the impugned order dated July 04, 2017 is repelled. It may be noted that there is no challenge to the subsequent order dated May 15, 2017 which resorts to Section 144 of the Code.

13. Accordingly, no interference at this stage is warranted in the execution proceedings.

14. The petition stands dismissed with the aforesaid liberty already granted by the lower court.

(RAJIV NARAIN RAINA)
JUDGE

25.7.2017
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Whether speaking/reasoned Yes

Whether reportable No