

In the High Court of Punjab and Haryana at Chandigarh

CR No. 6527 of 2017

Date of Decision:31.10.2017

Gurdev Singh

---Petitioner

vs.

M/s Madan Lal Sushil Kumar

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Pawan Attri, Advocate
for the petitioner

Rekha Mittal, J.

The present petition directs challenge against orders dated 13.5.2016 (Annexure P-2) passed by the Additional Civil Judge (Senior Division), Pehowa and dated 10.5.2017 (Annexure P-1) by the District Judge, Kurukshetra whereby application for setting aside ex parte order dated 10.8.2009 was dismissed by the trial court and appeal preferred against the order passed by the trial court did not find favour with the District Judge, Kurukshetra.

A brief backdrop of the case is that respondent firm M/s Madan Lal Sushil Kumar, Commission Agent Anaj mandi, Pehowa filed suit for recovery against the petitioner and Ram Lal, brother of the petitioner in

which the petitioner was proceeded against ex parte but Ram Lal contested the suit that eventually culminated in judgment and decree dated 4.3.2013 passed by the Additional Civil Judge (Senior Division), Pehowa whereby the plaintiff/deGREE holder was held entitled to recover Rs. 6,46,060.50/- alongwith interest at the rate of 12% per annum from the date of filing the suit till actual payment from petitioner/defendant No. 1.

The petitioner through Mithu Ram being his attorney filed the instant application dated 8.10.2013 for setting aside order dated 10.8.2009 whereby the petitioner was proceeded against ex parte. The plea of the petitioner is that he went abroad in the year 2006 and the respondent/plaintiff filed the suit in his absence knowing that the petitioner is abroad. No summons or notice was served upon him in abroad. He came to India on 22.5.2013 and came to know about the case when he got notice of execution on 1.6.2013 fixed for 5.6.2013 in the Court of Sh. Sumit Garg, Additional Civil Judge (Senior Division), Pehowa.

The respondent/deGREE-holder filed reply to the application and contested claim of the petitioner for setting aside ex parte order dated 10.8.2009.

The trial court, on the basis of pleadings of the parties framed issues, permitted the parties to adduce evidence in support of their respective contentions. The petitioner examined Panna Lal his son AW1 who tendered into evidence his affidavit Ex. AW1/A and placed on record power of attorney AW1/B. To rebut evidence of the petitioner, the respondent/plaintiff Sushil Kumar proprietor of the aforesaid firm appeared in the witness box, tendered into evidence his affidavit Ex. RW1/A and

documents Ex. R1 to R5.

After having heard counsel for the parties in the light of materials on record, the trial court answered issue No. 1 against the petitioner whereas issues No. 2 to 4 were answered in favour of the respondent/deGREE holder and resultantly, the application filed by the petitioner was dismissed. The appeal preferred by the petitioner against the order passed by the trial court was dismissed by the Appellate court and findings recorded by the trial court on issue No. 1 as well as on the question of limitation were affirmed.

Counsel for the petitioner has submitted that as the petitioner had left India in the year 2006 and came back after passing of the ex parte judgment and decree in the year 2013, there was no occasion for the petitioner to know about pendency of the suit and cause appearance before the trial court. It is argued that the petitioner was proceeded against ex parte on the basis of service by way of *munadi* but on the summons, there is a report dated 7.8.2009 by process server Suresh Pal that after effecting munadi and affixation, it was revealed that the addressee is residing abroad. It is argued with vehemence that as in view of the report made by serving official of the Court, the petitioner was reported to be residing abroad, the trial court erred by acting upon the report of service through affixation and munadi and proceeding ex parte against the petitioner vide order dated 10.8.2009. It is further submitted that a serious prejudice shall be caused to the petitioner in case the ex parte decree fastening a huge liability against the petitioner is not set aside and the petitioner is deprived of an opportunity to contest claim of the respondent/plaintiff.

I have heard counsel for the petitioner, perused the paper book and the original records of civil suit No. 387/2007 and application for setting aside ex parte order dated 10.8.2009.

Before advertng to the submissions made by counsel for the petitioner with regard to there being no service of the petitioner, it is pertinent to note that the petitioner filed an application only for setting aside ex parte order dated 10.8.2009 though the proceedings in the suit already culminated in the judgment and decree dated 4.3.2013. The application for setting aside ex parte order dated 10.8.2009 was filed by the petitioner through Mithu Ram, his son and general attorney. In para 4 of the application, there is reference that the petitioner executed a power of attorney in the name of Mithu Ram to proceed with the case as he has to go to Spain for urgent work. The respondent/decreed holder denied the said fact in reply to the application. Neither Mithu Singh appeared in the witness box to say something with regard to his competence to file the application on behalf of the petitioner nor any such power of attorney executed by the petitioner in favour of Mithu Ram has been proved on record much less original thereof being produced on record. Though the courts below have not adverted to this vital aspect of the matter but the petitioner has failed to establish that Mithu Ram was an attorney of the petitioner or competent to file the application for setting aside ex parte order dated 10.8.2009.

Another aspect of the matter that invites consideration is with regard to question of limitation. Article 123 of the Limitation Act, 1963 provides for limitation to file an application to set aside a decree passed ex parte or to rehear appeal decreed or heard ex parte. A relevant extract

therefrom reads as follows:-

<i>Discription of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
To set aside a decree passed ex parte or to rehear an appeal decreed or heard ex parte. <i>Explanation-</i> . For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not be deemed to be due service	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

The petitioner in paras 3 and 7 has raised allegations with regard to his knowledge of the case, read thus:-

“3.That the defendant No. 1 came in India on 22.5.2013 after getting the permanent resident of Spain and he come to know about the present case when he got notice of execution on dated 1.6.2013 of the execution titled as M/s Madan Lal versus Gurdev pending in the court of Sh. Sumit Garg, Id. ACJ(SD), Pehowa and same was fixed for 5.6.2013. Hence the defendant No. 1 came in the knowledge of the filling of the case and execution on dated 1.6.2013.

7. That the defendant No. 1 is filing the present application immediately after getting the knowledge about the ex parte order on dated 1.6.2013. Therefore, the application of the defendant No. 1 is not much belated and is within time.”

Indisputably, the application for setting aside the ex parte order

dated 10.8.2009 was filed on 8.10.2013. The courts below have recorded concurrent findings that the application is barred by limitation. Counsel for the petitioner has not advanced any arguments to assail findings of the Courts on the question of limitation. He is not in a position to say something as to how the application dated 8.10.2013 after getting knowledge of ex parte order on 1.6.2013 can be said to be within limitation from the date of knowledge. Under the circumstances, findings recorded by the Courts below with regard to the application being bared by limitation are liable to be affirmed and ordered accordingly.

The petitioner has failed to adduce any evidence with regard to competency of Mithu Ram to file the application and further the application is clearly barred by limitation. That being so, even if it is accepted that the petitioner was not duly served, ex parte judgment and decree dated 4.3.2013 can not be set aside disregarding that the petitioner did not pray for the same and only sought setting aside order dated 10.8.2009 whereby he was proceeded ex parte in the suit.

For the foregoing reasons, the petition fails and is accordingly dismissed in limine.

(Rekha Mittal)
Judge

31.10.2017
paramjit

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No