

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

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RSA No.1080 of 2009 (O&M)

Date of decision:15.9.2017

Parbhu and Rajinder Kumar

... Appellants

versus

Anita Bansal

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH.

Present: Ms. Nupur Choudhary, Advocate,
for the appellants.

Mr. Atul Gaur, Advocate,
for the respondent

...

AMOL RATTAN SINGH, J. (Oral)

CM No. of 2017

By this application, (unnumbered), the respondent-plaintiff seeks to place on record Annexures R-1 and R-2, the first being a typed copy of a sale deed dated 12.12.2007, by which it is alleged that the appellants, Parbhu Ram and Raj Kumar (wrongly shown in the memo of parties throughout this *lis* as Rajinder Kumar as per learned counsel for the appellants), are stated to have sold the suit property to one Smt. Santro Devi.

The second Annexure that is sought to be placed on record is a typed copy of an interim order of the learned Civil Judge (Junior Division), Kaithal, dated 22.4.2016, in execution proceedings, showing that warrants of possession issued in favour of the respondent-plaintiff (decree holder) have

been executed.

The application is wholly misplaced, in view of the fact that if at all any documents were sought to be placed on record in the accompanying second appeal, it could have been only by way of moving an appropriate application under Order 41 Rule 27 of the CPC and simply by filing an application under Section 151 CPC, even if the said documents are ordered to be taken on record, other than the second document, which is a part of judicial record in execution proceedings in this very lis, the first document, in any case, cannot be looked at by this Court.

Consequently, simply noticing the contention of learned counsel for the applicant-respondent-plaintiff, to the effect that, as contended, the suit property has already been sold by the appellants-defendants, this application is dismissed.

The Registry is, however, still directed to number the application, dated 15.09.2017, (with e-filing no.62919), the accompanying appeal itself having been put up for final hearing today.

RSA No.1080 of 2009

This second appeal has been instituted by the defendants in a suit filed by the respondent-plaintiff, seeking possession of the suit property, which is stated to be land measuring 0K-10Ms, stated to be fully described in the site plan led by way of evidence before the learned Civil Judge (Junior Division), Kaithal, with the numbered description thereof being khewat no.628/579 khatoni no.877, rect. no.24 killa no.3/2(3-8), 8/1(4-12), situate within the revenue estate of *Patti Gaddar*, Tehsil and District Kaithal, as per the *jamabandi* (record of rights) for the year 1999-2000, which the plaintiff

claimed to be in ownership of, contending such ownership to be reflected as per two mutation entries, numbering 11367 and 11350, both sanctioned on 11.04.2005.

Contending that the defendants (appellants herein) had no concern with the suit property, being complete strangers thereto, they had “recently encroached” upon it and despite the plaintiffs' requests to deliver peaceful possession of the property to her, they had refused to do so.

Consequently, Civil Suit no.RBT 366 of 2007 was initially instituted on 17.04.2006, 'the other date' of institution shown to be 30.10.2007.

2. As per the judgment of the trial Court, notice having been served upon the appellants herein, they refused to receive the same and not having appeared in Court, despite a *munadi* having been effected, they were proceeded against *ex parte* vide an order dated 09.06.2006.

3. The plaintiff having examined herself as PW1 and having led documentary evidence in the form of an *aks-shijra* as P1, a *fard jamabandi* as Ex.P2, a *khasra girdawari* as Ex.P4, a mutation as Ex.P5 and report of Local Commissioner as Ex.P6, the learned Civil Judge eventually in her short judgment, there being no pleadings, evidence or arguments on behalf of the defendants, held that the plaintiff had proved her title to the suit property and was therefore entitled to take possession from the defendants.

4. The present appellants-defendants having instituted a first appeal which came up for hearing before the learned Additional District Judge, Kaithal, that Court after noticing the facts stated in the plaint as also the recording of the Civil Judge that the appellants-defendants had refused to

accept notice and had eventually been proceeded *ex parte*, further duly noticed the argument made on behalf of the appellants-defendants that they had never been served with the notice issued by the trial Court and that the report of the Process-Server, dated 02.05.2006, was actually a false report obtained in collusion with the plaintiff.

An argument was also raised before that Court that the plaintiff had “pleaded wrong facts” as she herself was a co-sharer in the suit land alongwith the appellants-defendants and therefore no suit for possession against a co-sharer was maintainable.

Yet further, as recorded in the judgment of the learned Additional District Judge, it was contended by the appellants-defendants that “No mutation Ex.P1 has been placed on record. Had this mutation been produced on record, it would have unveiled the fact regarding co-sharer.”

Thus on the aforesaid grounds, as recorded in the judgment of the learned first appellate Court, the judgment and decree of the Civil Judge were challenged by the appellants-defendants.

5. The learned Additional District Judge also recorded in his judgment that a delay of 107 days in filing the appeal had been condoned vide an order dated 10.02.2009.

6. Thereafter, holding that even an *ex parte* decree can be assailed by way of an appal, that Court went on to further hold that as per the *khasra girdawari* for the years 2000 to 2005, as also as per the mutation “Exs. P4 and P5”, the ownership of the plaintiff-respondent to the suit property stood clearly established, which was also borne out by the report of the Local Commissioner.

Therefore, observing that the appellants-defendants had not been able to adduce any evidence, even in the course of the appeal, which would dis-entitle the plaintiff to the relief claimed by her, the first appeal filed by the present appellants-defendants was dismissed.

7. Alongwith the present second appeal filed, the appellants have also filed an application under Order 41 Rule 27 CPC (CM no.3113-C of 2009), stating therein that they had produced photocopies of the sale deeds in their favour before the 1st appellate Court but as no application for leading additional evidence had been filed, they could not establish that they were co-sharers in the property.

It has further been stated in the said application that the said sale deeds were registered and therefore could not be altered or tampered with, but as they had been proceeded against *ex parte* before the trial Court, not having been served of the notices issued on them, the said evidence could not be produced.

8. It needs to be stated here that having heard arguments of learned counsel, this Court had earlier reserved judgment but had put up the matter for re-hearing vide an order dated December 6, 2016, to enable counsel to address arguments on whether the original sale deeds, certified copies of which are sought to be led by way of additional evidence before this Court, were actually available with the appellants and if not, would such certified copies be *per se* admissible in evidence, no arguments having been addressed before this Court at an earlier stage by either side, on that issue.

9. The matter having been put up for re-hearing, learned counsel for the appellants had produced in Court on 22.12.2016 a sale deed, that was

contended to be the original sale deed, in respect of the suit property, the vendor shown to be one Rakesh Kumar, as noticed in the order of that date by this Court.

Thereafter, learned counsel for the respondent-plaintiff having sought time to address arguments on the admissibility of the said evidence at the stage of second appeal, the matter was adjourned and eventually had come up yesterday for arguments, when learned counsel for the appellants had again argued (on re-hearing of the matter) that the issue of non-service of notice upon the appellants-defendants had not been considered at all by the 1st appellate Court, which was an argument she had raised when this case was heard for the first time by this Court.

Learned counsel for the respondent-plaintiff however submitted that once the appellants had chosen to file an appeal under Section 96 of the Code of Civil Procedure, the reasons for the appellants-defendants having been proceeded against *ex parte* by the trial Court, could not be gone into by the 1st appellate Court.

10. As noticed in the order dated 14.9.2017 (yesterday), he had relied upon a judgment of a coordinate Bench of this Court in Ram Narain vs. Gobind Singh, 1992 PLJ 184, wherein it has been held that even where an *ex parte* decree was passed by the trial Court, the first appellate Court could still entertain an appeal under Section 96(2) of the CPC, and instead of converting the appeal into proceedings for setting aside an *ex parte* decree, that Court (the first appellate Court) should proceed to decide the appeal on merits. It was further held, however, that the 1st appellate Court should have (in that *lis*) restricted itself to the merits of the controversy and should have refused to

entertain any ground “regarding *ex parte* proceedings/decrees having been passed/taken against the vendee-petitioner”.

Per contra, today learned counsel for the appellants-defendants (JDs) has relied upon two judgments, one of a coordinate Bench of this Court and the other of the Supreme Court.

In Gram Panchayat of Village Garhi Jattan, Tehsil and District Karnal through its Sarpanch Tara Chand vs Ranjit Singh and another, 2005(2) PLR 31, it was held by this Court that the lower appellate Court, in fact, committed an illegality by holding (in an appeal against 'an *ex parte* decree'), that an application under Order 9 Rule 13 of the Code could alone have been filed, thereby implying that the appeal was not competent. It was further held that as per Section 96(2) of the CPC, read with the explanation to Order 9 Rule 13, the remedy of a first appeal against an *ex parte* decree is also available to an aggrieved party, and it is not necessary that such party should first file an application under Order 9 Rule 13 for setting aside the *ex parte* decree.

However, the said judgment does not further go on to hold that such an application (under Section 96(2) of the Code), would only be decided on merits and that the issue of the defendant having been proceeded against *ex parte* would not be gone into.

11. Yet, learned counsel for the appellants has further relied upon a judgment of the Supreme Court, in Bhanu Kumar Jain versus Archana Kumar and another, 2005(2) RCR (Civil) 781, wherein it was held by their Lordship as follows:-

“22. An appeal against an *ex-parte* decree in terms of Section 96 (2) of the Code could be filed on the following grounds:-

- (i) The materials on record brought on record in the *ex-parte* proceedings in the suit by the plaintiff would not entail a decree in his favour, and
- (ii) The suit could not have been posted for *ex-parte* hearing.”

A perusal of clause (ii) herein above would show that other than on the merits of the suit of a plaintiff, the defendant-judgment debtor, who had been proceeded against *ex parte* by the 'trial Court', has also a right to file an appeal under Section 96(2) of the Code contending that the suit could not have actually been posted for *ex parte* hearing, i.e. the defendant(s) could not have been proceeded against *ex parte*.

In the opinion of this Court, that would very obviously imply that, in fact, the appellate Court can go into the issue of whether the order proceeding against the defendants *ex parte*, was correctly passed by the trial Court, or not.

12. Learned counsel for the respondent-plaintiff, on the other hand, (in the present appeal), has submitted that in the circumstances of the present case, the aforesaid interpretation by this Court would not apply in any case, in view of the fact that both the Courts below have specifically held that the appellants-defendants refused to accept service and that they did not appear even after a *munadi* was carried out at their address.

Hence, he submits that the issue of non-service of the appellants-defendants could not have been and need not have been gone into by the appellate Court, in the aforesaid situation.

13. In rebuttal, learned counsel for the appellants submits that the refusal of summons by the appellants-defendants, pursuant to the notices issued in the suit, was admittedly witnessed only by the son of the

respondent-plaintiff and therefore, it is not *per se* believable and further, actually even the report on the *munadi* having been made was incorrectly recorded and hence, erroneously accepted by both the Courts below.

14. Having considered the aforesaid contentions, though of course, a coordinate Bench of this Court, in Ram Narains' case (supra) has held that on a judgment debtor filing an appeal under Section 96(2) CPC (before the first appellate Court), that Court would not go into the issue of *ex parte* proceedings having been taken against the judgment debtor by the trial Court; yet, in view of the fact that in the judgment of the Supreme Court in Bhanu Kumar Jains' case (supra), it has been held that the *ex parte* proceedings ordered by the trial Court could also be taken as a ground of challenge in an appeal under Section 96(2) CPC, obviously, this Court is bound by the ratio of that judgment.

15. In the present *lis*, it is seen that though the primary ground of appeal taken before the first appellate Court by the judgment debtors has been duly noticed by that Court, to the effect that they were wrongly proceeded against *ex parte* and they were never served of the notices issued by the trial Court, however, thereafter, the correctness of that contention or the correctness of the order of the trial Court proceeding against the judgment debtors *ex parte*, has not been looked into or considered at all and consequently, no finding has been given thereon.

16. In the aforesaid situation, it is considered appropriate to remit the matter back to the first appellate Court, which would first go into the issue of whether the order of the trial Court directing *ex parte* proceedings to be taken against the appellants-defendants, was correctly passed or not.

Thereafter, as the appellants wish to lead additional evidence in this second appeal, to the effect that, as a matter of fact, they had title to the suit property, having purchased it vide a sale deed executed in their favour on 24.5.2005 (with what is contended to be the original sale deed having been produced before this Court), any such application moved before that Court would be considered by it, the Courts below having held the respondent-plaintiff entitled to take possession of the suit property by holding that the appellants-defendants had no title to it whatsoever.

The learned 1st appellate Court would also consider any other applications filed before it even at this stage (on remand), by either party, under Order 41 Rule 27 CPC, as both parties are seeking to lead additional evidence even before this Court, (though as regards the respondent-plaintiff, only an application under Section 151 CPC has been filed, in Court today, as stated hereinabove).

Thereafter that Court would proceed to consider and decide the merits of the appeal before it.

17. Further, the specific contention of learned counsel for the respondent-plaintiff before this Court being that possession has already been taken over by the plaintiff in execution proceedings, if that is found to be factually correct by the first appellate Court, in terms of the orders passed by the executing Court, the respondent-plaintiff shall not be dispossessed, except in due course of law.

18. In view of what this Court has held hereinabove, the impugned judgment and decree of the first appellate Court is set aside and this appeal is disposed of by remitting the matter back to the first appellate Court, with the

aforesaid observations.

No order as to costs.

What is contended to be the original sale deed in favour of the appellants-defendants, has been returned to their learned counsel .

15.9.2017
pk/dinesh

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No