

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

***RSA No.5494 of 2016***

Date of Decision: 02.02.2017

Baldev Raj

....Appellant

Versus

Tarsem Singh and another

....Respondents

***BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY***

Present:- Mr. Vipin Mahajan, Advocate  
for the appellant.

Mr. Raj Kumar Arya, Advocate  
for the respondents.

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***DAYA CHAUDHARY, J.***

Appellant-Baldev Raj has filed the present appeal to challenge the judgment and decree dated 04.07.2016 passed by the First Appellate Court, which has been stated to be obtained by respondents/defendants by playing fraud upon the Court by concealing the fact that the controversy has already been put to rest by dismissal of RSA No.1624 of 2015 decided on 29.04.2015.

Briefly, the facts of the case, as made out in the present appeal, are that the appellant-plaintiff filed a suit for specific performance of the agreement to sell dated 20.02.2006 executed by the respondent/defendants in favour of appellant/plaintiff for the sale of land measuring 17 Kanal 15 Marla out of Khewat No.61-62-13, Khatauni No.87-88-22, Khasra No.15R/21/2 (7-11), 16R/13/2(4-0), 14/2(7-11), 17/1(5-16), 24/2/1/1(1-8),

25/1(7-11), 16R/15(8-0), 16(8-0), 24/2/1/2(0-2), 15R/10/1(0-8), 16R/6/1/11 (2-0) total land measuring 52 Kanal 7 Marla, situated at Village Dibku, Tehsil Pathankot, entered in the Jamabandi for the year 2005-06 for total sale consideration of ₹ 12,32,500/- i.e for ₹ 5,60,000/- ( ₹ Five lac and sixty thousand only) per acre out of which the plaintiff has already paid to the defendants a sum of ₹ 2,00,000/- as advance money (earnest money) and for delivery of actual possession of the suit land to the plaintiff along with suit for permanent injunction restraining the respondent/defendants from alienating the suit land and alternative relief for suit for recovery of ₹ 4,00,000/- viz ₹ 2,00,000/- as advance money and ₹ 2,00,000/- as damages.

As per case of the appellant-plaintiff, respondent-defendants are owners in possession of suit land to the extent of land measuring 17 Kanal 15 Marla out of total land measuring 52 Kanal 17 Marla and entered into an agreement to sell the suit land to the appellant/plaintiff for sale consideration vide agreement to sell dated 20.02.2006. Respondent-defendants received an amount of ₹ 2,00,000/- as advance money. The agreement of sale was also got scribed by the respondent-defendants. It was signed by the parties and was entered into the register of deed writer. Respondent-defendants undertook to refund the advance money and further to pay ₹ 2,00,000/- as damages in case the agreement to sell is not executed on or before the date fixed.

Reply to the suit was filed and a preliminary objection of *locus standi* and concealment of material facts from the Court for not disclosing the fact was also taken. Issues were framed by the trial Court and the parties were given liberty to lead evidence in support of their claim. The trial

Court, vide judgment and decree dated 26.09.2013, dismissed the suit filed by the appellant.

Aggrieved by said judgment and decree dated 26.09.2013 passed by the trial Court, the appellant-plaintiff preferred an appeal before the lower Appellate Court. Respondent/defendant No.1 was proceeded against ex-parte and the appeal was allowed. Respondents filed RSA, which was dismissed on 29.04.2016. Thereafter, respondent/defendant No.1 filed an application under Order IX Rule 13 of the Code of Civil Procedure for setting aside the ex-parte judgment and decree dated 04.03.2015 passed by the First Appellate Court, whereby, the appeal of the appellant was decreed ex-parte against respondent No.1. It was mentioned in the application that respondent No.1 has received summons in the execution application on 11.03.2015 and only then he came to know that the lower Appellate Court had passed ex-parte judgment and decree dated 04.03.2015 against him. The lower Appellate Court, vide order dated 04.07.2016 allowed the application under Order 9 Rule 13 CPC filed by respondent No.1 and the appeal was taken up afresh for final disposal. The First Appellate Court vide judgment and decree dated 04.07.2016 dismissed the appeal filed by the appellant/plaintiff.

Learned counsel for the appellant submits that the First Appellate Court has not appreciated the fact that earlier vide judgment and decree dated 04.03.2015, the First Appellate Court has allowed the appeal of the appellant-plaintiff by holding that the appellant has proved on record that he was always ready and willing to perform his part of contract, whereas, the respondent-defendants were not ready and willing to perform their part of contract. Said judgment and decree dated 04.03.2015 was

passed *ex-parte* against respondent No.1/defendant. Thereafter, both the respondent-defendants preferred Regular Second Appeal No.1624 of 2015 titled as ***Gurnam Singh and another vs Baldev Raj*** against the judgment and decree dated 04.03.2015. The appeal filed by the respondents was dismissed. The judgment and decree dated 04.03.2015 passed by the lower Appellate Court had attained finality. Learned counsel also submits that respondent No.1 was well aware about the judgment and decree dated 04.03.2015 but still an application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the *ex-parte* judgment and decree dated 04.03.2015 passed by the First Appellate Court was moved. At the end, learned counsel for the appellant submits that the judgment and decree dated 04.07.2016 passed by the lower Appellate Court deserves to be set aside and judgment and decree dated 04.03.2015 passed by the lower Appellate Court is liable to be restored.

Learned counsel for the respondents opposed the submissions made by learned counsel for the appellant but he has not disputed the factual position.

Heard the arguments of learned counsel for the parties and have also perused the impugned judgments and other documents on the file.

While issuing notice of motion in the appeal on 21.10.2016, the contentions of learned counsel for the appellant are that the judgment and decree dated 04.03.2015, whereby, suit for specific performance of the agreement to sell, RSA No.1624 of 2015 at the instance of both the defendants has been dismissed in *limine*. The application under Order 9 Rule 13 of Code of Civil Procedure was filed at the instance of defendant No.1-Tarsem Singh. It has also been contended that said application was not

maintainable and the act and conduct of the defendants is nothing but a fraud which has not been noticed by the Court below despite the fact that a specific objection was raised.

It is a settled position of law that the application for setting aside the *ex-parte* decree is not maintainable, where the appeal has already been disposed of/decided. Order 9 Rule 13 of the Civil Procedure Code is reproduced as under :-

**“ Order 9, Rule 13, CPC**

*“Setting aside decree ex-parte against defendant : In any case in which a decree is passed ex-parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit :*

*[Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also :*

*[Provided further that no Court shall set aside a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient to appear and answer the plaintiff's claim.]*

*[Explanation – Where there has been an appeal against a decree passed ex-parte under this rule, and the appeal has been disposed of on any ground other*

*than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex-parte decree].”*

Same issue was there before Hon'ble the Apex Court in case ***P. Kiran Kumar vs A.S. Khadar 2002(2) RCR (Civil) 809***, wherein, the following observations were made :-

*“12. Explanation was added to Order 9 Rule 13 with effect from February 1, 1977 by the Civil Procedure Code (Amendment Act, 1976). Prior to its enactment a defendant burdened by an ex-parte decree could apply under Order 9 Rule 13 for setting aside the ex-parte decree. He could also file an appeal under Section 96 against the ex-parte decree. The mere fact of filing the appeal did not take away the jurisdiction to entertain and dispose of an application for setting aside an ex-parte decree, only in the cases in which the trial court decree merged with the order of the appellate court by reversal, confirmation or varying it, the trial court was precluded from setting aside the ex-parte decree. Where the trial Court decree did not merge with the appellate court order the trial court was at liberty to proceed with the application for setting aside the ex-parte decree. Such instances arose when the appeal was dismissed in default or where it was dismissed as having abated by reasons of omission by the appellant to implead the legal representatives of a deceased respondent or where it was dismissed as barred by limitation. Explanation was added to discourage the two pronged attacks on the decree i.e by preferring an application to the trial court under Order 9 Rule 13 for setting aside the decree and by filing an appeal to the superior court against it. The legislative attempt incorporating the Explanation to Order 9 Rule 13 is to*

*confine the defendant, to either one of the remedies made available to him and not both. Dismissal of the appeal on any ground, apart from its withdrawal constituted a bar on the jurisdiction of the trial court to set aside the ex-parte decree. With the introduction of the explanation, no application to set aside the ex-parte decree would be maintainable where the defendant filed an appeal and the appeal was disposed of on any ground, other than the ground that the appeal have been withdrawn by the appellant.”*

The scope of explanation to Order 9 Rule 13 was also considered by the Hon'ble Apex Court in ***Rani Choudhury v. Lt. Col. Suraj Jit Choudhury 1982(2) SCC 596***, wherein, it was observed as under :-

*“ In the said case, the wife who had filed the appeal in this court had obtained an ex-parte decree of divorce against her husband in the matrimonial court. Husband had preferred an appeal in the High Court alongwith an application under Section 5 of the Limitation Act for condonation of delay in filing the appeal. The High Court dismissed the appeal as time barred. Respondent then moved an application under Order 9 Rule 13, Civil Procedure Code for setting aside the ex-parte decree. The matrimonial court dismissed the application on the ground that sufficient cause was not shown for condoning the delay. In appeal, however, the High Court took the view that explanation to Order 9 Rule 13, Civil Procedure Code did not create any bar to the maintainability of the application under that rule as the appeal against the ex-parte decree had not been dismissed on merits, but on the ground of delay. By not accepting the application for condonation of delay meant as if no appeal had been preferred. This Court allowed the appeal and set aside the judgment and order of the High Court.*

The main judgment was written by R.S. Pathak, J. It was held :

*“ The Civil Procedure Code (Amendment) Act 1976 was enacted with the avowed purpose of abridging and simplifying the procedural law. By enacting the Explanation, Parliament left it open to the defendant to apply, under Rule 13 Order 9 for setting aside an ex-parte decree or, in the case where he had preferred an appeal, the appeal has been withdrawn by him. The withdrawal of the appeal was tantamount to effacing it. It obliged the defendant to decide whether he would prefer or have the decree set aside by the trial court under Rule 13 Order 9. The legislative attempt incorporated in the Explanation was to discouraged a two pronged attack on the decree and to confine the defendant to a single course of action. If he did not withdraw the appeal filed by him, but allowed the appeal to be disposed of on any other ground, he was denied the right to apply under Rule 13 Order 9. The disposal of the appeal on any ground, whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation.”*

While passing the impugned judgment, the scope of explanation to Order 9 Rule 13 has not been taken into consideration. In the present case against the judgment and decree dated 04.03.2015, RSA No.1624 of 2015 filed at the instance of both the defendants has been dismissed in *limine*, therefore, the application under Order 9 Rule 13 of Code of Civil Procedure at the instance of defendant No.1-Tarsem Singh was not maintainable. It can safely be said that the defendants have played fraud with the Court and the same has not been taken into consideration by the Court below.

There is merit in the contentions raised by learned counsel for

the appellant and the judgment and decree passed by lower Appellate Court has no force of law and as such, the present appeal is allowed and the judgment and decree dated 04.07.2016 passed by the First Appellate Court is set aside.

02.02.2017  
**gupreet**

**(DAYA CHAUDHARY)**  
**JUDGE**

|                           |     |
|---------------------------|-----|
| Whether speaking/reasoned | Yes |
| Whether Reportable        | Yes |