

111.

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

CIVIL REVISION-1495-2018

Date of decision:08.03.2018.

SURINDER KUMAR

... Petitioner

Versus

SUNIL KUMAR

.... Respondent

CORAM: HON'BLE MR. JUSTICE HARI PAL VERMA

Present: Mr. R.P. Singh Ahluwalia, Advocate,
for the petitioner.

HARI PAL VERMA, J.

Petitioner-defendant has filed present revision petition under Article 227 of the Constitution of India against the orders dated 06.02.2017 and 28.10.2017 passed by learned Civil Judge (Junior Division), Ambala and learned District Judge, Ambala respectively, whereby the Civil Judge has dismissed the application filed by the petitioner under Order 9 Rule 13 CPC for setting aside the *ex parte* judgment and decree dated 04.06.2012 and further the appeal thereof by the District Judge, Ambala.

Briefly stated, the respondent-plaintiff filed a suit for specific performance of agreement to sell dated 05.02.2007 in respect of property/house No.2279/2 (new No.2796/1) situated at Hari Palace Road, Ambala City, and for permanent injunction restraining the defendant from alienating the suit property by way of sale, gift, mortgage etc. The petitioner-defendant had filed written statement. However, the plaint was amended vide order dated 11.02.2010 passed by the learned Civil Court. On 27.03.2010 when the case was listed before the trial Court, petitioner-

defendant could not appear and *ex parte* proceedings were initiated. The suit was ultimately decided on 04.06.2012 though *ex parte*. The petitioner thereafter filed an application under Order 9 Rule 13 CPC for setting aside the *ex parte* judgment and decree dated 04.06.2012. Vide order dated 06.02.2017, the application filed by the petitioner under Order 9 Rule 13 CPC for setting aside the *ex parte* judgment and decree 04.06.2012 was dismissed. The order dated 27.03.2010 whereby the petitioner-defendant was proceeded *ex parte* reads under:-

“Case called several times but none has appeared on behalf of defendant. No further wait is justified. Therefore, defendant is proceeded against *ex parte*. Now to come up on 10.05.2010 for *ex parte* evidence of plaintiff.”

The *ex parte* decree was passed on 27.03.2010, but the application under Order 9 Rule 13 CPC was filed on 26.10.2013. One of the plea as raised by the petitioner for setting aside the *ex parte* decree was that Shri Ajay Jain, Advocate, was the counsel for the petitioner-defendant, who was appointed as Additional Advocate General, Haryana and shifted to Chandigarh and since then, the petitioner was trying to track his case but without any result. It is only when the petitioner got summons from the court of Shri Danish Gupta, the then Civil Judge (Junior Division), Ambala regarding execution of decree, the factum of decree came to his notice. Thereafter, the petitioner immediately contacted Shri Ajay Jain, Advocate, about the status of his case and his junior informed the petitioner that Mr. Ajay Jain, Advocate has joined as Additional Advocate General, Haryana and shifted to Chandigarh. Not convinced with the grounds taken in the application, the trial Court dismissed the application vide order dated 06.02.2017.

The order whereby the application filed under Order 9 Rule 13 CPC was dismissed, was made the subject matter of challenge in an appeal, but the same was also dismissed observing therein that the very purpose of filing of the application is just to delay the proceedings so as to avoid the specific performance of agreement to sell and it cannot be accepted that the petitioner was not aware about the status of his case pending before the civil court.

Learned counsel for the petitioner has argued that his counsel Mr. Ajay Jain had assured the petitioner that he will inform him (petitioner) about the case if the need so arises. But his counsel never informed him about the *ex parte* order and the decree. The very observation of the trial Court that the object of filing application under Order 9 Rule 13 CPC is an attempt to delay the matter is just based on presumption. Had the court below gone into zimini orders passed by trial Court before passing the *ex parte* judgment and decree dated 04.06.2012, it would have been clear that it is the plaintiff who repeatedly tried to delay the proceedings. He has further argued that *ex parte* proceedings should ordinarily be set aside and the court should hear and decide the matter on merits. Counsel has produced a copy of order dated 28.02.2018 passed by this Court in C.R. No.7927 of 2017 titled as “Inderjeet Singh Versus Raghbir Singh and another” to contend that in similar circumstances, the court had issued notice of motion for setting aside the *ex parte* decree passed in a civil suit seeking specific performance of agreement to sell, though subject to payment of ₹50,000/- as costs.

I have heard learned counsel for the petitioner.

The provisions under Order 9 Rule 13 CPC are as under:-

“13. Setting aside decree *ex parte* against defendants.-

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 time 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 of setting aside the *ex parte* decree.”

In the case in hand, respondent-plaintiff had filed a suit on 18.05.2007 and thereafter, the suit was amended on 27.03.2010. When no one had put in appearance on behalf of the petitioner-defendant, the petitioner was proceeded against *ex parte* and the case was adjourned to 10.05.2010 for *ex parte* evidence of the plaintiff. One of the main argument raised by learned counsel for the petitioner is that the case was earlier entrusted to Shri Ajay Jain, Advocate, and since he had joined as Additional Advocate General, Haryana at Chandigarh, he could not appear before the trial Court on 27.03.2010. This argument, however, was not found satisfactory by the trial Court as the order proceeded against the petitioner *ex parte* was passed on 27.03.2010 whereas Ajay Jain was appointed as an

Additional Advocate General, Haryana on 07.06.2011. Therefore, on the date on which *ex parte* proceedings were initiated, petitioner was being represented through Mr. Ajay Jain, Advocate. The plea of counsel for the petitioner that he is ready to compensate the respondent-plaintiff in case *ex parte* proceedings are set aside, cannot be accepted as the respondent-plaintiff is pursuing the suit right from 18.05.2007 and the petitioner-defendant had appeared in the case on 30.07.2007. Even written statement was filed on 06.10.2007 and the issues were framed on 11.03.2008. The suit was amended and the amended plaint was filed on 03.03.2010. It is at this stage when the case was fixed for filling of written statement on behalf of petitioner to the amended plaint i.e. on 27.03.2010 when the petitioner did not appear and he was proceeded against *ex parte*. Even the application seeking setting aside *ex parte* order was filed in October 2013 i.e. after about 1 ½ years of passing of the judgment and decree dated 04.06.2012.

Considering the fact that the suit was filed on 18.05.2007 and the suit was decreed on 04.06.2012 though *ex parte*, this Court cannot ignore the fact that the respondent-plaintiff had been pursuing his case right from the year 2007. Even after passing of decree dated 04.06.2012, the same could not have been executed. So far as the reference made to C.R. No.7927 of 2017 is concerned, the interim order has no binding precedence, as each case has its different facts.

Dismissed.

(HARI PAL VERMA)
JUDGE

08.03.2018

sanjeev	Whether speaking/reasoned?	Yes/No
	Whether reportable?	Yes/No