

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Date of decision: 22.01.2018

CR No.1537 of 2017 (O&M)

1.

Shivani Gupta

.....Petitioner

Versus

Surinder Kumar and another

.....Respondents

2.

CR No.366 of 2017 (O&M)

Shivani Gupta

.....Petitioner

Versus

Surinder Kumar and another

.....Respondents

CORAM:HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. Jasbir Singh, Advocate,
for the petitioner(s).

Ritu Bahri, J.

This order shall dispose of CR No.1537 of 2017 and CR No.366 of 2017 together as common questions of law and facts are involved in both the petitions. For reference, facts are being taken up from CR No.1537 of 2017.

Challenge in CR No.1537 of 2017 is to the order dated 21.12.2015 passed by the Civil Judge (Senior Division), Yamuna Nagar at Jagadhri, dismissing an application filed by applicant-petitioner (Shhvani Gupta) under Order 9 Rule 13 CPC and judgment dated 03.11.2016 passed by the Additional District Judge, Yamuna Nagar at Jagadhri, whereby

appeal against the aforesaid order has been dismissed.

CR No.366 of 2017 has been filed against the judgment dated 03.11.2016 passed by the Additional District Judge, Yamuna Nagar at Jagadhri, dismissing an appeal filed by Shivani Gupta-petitioner against the order dated 21.12.2012 passed by the Civil Judge (Senior Division), Yamuna Nagar at Jagadhri, whereby her objections under Order 21 Rule 98 CPC have been dismissed.

Brief facts of the case are that initially, Surinder Kumar (respondent No.1) filed a suit for specific performance of agreement to sell dated 17.11.2004 against Anil Kumar (respondent No.2) with respect to house situated at Gobindpura, Yamuna Nagar. Upon notice, Anil Kumar appeared and contested the suit up to 26.03.2009 and thereafter, he did not appear and was proceeded against exparte vide order dated 18.07.2009. He filed an application for setting aside the exparte order dated 18.07.2009, but again failed to appear before the Court and his application was also dismissed for non prosecution vide order dated 25.10.2011. Ultimately, the aforesaid suit was decreed exparte vide judgment dated 16.12.2011.

Thereafter, present petitioner (Shivani Gupta) made an application under Order 9 Rule 13 CPC for setting aside the exparte decree dated 16.12.2011, which was dismissed on 11.03.2013. Against this order, she preferred an appeal, whereupon the Additional District Judge, Yamuna Nagar at Jagadhri, vide his order dated 05.09.2014, set aside the order dated 11.03.2013 and remanded the matter back to the trial Court with a direction to frame appropriate issues on the basis of pleadings of the parties and decide the matter afresh after affording opportunity of evidence to both the parties.

In compliance with the order dated 05.09.2014 passed by the

Additional District Judge, Yamuna Nagar, the following issues were framed:-

1. Whether judgment and decree dated 16.12.2011 is liable to be set aside? OPA
2. Whether the application is not maintainable in the present form? OPR
3. Whether the application is time barred? OPR
4. Relief.

After framing of issues, both the parties led their respective evidence. The main plea of applicant-petitioner was that both the decree holder (DH) and judgment debtor (JD) had colluded with each other in order to defeat her rights in the suit property. She had purchased the property vide sale deed dated 22.07.2009 executed by Anil Kumar (JD) in her favour, therefore, she had stepped into the shoes of original owner Anil Kumar. It was also pleaded that the decree dated 16.12.2011 had been obtained by the decree holder by playing fraud not only with the party, but also with the Court and the said decree was the result of collusion between the DH and JD to defeat the rights of the applicant.

After going through the evidence led by the parties, both the Courts below have returned concurrent finding of fact that an agreement to sell dated 19.08.2004 Ex.P3 was executed by Anil Kumar-JD in favour of Vidya Bhushan (father of present petitioner). However, this agreement was found to be a security document only to secure the repayment of Rs.3 lakhs allegedly advanced by Vidya Bhushan to JD Anil Kumar. There was no intention to sell the suit property in favour of Vidya Bhushan. Petitioner had also relied upon another agreement dated 19.12.2006, which was allegedly

executed by Anil Kumar in favour of Vidya Bhushan. In this agreement, it was pleaded that an amount of Rs.3 lakhs, which had been earlier paid to JD-Anil Kumar was adjusted as sale consideration. In fact, there was no documentary evidence with regard to payment of Rs.3 lakhs. In this agreement, nothing had been mentioned with regard to the earlier agreement dated 19.08.2004 or the fact that consideration had already been received by Anil Kumar. Rather, it was mentioned that an amount of Rs.3 lakhs had been paid to JD Anil Kumar on 19.12.2006 itself in the presence of witnesses.

Aforesaid Vidya Bhushan (father of petitioner) had filed a suit for specific performance against Anil Kumar. During pendency of the said suit, a written compromise had been effected between the parties on 08.08.2009 itself. Applicant-petitioner has claimed that after accepting a sum of Rs.2,70,000/-, JD Anil Kumar executed a sale deed in her favour on 22.07.2009. However, no writing was executed between the parties with respect to the aforesaid payment of Rs.2,70,000/-. Even a perusal of sale deed dated Ex.P5/2 shows that no consideration was passed on 22.07.2009. Even in the suit filed by plaintiff-Surinder Kumar, JD-Anil Kumar had filed his written statement and contested the suit. He had taken all the pleas available to him, including the plea that alleged agreement to sell was a result of fraud and fabrication. Later on, he failed to appear and was proceeded against exparte vide order dated 18.07.2009. Sale deed in favour of applicant-petitioner was executed on 22.07.2009 i.e. four days after passing of the exparte order dated 18.07.2009. On 05.12.2009, JD-Anil Kumar had filed an application for setting aside the exparte order dated 18.07.2009, which was dismissed in default on 25.10.2011.

All the above facts shows that there was collusion between applicant-petitioner (Shivani Gupta), her father Vidya Bhushan and JD-Anil Kumar. The trial Court has observed that though earlier alleged agreement dated 19.08.2004 was a security document, however, it was not believable that JD Anil Kumar would have executed another agreement to sell dated 19.12.2006 without receiving any consideration and without mentioning anything to that effect in the said agreement. Further, the civil suit filed by Vidya Bhushan against JD Anil Kumar was also dismissed as withdrawn as a compromise dated 08.08.2009 had been effected between the parties. Prior to this date, JD Anil Kumar could not have executed sale deed dated 22.07.2009 in favour of applicant-petitioner Shivan Gupta without mentioning with regard to adjustment of Rs.3 lakhs, as reflected in the agreements dated 19.08.2004 and 19.12.2006. Moreover, all those facts were never brought to the notice of the Court by JD Anil Kumar and collusion between Anil Kumar and Vidya Bhushan, father of applicant-petitioner, could not be ruled out.

JD-Anil Kumar had contested the civil suit filed by plaintiff-DH for specific performance of agreement to sell dated 17.11.2004 and even in this suit, he was proceeded against exparte on 18.07.2009. After four days of passing of said order, he had executed a sale deed in favour of the present petitioner. Hence, there was no evidence to show that he had colluded with decree holder-plaintiff Surinder Kumar when exparte decree was passed on 16.12.2011. Rather, it was evident that both JD Anil Kumar and Vidya Bhushan were in collusion with each other.

Applicant-petitioner also took a plea that in the agreement to sell dated 17.11.2004, name of father of Anil Kumar was corrected and changed

to Sham Singh. Since JD Anil Kumar did not deny having purchased the stamp papers and his signatures on the agreement dated 17.11.2004, it could not be proved that the judgment and decree dated 16.12.2011 was obtained by playing fraud upon the Court.

Further, on the question of limitation, it was observed by the trial Court that judgment and decree under challenge was passed on 16.12.2011 and application was made on 15.02.2013. Decree holder had filed execution application before the executing Court, wherein, objections were filed on behalf of the objector/petitioner on 02.06.2012. Application under Order 9 Rule 13 CPC had been filed after 8 months of appearance in the execution petition. There was no justifiable ground for condonation of delay, as application for setting aside the exparte decree could only be filed within 30 days and if, no summon or notice is served, then it is from the date of knowledge. Applicant-petitioner had filed her objections on 02.06.2012, meaning thereby, on that date, she had due knowledge about passing of the exparte decree dated 16.12.2011, however, she filed application under Order 9 Rule 13 CPC on 15.02.2013. Hence, the application was held to be time barred as there was no sufficient cause to condone such a long delay.

The petitioner was represented by her father, who was her General Power of Attorney holder, but even he had failed to bring on record sufficient reasons to set aside the judgment and decree dated 16.12.2011. Moreover, in the main suit, vide order dated 04.02.2006, defendant (JD) had been restrained from alienating the suit property till the decision of the suit. The sale deed in favour of present petitioner was made during the pendency of the suit on 22.07.2009. Even in the written statement filed by JD Anil

Kumar, he did not mention about the agreements dated 19.08.2004 and 19.12.2006, which were executed with Vidya Bhushan. With these observations, trial Court dismissed the application under Order 9 Rule 13 CPC as well as objections filed by the present petitioner. Appeal against those orders also met the same fate.

Learned counsel for the petitioner has vehemently argued that once, sale deed qua the suit property had been executed in her favour on 22.07.2009, she had stepped into the shoes of Anil Kumar (JD) and there was a collusion between Surinder Kumar (DH) and Anil Kumar (JD), as after execution of the aforesaid sale deed, exparte decree had been passed on 16.12.2011.

This argument of learned counsel for the petitioner has been considered in detail by both the Courts below. It has rightly been held that in the suit filed by Surinder Kumar, JD Anil Kumar was proceeded against exparte vide order dated 18.07.2009 and exactly four days thereafter, he executed sale deed in favour of present petitioner. Moreover, on 05.12.2009, he had filed an application for setting aside the judgment dated 18.07.2009, which was dismissed vide order dated 25.10.2011. Even in this application, Anil Kumar did not mentioned about the sale deed dated 22.07.2009. Hence, collusion between JD Anil Kumar and the present petitioner could not be ruled out. Both the Courts have rightly returned finding(s) that an agreement dated 19.08.2004 had been executed between JD Anil Kumar and Vidya Bhushan (father of present petitioner) and it was only a security document for Rs.3 lakhs. Subsequently, another agreement dated 19.12.2006 was executed between them. Even in this agreement, nothing was mentioned about the sale consideration. When Vidya Bhushan

filed a suit for specific performance of agreement to sell, compromise was arrived at between the parties on 08.08.2009. Trial Court had held that sale deed dated 22.07.2009 could not be executed in favour of the present petitioner. Hence, whether it was civil suit filed by Vidya Bhushan or present plaintiff Surinder Kumar, Anil Kumar (JD) had no occasion to execute sale deed dated 22.07.2009 in favour of petitioner-Shivani Gupta. No evidence was led by the petitioner that before executing sale deed in her favour on 22.07.2009, Vidya Bhushan (her father) had returned Rs.3 lakhs to JD Anil Kumar, as this fact was mentioned in the agreements dated 19.08.2004 & 19.12.2006. Without adjustment of this amount, there was no occasion for JD Anil Kumar to execute sale deed dated 22.07.2009 in favour of present petitioner-Shivani Gupta. Moreover, there was unexplained delay in making the application.

In the light of the above discussion, this Court is of the view that learned Courts below have rightly dismissed the application under Order 9 Rule 13 CPC as well as objections under Order 21 Rule 98 CPC filed by the petitioner. The scope of interference in the impugned orders/judgments is limited, as no illegality, much less perversity has been found therein warranting interference by this Court.

Resultantly, both the petitions i.e. Civil Revision Nos.1537 and 366 of 2017 are dismissed.

22.01.2018
ajp

(RITU BAHRI)
JUDGE

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