

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

**RSA No.3776 of 2008 (O&M)
and other connected matters
Date of Order:02nd November, 2018**

Ram Lal

..Appellant

Versus

Balwant Singh and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Pritam Saini, Advocate,
for the appellant (s) in RSA Nos.3376 and 3868 of 2008)

Mr. Som Nath Saini, Advocate,
for the petitioner in COCP No.2011 of 2016.

Mr. Ashwani Gaur, Advocate,
for the petitioners in CR No.8874 of 2017)

Mr. Sandeep Sharma, Advocate,
for respondent Nos.1 to 8 in RSA No.3776 of 2008.

Mr. V.K.Jindal, Sr. Advocate, with
Mr. Gopal Soni, Advocate,
for respondent nos.9 to 12 in RSA No.3776 of 2008)

ANIL KSHETARPAL, J.

By this judgment, RSA No.3776, 3868 of 2008, Civil Revision No.8874 of 2017 and COCP No.2011 of 2016 shall stand disposed of. In both the regular second appeals concurrent findings of the courts below have been challenged.

In the considered view of this court, two issues need determination.

- (1) What is the scope of a separate suit filed to challenge the ex-parte decree passed by a competent court of jurisdiction?
- (2) Whether in absence of any notification or evidence, the property can be held to be evacuee property?

Two suits were filed. One by Ram Lal seeking declaration with a consequential relief of permanent injunction challenging civil court judgment and decree passed in Civil Suit No.213 of 1985, decided on 20.10.1985. The second suit was filed by Man Singh, defendant in the first suit, seeking decree of permanent injunction. Both the suits were consolidated and disposed of by a single judgment passed by the trial court. Two appeals filed by the appellant herein i.e. Ram Lal have also been disposed of by a common judgment by the first appellate court.

It is significant to note that all the parties are successor-in-interest of one Ganga Ram. Ganga Ram had four sons, namely, Ram Lal, appellant herein, Late Shri Mange Ram, Ram Singh and Man Singh. It is the case of the plaintiff that some property was ancestral whereas some of the property was his self acquired and Ganga Ram, their father had permitted defendant no.1 and 2 to raise construction and they have taken over plot more than their share. It is claimed that property No.3ND was purchased by the plaintiff on 25.06.1987 from the Custodian Department. It is further pleaded case of the plaintiff that in the year 1995, plaintiff filed a suit restraining the defendants from raising construction, in which compromise was arrived at on 11.08.1987 to the effect that defendants would hand over 125 Sq. yards land but the defendants have failed to implement the aforesaid settlement. It was further claimed by the plaintiff

that Man Singh filed a suit which was decreed ex-parte by the court on 23.10.1985 and he (plaintiff-appellant herein) was wrongly proceeded against ex-parte and therefore the ex-parte judgment and decree is result of fraud.

Defendants contested the suit and pleaded that plaintiff has an alternative remedy of filing an application under Order 9 Rule 13 CPC for setting aside ex-parte judgment and decree. It was further pleaded that none of the brothers is in occupation of more than his 1/4th share. The existence of any compromise on 11.08.1987 was disputed.

Both the courts after appreciating the evidence have dismissed the suit filed by Ram Lal (appellant herein), and decreed the suit filed by Man Singh for injunction. In short both the courts have found that sale of property by the custodian department is sham as it is not proved on the file that the property was ever a custodian property. The courts have further found that plaintiff Ram Lal had failed to prove that there was any fraud in obtaining the decree dated 23.10.1985.

This court has heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by the courts below and the record.

Learned counsel while referring to Ex.P18, a copy of the summons, issued in the previous suit of 1985 has submitted that since the report on the aforesaid summons is factually incorrect, therefore, ex-parte decree is result of fraud. Learned counsel has submitted that on Ex.P18, report dated 30.04.1985 by the Process Server records that when process server visited the residence of Ram Lal, appellant herein, it was reported by his mother that he has gone out for work but she refused to accept the

summons and, therefore, copy of the summon of the court was pasted outside the residence of Ram Lal. He submitted that undisputedly, she had died before that date and therefore the report was manipulated.

This court has analyzed the argument of learned counsel. No doubt, the report dated 30.04.1985 records this fact but still the court did not proceed ex-parte against Ram Lal on the basis of the aforesaid report. Again summons were sent, copy whereof is Ex.P17, for 06.06.1985. The process server visited the residence of Ram Lal and the report was submitted that Ram Lal is not present in house and he has goes out of residence for work during day time. The members of the family who were present, refused to accept summons/notice and therefore, once again a copy of the summon has been pasted on the outer door of the house. Further the court still did not proceed against the appellant ex-parte (who was defendant in the previous suit). The court ordered local proclamation and after carrying out the local proclamation, appellant was proceeded ex-parte. It may be relevant to mention here that the report of local proclamation has not been filed or brought on record in the present proceedings. In these circumstances, in the considered view of this court, appellant Ram Lal cannot be permitted to take benefit of a small error in the first report dated 30.04.1985 particularly when subsequently fresh summons were sent. On both occasions, the summons were pasted on the outer door of the residence of the appellant Ram Lal and thereafter efforts was made to serve Ram Lal through local proclamation.

It is not the case of the appellant that he was not residing in that house along with his family members. Although, learned counsel for the appellant submitted that compliance of Order 5 of the Code of Civil Procedure has not been made. It may be noted that the court made sincere

attempt more than once to personally serve appellant herein in the previous suit. In such circumstances, substantial compliance has been made and therefore the previous judgment cannot be held to be result of fraud on the aforesaid small error. Still further plaintiff-appellant has chosen to challenge the decree passed in the year 1985 by filing a suit on 12.02.1994 and therefore, the present suit is also barred by time.

Learned counsel for the appellant further submitted that property i.e. property No.3ND is a self acquired property having been purchased by him from Custodian Department on 25.06.1985. He submitted that the aforesaid property cannot be treated as Joint Hindu Family property and hence the previous decree is result of fraud. It has come in evidence as found by both the courts below that there was no notification declaring the property as evacuee property under the Administration of Evacuee Property Act, 1950.

It may be noted that Ganga Ram was elder of a Hindu Family. It is the case of the plaintiff that some property was ancestral and the property No.3ND, which was his self acquired property. Even if it is assumed that the assertion of the plaintiff is correct with respect to property No.3ND, still once in the previous suit, a decree was passed dividing the property which included the property in dispute which is claimed to be self acquired property, the decree cannot be set aside on the ground that it is result of fraud.

Learned counsel for the appellant submitted that civil court has no jurisdiction to examine whether property is property of the Custodian or not. He made reference to Section 46 of the Administration of Evacuee Property Act, 1950. No doubt, the jurisdiction of the civil court is barred.

However, it was incumbent on the plaintiff to first prove that the property was ever notified as custodian property.

Now the stage is set for considering the issues which have been framed.

With regard to first issue, it may be noted that a party aggrieved by an ex-parte decree has four options:-

- (1) The party is entitled to file an application under Order 9 Rule 13 CPC for setting aside ex-parte decree. In those proceedings, party is entitled to establish before the court that he has been incorrectly proceeded against ex-parte or there was a sufficient cause for his non-appearance and therefore he has right to be heard in the suit.
- (2) The party also has a right to challenge the decree on merits by filing an appeal. The appellate court can examine the case on merits and decide.
- (3) A party against whom ex-parte decree was passed can also file a separate suit on the ground that the previous decree was result of fraud. However, in subsequent suit, the court can interfere only if fraud is proved.
- (4) In appropriate cases he can also file an application for review in which again the court has a very limited jurisdiction.

As noted above, in the proceeding under Order 9 Rule 13 i.e. application for setting aside ex-parte decree, party is entitled to establish before the court that he was proceed against ex-parte wrongly. As regards a separate suit, for declaration that the ex-parte decree is result of fraud, it can

only be set aside unless the court comes to the conclusion that such decree is result of fraud. Fraud has to be pleaded and proved like a criminal case. A small irregularity in the report of the process server would not make the judgment and decree fraudulent particularly when party to the suit was not proceed against ex-parte on the aforesaid report. Similarly, the scope of review application, if any, filed is very limited.

Learned counsel for the appellate while referring to a judgment passed by the Hon'ble Supreme court in the case of **Mahesh Yadav and another vs. Rajeshwar Singh and others, (2009) 2 SCC 205** has submitted that the courts have wrongly held that the separate suit is not maintainable. Learned counsel has referred to para 15 of the judgment, wherein the Hon'ble Supreme Court concluded that these 4 options as noted above are available. Paragraph 15 is extracted as under:-

“15. The proviso appended to Order IX rule 13 of the Code of Civil Procedure postulates that when an ex parte decree has been passed against some of the defendants and it is necessary to set aside the entire decree, the Court is not powerless to do so. If an application for setting aside the ex parte decree was maintainable at the instance of the appellants, we fail to understand as to why a separate suit was required to be filed. When an ex parte decree is passed, the defendant may have more than one remedies. He may file a suit contending that the decree was obtained fraudulently. He may file an application under Order IX Rule 13 of the Code of Civil Procedure for setting aside the ex parte

decree. He may prefer an appeal from the ex parte judgment and decree. In a given case, he may also file a review application.

On careful reading of the aforesaid judgment, it is apparent that reliance has been placed by the Hon'ble Supreme Court on a previous judgment in the case of **Bhanu Kumar Jain v. Archana Kumar and another, (2005) 1 SCC, 787.** The conclusion drawn by the Hon'ble Supreme court in the aforesaid judgment is in para 38, which is extracted as under:-

38. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr. Chaudhari that the "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this Court in Rani Choudhary, P. Kiran Kumar and

Shyam Sundar Sarma v. Pannalal Jaiswal.”

On careful examination of the aforesaid judgments and the relevant portions which have been extracted above, it can be concluded that no doubt separate suit is maintainable to challenge an ex-parte decree but the same can only be allowed if the court comes to a conclusion that previous ex-parte decree was result of fraud.

In the present case, no fraud has been established. Even if it is assumed for argument sake that some property i.e. property no.3ND was self acquired property, but once parties have chosen to divide the same amongst family members by including the entire property, the decree cannot be said to be result of fraud. It was equitable distribution of the property held by the family members.

Now let us examine the second issue which noted above. In the considered view of this court, on careful examination of the various judgment relied upon by learned counsel for the parties, it is apparent that the notification under Section 7 of the Administration of Evacuee Property Act, 1950, is sine-qua non for holding that the property is evacuee property . No doubt, Section 8 of the Administration of Evacuee Property Act, 1950 also includes those properties which have been declared as such prior to the enactment of the Act. Still further, there was an amendment in the Act of 1950 by Act no.42 of 1954 enforced with effect from 08.10.1954 which provided that no property shall be declared evacuee property on or after 07.05.1954, However, there was certain exceptions which were carved out under Section 7A. In the present case, apart from allotment and the sale deed, executed by the Custodian Department, no substantive evidence has been led to prove that property no.3ND was a custodian property. It is the

claim of the appellant that he was paying rent to the Custodian Department from the year 1947 till April 1987. However, when Ram Lal appeared in evidence, he gave his age as 72 years on 08.04.2006. Meaning thereby the plaintiff claims that he was barely 13 years old when he started paying rent to the Custodian Department. Hence, the tenancy in favour of the plaintiff-Ram Lal becomes highly doubtful. Learned counsel has further made a reference to an order passed by the Joint Secretary Rehabilitation-cum-Settlement Commissioner, dated 18.10.1985. By this order, an application filed by Mange Ram, for impleading him as a party in the proceedings Ram Lal vs. State was dismissed by the Settlement Officer while holding that he cannot adjudicate upon this controversy as such controversy only be adjudicated upon in the capacity as a custodian general. In the considered view of this court, this order nowhere concludes that the property belongs to Custodian Department.

Now let's deal with Civil Revision No.8874 of 2017.

This revision petition has been filed against an order passed by the court under Section 10 of the Code of Civil procedure staying the proceedings in the subsequent suit. Once the appeal is being decided, the civil court would proceed with the suit as the reason for staying the proceedings has ceased to exist.

As regards COCP No.2011 of 2016, it may be noted that violation of the interim order passed by this court has been asserted. However, learned counsel for the petitioner in COCP has submitted that the judgment passed in the main case would also govern the decision of this COCP.

In view of the aforesaid discussion, Regular Second Appeal

Nos.3776 and 3868 of 2008 shall stand dismissed. Whereas Civil Revision No.8874 of 2017 and COCP No.2011 of 2016 shall stands disposed of in terms of the judgment in the regular second appeals.

02nd November, 2018
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(ANIL KSHETARPAL)
JUDGE

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