

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

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RSA No. 2733 of 2017 (O&M)

Date of decision : April 16, 2018

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Surender and others

.....Appellants

Versus

Maan Singh and others

.....Respondents

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BEFORE: HON'BLE MS. JUSTICE RITU BAHRI

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Present: Mr. S.K Chauhan, Advocate for the appellants.

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RITU BAHRI, J.

C.M No. 6786-C of 2017

Prayer made in the application is for condonation of delay of 247 days in filing the appeal.

For the reasons mentioned in the application, delay of 247 days in filing the appeal is condoned. C.M is allowed.

RSA No. 2733 of 2017

Appellants-defendants have come up in appeal against the judgment of the appellate Court dated 30.5.2016 passed by the District Judge, Bhiwani, whereby appeal against the judgment and decree dated 18.2.2015 passed by the Civil Judge (Junior Division), Bhiwani was allowed and the suit of the plaintiff was decreed. Vide the judgment of the trial Court, suit filed by the contesting respondent-plaintiff (hereinafter referred to as 'the plaintiff') was dismissed

Briefly stated, the facts of the case are that the plaintiff sought the relief of declaration that the plaintiff and proforma defendants be declared owner of the suit property on the basis of Will dated 7.4.1997 (Ex. P-1) and further sought the relief of declaration that mutation No.4800 is

wrong and against the law and not binding on his rights. Relief of permanent injunction restraining the defendants from causing any kind of interference in the suit property on the basis of mutation No.4800 was also sought. Plaintiff and proforma defendants were real brothers and defendant no.4 was their real sister. Contesting defendants no. 1 to 3 are Lrs of Om Parkash. On 7.4.1997, Masudi Singh got the will registered stating that after his death, the plaintiff and proforma defendants will be owner in possession over his property. On 19.10.1997, Masudi Singh died. Thereafter, the father of defendants no. 1 & 2 and husband of defendant no.3, Om Parkash got entered mutation no. 4800 in favour of plaintiff and proforma defendants along with contesting defendant no.4. The plaintiff and proforma defendants were not having any notice of the mutation and the suit was filed to get the mutation no.4800 cancelled in view of the Will dated 7.4.1997 (Ex.P-1).

On notice, defendants appeared and filed written statements and took the plea that the alleged Will was the result of fraud due to the execution of coercion executed by the executant as Masudi Singh was not of sound mind when he executed the Will as he was of 85 years of age. They further stated that as per the Will, they did not receive any alleged house and alleged Will was prepared at the instance of the plaintiff and proforma defendants. It was further submitted that the answering defendants have a pre-existing rights in the ancestral property being a coparcener and alleged Will is not binding on the rights of the defendants and mutation No.4800 dated 30.5.1998 was correctly sanctioned in favour of the legal heirs of deceased Masudi Singh. The land belonged to Bakhtawar and after his death the land came in the hands of Masudi Singh i.e grandfather of

defendants and thereafter mutation of inheritance was sanctioned in favour of plaintiff and proforma defendants and in favour of answering defendants. It was further submitted that the plaintiff had earlier also filed a suit against the proforma defendant no.8 challenging the plot of 600 yards alleged to be owned and possessed by him and the said plot was alleged to be given to him by Masudi Singh. In that plaint, the plaintiff himself admitted that late Om Parkash i.e father of defendants had an equal share in that plot alleged to be owned by proforma defendant no.8 and estopped from his act and conduct and mutation of inheritance was duly sanctioned in the presence of plaintiff and defendants and proforma defendants.

From the pleadings of the parties, the following issues were framed:

- (i) Whether the plaintiff and proforma defendants are entitled to the relief of suit for declaration? OPP
- (ii) If issue No.1 is proved then whether the plaintiff is entitled for relief of permanent injunction as prayed for? OPD
- (iii) Whether the suit of the plaintiff is not maintainable? OPD
- (iv) Whether the suit of the plaintiff is bad for non-joinder and mis-joinder of necessary parties? OPD
- (v) Whether the suit of the plaintiff is time barred? OPD
- (vi) Relief.

The defendants did not appear in the witness box and were proceeded against ex parte.

After hearing counsel for the parties and examining the evidence produced on the record, trial Court dismissed the suit of the

plaintiff. Trial Court held that the suit property was ancestral and any person cannot make a Will of the property wherein there is undivided interest of the other coparceners. Thus, the mutation no. 4800 could not be declared null and void and resultantly the plaintiff and proforma defendants only could not be declared as owner in possession over the suit property.

The appeal filed by the plaintiff against the judgment dated 18.2.2015 was allowed by the lower appellate Court. It was observed that the Will (Ex.P1) did not contain any recital that the suit property was inherited by Masudi Singh from his father Bakhtawar. The Will recited that the testator is the owner of properties. There was no documentary evidence that Masudi Singh had inherited the property by way of natural succession from his father, Bakhtawar. The finding of the trial Court that the suit property was ancestral property in the hand of Masudi Singh and he was not competent to execute the Will was held to be not sustainable in the eye of the law. It was held that the suit property was self acquired property of Masudi Singh and he was competent to dispose of the same, in any manner. Further Masudi Singh had executed the Will dated 7.4.1997 (Ex.P1) in favour of the plaintiff and proforma defendants no. 5 to 8 and his son Om Parkash and daughter Dharam Devi had no right or interest in the same.

Counsel for the appellants-defendants have argued that the judgment passed by the lower appellate Court is based on wrong assumption that the property is not ancestral. A perusal of the judgment of the trial Court and lower Appellate Court shows that the defendants were proceeded against ex parte.

Heard counsel for the parties and gone through the records of the case. Execution of Will No. 5 dated 7.4.1997 was duly proved by

leading cogent evidence. Jagmohan, HRC, DC Office Bhiwani (PW-1) produced the record of the Will and proved the certified copy of the Will (Ex.P1). Jagdish Sachdeva (PW-2) had scribed the Will, who deposed that he had scribed the Will at the instance of Masudi Singh. Sh. Anand Dhayal, Advocate and Gulab Singh were attesting witnesses. Masudi Singh had thumb marked the Will in his presence. The attesting witnesses had also signed in his presence. He had entered the Will at serial no. 177 dated 7.4.1997 in his register. Masudi Singh had also thumb marked in his register. Mann Singh (PW-3) in his affidavit (Ex. PW3/A) affirmed his case as set up in the plaint. Sh. Anand Dhayal, Advocate (PW-4) deposed that he is an Advocate. He had attested the Will No.5 dated 7.4.1997. Gulab Singh was another attesting witness, who had attested the Will. The execution of the Will was duly proved by the plaintiff.

Counsel for the appellants-defendants has not been able to cite any judgment to contend that once the defendants were proceeded against ex parte before the trial Court then the lower appellate Court was bound to issue a notice to them, at the stage of appeal. He referred to a judgment passed by a Co-ordinate Bench of this Court in the case of ***Makhan Singh and others vs. Harbans Lal and another, 2017 (1) RCR (Civil) 288***, where the Court had refused to stay the execution proceedings when an application for setting aside the ex parte decree and order was pending. In the present case, after the defendants were proceeded against ex parte, no application for setting aside the ex parte proceedings had been filed. Thus, no attempts were made to set aside the ex parte proceedings. Hence the ex parte order had attained finality. The second judgment referred by him and passed by a Co-ordinate Bench of this Court in the case of ***Delhi Financial***

Corporation and others vs. Purshottam Dass Garg and others 2017 (3)

RCR (Civil) 95 is also of no help to the appellants-defendants as in that case also, application for setting aside of ex parte order was moved after ten years by making wrong statement of facts that the petitioners were not aware of the facts, whereas an application in this regard was already moved and was dismissed.

In the present case, after the ex parte order had been passed in the year 2012, the trial Court had dismissed the suit of the plaintiff on 18.2.2015. No steps were taken to get the ex parte order set aside. A perusal of the trial Court order shows that on notice of the suit, the defendants appeared and filed written statements and they were proceeded ex parte on different dates.

Under Order 41 Rule 21, relevant provisions of the CPC would be as under:

21. Rehearing on application of respondent against whom ex parte decree made- Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the Appellate Court to rehear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall rehear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

As per Order 41 Rule 21 CPC, the appellate Court has a discretion to dispense with the service of the notice of the appeal on those, who had not appeared in the trial Court. This question came up for

consideration before this Court in *Satnam Singh vs. Roop Lal 1998 (4) RCR (Civil) 656*, wherein it has been held that dispensing with the service of respondents in appeal under Order 41 Rule 14(3) is only discretionary. If they were proceeded ex parte by the trial Court after service, only then the appellate Court can exercise this discretion in appropriate cases. If the defendants were not personally served in the trial Court, the appellate Court will not be justified in proceeding without serving such respondents in appeal. In that case since the service of the defendants had not been affected before they were proceeded ex parte it was held that the Additional District Judge should not have exercised discretion in dispensing with the service of the notice of the appeal when it has been alleged that the defendants have not been served personally in the trial Court. The appeal was allowed and the ex parte judgment and decree was set aside and the matter was remedied to the Court of the Additional District Judge by this Court.

A Division Bench of this Court in the case of *Sarabjit Singh vs. Lourdes Serrato 2014 (3) RCR (Civil) 783*, was examining a case where marriage had been solemnized between a Sikh boy and a Christian girl. Appellant had filed a petition under Section 13 of the Hindu Marriage Act, 1955 seeking dissolution of the marriage between the parties. In the petition, the respondent-wife was served with notice but did not appear. The respondent-wife was residing in California. After 20 days of marriage, she had gone back to California and stated that she would never come back to India in future. The divorce petition was dismissed on the ground that there was a gap 12 years between filing the divorce petition and the solemnization of marriage and that no witnesses had been examined. In

the appeal filed before this Court, appellant prayed that he may be allowed to withdraw the appeal and be granted permission to withdraw the initial petition filed for divorce so as to enable the appellant to seek appropriate remedy of nullity of the marriage by filing a necessary suit or petition on the same subject matter. It was held by this Court that marriage between Sikh unmarried man and Christian unmarried girl would be governed under the provisions of Special Marriage Act, 1954. The provisions of Hindu Marriage Act, 1955 would not be applicable and thus, in this case, petition under the Hindu Marriage Act, 1955 ought to have been dismissed on the ground that it was not maintainable. Since respondent-wife was proceeded ex parte before the trial Court, the Division Bench held that in view of the provisions of Order 41 Rule 14(3) of the Code of Civil Procedure as applicable to State of Punjab, there was no need to serve notice on the respondent. Accordingly, the appellant was allowed to withdraw the appeal as also the petition initially filed before the District Judge at Ferozepur and liberty was granted to him to seek appropriate remedy in accordance with law or file a fresh petition or suit for the same subject matter.

Hence in both the cases, keeping in view the special circumstances, the discretion has been exercised in the matter of giving notice to the respondent who was proceeded ex parte. In ***Satnam Singh's case (supra)***, the service of the respondent had not been affected and hence in appeal, the lower appellate Court was required to give notice and thereafter pass appropriate orders. In ***Sarabjit Singh's case (supra)*** before a Division Bench of this Court, since the marriage itself was a nullity and the respondent was proceeded ex parte after due service, the Division Bench allowed the husband to withdraw the appeal as also the petition initially

filed before the trial Court and to file a fresh petition or suit for the same subject matter

In the facts of the present case, as per the trial Court order, the defendants were proceeded ex parte vide four separate set of orders as reflected in paragraph 6 of the trial Court which is reproduced as under:

“On the other hand, defendants no. 1 to 3 did not appear before the Court on 17.2.2014 and proceeded against ex parte. Defendant no.4 did not appear before the Court on 23.7.2012 and proceeded against ex parte. Defendant no. 5 & 6 proceeded against ex parte VOD 17.2.2011. Defendant no.8 proceeded against ex parte VOD 20.3.2012. Defendant no.7 proceeded against ex parte VOD 13.11.2010”.

Thus, before the lower appellate Court, the defendants were rightly proceeded ex parte as service on them had been affected and the discretion has been rightly exercised as they had put in appearance and filed their written statements after service. Moreover, lower appellate Court has examined the Will (Ex.P-1) which did not contain any recital that the suit property was inherited by Masudi Singh from his father Bakhtawar. It stated that he was the owner of the suit property. Before the trial Court also, when the written statement was filed by the defendants and issues were framed they did not lead any evidence that the property in dispute was inherited by Masudi Singh from his father and hence the finding of the lower appellate Court that the property was self-acquired property has been rightly given. No ground is made out to interfere in the judgment passed by

the lower Appellate Court.

In view of all that has been discussed above, present regular second appeal is dismissed.

16-04-2018

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(RITU BAHRI)
JUDGE

Whether speaking/reasoned	Yes
Whether reportable	Yes