

CR-7287-2017 (O&M)

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

CR-7287-2017 (O&M)

Date of decision : 02.04.2019

Suresh C. Sharma

... Petitioner

Versus

S.B. Sharma and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Neeraj Gupta, Advocate
for the petitioner.

Mr. Chetan Mittal, Senior Advocate with
Mr. Satish Singla, Advocate,
Mr. Vishal Garg, Advocate
for respondent No.1.

AMIT RAWAL, J. (ORAL)

The present revision petition is directed against the impugned order dated 28.09.2017 (Annexure P-9) of the lower Appellate Court, accepting the appeal of the respondent-defendant No.1 preferred against the order dated 14.09.2015, whereby the application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the *ex parte* judgment and decree dated 08.03.2013, dismissed by the trial Court, has been allowed.

The petitioner-plaintiff instituted the suit for specific performance of agreement to sell dated 16.08.2004. Defendant Nos.1 and 2, on account of non-appearance, vide order dated 16.01.2013, were proceeded *ex parte*. The matter was posted for evidence of the plaintiff and finally, the *ex parte* judgment and decree was passed on 08.03.2013. The petitioner,

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vide legal notice dated 17.04.2013 (Annexure P-4), called upon defendant No.1, to appear before the Sub-Registrar for registration and execution of the sale deed, in terms of the judgment and decree dated 08.03.2013. The respondent-defendant No.1, submitted an application (Annexure P-5) for setting aside the *ex parte* judgment and decree, on the premise that respondent-defendant No.1, bona fide pleaded that till the application for amendment of the suit was not filed and copy supplied, the application under Order 7 Rule 11 of CPC will not be heard. On going back to England from India, defendant No.1 informed the concerned person to collect all the letters, on his behalf, but till date, counsel for the plaintiff did not supply the amended plaint to defendant No.1. On 05.02.2013, the father-in-law of the counsel for the defendant was seriously ill and suffering from Cirrhosis and lungs disease and ultimately succumbed to the organ failure, on 26.02.2013. Defendant No.1 was also engaged in a divorce case of his daughter in USA, during March-August 2013, therefore, was unable to attend the proceedings. The trial Court dismissed the application, but the lower Appellate Court allowed the same.

Learned counsel for the petitioner further submitted that the order of proceeding defendant No.1 *ex parte* was preceded by four perpetual absence, which has gone unexplained. The application for amendment was allowed and the case was adjourned to 17.12.2012, but the Presiding Officer was on leave on 17.12.2012 and the matter was taken up on 15.12.2012 and ordered to be listed on 16.01.2013, for the purpose already fixed. On 16.01.2013, counsel for defendant No.1 did not appear and was proceeded *ex parte*. The act and conduct of respondent-defendant No.1, had not only honest, but fraudulent. The agreement to sell was

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executed with the petitioner on receipt of ₹7,45,248/- out of total sale consideration of ₹13.5 Lacs, but defendant No.1 subsequently received ₹60 Lacs from the Firm namely, M/s Kamal Concrete, during execution of Memorandum of Understanding (MOU) dated 18.09.2010 and executed a sale deed dated 28.07.2011 in favour of one Jag Roshni Devi. The sufficient cause was conspicuously absent. The *ex parte* decree is recognized in law and in the application under Order 9 Rule 13 of CPC, the matter cannot be opened at the drop of the hat, thus, urges this Court for setting aside the impugned order.

Per contra, Mr. Chetan Mittal, learned Senior Counsel assisted by Mr. Satish Singla, learned counsel for the respondent No.1, submitted that the order of the lower Appellate Court is based upon the equity and relevant facts as the previous order reveals that the Presiding Officer while going on leave, had taken up the matter before the adjourned date of hearing i.e. on 15.12.2012 and posted the matter for 16.01.2013 i.e. in the absence of counsel for the parties. The reasons given in the application regarding divorce petition of the daughter and ill-health of the counsel, have also been appreciated. The petitioner has already taken almost six years i.e. two years before the trial Court as well as the lower Appellate Court and should not have opposed the application by this time, there would have been adjudication on merits and decision of the appeal, on either way, thus, urges this Court for dismissal of the present revision petition.

Mr. Gupta, also raised an argument that lower Appellate Court did not deal with the decision of the application under Section 5 of the Limitation Act.

I have heard learned counsel for the parties and appraised the

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paper book.

The facts, as noticed above, are not in dispute.

The petitioner could not belie the contents of the application regarding divorce proceedings of the daughter of defendant No.1 and ill-health of father-in-law of the counsel. It is a common practice amongst the litigants as well as lawyers to lay focus on health condition of family member. The trial Court should not have adopted harsh and stringent approach in declining the application. Even if, the suit property had been, alienated, during the pendency of the appeal, before the lower Appellate Court, the same would be subject matter of the decision, in case the suit is decided in the presence of the defendants i.e. after contest. The impugned order of the lower Appellate Court after noticing the evidence and the equity, allowing the application for setting aside the *ex parte* judgment and decree dated 08.03.2013, cannot be said to be suffering from illegality and infirmity. No ground is made out for interference. The trial Court is directed to expedite the disposal of the suit, as early as possible.

Accordingly, the present revision petition is dismissed.

Records of the Courts below be sent back.

02.04.2019

Yogesh Sharma

**(AMIT RAWAL)
JUDGE**

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**