

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

C.R.No.1219 of 2015(O&M)

Reserved on 22.09.2022

Date of Order:05.01.2023

Harbhajan Singh

...Petitioner

Versus

Umrao Singh Dhillon @ Umar Singh Dhillon (dead)
though his LRs and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Amit Jhanji, Sr. Advocate, with
Ms. Eliza Gupta, Advocate, and
Mr. Siddharth Bhukkal, Advocate
for the petitioner.

Mr. Amit Jain, Sr. Advocate, with
Mr. Varun Parkash, Advocate and
Mr. Chetan Salathia, Advocate
for respondent No.1(i), (ii).

ANIL KSHETARPAL, J

1. The plaintiff's suit for grant of decree of declaration that he is owner in possession to the extent of ½ (half) share in the land specified in the plaint, on the basis of a registered Will dated 30.06.1992 executed by late Sh. Atma Singh son of Sh. Hakam Singh, has been decreed ex-parte on 22.11.2006.

2. An application filed by the defendant no.1 to set aside the ex-parte decree has been dismissed by the trial court which order has been affirmed in the appeal. Defendant no.1 assails the correctness of orders passed by the courts below while dismissing his application under Order 9

Rule 13 CPC to set aside the ex-parte decree as well as the consequential appeal.

3. The relevant facts, in brief, are required to be stated which are as under:

Late Sh. Atma Singh had left behind two sons and three daughters, who are all residing abroad. It is the case of the plaintiff that late Sh. Atma Singh, while executing a registered Will dated 30.06.1982 bequeathed his property in favour of his two sons in equal shares, whereas, it is the case of defendant no.1 (the petitioner herein) that late Sh. Atma Singh bequeathed his entire property in his favour vide registered a Will dated 17.05.1994. By the impugned ex-parte decree dated 22.11.2006, the plaintiff has been declared the owner in possession to the extent of one ½ share in the suit property.

4. It is noted here that the Sub Divisional Magistrate-cum-Assistant Collector IInd Grade, Jalandhar, completed the mutation proceedings on 04.05.1999 in the presence of the parties. It was held that the Will dated 17.05.1994 executed by late Sh. Atma Singh was his last Will, therefore, the mutation, with respect to the property of late Sh. Atma Singh, is exclusively sanctioned in favour of Sh. Harbhajan Singh-the petitioner/defendant no.1.

5. Late Sh. Umrao Singh Dhillon filed the suit against his brother Sh. Harbhajan Singh and the three sisters. Defendant no.1-Harbhajan Singh was impleaded as a party in the suit. In the plaint, his address for service of summons was disclosed in the following manner:-

“1. Harbhajan Singh, S/o Atma Singh, S/o Hakim Singh, through Amarjit Singh S/o Gurmail Singh, Resident of Raikot, District Ludhiana, his general attorney.”

6. On 09.06.1999, the Court directed the issuance of summons in the suit as well as in the application for grant of temporary injunction. On three different dates of hearing, the Court noticed that the plaintiff did not furnish a registered cover along with the copy of the plaint to enable the office to issue notice. On 14.03.2000, the Court noticed that the summons have been received back unserved and fresh notice was directed to be issued for 09.06.2000 on which date, again, the summons sent to the defendants were not received back as served, thus, fresh notices were directed to be issued for 07.09.2000. Thereafter, on 07.09.2000, the court noticed that the summons issued to defendant no.2 to 4 have been received back with the report that they are residing abroad. The counsel representing the plaintiff was directed to furnish the correct addresses of defendant no.2 to 4 and thereafter, the defendants were directed to be summoned for 11.12.2000, on which date, again, the summons could not be issued for want of correct address. The plaintiff was given another opportunity to furnish the same within three days. On 27.02.2001, once again, summons could not be issued on the said defendants for want of correct address. Yet again, an opportunity was given to the plaintiff to furnish the correct address within three days and thereafter, the summons were directed to be issued to the defendants for 22.05.2001. The file of the case was taken up on 19.05.2001 as the Presiding Judge was going on leave from 21.05.2001 to 10.06.2001 and as the summons still remained unserved, they were once again directed to be issued for 03.08.2001. On 03.08.2001, the Court noticed that the summons could not be sent to the defendants notice as the plaintiff did not deposit the

process fee and registered cover. The case was adjourned while directing the office to issue fresh notice for 15.09.2001. The file of the case was taken up on 31.08.2001 as the Presiding Judge was to attend training from 03.09.2001 to 19.10.2001. Hence, the case was adjourned to 14.12.2001 for service of the defendants on filing of the process fee. On 14.12.2001, the following order was passed:-

“Present: Counsel for the plaintiff.

Today summons of the defendants received back with the report that the defendants have gone to Foreign Country. So I am satisfied that the service of the defendants cannot be effected through an ordinary way. So publication notice be issued to the defendant for 14.02.2001 in Nawan Zamana on depositing of Publication charges within seven days.

Sd/- CJ(JD)/14.12.01”

7. On the basis of the publication in the newspaper “Nawa Jamana” ex-parte proceedings were ordered to be initiated against the defendants on 14.02.2002.

8. The suit was decreed ex-parte on 22.11.2006. Defendant no.1 sought the setting aside of the ex-parte decree while asserting that he came to know about passing of the ex-parte decree only on 21.04.2007. Reply to the application was filed claiming that the application is barred by time as the defendant no.1 was in knowledge of the pendency as well as the decision of the suit. A replication to the reply filed by the plaintiff was also filed.

9. Sh. Amarjit Singh, son of Sh. Gurmail Singh, while appearing as the power of attorney holder of defendant no.1-Harbhajan Singh stated that he came to know of the suit in the first week of March, 2007.

Immediately, he informed this fact to defendant no.1-Sh. Harbhajan Singh

on telephone, who, soon thereafter, came to India and gave him the Power of Attorney dated 30.03.2007 and went back to Canada. After that, he made an enquiry about the status of the suit and accordingly, filed the application for setting aside the decree. AW2-Sh. Amarjit Singh son of Sh. Parkash Singh appeared in evidence and submitted that he is the mortgagee in possession of the property since 1999. It was stated that three persons visited the suit property in the month of March 2007 and informed him that a decree has been passed in their favour. He, then, informed this fact to Sh. Amarjit Singh son of Gurmail Singh, attorney of Sh. Harbhajan Singh. Sh. Harbhajan Singh came to India and met him in April, 2007.

10. Sh. T.P.S.Kalra, Advocate, appeared in evidence as AW3 and stated that Sh. Harbhajan Singh accompanied by Sh. Amarjit Singh came to him for the first time in the first week of March, 2007 and requested him to file an application for setting aside the ex-parte decree, however, he was not formally engaged on that day. After he was officially engaged as a counsel on 30.03.2007, he searched for the record and inspected the suit institution diary (Register) maintained by the Clerk of the Courts of Civil Judge (Sr. Divn.), Jalandhar as well as made enquiries from the Clerk. However, the clerk did not disclose him the exact date, month or year of the institution of the suit nor he disclosed the name of the Court in which the suit was listed, however, he was informed about the title of the suit. On further probe, he came to know that the suit was entrusted to the court of Sh. K.K.Kakkar, the then Civil Judge (Jr. Divn.), Jalandhar, and after search of the record of the successor Court, he came to know that an ex-parte judgment and decree has been passed against the petitioner herein. He applied for inspection and after

becoming aware of the facts of the case, he prepared an application for setting aside the ex-parte decree, which was filed in the Court within 2-3 days in the Court.

11. Both the courts have dismissed the application on the ground that the application was filed beyond the prescribed period of 30 days from the date of knowledge. It was observed by the Courts that as per the admission of Sh. Amarjit Singh, attorney and Sh. T.P.S.Kalra, Advocate, Sh. Harbhajan Singh came to know of the ex-parte decree in first week of March, 2007, whereas, the application was filed on 21.04.2007.

12. This Bench has heard the learned senior counsels representing the parties at length and with their able assistance perused the paper book.

13. The following question needs adjudication:-

(1) What is the true and correct interpretation of the phrase “knowledge of the decree” as used in Article 123 of the Schedule attached to the Limitation Act, 1963?

14. In this case, it is evident that defendant no.1 (the petitioner herein) is not residing in India. From the reading of the plaint, it is evident that the plaintiff knew that the defendant does not reside in India. The plaintiff neither disclosed the complete address and details of the defendant nor of his attorney. As per the report dated 16.01.2000, the summons to defendant no.1 could not be served through his attorney as the details of the area in which the addressee resides was not provided by the plaintiff. There is no evidence that the newspaper “Nawan Jamana” has circulation outside India. It is also evident that the plaintiff while filing the suit did not disclose

that defendant no.1 has propounded a registered Will executed in Canada by late Sh. Atma Singh in the mutation proceedings.

15. From the reading of the depositions of Sh. Amarjit Singh, son of Sh.Gurmail Singh, attorney of defendant no.1-Harbhajan Singh, it is evident that he came to know of the decision in the first week of March, 2007. He, immediately informed Sh. Harbhajan Singh on telephone, who, in turn, soon thereafter, came to India and executed a power of attorney dated 30.03.2007. They formally engaged Sh. T.P.S. Kalra, Advocate, for filing the application. There is no evidence that Sh. Amarjit Singh son of Sh.Gurmail Singh or Sh. Harbhajan Singh had the knowledge of the date, particulars or the contents of the decree. The only information available with them was that a decree has been passed. Neither the particulars of the court were available nor the suit number, its title or the date of decision was known. From the reading of statement of Sh. Amarjit Singh son of Sh. Parkash Chand, the mortgagee of Sh. Harbhajan Singh, it is evident that in the month of March, three persons visited the disputed land and disclosed that a decree has been passed with respect to the land, however, the entire details of the ex-parte decree were not disclosed. Sh. T.P.S. Kalra, Advocate, has stated that Sh. Harbhajan Singh along with Sh. Amarjit Singh, his attorney, came to him in the first week of March, 2007 and consulted him regarding the filing of an application for setting aside the ex-parte decree and Sh. Harbhajan Singh executed the power of attorney in favour of Sh. Amarjit Singh on 30.03.2007 which led to the formal engagement of Sh. T.P.S. Kalra, Advocate, as the petitioner's counsel. He, thereafter, searched the details of the suit from the suit institution register and then perused the

record of the concerned court to whom the suit was assigned. After the inspection of the record, he came to know of the complete details in the third week of April, 2007 and filed an application for setting aside the ex-parte decree on 21.04.2007. In such circumstances, the issue framed in para 13 of the judgment arises for adjudication and the Court has to determine whether the application filed by the petitioner for setting aside the ex-parte decree was barred by time.

16. It may be noticed that the Parliament has used the expression “the knowledge of decree” in Article 123 which is extracted as under:-

Description of application	Period of limitation	Time from which period begins to run
123. To set aside a decree passed ex parte or to re-hear an appeal decreed or herd ex parte	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

17. From the reading of commentary on the Limitation Act, 1963 by Manohar and Chitley, 8th Edition, it is evident that the term “knowledge” means a certain and clear perception of a fact. The expression “knowledge of the decree” in the Article means knowledge not of a decree but of a particular decree which is sought to be set aside. The Patna High Court in **Batulan vs. S.K.Ddivedi 1954 SCC Online Patna 144/ ILR (1954) 33 Patna 1025** has explained the expression “knowledge of the decree”. In **Bapu Rao vs. Sukh Ram Sadhu AIR 1923, Bombay 193**, it was explained that the words of the Article mean something more than mere knowledge that a decree had been passed in some suit, in some court against the applicant. The applicant must have knowledge not merely that a decree has

been passed by a court against him but that a particular decree has been passed against him in a particular court in favour of a particular person for a particular sum or granting certain relief. Subsequently, this expression came up for consideration before the Hon'ble Supreme Court in **Panna Lal vs. Murari Lal (dead) by LRs, AIR 1967 Supreme Court 1384.** While interpreting Article 164 of the Indian Limitation Act, 1908, the Court interpreted the expression "knowledge of the decree" in the following manner:-

"(4) In Pundlick Rowji v. Vasantrao Madhav- rao, (1909) 11 Bom LR 1296 Davar, J., held that the expression "knowledge of the decree" in Art. 164 means knowledge not of a decree but of the particular decree which is sought to be set aside, a certain and clear perception of the fact that the particular decree had been passed against him. On the facts of that case, Davar, J., held that a notice to the defendant that a decree had been passed against him in the High Court suit No. 411 of 1909 in favour of one Pund- lick Rowji with whom he had no dealings was not sufficient to impute to him clear knowledge of the decree in the absence of any information that the decree had been passed in favour of Pundlick Rowji as the assignee of a promissory note which he had executed in favour of another party. This case was followed by the Calcutta High Court in Kumud Nath Roy Chowdhury v. Jotindra Nath Chowdhury, (1911) ILR 38 Cal 394 at p. 403. In Bapurao Sitaram Kar- markar v. Sadbu Bhiva Gholap, ILR 47 Bom 485: (AIR 1923 Bom 193) the Bombay High f Court held that the evidence of two persons t who had been asked by the plaintiff to te the defendant about the decree and to settle the matter was not sufficient to impose knowledge of the decree on the defendant within the meaning of Art. 164. C. J., said: Macleod,

"We think the words of the article mean something more than mere knowledge that a decree had been passed in some suit in some Court against the applicant. We think it means that the applicant must have knowledge not merely that a decree has been passed by some Court against him, but that a particular decree has been passed to against him in a particular Court in favour of a particular person for a particular sum. A judgment-debtor is

not in such a favour able position as he used to be when he had thirty days from the time when execution was levied against him. But we do not think that the Legislature meant to go to the other extreme by laying down that time began to run from the time the judgment- debtor might have received some vague information that a decree had been passed against him."

This decision was followed in Batulan v. S. K. Dwivedi, (1954) ILR 33 Pat 1025 at pp. 1050-8 and other cases. We agree that the expression "knowledge of the decree" in Art. 164 means knowledge of the particular decree which is sought to be set aside. When the summons was not duly served, limitation under Art. 164 does not start running against the defendant because he has received some vague information that some decree has been passed against him. It is a question of fact in each case whether the information conveyed to the defendant is sufficient to impute to him knowledge of the decree within the meaning of Art. 164. The test of the sufficiency is not what the information would mean to a stranger, but what it meant to the defendant in the light of his previous dealings with the plaintiff and the facts and circumstances known to him. If from the information conveyed to him the defendant has knowledge of the decree sought to be set aside, time begins to run against him under Art. 164.. It is not necessary that a copy of the decree should be served on the defendant. It is sufficient that the defendant has knowledge of the material facts concerning the decree, so that he has a clear perception of the injury suffered by him and can take effective steps to set aside the decree."

18. A similar view has been expressed by the Punjab and Haryana High Court in **Smt. Kamal B vs. Jasmal, 1981 Punjab Law Reporter 482.**

19 Keeping in view the aforesaid interpretation, it is evident that a mere knowledge of the fact that a decree has been passed by some court against a person is not sufficient. The limitation for filing an application for setting aside the ex-parte decree is required to be calculated from the date on which the applicant has knowledge of the fact that a particular decree has been passed against him in a particular court in favour of a particular person.

Unless, the knowledge of the decree is complete, the period of limitation cannot begin to run. A party praying to set aside an ex-parte decree cannot be held to have had the knowledge of the decree from the mere fact that he has been told that a decree has been passed against him in a suit without disclosing the specific details like the date of decision, title of the suit and the court which passed the decree.

20. If we test the facts of the case on the basis of the aforesaid interpretation, it is evident that when Sh. Harbhajan Singh along with Sh. Amarjit Singh visited the office of Sh. T.P.S.Kalra, Advocate, in first week of March, 2007, they were not aware of the complete details of the decree which had been passed against them. The petitioner, being a resident of Canada, appointed a power of attorney on 30.03.2007 which, in turn, formally engaged Sh. T.P.S.Kalra, Advocate, who, on searching the Court record, dug out the complete information with regard to the details of the decree and thereafter, filed the application for setting aside the decree. In these circumstances, the approach of the trial court as well as the First Appellate Court was, clearly, mechanical and erroneous. No effort has been made out to ascertain the actual date of knowledge of the specific decree in its true sense. In such circumstances, the courts have erred in dismissing the application as time barred.

21. It is evident from the plaint that the plaintiff neither provided the complete address of Sh. Harbhajan Singh nor his attorney. There is also no evidence that the newspaper 'Nawa Jamana' had any circulation in Canada. Thus, even the fact of due service of summons is not satisfied.

Moreover, explanation to Article 123 of the Limitation Act, 1963, clearly

provides that for the purpose of this Article, substituted service under Rule 20 of Order 5 of the CPC shall not be deemed to be due service.

22. The approach adopted by the Courts is myopic and rigid for another reason. Even if it is assumed that the application was filed after the expiry of limitation, still the courts have enormous powers to condone such delay in filing the application under Section 5 of the Limitation Act, 1963, on sufficient cause being shown by the applicant. The reasons given by the petitioner in the present case are clearly justified, bonafide and sufficient to avail the discretion of Section 5 of the Limitation Act, 1963 in his favour. The Courts have miserably failed to protect the interest of justice by deciding a meritorious matter on technicalities. It has also resulted in wastage of the precious time of the courts and the parties.

23. Keeping in view the aforesaid facts, this Court is of the considered view that the petitioner (defendant no.1) has made out a sufficient case for setting aside the ex-parte decree dated 22.11.2006.

24. Hence, the revision petition is allowed. The ex-parte judgment and decree passed on 22.11.2006 as also the impugned orders of both the courts are set aside and the suit is restored to its original number. The Trial Court is requested to decide the suit afresh after granting proper opportunities to both the parties to prove their case.

25. The parties through their learned counsels are directed to appear before the trial Court on 30.01.2023.

26. All the pending miscellaneous applications, if any, are also disposed of.

05th January, 2023

(ANIL KSHETARPAL)

nt

JUDGE

Whether speaking/reasoned :YES/NO

Whether reportable :YES/NO