

285 IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CM-12377-C-2023 in/and
RSA-2873-2023 (O&M)
Decided on:-14.11.2023

Rukmani Devi

....Appellant..

vs.

Ashok Kumar and others

....Respondents.

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present: Mr. Jagdish Manchanda, Advocate for the appellant.

Mr. Tanmoy Gupta, Advocate,
for contesting respondents No.1 and 2.

HARKESH MANUJA J. (Oral)

CM-12377-C-2023

Prayer in the present application is for preponement of the date of hearing in the main case, which is fixed for 23.01.2024.

On 07.11.2023, notice of the application was issued and accepted by Mr. Tanmoy Gupta, Advocate on behalf of contesting respondents No.1 and 2.

Having heard learned counsels for the parties and gone through the contents of the application, the same is allowed and the date of hearing in the main appeal is preponed from 23.01.2024 to today itself i.e. 14.11.2023, for its final disposal.

Main case

1. By way of present appeal, challenge has been laid to the judgment and decree dated 21.07.2023 passed by the Appellate Court,

whereby, ex-parte judgment and decree dated 22.05.2017 passed by the Trial Court has been set-aside and the matter has been sent back to the Trial Court for deciding the suit afresh, upon hearing respondents No.1 and 2/defendants No.5 and 6.

2. Briefly stating, appellant-plaintiff filed a suit for declaration as well as seeking consequential relief of permanent injunction, claiming herself to be owner in joint possession to the extent of 1/7th share of the suit property, situated within the revenue estate of village Badshahpur, Tehsil and District Gurugram (Haryana).

3. In the aforementioned suit, respondents No.1 and 2/defendants No.5 and 6 were proceeded against ex-parte on 17.02.2016 and finally, the ex-parte judgment and decree dated 22.05.2017 was passed in favour of the appellant-plaintiff.

Later, respondents No.1 and 2/defendants No.5 and 6 filed an application dated 11.04.2018, invoking Order 9 Rule 13 CPC, praying for setting-aside the ex-parte judgment and decree dated 22.05.2017, wherein notice was issued and the proceedings remained pending. Simultaneously, respondents No.1 and 2/defendants No.5 and 6 also filed Civil Appeal No.19 of 2018 dated 25.04.2018, praying for setting-aside the ex-parte judgment and decree dated 22.05.2017, wherein also notice was served upon the appellant-plaintiff. While the aforementioned first appeal was pending consideration, respondents No.1 and 2/defendants No.5 and 6 got their statements recorded before the Trial Court, submitting that they wish to withdraw their application filed under Order 9 Rule 13 CPC, so as to pursue other remedy of first appeal as both the proceedings could not go hand-in-

hand.

4. Vide order dated 05.07.2022, the Trial Court i.e. Civil Judge (Junior Division), Gurugram, permitted respondents No.1 and 2/defendants No.5 and 6 to withdraw their application under Order 9 Rule 13 CPC and liberty was granted in their favour to pursue their first appeal. Relevant part of order dated 05.07.2022 passed by the Trial Court, is reproduced hereunder:-

“Learned counsel for the applicants submitted that the present application was filed for setting-aside exparte orders under Order 9 Rule 13 of CPC. He further submitted that the applicants do not want to pursue further their present application. In view of the his submission, separate statement of applicant/defendant No.5 Ashok Kumar Kakkar and Sh. J.K. Maheshwari ld. Counsel for the both the applicants has been recorded wherein they jointly stated that exparte decree dated 22.05.2017 was passed in Smt. Rukmani Devi Vs. Rukmani and against the said decree both the brothers had filed the present application for setting-aside the exparte decree. They further stated that they have also filed civil appeal against the said decree and as per law out of both the remedies only one can be availed therefore, they withdraw the present application and the appeal which is pending in the court of Maj. Phalit Sharma, Ld. Additional District Judge, Gurugram shall be continued. Separate statement to this effect recorded in writing.”

5. The First Appellate Court vide judgment and decree dated 21.07.2023, upon recording that no service was ever effected upon respondents No.1 and 2/defendants No.5 and 6, set-aside the ex-parte judgment and decree dated 22.05.2017, while remanding the matter to the Trial Court for its fresh adjudication.

6. Impugning the aforementioned judgment and decree dated 21.07.2023 passed by the First Appellate Court, learned counsel for the appellant-plaintiff submits that once an application under Order 9 Rule 13 CPC was filed at the instance of respondents No.1 and 2/defendants No.5 and 6, seeking setting aside the ex-parte judgment and decree dated 22.05.2017; and the proceedings therein reached the stage of recording of evidence of the parties, it was wholly uncalled for on the part of the Trial Court to have permitted respondents No.1 and 2/defendants No.5 and 6 to withdraw the said application and permit them to pursue their first appeal.

Learned counsel for the appellant also submits that an application under Order 41 Rule 27 CPC, filed at the instance of appellant-plaintiff was allowed by the First Appellate Court, however, those documents were never considered or dealt with at the time of final disposal of the first appeal while passing the judgment and decree dated 21.07.2023.

7. On the other hand, learned counsel representing respondents No.1 and 2/defendants No.5 and 6 submits that the order dated 05.07.2022 permitting respondents No.1 and 2/defendants No.5 and 6 to withdraw the application under Order 9 Rule 13 CPC granting liberty to pursue their first appeal, was never assailed at the instance of appellant-plaintiff and thus, having participated in the proceedings arising out of Civil Appeal No.19 of 2018, the appellant-plaintiff at this stage was estopped from assailing the same. He further submits that the documents sought to be adduced by way of additional evidence at the first appellate stage were not relevant as in all of those documents, the addresses of respondents No.1 and 2/defendants No.5 and 6 were of New Delhi and not of Gurugram.

8. I have heard learned counsel for the parties and gone through the paper book as well as the records of the Courts below.

9. A perusal thereof shows that vide order dated 19.03.2015 passed in the civil suit by the Trial Court, notices issued to respondents No.1 and 2/defendants No.5 and 6 were received back with the report of incorrect addresses and the appellant-plaintiff was directed to furnish their correct addresses. Perusal of the record further shows that fresh addresses of respondents No.1 and 2/defendants No.5 and 6 were never furnished by the appellant-plaintiff thereafter, and the Trial Court continued to proceed with the suit while making efforts to serve them at the addresses already mentioned in the plaint itself and finally, they were proceeded against ex-parte vide order dated 17.02.2016 while relying upon notice issued through publication in the News Paper, without making any effort to serve them through ordinary process and other means and that too without the fresh and correct addresses. Accordingly, no fault can be found with the judgment and decree dated 21.07.2023 passed by the First Appellate Court while setting aside the ex-parte judgment and decree dated 22.05.2017 and sending the matter back to the Trial Court for its fresh adjudication, upon hearing respondents No.1 and 2/defendants No.5 and 6.

10. Though, respondents No.1 and 2/defendants No.5 and 6 initiated two separate proceedings, assailing the ex-parte judgment and decree dated 22.05.2017, while having moved an application dated 11.04.2018 invoking Order 9 Rule 13 CPC, besides filing first Civil Appeal No.19/2018, impugning the judgment and decree dated 22.05.2017, however, at a later stage, they rightly withdrew their application under Order 9 Rule 13 CPC, so

as to pursue their remedy of first appeal, which was permitted in their favour by the Trial Court i.e. Civil Judge (Junior Division), Gurugram, vide order dated 05.07.2022, which admittedly was never assailed by the appellant-plaintiff and rather on the other hand, she continued to appear before the First Appellate Court, defending the ex-parte judgment and decree dated 22.05.2017.

Accordingly, at this belated stage, the appellant-plaintiff was even estopped from questioning the validity of order dated 05.07.2022 and the permission granted therein. Undoubtedly, remedies under Order 9 Rule 13 CPC of filing an application for setting aside an ex-parte decree as well as an appeal under Section 96(2) of CPC can be availed consecutively, the scope of both proceedings being different. In an application filed under Order 9 Rule 13 CPC, the Court can only look into the matter as regards the validity of service upon the party who was proceeded against ex-parte, whereas in an appeal filed under Section 96(2) of CPC, the Appellate Court can even go into the merits of the ex-parte judgment and decree besides looking the aspect of service. It is only that in case the application under Order 9 Rule 13 CPC is dismissed by the Trial Court while holding that the party proceeded against ex-parte was validly served during trial of the suit, the said aspect cannot be re-agitated and gone into by the First Appellate Court in the appeal while considering the merits of the ex-parte decision passed by the Trial Court.

11. In the humble opinion of this Court, no merit can be found in the submissions made on behalf of the appellant-plaintiff as regards non-consideration of documents Ex-A-1 to A-7, which were though permitted to

be taken on record by way of additional evidence by the First Appellate Court vide order dated 21.07.2023. A perusal of record shows that in all those documents, permanent addresses of respondents No.1 and 2/defendants No.5 and 6 recorded is of New Delhi, whereas in the plaint, they have been shown to be residing at village Badshahpur, Tehsil and District Gurugram. Accordingly, the documents which were taken on record by way of additional evidence had no bearing on the merits of the plea raised at the instance of respondents No.1 and 2/defendants No.5 and 6 as regards the material discrepancies while effecting service upon them before the Trial Court in the suit.

12. Resultantly, in view of the discussion made herein above, finding no merit in the present appeal, the same is thus, dismissed there being no illegality or perversity in the reasoning recorded by the First Appellate Court. However, considering the fact that the civil suit was filed by appellant-plaintiff on 28.01.2015 and still after the expiry of almost 8 years, the proceedings are at initial stage, the Trial Court is requested to dispose of the suit within a period of one year from the date of receipt of certified copy of this order.

13. Pending application, if any, stands disposed of.

14.11.2023

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(HARKESH MANUJA)
JUDGE

Whether speaking/reasoned:

Yes/No

Whether reportable:

Yes/ No