

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-6431-2016 (O&M)
Reserved on 15.01.2024
Date of decision: 19.02.2024

BHAJAN SINGH (DECEASED) THROUGH LRS AND ORS
..Petitioners

Versus

SOHAN SINGH AND ORS
..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Malkeet Singh, Advocate
for the petitioners.

Mr. D.D. Bansal, Advocate
for respondent No.1 and 2.

ANIL KSHETARPAL, J.

1. The petitioners were defendants in a suit filed for grant of decree of declaration that the plaintiffs are co-owners to the extent of half share of the joint property. On 18.02.2010, the aforesaid suit was ex parte decreed. An application filed by the petitioners under Order IX Rule 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as the "CPC") to set aside ex parte judgment decree, has been dismissed by both the Courts below. The correctness of the aforesaid order is challenged in this revision petition.

2. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paperbook along with the requisitioned record.

3. On the one hand, the learned counsel representing the petitioners while drawing the attention of the Court to various zimni orders

(daily orders), passed by the trial Court contended that the petitioners also

filed application under Order IX Rule 7 of the CPC to set aside ex parte proceedings during the pendency of the suit, which was never decided by the trial Court. Thereafter, the petitioners also filed an application for setting aside ex parte judgment decree, which has also been wrongly dismissed by the Courts below.

4. On the other hand, learned counsel representing the respondents submits that both the Courts on appreciation of evidence have concurrently held that the petitioners have failed to furnish sufficient explanation for non-appearance. Hence, this Court should not interfere. While highlighting that the application for setting aside ex parte judgment and decree was filed after a period of 1 year and 8 & ½ (half) months. He further submits that no application for condonation of delay was filed.

5. In order to comprehend the issue involved in the present case, the relevant facts, in brief, are required to be noticed.

6. As many as 14 plaintiffs filed suit against as many as 19 defendants. The plaintiffs prayed that they are owners to the extent of half share of the property by virtue of sale deed dated 07.01.1958, whereas, it is the case of the petitioners that they purchased the property vide registered sale deed No.1671 on 17.07.1956. It is also highlighted that on the basis of the registered sale deed dated 17.07.1956, mutation in favor of the defendants was entered into.

7. In the grounds of revision, the petitioners have extracted various zimni orders passed by the trial Court on various dates of hearing, which are reproduced as under:-

09.12.2003

“As per report defendants No.2 to 16, 18, 19 served but on calling the case time and again none (not legible) on behalf of these defendants. As such defendant No.2 to 16, 18, 19 are proceeded ex-parte. As per report defendant No.17 does not reside at the given address. Plaintiff is directed to file PF/CA of defendant No.17 within three days and thereafter defendant No.17 be summoned for 04.02.2003 for which date defendant No.17 shall file w/statement. Plaintiff has sought relief against defendants No.2 to 6, 15, 16, 18 and 19 restraining them from alienating of suit property. As the defendants No.2 to 6, 15, 16, 18 & 19 are proceeded against ex-parte. As such defendant No.2 to 6, 15, 16, 18 & 19 and plaintiff is directed to maintain status-quo of suit property as detailed in the head note of the plaint, except in due course of law till 04.02.2004.”

04.02.2004

“As per report PF/CA not filed for defendant No.17 by the plaintiff. As such defendant No.17 could not be summoned. Plaintiffs directed to file PF/CA of defendant No.17 within three days and thereafter defendant No.17 be summoned for 11.02.2004 for which date defendant No.1 shall file written statement. Status quo is extended till then.”

18.05.2004

“Notice issued to defendant No.17 received back with report of refusal. Let service of defendant No.17 be effected vide munadi and affixation on depositing munadi fee for 08.09.2004.”

The petitioners moved application for setting aside ex parte proceedings against the petitioners vide order dated 09.12.2003 and the Ld. Trial Court again passed the following order on the even date i.e. 18.05.2004

“At this stage, an application for setting aside the order dated 09.12.2003 has been filed on behalf of defendant No.2 to 6, 18 & 19. Copy has been supplied to the Ld. Opposite Counsel for the plaintiff. Reply of the same be also filed on dated 08.09.2004.”

08.09.2004

“Reply to the application for setting aside the ex parte proceedings against the defendant No.2 to 16 and 18 and 19 has not been filed. The learned proxy counsel has made a request that the advocates are staying away due to call given by bar council of India.

Notice qua service of defendant No.17 be effected by substituted means, as the learned proxy counsel has

brought to the notice of the Court that the said defendant is residing abroad. Let his service be effected vide order 5 Rule 25 CPC. Now to come upon dated 23.11.2004”

18.09.2004

“In pursuance of the application has been moved for depositing publication fee qua service of defendant No.17 vide substituted means, the case file has been taken up today. I have heard the learned counsel for the plaintiff and have carefully perused the order dated 08.09.2004. As the defendant No.17 is residing abroad and the court has already ordered that service of defendant No.17 be effected vide order 5 Rule 25 CPC. Hence now to come upon 23.11.2004 the date already fixed in this case and service qua defendant No.17 be effected vide registered letters.”

14.02.2004

“Summons of defendant No.17 received back unserved. Fresh notice to defendant No.17 be issued as per order dated 18.09.2004 for dated 17.01.2005.

Reply to application for setting aside the ex parte proceedings against defendant No.2 to 16, 18 & 19 be filed on the date fixed.”

17.01.2005

“Registered covers of defendant No.17 received back unserved for want of correct address. Let correct address of defendant No.17 be filed on 31.01.2005.

Reply to the application for setting aside ex parte proceedings be filed on the date fixed.”

30.03.2005

“An application for service by way of publication file for consideration to come upon 27.04.2005”

27.04.2005

“Arguments on application for service of defendant No.17 by way of publication dated 30.03.2005 heard. Application is supported by an affidavit. It has been alleged that the defendant No.17 Jagdish Kaur daughter of Kapur Singh has shifted to Malasia and her address is not readily available. I am satisfied that service of defendant No.17 cannot be effected in an ordinary way. Withouty any ordinate delay, the defendant No.17 is hence ordered to be served through substituted service by way of publication in the Tribune Chandigarh for dated 06.06.05. The plaintiff is directed to collect the process dasti and deposit the publication charges in the Sub Office at Bathinda.

Reply to the application for setting aside ex parte proceedings be also filed on that date.”

06.06.2005

“Publication with regard to defendant No.17 be issued as per previous order for dated 12.09.05.

Reply to the application for setting aside ex parte proceedings be also filed on that date.”

04.01.2006

“Publication charges of Rs.300/- be deposited within three days and then fresh publication with regard to defendant No.17 be issued again as per order dated 27.04.05 for dated 17.02.06”

17.02.2006

“Publication not received back. Fresh publication with regard to defendant No.17 be issued again for dated 27.03.2006”

24.07.2007

“Earlier the defendant No.1 was represented through his counsel, but today none has appeared on behalf of defendant No.1 despite calling the case time and again, the defendant No.1 is proceeded against ex parte.

For ex parte evidence of plaintiff, case is adjourned to 21.11.2007”

8. It is evident that when the suit was pending on 18.05.2004, the petitioners filed application under Order IX Rule 7 of the CPC. No reply to the application filed by the petitioners was filed. However, The trial Court proceeded to decide the case without deciding the application.

9. Still further, both the Courts have erred while observing that without the presence of the applicants, their application for setting aside ex parte could not be decided. Once an application have been filed, the Court was required to decide the same. The Court should have either dismissed the application in default or decide the same on merits.

10. Moreover, the Courts have also erred in observing that the petitioners filed application after remaining silent for so many years. The

aforesaid finding is against the record. As already noticed, the petitioners filed the application for setting aside ex parte proceedings in May, 2004. The trial Court adjourned the application from time-to-time as the plaintiff failed to file reply upto 06.06.2005. Thereafter, the Court appear to have overlooked the same. The suit was ex parte decreed on 18.02.2010. The petitioners claim that they are farmers and rustic villagers. They engaged counsel to file application for setting aside ex parte proceedings. They had no knowledge of the ex parte decree because their counsel never informed them. Immediately on coming to know of the decree from local revenue official in the month of October, 2011, they filed the application under Order IX rule 13 of the CPC

11. In these circumstances, both the Courts have erred in observing that the application was filed after so many years. Still further, the Courts were also wrong while observing that the petitioners have failed to explain the delay of each day in filing the application and they failed to prove that they have filed the application within the limitation because they failed to explain the delay in filing the application.

12. In the considered view of the Court, both the Courts have erred in overlooking the fact that an application for setting aside ex parte decree was filed by the petitioners during the pendency of the suit. In May, 2004, the Court should have straightaway permitted the defendants to join the proceedings because the suit was pending for completion of service of notice in the suit. No substantive proceeding except interim injunction order was in between passed. In these circumstances, the trial Court as well as First Appellate Court committed error. Still further, It is evident that the

petitioners have explained the delay on the ground that they engaged counsel to file an application for setting aside ex parte proceedings in the year 2004, who continued to appear in the application for more than a period of 1 year. Thereafter, the Court failed to take up the application. The counsel also did not inform the petitioners. In these circumstances, the Court should have taken a holistic view of the matter. It is evident that the plaintiff’s suit is concerning a large chunk of agriculture land. By ex parte decree, the petitioners stand deprived thereof. It is evident that the petitioners are residing in the villages and are not aware of the technicalities of law. In such circumstances, the approach of the Court was expected to be more pragmatic.

13. Keeping in view the aforesaid discussion, the orders passed by both the Courts are set aside and thus, ex parte judgment and decree passed on 18.02.2010, is set aside.

14. The trial Court is directed to decide the suit afresh after granting opportunity to the petitioners to file their written statement and after the parties have been granted opportunity to lead their evidence.

15. The parties through their counsel are directed to appear before the trial Court on 19.03.2024.

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

February 19th, 2024
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No