

(1998) 12 P&H CK 0006

High Court Of Punjab And Haryana At Chandigarh**Case No:** Civil Revision No. 3932 of 1998

Girver Dayal Ganda Ram

APPELLANT

Vs

Raghunath Sahai etc.

RESPONDENT

Date of Decision: Dec. 3, 1998**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13

Citation: (1999) 1 CivCC 491 : (1999) 121 PLR 47 : (1999) 2 RCR(Civil) 288**Hon'ble Judges:** V.K. Jhanji, J**Bench:** Single Bench**Advocate:** A.P. Bhandari, for the Appellant;**Final Decision:** Dismissed

Judgement

V.K. Jhanji, J.

This is tenant's revision directed against the order of the Rent Controller whereby application of the tenant (petitioner herein) for setting aside ex-parte eviction order dated 25.9.1990 has been dismissed.

2. Landlords (respondents herein) filed eviction application against the tenant and ex-parte eviction order was passed on 25.9.1990. Landlord in execution took possession of the premises on 21.12.1990. Tenant felt aggrieved of the ex-parte eviction order and thus, filed application under Order 9 rule 13, Code of Civil Procedure, for setting aside the ex-parte order. Similarly, tenant also filed an appeal before the appellate Authority against ex-parte order dated 25.9.1990. Appeal against order dated 25.9.1990 was dismissed on 10.5.1993. On dismissal of the appeal, Rent Controller vide order dated 14.9.1996, dismissed the application under Order 9 Rule 13, Code of Civil Procedure, on the ground that in view of Explanation added to Order 9 Rule 13 after decision of appeal, application under Order 9 Rule 13 is not competent. Against order dated 14.9.1996 passed by the Rent Controller, tenant filed appeal before the appellate Authority, but the appellate Authority vide

order dated 14.10.1997 on finding that only revision could be filed against order dated 14.9.1996, dismissed the appeal being not maintainable. This is how the present revision petition has been directed against order dated 14.9.1996 of the Rent Controller.

3. Learned Counsel appearing on behalf of tenant has contended that the tenant had not been served in this case and therefore, ex-parte eviction order obtained against the tenant was patently illegal and tenant could not have been dispossessed in execution of the said order. It is also contended that against the ex-parte order, tenant had two remedies; firstly, to file an application under Order 9 Rule 13 to set aside ex-parte order and secondly, to challenge order in appeal. It is contended that both the remedies could be availed of simultaneously.

4. After hearing the learned counsel and going through the record, I am of the view that the revision petition deserves to be dismissed on the short ground that after the decision in appeal, application under Order 9 rule 13, Code of Civil Procedure, was not competent.

5. Prior to amendment of 1976, a defendant burdened by an ex-parte decree could seek to set it aside under Order 9 rule 13 by the trial Court and also prefer an appeal against it u/s 96 of the Code of Civil Procedure. Mere filing of the appeal did not take away the jurisdiction of the trial Court to entertain and dispose of the application for setting aside ex-parte decree. It was where the appeal was disposed of, and the appellate decree superseded the trial Court decree by reversing, confirming or varying it that the trial Court could not proceed to set aside its ex-parte decree. For the trial Court, decree was said to have merged with the appellate decree. There are, of course, cases where the trial Court decree does not merge in the appellate decree, like when the appeal is dismissed in default or abated etc. In cases, where trial Court decree merges in the appellate decree, the application before the trial Court for setting aside the decree becomes incompetent. By amendment of 1976, the following explanation was added to Order 9 rule 13, Code of Civil Procedure:

"Explanation - where there has been an appeal against a decree passed ex-parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree."

6. In consequence of the Explanation, no application for setting aside ex-parte decree can lie where the defendant has filed an appeal and the appeal has been disposed of on any ground other than the one on the basis of which appeal has been withdrawn by the appellant. This Explanation was considered by the Apex Court in [Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury](#), and in that context, their Lordships of the Supreme Court observed:

"No doubt the provision is described as an "Explanation", but as is well known it is not the rubric which decisively defines the true nature of a statutory provision. Its

true nature must be determined from the content of the provision, its import gathered from the language employed, and the language construed in the context in which the provision has been enacted, xxx xxx xxx.

.....The CPC (Amendment) Act, 1976 was enacted with the avowed purpose of abridging and simplifying the procedural law. By enacting the Explanation, Parliament left it open to the defendant to apply under Rule 13 of O.9 for setting aside an ex parte decree only if the defendant had opted not to appeal against the ex parte decree or, in the case where he had preferred an appeal, the appeal had been withdrawn by him. The withdrawal of the appeal was tantamount to effacing it. It obliged the defendant to decide whether he would prefer an adjudication by the appellate Court on the merits of the decree or have the decree set aside by the trial Court under Rule 13 of O.9. The legislative attempt incorporated in the Explanation was to discourage a two pronged attack on the decree and to confine the defendant to a single course of action. If he did not withdraw the appeal filed by him, but allowed the appeal to be disposed of on any other ground he was denied the right to apply under Rule 13 of O.9. The disposal of the appeal on any ground whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation."

7. In this case, appeal filed by the tenant was not withdrawn, but was dismissed on other grounds. In view of the Explanation, application under Order 9 rule 13, Code of Civil Procedure, was not competent and therefore, Rent Controller has not committed any illegality in dismissing the same. It is not necessary to go into the other contentions urged by learned counsel for the tenant.

Consequently, the revision petition fails. It is accordingly dismissed.