

Smt. Shashi Bala and Others Vs Hari Ram

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Oct. 7, 2002

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Order 9 Rule 3, 35

Citation: (2002) 4 RCR(Civil) 794

Hon'ble Judges: K.C. Gupta, J

Bench: Single Bench

Advocate: S.D. Bansal, for the Appellant; Pawan Kumar, for the Respondent

Final Decision: Dismissed

Judgement

K.C. Gupta, J.

This revision petition is directed by the defendants against order dated 9.5.2000 passed by the Additional District Judge,

Jagadhri, whereby their application for condoning the delay in filing the appeal was dismissed as time barred.

2. Briefly stated, the facts are that Smt. Bachni Devi, respondent through her general power of attorney. Hari Ram, filed a suit for separate

possession by partition of House No.60, Shastri Colony, Yamunanagar, against the petitioners Smt. Shashi Bala etc. on the 28.5.1990 on the

allegation, that once it was held by Late Amar Nath, Smt. Bachni Devi widow of Sh. Sir! Kishan and the petitioners (defendants) as Joint Hindu

Family Property.

3. It was further averred that Amar Nath expired on 5.12.1979 leaving behind his mother Smt. Bachni Devi, Smt. Shashi Bala widow, his son

Ashish Gupta, daughters Sangeeta Gupta and Sarita (minors) as his legal heirs and, thus, the petitioners and the respondent became joint owners in

equal share having 1/5th share each. However, the petitioners were in possession of the whole of the property and were enjoying the same in

excess of their respectively shares, so, the respondent was entitled to mesne profits and was also entitled to take separate possession of 1/5th

share.

4. The petitioners contested the suit. They denied the allegations of the respondent and stated that the respondent was neither owner nor in

possession of the house in dispute and as such had no locus standi to file suit for separate possession by partition. They further stated that during

his life time, Amar Nath had executed valid will in favour of his wife, Shashi Bala on 14.10.1979 as it was self acquired property of Amar Nath

and by virtue of that will, Shashi Bala, had become owner in exclusive possession of the house in dispute after the death of Amar Nath. They

further denied that it was joint Hindu Family property of Amar Nath and the respondent or they constituted joint Hindu family property.

Consequently, the following issues were framed:-

1. Whether suit property was the Joint Hindu. Family Property of Amar Nath deceased plaintiff & defendants as alleged? OPP
2. If issue No.1 is proved, whether plaintiff was having 1/5th share in the suit property? OPP
3. Whether suit property was the joint properties of Amar Nath & defendant No.1 as alleged? OPD
4. Whether Amar Nath executed a valid will dated 14.10.1979 in favour of the defendant No.1 if so, its effect ? OPD
5. Whether defendant No.4 has not properly sued as alleged? OPD
6. Whether defendants No.3 & 4 have no right in the suit property? OPD
7. Whether defendant No. 1 is entitled to special costs as alleged? OPD
8. Relief.

The parties adduced their evidence.

5. After hearing counsel for the parties, the Civil Judge (Jr. Division), Jagadhri, vide judgment and decree dated 3.4.1999 decreed The suit of the

respondent-plaintiff by holding that respondent was entitled to separate possession by partition of 1/5th share of House No.60, Shastri Colony,

Yamunanagar. Consequently, preliminary decree was passed by holding under Issue Nos.1 and 2 that the will dated 21.6.1988, Ex.PI, was duly

executed by Smt. Bachni in favour of her son, Hari Ram and according to that will, Hari Ram was entitled to separate possession of 1/5th share of

the suit property by meets and bounds. The petitioners did not lead any evidence on issue Nos.3 to 7 and as such, the same was decided against

them. It was also held that there is no evidence that Amar Nath had executed any will dated 14.10.1979 in favour of his wife Shashi Bala.

6. Aggrieved by the said judgment and decree, the defendants filed an appeal, in which they moved an application for condonation of delay, which

was dismissed by the Additional District Judge, Jagadhari, vide order dated 9.5.2000 by holding that there was no sufficient cause for condonation

of delay.

7. Dis-satisfied by the said order, the defendants have filed the present revision petition.

8. I have heard Sh. S.D. Bansal, counsel for the petitioners, Sh. Pawan Kumar, counsel for the respondent and carefully gone through the record.

9. A perusal of the order dated 31.3.1999, which was passed by Civil Judge (Jr. Division) reads as under:-

Present: Sh. S.K.. Keep, counsel for the plaintiff.

Sh. S.K. Garg, counsel for the defendant.

No. DW is present or summoned for today. Learned counsel for the defendant refused to make the payment of costs deposit demand of the

learned counsel for the plaintiff. Defence of the defendants is struck off due to the non-payment of costs of Rs.100/-. The evidence of the

defendants stands closed down. The learned counsel for the defendants moved an application with the contents that he has no instruction to put in

appearance on behalf of the defendants in the case for today. The application be placed on record. Now to come up for arguments on 3.4.1999.

Sd/-

C.J.(Jr. Division),

31.3.1999

10. Thus, according to the order, the petitioners neither produced any evidence nor made payment of the costs of Rs. 100/- and as such, the

defence of the petitioners was struck off and their evidence was closed. After the order was passed, counsel for the petitioners moved an

application that he had no instructions to put in appearance on their behalf which was placed on record. However, in the presence of counsel for the

petitioners, the case was posted for arguments on 3.4.1999 and ultimately the suit was decreed on the same day.

11. The petitioners had alleged in the application for condonation of delay that Shashi Bala came to know from her counsel on 16.5.1999 when

she contacted him for preparation of the case that the case in fact was fixed for 31.3.1999 and not 31.5.1999 and her counsel had pleaded before

the Court ""NO INSTRUCTIONS"" and he had also moved an application to that effect and thereafter on 17.5.1999", she contacted some officials

of the Court and came to know that the case had already been decided ex parte on 3.4.1999. Thereafter, she immediately applied for copy of the

order on 17.5.1999 which was made available to her on 18.5.1999 and thus, she filed the appeal on 19.5.1999.

12. The main contention of counsel for the petitioners is that since on 19.3.1999, when the case was fixed for evidence of the petitioners on

payment of costs and counsel had pleaded on instructions, in that event a notice should have been issued to the petitioners and the evidence should

not have been closed by order of the Court by striking off their defence. For this contention, he placed reliance upon an authority of the Hon"ble

Apex Court i.e. Malkiat Singh and Anr. v. Joginder Singh and Ors. (1998)128 P.L.R. 271, in which it was observed that if the counsel for

the appellants pleaded no instructions and ex parte decree was passed without serving notice to the appellants, who admittedly were not present on

the day when the counsel pleaded no instructions, then the exparte proceedings should have been set-aside. In my opinion, the above mentioned

authority is not applicable to the facts of the present case because in the present case the counsel was very much present and he was further unable

to pay the costs of the previous adjournment of Rs. 100/- and then the defence of the petitioners was struck off on non-payment of costs and their

evidence was closed by the order of the Court. He did not, at the first instance, report no instructions. He made an application afterwards, when

the evidence was already closed to report ""NO INSTRUCTIONS"", This shows that this application was moved only to create evidence and in

fact, he had the instructions to appear. If he had no instructions, then he would not have participated in the proceedings from the very beginning.

The trial Court has also held that the application moved on 31.3.1999 and hand written by counsel for the petitioners hurriedly and it seems that

the same was written after the Court made up its mind to strike off the defence of the petitioners on account of non-payment of costs. Thus, this

application was moved as a dilatory tactics to prevent the Court to proceed in accordance with law. Otherwise also, the case was fixed for

3.4.1999 in the presence of counsel for the petitioners. Thus, he knew from the very beginning that the case must have been disposed on

3.4.1999. If Smt. Shashi Bala had visited her counsel on 16.5.1999, then certainly counsel would have told the case had been decided exparte on

3.4.1999 and as such, her objection that she came to know from the court official on 17.5.1999 that the case had been decided exparte on

3.4.1999, was just an after thought. Moreover, the appeal was filed by the petitioner through the same counsel i.e, Sh. S.K. Garg who had earlier

pleaded no instructions. Again, it shows that Sh. S.K. Garg was very much their counsel and he had the instructions and the application was made

just to prevent the court from proceeding in accordance with law and it was a dilatory tactics. Thus, there was no sufficient cause to set-aside the

exparte proceedings and the decree and in condone the delay. Consequently, the application was rightly dismissed by the Additional District Judge

vide his order dated 9.5.2000. There is no illegality or impropriety in the same.

13. Therefore, the revision petition is dismissed.