

(2013) 08 P&H CK 0537

High Court Of Punjab And Haryana At Chandigarh

Case No: CR No. 7406 of 2011 (O and M)

Harnek Singh

APPELLANT

Vs

Shinder Kaur @ Surinder Kaur

RESPONDENT

Date of Decision: Aug. 5, 2013

Citation: (2013) 172 PLR 586

Hon'ble Judges: K. Kannan, J

Bench: Single Bench

Advocate: B.R. Mahajan, for the Appellant; Ramesh Sharma, Advocate and Ms. Amandeep Soni, Advocate, for the Respondent

Judgement

K. Kannan, J.

The revision is against the order allowing an ex parte decree to be set aside against the respondent, who is described as Shinder Kaur in suit. The suit was for enforcement of an agreement said to have been executed by the respondent's husband Malkiat Singh and against the legal representatives of Malkiat Singh after his death. The plaintiff had purported to have issued a notice on all the legal representatives seeking for compliance with the obligation under the agreement and on failure to comply with the same, a suit for specific performance was filed on 28.06.2005. The suit was against the widow and four sons. Only one son entered contest and while the remaining were not served, publication for substituted services was ordered and they were set ex parte. The son denied the execution of the agreement by his father and the issue for consideration, inter alia, was whether the agreement was true and valid. The suit was decreed after a full-fledged contest on 19.10.1999. The agreement recited an advance of Rs. 1,00,000/- as having been paid to the vendor and out of total consideration of Rs. 4,60,000/-, the balance of sale consideration was deposited on 11.11.2009 and a sale deed through Court was also obtained on 28.04.2010. The petition for setting aside the ex parte decree was filed by the defendant-widow stating that her name was Surinder Kaur and not Shinder Kaur and that admittedly, she was not served by the correct name as she

was living in a different village from her son. The plaintiff sought to discredit this contention by filing the voter list as well as a ration card that showed that the person, namely, Shinder Kaur was residing along with her son at the place where the son was served and where the service was said to be effected prior to the decree. The Court found that there was a valid justification by the widow for non-appearance and allowed a fresh opportunity to contest. The decree was set aside selectively only for the widow and it appears that she has filed an appeal before the appellate Court to contend that the decree must be set aside against all the defendants. The plaintiff whose decree was set aside against the widow is the revision petitioner before this Court.

2. In a case where the defendant is not served and it was a good enough reason for non-appearance, the Court will always be justified in allowing a fresh opportunity to be given for full-fledge contest. I will examine such opportunity is relevant in all cases where there is a right to immoveable property, which is involved and substantial rights will be taken away if an opportunity is not given. In this case, the truth of the contentions of the widow will have to be tested on a singular contention that her own son had entered contest in suit and the defence for others were not likely to be different. The widow could not have a right independent to her son when the suit was against the legal representatives of the deceased. Indeed, the expression "legal representative" in CPC itself is a wide expression. When application was filed by the widow, she had, therefore, more to explain as to how the defence entered by her son was not sufficient and how his representation was not sufficient. If she had been a party of agreement or if the plaintiff was trying to seek an enforcement on a document that contained the signature of the widow as well, an independent defence that the document was not true and that she had not signed, could still be available to her to contend, apart from what a son was contending. On the other hand, if the suit is for an enforcement of an agreement by Malkiat Singh and the suit was filed against the legal representatives of Malkiat Singh, the defence amongst the legal representatives themselves cannot be different. Exception could be that the executant of agreement himself was not the owner of the property and that the widow and sons have independent right and the widow an independent defence. If the defence was, on the other hand, that she was also one of the legal representatives, then, the defence by the son already entered and considered by the trial Court to grant a decree ought to be taken as sufficient to bind the widow as well. An opportunity that the widow claimed before the Court could have been afforded, if there was truly a prejudice which could be said to have been caused. In this case, I cannot even believe that the widow did not know about the litigation. If there was a documentary evidence to describe her living as with her son, the mere fact that the spelling of her name was given wrongly could not prove her contention. A phonetically similar sounding name Shinder Kaur as Surinder Kaur was an obvious mistake and this could not mislead a person. Indeed, I would held that the service was not effected but non-service at all times is not be a justification

to set aside the ex parte decree. Here the representation of the son in the suit as a legal representative of the deceased executant was sufficient to bind the mother as well. In this case, one of her son was actually contesting the case in Court and no ground has been made in the petition that he was negligent in his defence or he had colluded with the plaintiff. There is no justification to set aside the ex parte decree. I set aside the order and allow the civil revision.