
(2011) 05 P&H CK 0299

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Revision No. 4518 of 2003 (O and M)

Pirithi

APPELLANT

Vs

Surta Ram

RESPONDENT

Date of Decision: May 2, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- Constitution of India, 1950 - Article 227

Citation: (2011) 3 CivCC 840 : (2011) 163 PLR 160

Hon'ble Judges: Ram Chand Gupta, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Ram Chand Gupta, J.

The present revision petition has been filed under Article 227 of the Constitution of India for quashing of order dated 3.9.2003 passed by learned first appellate Court dismissing the appeal filed by petitioner-defendant against order dated 31.5.2003 passed by learned trial Court vide which application filed by petitioner for setting aside ex parte order and ex parte judgment and decree dated 15.3.2002 under Order IX Rule 13 of the CPC (for short "the Code") was dismissed.

2. I have heard learned counsel for the parties and have gone through the whole record carefully including the impugned orders passed by learned courts below.

3. Facts relevant for the decision of present revision petition are that a suit for possession by way of specific performance of agreement to sell dated 25.4.1998 was filed by respondent-plaintiff against petitioner-defendant regarding the land measuring 16 kanals, as fully detailed and described in para No.1 of the plaint, vide jamabandi for the year 1993-94, situated within the revenue estate of village Seekri, Tehsil Nilokheri, District Karnal. The suit was filed on 12.10.1999. On receiving notice of the suit petitioner-defendant appeared and contested the suit denying the very

execution of the agreement to sell. Rather, the plea has been taken that respondent-plaintiff in collusion with M/s Surat Singh, Commission Agent, Nai Anaj Mandi, Indri and Shri Rajhtder Singh son of Zile Singh, had forged the agreement as petitioner used to sell his crop with aforesaid commission agent and he stopped selling the same in the year 1995, Parte plea has been taken that thumb impression of petitioner were obtained on some blank papers by respondent-plaintiff on the pretext of preparing an authority letter for receiving payment of the produce from the parties. The said commission agent also filed a suit for recovery of the amount, which is also pending. Hence, petitioner denied execution of agreement to sell and having received earnest money. Suit was being contested by petitioner-defendant. However, the suit was pending before learned Civil Judge, Junior Division, Karnal, who was not having the pecuniary jurisdiction to try the same. Hence, an application was moved before learned District Judge, Karnal, for transferring the suit from the Court of learned Civil Judge, Junior Division, Karnal, to the Court of learned Civil Judge, Senior Division, Karnal, who was competent to decide the same. It may be mentioned here that earlier suit was taken up for hearing by Shri K.P. Singh, the then learned Civil Judge, Junior Division, Karnal, in whose Court the suit was pending on 16.1.2002 and it was adjourned for 5.4.2002 for cross-examination of witnesses of plaintiff at the request of counsel for the defendant. However, in the meantime, order was passed on transfer application by the then learned District Judge, Karnal, on 28.1.2002 transferring the case from the Court of Shri K.P. Singh, learned Civil Judge, Junior Division, Karnal to the Court of learned Civil Judge, Senior Division, Karnal. Counsel for both the parties had appeared before learned District Judge on 28.1.2002 and the parties were directed to appear before the transferee Court on 4.2.2002. On 4.2.2002, both counsel appeared before the transferee Court and the case was adjourned to 21.2.2002 for evidence of respondent-plaintiff. However, as on 21.2.2002, none appeared for the petitioner-defendant, he was proceeded ex parte and the cross-examination of the witnesses of the plaintiff on behalf of the defendant was recorded as nil. The case was adjourned for ex parte arguments on 13.3.2002, when the arguments were heard and the case was fixed for orders for 15.3.2002, on which date the impugned judgment and decree was passed vide which suit filed by respondent-plaintiff was decreed with cost.

4. Application for setting aside the order vide which petitioner-defendant was proceeded ex parte and for setting aside ex parte judgment and decree dated 15.3.2002 under Order IX Rule 13 of the Code was; filed by petitioner-defendant before learned trial Court, mainly, on the ground that date of hearing was wrongly noted down by clerk of counsel for petitioner-defendant as 5.4.2002 instead of 21.2.2002, as the case was earlier fixed for 5.4.2002 by the Court of Shri K.P. Singh, the then learned Civil Judge, Junior Division, Karnal, and hence, due to negligence of the counsel petitioner did not appear on mat date, as he was having no notice to appear on that date. Plea has also been taken that he has also received no notice in the transfer application filed before learned District Judge, Karnal. Further plea has

been taken that he came to know about passing of ex parte judgment and decree when he appeared in the Court on 5.4.2002 and he found that the case was not fixed before the Court of learned Civil Judge, Junior Division, Karnal, and hence, he moved an application for tracing the file on the same day and came to know that ex parte judgment and decree had already been passed against him on 15.3.2002. Application was contested by respondent-plaintiff.

5. From the pleadings of the parties, the following issues were framed by learned trial Court:-

"1. Whether the ex parte order dated 21.2.2003 and ex parte judgment and decree dated 15.3.2002 both are liable to be set aside on the grounds prayed for? OPA

2. Whether the application of the applicant is not maintainable nor the applicant has locus standi to file the present application? OPR

3. Relief."

6. Parties adduced evidence in support of their respective contentions on the said application. However, learned trial Court dismissed the said application vide order dated 31.5.2003. Petitioner filed appeal against the said judgment before learned Additional District Judge, Karnal, however, his appeal was also dismissed and hence, this revision.

7. It has been vehemently contended by learned counsel for the petitioner-defendant that it is a clear case of wrong noting down of the date of hearing by clerk of counsel for the petitioner-defendant. It has been contended that petitioner-defendant had appeared before the Court of learned Civil Judge, Junior Division, Kamal, on 16.1.2002 when the case was fixed for evidence of the plaintiff and when it was adjourned for 5.4.2002. It is further contended that petitioner was having no knowledge of filing of any application for transfer of this case from the Court of Shri K.P. Singh, the then learned Civil Judge, Junior Division, Karnal, to some other court, as no such notice was issued to him by learned District Judge, Karnal, on the transfer application. It is further contended that only counsel for the petitioner appeared before learned District Judge, as is clear from the order passed by learned District Judge, dated 28.1.2002. It is further contended that both the counsel were directed to appear before the transferee Court on 4.2.2002 and that his counsel appeared on 4.2.2002, however, the date of hearing on the brief of counsel remained the same, i.e., 5.4.2002 as clerk of his counsel did not correct the date of hearing as 21.2.2002 instead of 5.4.2002, as the transferee Court has preponed the date of hearing to 21.2.2002. It is further contended that as the case was not noted down in the diary of counsel for the petitioner for 21.2.2002, nor petitioner was having any knowledge of the fact that the same was adjourned to 21.2.2002, hence, neither the petitioner nor his counsel appeared on 21.2.2002 and, hence, petitioner-defendant was proceeded ex parte and ex parte judgment and decree was passed on 15.3.2002, i.e., before 5.4.2002, the date already fixed by the then

learned Civil Judge, Junior Division, Karnal, vide order dated 16.1.2002. It is further contended that on 5.4.2002, when petitioner appeared before the Court of learned Civil Judge, Junior Division, Karnal, and moved an application for tracing out the file, as the case was not fixed before that Court on that date, and came to know that the same was already decided by other Court vide impugned judgment and decree dated 15.3.2002. It is further contended that in order to prove this fact, petitioner besides his own statement has also examined Ahlmad of the Court of learned Civil Judge, Junior Division, Karnal, who has proved the application having been moved by petitioner-defendant in this regard. He has also contended that petitioner also examined clerk of his counsel, who has proved the extract from the brief of his counsel to show that the date of hearing was noted down as 5.4.2002. Hence, it is contended that learned Courts below have ignored the said facts, while passing the impugned orders. It is contended that it was a case for possession of immovable property and the suit was being contested by petitioner-defendant and, hence, there was no reason as to why petitioner-defendant should not have appeared and should have allowed himself to be proceeded ex parte,

8. On the other hand, it has been contended by learned counsel for the respondent-plaintiff that the case was adjourned by learned District Judge, Karnal, in the presence of counsel for both the parties and they were directed to appear before transferee Court on 4.2.2002 and that in fact both the counsel appeared before the transferee court on 4.2.2002 and the case was adjourned to 21.2.2002 in the presence of counsel for both the parties and hence, it is contended that when none appeared for petitioner-defendant on 21.2.2002, he was rightly proceeded ex parte. Hence, it is contended that no ground for setting aside ex parte order dated 21.2.2002 and ex parte judgment and decree dated 15.3.2002 is made out.

9. Law is well settled that procedural provisions are intended to further the cause of justice and to determine the real controversy between the parties and not to grant undue benefit to a party over the other in complete contradiction to the spirit of procedural law. On the point reliance can be placed upon [Balwant Singh and Others Vs. Dalip Kaur and Others](#), and Ajti Singh v. Santokh Singh, (2002)132 P.L.R. 769.

10. Law is also well settled that wrong noting of date of hearing by counsel for a party is taken as a sufficient ground for setting aside ex parte proceedings, if no mala fide is attributable to the said party.

11. On similar facts in [Om Parkash Vs. Golden Forest India Ltd. and Others](#), it was observed by this Court that the reason for non-appearance given by the petitioner is that as against March 4, 2004, the date was noted as March 09, 2004 and it was on that account, neither the petitioner nor his counsel could appear in case and the complaint was dismissed in default and hence, reasons for nonappearance was taken as a bona fide.

12. In *Smt. Suchinta Khurana v. Estate Officer, U.T., Chandigarh and another*, 1990 (1) CLJ 114, a bona fide mistake was made by a counsel and his non-appearance on the date fixed was on the ground of wrong recording of the date of hearing on the brief cover and hence, the order dismissing the appeal for non prosecution was ordered to be recalled.

13. In *M/s Sahara India v. M.C. Aggarwal HUF*, in Civil Appeal No.876 of 2007 decided on 21.2.2007, it was observed by Hon"ble Apex Court that on wrong noting of date of hearing by counsel for defendant, defendant cannot be made to suffer and on that ground ex parte decree against defendants was set aside, however, defendant was burdened with cost of Rs.20,000/-.

14. Hence, if the present case is considered in the light of the aforementioned legal proposition, this Court is of the view that learned Courts below have committed illegality and material irregularity in declining the request of petitioner-defendant to set aside the ex parte proceedings and ex parte judgment and decree.

15. Admitted facts are that the case was fixed before learned Civil Judge, Junior Division, Karnal, on 16.1.2002 for evidence of the plaintiff and examination-in-chief of some witnesses was also recorded on that date and the case was adjourned for 5.4.2002 for cross-examination at the request of counsel for the defendant. However, before the case could be taken up by the said Court on 5.4.2002, an application was moved before learned District Judge by respondent-plaintiff for transferring the case from the Court of learned Civil Judge, Junior Division, Karnal, to the Court of learned Civil Judge, Senior Division, on the plea that learned Civil Judge, Junior Division was not having pecuniary jurisdiction to decide the said case. On the said application order was passed by learned District Judge, Karnal, on 28.1.2002 in the presence of counsel for the parties. There is nothing on record that notice of transfer application was given to present petitioner. It seems that notice was given to the counsel only, who also appeared before learned District Judge on 28.1.2002. However, learned District Judge, instead of directing the parties to appear before the transferee Court on 5.4.2002, the date already fixed by learned Civil Judge, Junior Division, Karnal, directed them to appear before the transferee Court on 4.2.2002. On 4.2.2002 again both the counsel were present before the transferee Court and the case was adjourned to 21.2.2002. However, plea of present petitioner-defendant is that Clerk of his counsel inadvertently noted the date of hearing as 5.4.2002 as was earlier given by learned Civil Judge, Junior Division, Karnal, from whose Court the case was transferred as per order of learned District Judge and hence, none appeared on behalf of the petitioner-defendant on 21.2.2002. There was no notice to petitioner-defendant of the transfer of the case. According to him even his counsel did not inform him about preponing the date of hearing as on the brief cover of the counsel as well, the date was mentioned as 5.4.2002. The said fact is also proved from deposition of Clerk of the counsel as well as from the brief cover of the counsel. Petitioner-defendant appeared before the Court in which case was

pending and was adjourned in his presence to 5.4.2002 on the said date only. However, when he came to know that the case was not listed in the said Court on 5.4.2002, he moved an application before the said Court for tracing the case and the said application has been proved by concerned Ahlmad of the Court. Hence, petitioner-defendant has been able to prove that he came to know about passing of ex-parte order and ex -parte judgment and decree against him on 5.4.2002 and, thereafter, within 30 days of the same, he moved the present application for setting aside ex parte order and ex parte judgment and decree dated 15.3.2002. Hence the application is also within limitation from the date of gaining the knowledge of passing of ex parte order and ex parte judgment and decree. Even if it is taken that there was negligence on the part of the counsel for the petitioner as he should have correctly recorded the date on his brief cover and he should have informed the petitioner-defendant about the correct date of hearing, petitioner-defendant cannot be made to suffer and, however, due to negligence of counsel for the defendant, the other party can be compensated by way of cost as due to negligence on the part of counsel for the petitioner-defendant, decision of the suit filed by respondent-plaintiff has been delayed.

16. Hence, in view of these facts, I am of the view that illegality and material irregularity has been committed by learned courts below in passing the impugned orders in dismissing the application filed by petitioner-defendant and hence, grave injustice or gross failure of justice has occasioned thereby, warranting interference by this Court.

17. Hence, the present revision petition is accepted. Impugned order dated 31.5.2003 passed by learned trial Court and order dated 3.9.2003 passed by learned first appellate Court are set aside and as a consequence thereof, order dated 21.2.2002, vide which petitioner-defendant was proceeded ex parte and ex parte judgment and decree dated" 15.3.2002, passed by learned trial Court were also set aside. However, petitioner-defendant is burdened with cost of Rs.20,000/-, which shall be a condition precedent.

18. Learned trial Court is directed to register the suit at its original number and proceed further to decide the same on merit, as per law.

19. However, as the suit pertains to the year 1999, learned trial Court is directed to decide the same expeditiously by giving short adjournments and efforts be made to decide the same within three months from the date of receipt of certified copy of this order.

20. Parties through their counsel are directed to appear before learned trial Court on 30.5.2011.