

SUPREME COURT OF INDIA

Rabindra Singh

Vs.

Financial Commissioner, Cooproration, Punjab

C.A.No.3574 of 2008

(S.B. Sinha and Lokeshwar Singh Panta JJ.)

14.05.2008

JUDGMENT

S.B. Sinha, J.

Leave granted.

1. Jurisdiction of a Land Revenue Court to set aside an ex-parte decree is in question in this appeal which arises out of a judgment and order dated 28th July,2003 passed by the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition No. 11599 of 2003.

2. A suit for partition was filed by Kulwant Singh, the respondent No.4 herein against the appellant as also the other respondents. The said suit was decreed ex-parte against the appellant. He had been residing in Houston, Texas, in the United State of America for more than 25 years. He had never been served with any notice, although respondent No.4 had full knowledge of his correct address.

3. Assistant Collector, 1st Grade, Phagwara, while passing a judgment and order dated 26th November, 1997 observed that no notice could be served upon the appellant.

4. An application in terms of Order IX Rule 13 read with Section 151 of the *Code of Civil Procedure* was filed by the appellant herein alleging :-

"That the respondents-applicants were not at all served or notified in any manner whatsoever in the above partition proceedings. Neither any summons of this court nor any other process whatsoever of this court was ever served on the respondent-applicants. And the ex parte order dated 26.11.1997 mentioned is thus invalid, illegal and ineffective on the rights and title of the applicant-respondents in the land mentioned above and they are entitled to get it set aside. "

5. Tehsildar, Phagwara, exercising his power as Assistant Collector, 1st Grade, as regards the service of notice upon the appellant herein, observed in the following terms:-

"On 3-7-1998, the file was presented and notice issued to the petitioner in the partition proceedings was received back un-served which is taken on record. It was reported that Kulwant Singh son of Uttam Singh is residing in foreign country and the original file was also not received in the court. The next date of hearing was fixed for summoning of the record and the parties. The counsel for the respondents No. 4, 5 and 6 was directed that the correct address of the petitioner be furnished within two days. On 26-8-98, the file was presented in the court. The notice sent to the petitioner was received again without service, which was taken on record. It was reported by the process server that the address furnished by the opposite party is wrong. The original file has been received from the record. The case was kept for consideration on 10-9-98. On 10-9-1998, the court was not held on account of some official engagement. On 9-10-98 and 16-10-98, I could not make consideration being busy in official work. Therefore, the case was kept for 30-10-98 for consideration."

Tehsildar, however, relied upon a commentary by some author on Section 20 of the *Punjab Land Revenue Act, 1887* wherein the following observation has been made :-

"It is not admissible for a revenue officer to set aside an ex parte order in partition proceedings except by means of a review as the provisions of civil procedure code relating to setting aside of ex parte decree have no application to such a case."

Holding that the application under Order IX Rule 13 of the *Code of Civil Procedure* was not maintainable, the same was dismissed by an order dated 30th October, 1998."

6. An appeal preferred thereagainst was dismissed by the Collector, Phagwara by an order dated 24th March, 1999 wherein inter alia it was held that the service of notice by substituted service having been taken recourse to as envisaged under Section 20 of the Punjab Land Revenue Act, 1887, the ex-parte decree could have been validly passed by the Assistant Collector.

7. A revision petition filed before the Commissioner, Jalandhar Division, was dismissed by his order dated 28th August, 2002.

8. A revision petition filed thereagainst had also been dismissed by the Financial Commissioner by his order dated 19th May, 2003.

9. By reason of the impugned judgment the High Court while noticing the purported finding of the Commissioner that the attorney of the appellant had the knowledge of the proceeding but did not appear, held :-

"We would have certainly gone deeper in the issue as to whether provisions of Code of Civil Procedure were applicable to partition proceedings and the revenue officers had jurisdiction to set aside the same or it is only a review application which is competent but, inasmuch as the matter has been discussed on merits as well as by learned Collector and the Commissioner and the findings recorded by the said

revenue offices appear to be correct, it would be an exercise in futility to go into the question, as mentioned above."

It was furthermore opined that the appellant has not suffered any prejudice.

10. Indisputably the authorities under the *Punjab Land Revenue Act, 1887* (hereinafter referred to as 'the Act') could entertain an application for partition of the joint family property. It lays down the procedures for summoning the parties, witnesses etc. For the said purpose it has the power of a civil court. Section 20 of the Act provides for the mode of service of summons, stating that the same shall be served personally on the person to whom it is addressed, or, failing him his recognized agent or an adult male member of his family usually residing with him.

11. Section 21 of the Act provides for the mode of service of notice, order or proclamation or copy thereof in the following terms:

"21. Mode of service of notice, order or proclamation or copy thereof. - A notice, order or proclamation or copy of any such document, issued by a Revenue officer for service on any person shall be served in the manner provided in the last foregoing section for the service of a summons."

12. Section 22 of the Act also provides for mode of making proclamation in the following terms:-

"22. Mode of making proclamation. When a proclamation relating to any land is issued by a Revenue officer, it shall, in addition to any other mode of publication which may be prescribed in any provision of this Act, be made by beat of drum or other customary method, and by the posting of a copy thereof on a conspicuous place in or near the land to which it relates."

13. In the plaint of the suit filed by respondent No.4 herein, the address of the appellant was stated to be at "Village Khotharan, Distt. Nawanshahr".

Parties are brothers. The allegation of the appellant that he had been residing in the United States of America for last more than 25 years was not, therefore, unknown to the respondent No.4 herein. If, even according to respondent No.4/plaintiff, the appellant had executed a General Power of Attorney in favour of somebody, notices could have been served on him through his constituted attorney. The said fact could have been disclosed in the plaint itself and steps could have been taken to serve the summons upon the said constituted attorney. No such step was taken. Nothing was shown that he could have accepted notice on behalf of the appellant and defend the suit.

14. The Act had been enacted at a point of time when agriculturists ordinarily used to reside in the village. The provisions laying down the mode of service of summons as contained in

Sections 20, 21 and 22 of the Act must, therefore, be construed having regard to the state of affairs as was obtaining during the relevant period. Substituted mode of service is permissible in law but such substituted mode of service in the changed context of a member of a family residing abroad for a number of years, cannot be held to be sufficient, particularly when the plaintiff himself took recourse to suppressio veri and suggestio falsi. A purported service by beat of drum or publication of a notice in a local newspaper which has no circulation in the United States of America etc. cannot be said to be an effective service. With the development of science and technology the on-going statutes cannot be construed in such a manner so as to take the society backwards and not forwards. [See *State of Punjab & Ors. v. M/s. Amritsar Beverages Ltd. & Ors.*¹]

15. In this case there has been a clear fraudulent attempt on the part of the respondent No.4 to suppress the service of notice upon the appellant herein.

“The Tehsildar, in his judgment, has resorted to a peculiar logic. According to her, the provisions of Review were attracted and not under Order IX Rule 13 for setting aside the ex-parte proceeding. Even if that be so, the ex-parte decree, in our opinion, could have been set aside. She could have exercised her power of review. The commentary on which reliance was placed, was made on the basis of a decision of the *Financial Commissioner in Hukam Chand & ors. v. Malak Ram & ors.*². The said decision, with respect, does not lay down the correct law. All courts in a situation of this nature have the incidental power to set aside an ex parte order on the ground of violation of the principles of natural justice. We will deal with this aspect of the matter a little later.”

16. A defendant in a suit has more than one remedy as regards setting aside of an ex-parte decree. He can file an application for setting aside the ex-parte decree; file a suit stating that service of notice was fraudulently suppressed; prefer an appeal and file an application for review.

In *Bhanu Kumar Jain v. Archana Kumar and another*¹ this Court held:

"26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true."

17. What matters for exercise of jurisdiction is the source of power and not the failure to mention the correct provisions of law. Even in the absence of any express provision having

regard to the principles of natural justice in such a proceeding, the courts will have ample jurisdiction to set aside an ex parte decree, subject of course to the statutory interdict.

In *Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal*⁴ this Court has held that an Industrial Tribunal has the requisite jurisdiction to recall an ex parte award. [See also *Sangham Tape Co. v. Hans Raj*⁵ and *Kapra Mazdoor Ekta Union v. Birla Cotton Spinning and Weaving Mills Ltd. and Another*⁶]

18. A substituted service furthermore is meant to be resorted to serve the notice at the address known to the parties where he had been residing last. Appellant had been residing in the United States of America for the last about 25 years. He, thus, ceased to stay for all intent and purport at Village Khotheran, Distt. Nawanshahr. Therefore, no substituted service could have been effected on him for service of notice at that address.

19. In *Great Punjab Agro Industries Ltd. vs. Khushian*⁷ this Court held :-

"In view of the order that we propose to pass, it is not necessary to recite the entire facts leading to the filing of the present appeal. Suffice it to say that the suit was decreed ex parte by an order dated 16-4-1994. The application for setting aside the ex parte order has been rejected by the courts below. Hence, the present petition. The notice to the appellant is by way of substituted service. The substituted service was published in the Tribune and the Punjab Kesari which have circulation only in the State of Punjab. Admittedly, the appellant stays at Bombay. The newspapers in which the notice was published by way of substituted service, namely, the Tribune and the Punjab Kesari have no circulation in Bombay. Order 5 Rule 20(1-A) CPC enjoins that if the service of notice is by advertisement in the newspaper, it shall be in the daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided. In the instant case, the procedure prescribed under Order 5 Rule 20(1-A) with regard to substituted service has been violated. In the premises, it cannot be said that the summons upon the defendant were effectively served. In this view of the matter, the ex parte decree dated 16-4- 1994 is set aside."

See also *Naresh Chandra Agarwal v. Bank of Baroda*⁸ and *Kewal Ram v. Ram Lubhai*⁹.

20. Knowledge on the part of the constituted attorney would not be such which would come on the way of the appellant in maintaining an application for setting aside an ex parte decree. Such a contention cannot be raised in a proceeding for setting aside an ex-parte decree.

21. The Collector as also the Financial Commissioner, therefore, while exercising their appellate and revisional jurisdiction respectively posed unto themselves wrong questions and, thus, misdirected themselves in law.

“The Commissioner, as also the High Court, in our opinion, committed a serious error in so far as they proceeded on the basis that the appellant had not suffered any prejudice.”

22. Admittedly, partition had been effected between the parties by metes and bounds. He could at least in the final decree proceedings, raise several objections as regards allotment of lands. He did not get such an opportunity. Where principles of natural justice are required to be complied with, non affording of an opportunity itself causes prejudice. {See *S.L. Kapoor v. Jagmohan*¹⁰}.

23. We are, therefore, of the opinion that the courts below ought to have held that the appellant had been able to establish sufficient cause for an order setting aside the ex-parte decree.

24. This Court in *G.P. Srivastava v. R.K. Raizada*¹¹, it has held that:-

“The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.”

25. Yet again in *Tea Auction Ltd. v. Grace Hill Tea Industry*¹² it was noticed:-

"12. In *G.P. Srivastava v. R.K. Raizada* a similar question came up for consideration. A Division Bench of this Court opined that the provision under Order 9 Rule 13 of the Code of Civil Procedure should receive a broad construction and no hard-and-fast guidelines can be prescribed. The courts have a wide discretion to set aside an ex parte decree on satisfying itself as regards existence of a "sufficient cause", opining:

"The `sufficient cause' for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If `sufficient cause' is made out for non- appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated

by adequate costs and the lis decided on merits." was furthermore held that terms for setting aside an ex parte decree should be reasonable

26. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. However, we, in exercise of our jurisdiction under Article 142 of the Constitution of India direct that the appellant must file his written statement within four weeks from date. Copies of deposition of witnesses examined, if any, may be supplied to lawyer of the appellant within the aforementioned period. The said witnesses would be offered for cross-examination by the appellant soon thereafter. Parties shall not take any adjournment on the dates fixed, save and except for sufficient and cogent reasons. The Court shall fix such dates which may be convenient to the appellant and, if possible, the hearing of the case may be taken up on day to day basis.

27. This appeal is allowed with the aforementioned observations and directions. In the facts and circumstances of this case, there shall be no order as to costs.

¹2006 (7) SCALE 587

⁴[1980 Supp SCC 420]

⁷(2005) 13 SCC 503

¹⁰[(1980) 4 SCC 379]

²[1932 (XI) *The Lahore Law Times* 42]

⁵(2005) 9 SCC 331

⁸[(2001) 3 SCC 163]

¹¹[(2000) 3 SCC 54]

³[(2005) 1 SCC 787]

⁶(2005) 13 SCC 777

⁹[(1987) 2 SCC 344]

¹²[(2006) 12 SCC 104]