
(2014) 12 P&H CK 0049
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 3388 of 2011

Amrik Singh Chana and Others

APPELLANT

Vs

Vipin Khanna and Others

RESPONDENT

Date of Decision : 17-12-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 43 Rule 1(c), Order 43 Rule 43, Order 9 Rule 13, Order 9 Rule 9
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 5

Citation : (2015) 178 PLR 145

Hon'ble Judges : Gurmeet Singh Sandhawalia, J

Bench : Single Bench

Advocate : Anupam Gupta, Senior Advocate, Siddharth Sharma and Govind Narain Kaushik, Advocate for the Appellant; C.S. Bakshi, Advocate for the Respondent;

Final Decision : Allowed

Judgement

Gurmeet Singh Sandhawalia, J.

1. Prayer in the present revision petition, filed under Article 227 of the Constitution of India, by the plaintiff-petitioners, is for setting aside the order dated 01.06.2010 (Annexure P2), whereby the application, filed for recalling the order dated 07.01.2008 (Annexure P3), vide which the Civil Suit of the plaintiff-petitioners for possession was rejected on the ground that there was no proper explanation for the non-appearance of the plaintiff on the date fixed and also that the application was time-barred. The order dated 01.12.2010 (Annexure P1), passed by the Additional District Judge, Gurgaon is also subject matter of challenge, upholding the order of the Trial Court by recording a finding that the same was a revisable order and only a revision could be instituted. Learned Senior Counsel for the petitioners has been at pains to explain the background of the case as to how the petitioner, who is a NRI, is fighting the litigation and trying to save his immoveable property which has been fraudulently sold.

2. Counsel for the respondents, on the other hand, submitted that the property had been sold by a registered power of attorney and it was only an attempt to keep the litigation pending and even the criminal proceedings had ended in favour of the respondents as they had been acquitted of the charges framed by the Judicial Magistrate, 1st Class on 03.09.2014.

3. In order to appreciate the dispute, the facts will necessarily have to be gone into.

4. A perusal of the paperbook would go on to show that the petitioner and his wife had been allotted plot No. 382 measuring 500 sq. yards in Sector 14 in the urban estate at Gurgaon on 06.03.1973. A registered general power of attorney is alleged to have been executed on 07.06.1984 (Annexure P5), whereby they had appointed one Inder Singh, respondent No. 2 as their attorney to do the necessary acts regarding the said plot and to apply for transfer etc. On the strength of the said power of attorney, the plot was transferred to Vipin Khanna, respondent No. 1 herein on 23.08.1984. The petitioner filed a suit for possession on 01.12.1986 alleging that they had never executed the power of attorney in favour of respondent No. 2 and that the same was false and fabricated and respondent No. 1 had illegally occupied the plot without any right. The date of knowledge was attributed to be on 30.01.1986 when they had visited India and on subsequent enquiry from the office of the Haryana Urban Development Authority (its acronym, "HUDA")-respondent No. 3, herein. In the meantime, respondent No. 1-Vipin Khanna sold the property to one Inder Kumar Bansal and Sumitra Bansal on 27.10.1986. The suit was decreed ex parte on 24.11.1995 (Annexure P8) against the attorney and respondent No. 1, the first beneficiary, on the ground that as per the photocopy of the passport of the petitioner, he had never visited India in 1984. Warrants of possession in execution of the decree in question were also issued by the Executing Court.

5. An appeal was also preferred by HUDA, respondents No. 3 & 4, before the Additional District Judge which was dismissed on 02.08.1999. The objections were filed by the second purchaser, Inder Kumar Bansal in execution petition which were dismissed on 13.02.2007 on the ground that the occupation certificate of the second purchaser was dated 02.10.1989, i.e., after the institution of the suit and the judgment and decree dated 24.11.1995 had become final and the objections filed on 19.03.2003, after fourteen years of purchase were only for the purpose of frustrating the decree and warrants of possession were issued vide the said order. The second purchaser, therefore, approached this Court in CR No. 1475 of 2007 titled Inder Kumar Bansal v. Vipin Khanna and others, in which the present petitioners were arrayed as respondents No. 5 & 6. Vide order dated 17.03.2007, this Court stayed their dispossession, keeping in mind the fact that the Executing Court should have framed an issue before dismissing the objection in the execution proceedings. On 25.08.2007, in the meantime, an application was filed under Order 9 Rule 13 CPC for setting aside the ex parte judgment and decree, by respondent No. 1, Vipin Khanna. The

Trial Court noticed that service had not been effected since he was residing in Delhi and the judgment and decree in favour of the petitioners was set aside vide order dated 25.08.2007 (Annexure P12) and the case was restored to its original number and respondent No. 1 was directed to file written statement on 17.09.2007, which was duly complied with. Issues were framed on 15.10.2007 and thereafter, the case was transferred to another Court and request was made by counsel for the plaintiff that since he was residing abroad, long date be given for leading evidence. The case was, thereafter, adjourned to 07.01.2008 for examination of the plaintiff witnesses. In the interregnum period, the case was preponed by the Trial Court on account of the fact that the case being old and that there should be trial on day to day basis. Eventually, it was again taken up on 07.01.2008 and on account of counsel not appearing, it was dismissed in default since no plaintiff witness was present. It was, however, noticed that summons had been sent to the Estate Officer, HUDA and had been received back served but no one was present on his behalf. In the meantime, counsel for the petitioners had put in appearance before this Court in CR No. 1475 of 2007, filed by Inder Kumar Bansal, on 18.08.2008. The case was, however, dismissed in default on 09.09.2008. The non-appearance for the second purchaser was apparently on account of the fact, firstly, that the decree in question dated 24.11.1995 already stood set aside under Order 9 Rule 13 CPC, vide order dated 25.08.2007, at the instance of respondent No. 1. The second reason for the non-appearance would be that the suit was dismissed in default on 07.01.2008.

6. Accordingly, the petitioners, thereafter filed application under Section 151 CPC on 22.09.2008 for recalling the order dated 07.01.2008 along with application under Section 5 of the Limitation Act and the plea taken was that CR No. 1475 of 2007 which had been filed in this Court was dismissed on 09.09.2008. When they had approached the Executing Court for execution of the decree, they had come to know about the order dated 07.01.2008. As they are residing in England being NRs, were not aware of the dismissal of the suit and accordingly, prayed for recall of the order. The application for recalling was, as noticed, dismissed on 01.06.2010 on the ground that there was no sufficient cause and since the applicant had not reported about the misconduct of his Advocate, since it had been alleged that he had failed to inform them about setting aside of the ex parte judgment and decree dated 24.11.1995. It was held that no proper explanation had been given for non-appearance on 07.01.2008 and therefore, both the application, for restoration and for condoning the delay, were dismissed.

7. The appeal, as noticed above, has been dismissed on the ground that the application for restoration of the suit was not appealable and was only revisable, as no decree had been passed.

8. Under Order 9 Rule 9, the plaintiff is entitled to apply for setting aside the dismissal order and if the Court is satisfied that there is sufficient cause for his non-appearance, the Court shall pass an order setting aside the dismissal order on such terms as to costs or otherwise as it thinks fit. The relevant provisions

read as under:

"R.9. Decree against plaintiff by default bars fresh suit.-

(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

Order 43 Rule 1. An appeal shall lie from the following orders under the provision of section 104, namely :--

(a) ****

(b) ****

(C) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;"

9. In the present case, as noticed, an application was filed for setting aside the order dated 07.01.2008 along with an application for condonation of delay. Under Order 43 Rule 1(c) CPC, an order under Order 9 Rule 9 CPC, rejecting the application to set aside the dismissal of a suit is appealable. In such circumstances, the applicants could show sufficient cause which they did but the order dated 01.06.2010 was passed. In such circumstances, the Lower Appellate Court was not justified in holding that the appeal was not maintainable. This Court in *Manphul Singh v. Gram Panchayat, Toshram and another*, 1977(2) Rent Law Reporter 319, in similar circumstances, held that an appeal lies against an order disallowing an application for restoration of the suit under Order 43 and allowed the revision petition filed against the order of the Lower Appellate Court which had declined the appeal on the ground that it was not maintainable. A similar view was taken by the Full Bench of the Madhya Pradesh High Court in *Nathu Prasad Vs. Singhai Kapurchand*, .

10. A perusal of the above facts would go on to show that there was sufficient cause for non-appearance of the petitioners on 07.01.2008 due to the fact that there was litigation pending in this Court in CR No. 1475 of 2007, filed by Inder Kumar Bansal, in which their dispossession had been stayed on 17.03.2007. The petitioners, who are NRIs, were busy prosecuting the civil revision proceedings and in the meantime, the application under Order 9 Rule 13 CPC was also allowed by the Trial Court in favour of respondent No. 1 though it was in the presence of their counsel. The dispute had, thus, shifted to this Court where the petitioners were focusing the energy and eventually in view of the orders dated

25.08.2007 and 07.01.2008, the revision petition had become infructuous and was dismissed for non-prosecution, on 09.09.2008 which led to the filing of the application for restoration of the suit, immediately thereafter, on 22.09.2008. It is also important to note that the petitioners had also initiated criminal proceedings by filing a criminal complaint on 17.03.2008, against both the purchasers and were, thus, fighting tooth and nail regarding the litigation which had opened up on many fronts.

11. Thus, in the above-said facts and circumstances, especially keeping in mind the fact that the petitioner are NRIs, this Court is of the opinion that the Trial Court failed to take into consideration the application for restoration in its true perspective. The Lower Appellate Court had also taken a very technical view for dismissing the application being not maintainable, while placing reliance upon *Daya Chand Vs. Ram Phal and Another*, . In the said case, the second application for restoration had been heard on merits and it had been found that there was negligence in not depositing the process fee, which had been reversed in appeal. It was, thus, held that the order on such an application was not appealable. The judgment in *The Commissioner Vs. Shrishail and Others*, , referred to the Appellate Court, is regarding the order in appeal, following the rejection of the application under Section 5 of the Limitation Act. Similarly, the judgment rendered in *Mamuda Khateen and Others Vs. Beniyan Bibi and Others*, of the Calcutta High Court is also not applicable to the facts and circumstances of the present case. The judgment rendered in *Dev Bala Sehgal Vs. Devinder Pal Sehgal*--> is also on the issue whether the Court had the power to condone the delay in the absence of an application under Section 5 of the Limitation Act, filed along with the application under Order 9 Rule 9 CPC. In the present case, as noticed, application for condonation of delay was also filed and therefore, the said judgment has been wrongly been applied by the Lower Appellate Court against the petitioners.

12. The words "sufficient cause" is an elastic term, which has been used by the Apex Court in *Oriental Aroma Chemical Industries Ltd. Vs. Gujarat Industrial Development Corporation and Another*, in which it has been held that a liberal approach should be applied. Relevant observation reads as under:

"8. We have considered the respective submissions. The law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time. The expression "sufficient cause" employed in Section 5 of the Indian Limitation Act, 1963 and similar other statutes is elastic enough to enable the courts to apply the law in a meaningful

manner which sub serves the ends of justice. Although, no hard and fast rule can be laid down in dealing with the applications for condonation of delay, this Court has justifiably advocated adoption of a liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate - Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , N. Balakrishnan Vs. M. Krishnamurthy, and 10 Vedabai @ Vijayanatabai Baburao Pateil Vs. Shantaram Baburao Patil and Others, . In dealing with the applications for condonation of delay filed on behalf of the State and its agencies/instrumentalities this Court has, while emphasizing that same yardstick should be applied for deciding the applications for condonation of delay filed by private individuals and the State, observed that certain amount of latitude is not impermissible in the latter case because the State represents collective cause of the community and the decisions are taken by the officers/agencies at a slow pace and encumbered process of pushing the files from table to table consumes considerable time causing delay - G. Ramegowda, Major and Ors Vs. Special Land Acquisition Officer, Bangalore, , State of Haryana Vs. Chandra Mani and others, , State of U. P. and others Vs. Harish Chandra and others, , State of Bihar Vs. Ratan Lal Sahu and Others, , State of Nagaland Vs. Lipok AO and Others, , and State (NCT of Delhi) Vs. Ahmed Jaan, ."

Accordingly, keeping in view the above discussion, this Court is of the opinion that the Courts below were not justified in rejecting the application for restoration. Accordingly, the present revision petition is allowed and the orders dated 01.06.2010 (Annexure P2) and 01.12.2010 (Annexure P1) are set aside, subject to payment of Rs. 10,000/- as costs, to be paid by the petitioners to respondent No. 1.