
(2006) 01 P&H CK 0151
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 4475 of 1995

Chhota Singh and Others

APPELLANT

Vs

Deewan N.K. Khosla and Others

RESPONDENT

Date of Decision : 24-01-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20
Pepsu Tenancy and Agricultural Lands Act, 1955 — Section 8

Citation : (2006) 143 PLR 103

Hon'ble Judges : Hemant Gupta, J

Bench : Single Bench

Advocate : R.L. Gupta, for the Appellant; S.S. Dahiya, for the Respondent

Final Decision : Allowed

Judgement

Hemant Gupta, J.—The present revision is directed against the order passed by the learned Trial Court on 26.9.1995 whereby on an application filed by defendant Naval Krishna Khosla, (hereinafter referred to as an applicant), the ex parte decree dated 1.10.1994 was set aside.

2. The petitioner herein filed a suit for declaration in the year 1973 to the effect that he is the owner and in possession of the land measuring 53 Kanals 6 Marias on the basis of sale deed dated 21.9.1955 executed by Brij Mohan Khosla, father of Naval Krishna Khosla-defendant No. 2 for valuable consideration. In the said suit, Brij Mohan Khosla was served. He put in appearance before the learned Trial Court on some dates but subsequently, abstained from proceedings. Defendant No. 1 Navai Krishan Khosla, was served by way of substituted service by publication in Daily Newspaper, Chardi-kalan. On the basis of such substituted service, defendant No. 1 was proceeded ex parte and after recording ex parte evidence, the suit was decreed on 1.10.1974.

3. The application for setting aside of such decree was field on 7.12.1983. It was alleged by the respondent-applicant that he came to know about such decree for

the first time only on 10.11.1983 when Shri S.N. Khosla, Advocate, communicated to the applicant about the entries in the revenue record on the basis of ex parte judgment and decree when he was engaged. Such communication was result of the request of the applicant to file an ejectment petition against the petitioner therein.

4. Learned Trial Court ordered setting aside of ex parte judgment and decree on payment of Rs. 500/- as costs. The Court found, inter alia, that no particulars of the address of the applicant was given in the plaint nor the application for effecting service by way of substituted service was supported by an affidavit. It is also found that concise statement of the plaint did not find mention in the proclamation nor copy of publication was sent to the addressee given in such proclamation. This Court in revision against the said order stayed further proceedings in pursuance of the impugned order passed by the learned Trial Court while admitting the petition on December 11, 1995.

5. In the application for setting aside of ex parte decree, it was pleaded that the father of the applicant died in the last week of October, 1981 when "he was living with his daughter and son-in-law at Shimla. It is also mentioned that the applicant has instructed his counsel to file an application u/s 8 of the Pepsu Tenancy Act for possession of the disputed land before the death of his father in accordance with Jamabandi entries as the applicant is a small land-owner and requires the land for his self-cultivation. It is also pleaded that the applicant was anxious to get possession of the land lest some tenant trouble should arise after the death of his father. Paras No. 3 and 4 of the application read as under:

3. That before the applicant's father's death in accordance with the Jamabandi entries, the applicant had instructed his counsel Shri S.N. Khosla, Advocate, Patiala, to file an application u/s 8 of the Pepsu Tenancy Act for possession of the disputed land bearing Khasra Nos. 8/16, 25, 9/11, 12/1, 19/2/20, 21. 17/1 and 18/5 situated in the revenue estate of village Bhattian on the ground that the applicant is a small land owner and requires the land for self cultivation.

4. That after the applicant's father's death, he was anxious to get possession of the land, lest some tenant trouble should arise and he had thus desired his counsel at Patiala to initiate early proceedings.

6. Learned Counsel for the petitioner has vehemently argued that the petitioner has purchased the land in dispute by virtue of registered sale deed dated 21.9.1955 and thereafter, the possession of the petitioner is that of the owner. The applicant is claiming the title in the suit land on the basis of gift allegedly executed by his father Brij Mohan Khosla. But no date of alleged gift is disclosed nor the gift deed has been produced. It is further argued that father of the applicant had put in appearance before the Trial Court but has not even filed written statement and was proceeded ex parte. The applicant was served by way of substituted service. The ex parte decree was passed in October, 1974. whereas the application to set aside such decree had been filed after 9 years in

December, 1983. The conduct of the applicant is not bona fide. The application is, in fact, flagrant abuse of the process of law which does not call for any indulgence, at this stage. It is argued that though the Courts are liberal in setting aside ex parte judgment and decree but in the facts of the present case such liberal attitude is not warranted due to contumacious conduct of the applicant. Such conduct does not warrant indulgence either in law or in equity.

7. After hearing learned Counsel for the petitioners, I am of the opinion that the applicant has failed to show bona fide sufficient reasons to seek setting aside of ex parte judgment and decree.

8. The petitioner has sought declaration on the basis of registered sale deed executed by Brij Mohan on 21.9.1955 to the effect that he is owner of the suit land and that the revenue entries recording Naval Kishore as the owner are incorrect. Naval Kishore has appeared as his own witness in the proceedings for setting aside ex parte decree as A.W. 1. It is his stand that he became owner by partition on the basis of gift. In cross-examination, he has deposed that his father gave some land out of joint Hindu family property in a partition/gift. Still further, he has deposed that he does not know that there was any permanent partition at that time and that his is a joint Hindu family with his father. He has further deposed that his father used to collect Batai of his land from Chhota Singh and Ors. and he did not get any Batai from Chhota Singh because that was the job of his father. Still further, his father never gave any Batai to him.

9. The father of the applicant was admittedly served but has not contested the suit. It was open to the father of the applicant to resist the claim of the plaintiff of purchase of property in dispute vide registered sale deed allegedly executed by him. Similarly, the father could also assert the partition of the joint Hindu Family Property so as to confer ownership rights in favour of the applicant. The applicant is deriving his right, if any, through his father. Such conduct of proceedings shows total lack of bona fides of the applicant. Still, further in the application itself he has alleged that he was anxious to get possession of the land after the death of his father lest some tenant problem arise. If the applicant was undisputed owner of the suit land, there was no occasion for him to expect trouble after the death of his father to seek eviction of his tenant.

10. The stand of the applicant that he came to know about the ex parte decree on the basis of communication addressed by an Advocate who happens to be his relation is again not trustworthy. It has been found that the petitioner has never paid any Batai to the applicant. The Batai was being paid to the father of the applicant. It is not the case of the applicant that he ever demanded any Batai from the petitioner after becoming owner as alleged by him. Such communication is, in fact, a made up story creating a cause to seek setting aside of ex parte decree after lapse of long time.

11. There is nothing on record to show any overt assertion of title by the applicant in respect of the land in dispute after its alleged gift. Even if, one is to

assume the sale was not executed, the applicant has not alleged of payment of rent to him or any other action into reflect the relationship of landlord and tenant between the plaintiff and the applicant. Although such payment by itself may not be relevant to determine the controversy whether the applicant was properly served in the suit but the same becomes relevant to consider the bona fides and conduct of the applicant in seeking setting aside of ex parte judgment and decree passed way back on 1.10.1974.

12. The finding recorded by the learned Trial Court that the address of defendant was not complete is not a correct statement of facts. Though in the plaint originally filed, the address was not complete but subsequently, while filing process fee, the complete address was given. On 8.8.1973, Ahlmad was directed to give correct address in the summons according to the process fee. On the next date i.e. 14.9.1973. defendant No. 2 appeared before the trial Court as well as on the adjourned date i.e. 19.10.1973 and on 26.11.1973. Learned trial Court has ordered substituted service on 19.10.1973. Such address finds mention in the decree prepared as well. The reasoning that the applicant was ordinarily resident of Delhi is not really made out as in the revenue record, there is no such indication. There is no correspondence exchanged between the parties or any other document to attribute knowledge of residence of the applicant at Delhi as well.

13. The argument that the application for substituted service was not supported by an affidavit is not a ground on the basis of which it can be said that substituted service was not justified. In terms of Order 5 Rule 20 of the Code of Civil Procedure, it is the satisfaction of the Court before an order of substituted service is passed. Such satisfaction can be on the basis of an application supported by an affidavit or on the basis of record available. The Court has recorded a satisfaction that defendant No. 1 cannot be served in the ordinary way. Still further, even if registered envelopes are not available on record, one cannot find fault in the satisfaction recorded by the Trial Court for substituted service during the course of proceedings before the Court. The application has been filed after 9 years of the passing of the ex parte decree taking advantage of some procedural irregularities which are not material, in view of the finding recorded above.

14. The finding that defendant No. 2 was not having the cordial relationship with the applicant is not relevant for determining the sufficiency of proceeding ex parte against the said applicant. The ex parte proceedings were initiated in the year 1973, whereas defendant No. 2 died in the year 1981 at Shimla. Mere fact that at the time of death 8-9 years later, defendant No. 2 was at Shimla is not indicative of lack of cordial relationship between the father and the son.

15. In view of above, I am of the opinion that the finding recorded by the learned Trial Court that the applicant was not properly served is a finding based upon conjectures and surmises. The application to seek setting aside ex parte judgment and decree lacks bona fide. The order passed by the learned Trial

Court suffers from patent illegality and material irregularities causing manifest injustice to the petitioner.

16. Consequently, the revision petition is allowed. The order dated 26.9.1995 is set aside and the application to seek setting aside of ex parte judgment and decree is dismissed with no order as to costs.