

LAL DEVI AND ANR.
v.
VANEETA JAIN AND ORS

MAY 14, 2007

[B.P. SINGH AND HARJIT SINGH BEDI, JJ.]

Specific Relief Act, 1963/Code of Civil Procedure, 1908; O. IX R 13 read with s. 151 and O. IX R 7:

Suit for specific performance—Agreement to sell immovable property—Payment of earnest money—Vendor allegedly did not execute sale deed—Suit—Trial Court passing an ex-parte decree against defendant though application for recalling the order was filed by the counsel of defendant before pronouncement of the Order, but it was dismissed as not maintainable—Affirmed by High Court—On appeal, held, no doubt the counsel for the defendants did not show even the minimum courtesy expected of them by not informing to the Trial Court that they were busy in the High Court—However, counsel for the defendant submitted an application for recalling the order and that the matter may not be proceeding ex-parte, but the same was rejected as not maintainable—In view of settled law on the subject, Trial Court could not have entertained an application under O. IX R 7 but passing of an ex-parte decree in a case of this nature is too harsh a consequence to be upheld—Defendant could not be made to suffer an ex-parte decree particularly when he was not at fault having instructed the counsel to appear before the Court—Hence, Trial Court is directed to proceed with the suit in accordance with law.

Plaintiff and defendant, since deceased, were good friends. Defendant owned a property in Shimla, which he agreed to sell to the defendant on March 26, 1982 for a consideration amount of Rs.4,20,000/-. A sum of Rs.40000/- was stated to be paid by the plaintiff to the defendant as earnest money. However, the defendant did not execute the sale deed. Therefore, a suit for specific performance of the agreement of sale was filed by the plaintiff before the High Court.

Before the trial Court, evidence had been recorded and ex-parte

A arguments had been heard and even judgment had been dictated, and then an application was moved by the Counsel for the defendant for re-calling of the order for pronouncement of judgment. Since the application was moved after the hearing stood completed and the case was adjourned to post lunch session for pronouncement of judgment, the same was held to be not maintainable by the trial Court in view of the law laid down by the Supreme Court in "*Arjun Singh v. Mohindra Kumar and Ors.*," A.I.R. (1964) C.993. Moreover, no sufficient ground had been shown in the application for the absence of the defendant and/or his counsel when the case was called. The suit was decreed. Aggrieved, the defendant filed an appeal, which was dismissed by the High Court. Hence the present appeal.

C Appellant-vendor contended that having regard to the facts and circumstances of the case the District Judge/trial Court was not justified in proceeding with the matter *ex-parte*, particularly when counsel for the defendant appeared before him soon thereafter and made a request to re-call the order. The request was made before the judgment was pronounced.

D However, the trial Court proceeded to pass an *ex-parte* decree on the same day.

E Respondent submitted that in the absence of the defendant and his counsel, and in the absence of any request on their behalf, the trial Court had no option but to proceed *ex-parte*; and that the setting aside of an *ex-parte* decree may give to them an undue advantage and they may raise all sorts of pleas to defeat the just claim of the respondents.

Allowing the appeal, the Court

F HELD: 1.1. It is no doubt true that when the suit was called out before the Court of the District Judge/trial Court, counsel for the parties ought to have been present in Court. If on account of any unforeseen or unavoidable reason it was not possible for the defendant or his counsel to be present in Court, courtesy demanded that a representation ought to have been made before the Court by any other counsel so that the Court was informed that the counsel engaged were busy in the High Court. If such a request was made, no doubt, G the trial Court would have accommodated counsel for the defendant. It is not unusual for the lower Courts to accommodate counsel on whose behalf a representation is made about their absence on account of remaining pre-occupied before the High Court. No doubt, the counsel for the defendant were remiss in not showing even the minimum courtesies expected of them.

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[Para 13] [567-F, G, H; 568-A]

1.2. Having regard to the totality of circumstances, this court is of the view that in the interest of justice this appeal must be allowed. The trial Court recorded evidence, heard arguments and posted the matter later in the day for delivery of judgment. If the Court had adjourned the proceedings to another day after deciding to proceed *ex-parte*, the defendant could have applied for being permitted to participate in the proceedings. In this case since everything happened on the same day the defendant did not get an opportunity to do so.

[Para 15] [568-C, D]

2.1. It is true that in view of the law laid down by this Court in *Arjun Singh v. Mohindra Kumar and Ors*, the trial Court could not have entertained an application under Order IX Rule 7 C.P.C. This Court has also no hesitation in observing that counsel of the defendant were not careful enough to inform the Court about their pre-occupation before the High Court which prevented them from being present in his Court when the case was called for hearing. But the passing of an *ex-parte* decree in a case of this nature is too harsh a consequence to be upheld. The defendant cannot be made to suffer an *ex-parte* decree particularly when he was not at fault, having duly instructed his counsel to appear before the Court of the District Judge. The District Judge could not entertain an application under Order IX Rule 7 C.P.C., and even the application under Order IX Rule 13 was dismissed as not pressed. But nothing prevented the High Court from setting aside the *ex-parte* decree in the appeal preferred against it. [Paras 15 and 16] [568-E, F, G; 569-A]

2.2. The Trial Court is directed to proceed with the suit in accordance with law. [Para 19] [569-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2494 of 2007.

From the Final Judgment and Order dated 29.08.2005/22.09.2005 of the High Court of Himachal Pradesh at Shimla in RFA No.133 of 1998.

M.N. Rao, Rajni Hari Lal, Seema Jain and Himinder Lal for the Appellants.

K.K. Venugopal and Rajiv Dutta, E.C. Agrawala, Anand Sharma, Mahesh Agarwal, Rishi Agrawala, Gaurav Goel, Varun Mathur, Neha Aggarwal, Amit Kumar Sharma, Joy Abraham and C.K. Sasi for the Respondents.

The Judgment of the Court was delivered by

A **B.P. SINGH, J.** 1. Special Leave granted.

B 2. This appeal is directed against the judgment and order of the High Court of Himachal Pradesh dated August 29, 2005 and September 22, 2005 in R.F.A. No.133 of 1998. By the impugned judgment and order the High Court dismissed the appeal preferred by the defendants and affirmed the *ex-parte* decree for specific performance passed by the Trial Court by its impugned judgment and decree of January 7, 1998.

C 3. In view of the order that we propose to pass it is not necessary for us to consider in detail the facts of the case and the issues that arise in the suit, because we have reached the conclusion that the Trial Court was not justified in passing an *ex-parte* decree in the facts and circumstances of the case. We shall, therefore, notice the facts of the case only in so far as they are relevant for disposal of this appeal.

D 4. It is not in dispute that late P.S. Multani (Defendant) and late Jawahar Lal Jain (Plaintiff) were good friends. Late P.S. Multani owned a property known as Brombley Estate in Shimla which comprised of about 20 bighas of land with house and orchard (hereinafter referred to as "the property").

E 5. The case of the plaintiff late Jawahar Lal Jain was that an agreement to sell the property to him was executed by late P.S. Multani on March 26, 1982 for a sum of Rs.4,20,000/-. A sum of Rs.40000/- was paid as earnest money. Despite his best efforts late P.S. Multani did not execute the sale deed. A suit for specific performance of agreement was filed before the High Court at Shimla on March 26, 1985. Ten witnesses were examined on behalf of the plaintiff. PW-8, S.C. Dave was under cross-examination which remained inconclusive and was deferred to August 27, 1993. The matter was subsequently adjourned for production of documents and record etc.. The matter was listed before the Court on several dates and ultimately the matter came up before the Court on May 17, 1995. On that date no one appeared on behalf of the parties. It appears that some time in 1995 in view of the enhancement of the pecuniary jurisdiction of the Court of the District Judge, the matter was transferred and assigned to the Court of District Judge, Shimla for disposal. The record of the case also shows that thereafter the matter was fixed before the Trial Court on several dates and ultimately came up before the Court on January 7, 1998. On that day while the plaintiff's witnesses were present as also his counsel, no one appeared on behalf of the defendant. PW-8 a witness who had been partly cross-examined was present but there was

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no one to further cross-examine him. Witness Rajinder Singh Sethi was examined as PW-10. The order of the Trial Court passed on that day is quoted below in extenso:- A

“7.1.1998: Present: Plaintiff’s counsel Shri Deepak Gupta.

Witness PW-8 S.C. Dave and witness Shri Rajinder Singh Sethi. B

None for the defendant. Hence proceeded *ex-parte*.

There is no one to further cross-examine PW-8 Shri S.C. Dave. Statement of Shri Rajinder Singh Sethi PW-10, has been recorded. Arguments heard. Put up for pronouncement of judgment in the after noon. C

Sd/- District Judge, Shimla.

7.1.1998: (Case called again for the pronouncement of the judgment)

After the evidence had been recorded and the *ex-parte* arguments had been heard and even judgment had been dictated to the P.A., an application was moved by the defendant’s counsel Shri R.L. Sood making prayer for the re-call of the order for pronouncement of judgment. Since the application has been moved after the hearing stood completed and the case was adjourned to post lunch session for pronouncement of judgment, the same is not maintainable in view of law laid down by the Hon’ble Supreme Court in “*Arjun Singh v. Mohindra Kumar and Ors.*,” A.I.R. (1964) S.C.993. Moreover, no ground, leave alone a sufficient ground, has been shown in the application for the absence of the defendant and/or his counsel when the case was called. D E F

Per separate judgment placed on the file, the suit is decreed. Formal decree sheet be drawn accordingly. Record be completed and consigned to the record room”.

6. From the order aforesaid it would appear that the learned District Judge decided to proceed *ex-parte* since neither the defendant nor his counsel was present to cross-examine the witnesses examined by the plaintiff. After closing the cross-examination of PW-8 and recording the statement of PW-10, the Court proceeded to hear arguments advanced by Counsel for the plaintiff. After the arguments were heard the Court directed that the matter be put up for pronouncement of judgment in the after noon. It also appears H

- A from the order aforesaid that the learned District Judge had dictated the judgment to his personal assistant but before he could pronounce the judgment counsel for the defendant made a prayer for recall of the order for pronouncement of judgment. An application under Section 151 of the Code of Civil Procedure was filed for setting aside the order to proceed *ex-parte*.
- B This application was also disposed of by the same order holding the same to be not maintainable. The Court further observed that no sufficient ground had been shown for the absence of the defendant and/or his counsel when the case was called. The learned District Judge proceeded to deliver his judgment decreeing the suit for specific performance.
- C 7. It is not disputed that on January 9, 1998 an application under Order IX Rule 13 C.P.C. read with Section 151 was filed for setting aside the *ex-parte* decree dated January 7, 1998. However, the said application was not pressed by the defendant in view of the fact that an appeal had been filed in the High Court against the *ex-parte* decree dated January 7, 1998.
- D 8. During the pendency of the appeal before the High Court both the plaintiff Jawahar Lal Jain and the defendant P.S. Multani died. The legal representatives of the plaintiff and defendant were brought on record to pursue the appeal. The legal representatives of the deceased/defendant are the appellants before this Court while the legal representatives of the plaintiff are the respondents herein.
- E 9. From the application filed for setting aside the *ex-parte* decree it appears that on that day i.e. on January 7, 1998 both the advocates engaged by the defendant were busy in the High Court and on account of some misunderstanding that the other would be attending the Court of the District Judge, neither of them was present when the matter was taken up by the learned District Judge at about 11.30 a.m.. On account of their absence the learned District Judge decided to proceed *ex-parte*. When the advocate for the defendant was informed that the matter had been called out for hearing by the learned District Judge he rushed from the High Court to appear before the District Judge but by the time he reached the Court of the District Judge at about 12.05 p.m. he learnt that the Court had recorded the evidence and also heard arguments in the matter and that the matter was to be put up later in the day for pronouncement of the judgment. In these circumstances, an application under Section 151 C.P.C was filed praying that the order may be recalled and the witnesses be re-examined.
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- H 10. It was, therefore, submitted before us on behalf of the appellants

that having regard to the facts and circumstances of the case the learned District Judge was not justified in proceeding with the matter *ex-parte*, particularly when counsel for the defendant appeared before him soon thereafter and made a request to re-call the order. This request was made before the judgment was pronounced. However, the learned District Judge proceeded to pass an *ex-parte* decree on the same day.

11. From the reply filed by the plaintiff/respondents to the application filed by the appellants for setting aside the *ex-parte* decree it appears to be the case of the respondents that the case was called out at 10.30 a.m. in the Court of the learned District Judge and since no one was present on behalf of the defendant it was again called out at about 11.30 a.m.. Since neither the defendant nor his counsel was present when the matter was again called out the Court decided to proceed *ex-parte*, and accordingly, after hearing arguments reserved judgment to be delivered later in the day. The plaintiff submitted that the counsel engaged by the plaintiff could have sent one of his juniors to the Court of the learned District Judge to make a request for accommodating them on account of their pre-occupation with matters before the High Court. The minimum courtesy which the defendant was expected to show to the Court was also not shown. It was, therefore, submitted that in the absence of the defendant and his counsel, and in the absence of any request on their behalf, the Court had no option but to proceed *ex-parte*.

12. Learned counsel for the parties have addressed us at length and cited several authorities in support of their respective submissions. We are satisfied that having regard to the facts and circumstances of the case this appeal ought to be allowed and the *ex-parte* decree set aside.

13. It is no doubt true that when the suit was called out before the Court of the learned District Judge counsel for the parties ought to have been present in Court. If on account of any unforeseen or unavoidable reason it was not possible for the defendant or his counsel to be present in Court, courtesy demanded that a representation ought to have been made before the Court by any other counsel so that the Court was informed that the counsel engaged were busy in the High Court. If such a request was made, we have no doubt that the learned District Judge would have accommodated counsel for the defendant. It is not unusual for the lower Courts to accommodate counsel on whose behalf a representation is made about their absence on account of remaining pre-occupied before the High Court. We have no doubt that the counsel for the defendant were remiss in not showing even the

A minimum courtesy expected of them. It was argued on behalf of the appellants before us that the two advocates engaged by the defendant miscalculated and under the impression that the other would be attending the Court neither of them made an effort to send someone to the Court of the District Judge to make a representation on their behalf.

B 14. However, it is equally true that soon after the Court heard arguments and reserved judgment to be delivered later in the day, counsel for the defendant appeared before him and filed an application and prayed that the order may be recalled and the matter may not be proceeded with *ex-parte*. The District Judge however refused to grant the prayer and held the application C to be not maintainable. He thereafter proceeded to pass a judgment and decreed the suit for specific performance on the same day.

15. Having regard to the totality of circumstances we are of the view that in the interest of justice this appeal must be allowed. The learned District Judge recorded evidence, heard arguments and posted the matter later in the D day for delivery of judgment. If the Court had adjourned the proceedings to another day after deciding to proceed *ex-parte*, the defendant could have applied for being permitted to participate in the proceedings. In this case since everything happened on the same day the defendant did not get an opportunity to do so. The learned District Judge decided to proceed *ex-parte*. E It thereafter examined the witnesses present in Court and proceeded to hear arguments. It reserved its judgment to be pronounced later in the day. Even before he could pronounce judgment counsel for the defendant had moved an application before him for recall of the order. It is true that in view of the law laid down by this Court in *Arjun Singh* (supra) the learned District Judge could not have entertained an application under Order IX Rule 7 C.P.C. We F have also no hesitation in observing that counsel of the defendant were not careful enough to inform the learned District Judge about their pre-occupation before the High Court which prevented them from being present in his Court when the case was called for hearing. But the passing of an *ex-parte* decree in a case of this nature is too harsh a consequence to be upheld. The G defendant cannot be made to suffer an *ex-parte* decree particularly when he was not at fault, having duly instructed his counsel to appear before the Court of the learned District Judge.

16. We are not delving into the technicalities of the legal questions argued before us because we are of the view that in the facts of this case H the interest of justice demands that the *ex-parte* decree be set aside. We

appreciate that the learned District Judge could not entertain an application under Order IX Rule 7 C.P.C., and even the application under Order IX Rule 13 was dismissed as not pressed. But nothing prevented the High Court from setting aside the *ex-parte* decree in the appeal preferred against it. A

17. Shri K.K. Venugopal, learned senior counsel appearing on behalf of the respondents submitted before us that if the *ex-parte* decree is set aside, the appellants may take undue advantage of the death of the defendant. They may now seek amendment of the written statement and set up fresh pleas. Counsel referred to the decree suffered by the wife of the defendant Smt. Lal Devi, appellant No.1 herein in Civil Suit No.259 of 1999 dated April 6, 2002 whereby a decree for permanent prohibitory injunction restraining the defendant No.1 from selling or conveying the property mentioned therein has been passed. He, therefore submitted that the setting aside of the *ex-parte* decree may give to the appellants an undue advantage and they may raise all sorts of pleas to defeat the just claim of the respondents. They may find ways and means of delaying the suit which has already been considerably delayed. B C D

18. We have no doubt that the Courts are not helpless. When parties adopt unfair or delaying tactics Courts have abundant powers to deal with such situations. We direct the Court of District Judge who shall try the suit to proceed with utmost expedition so as to conclude the suit within a period of six months from the date on which the parties appear before him. He shall not grant adjournment unless it becomes absolutely necessary. To the extent possible he shall proceed with day-to-day hearing of the suit. E

19. In the result this appeal is allowed and the impugned judgment and order of the High Court as also the *ex-parte* decree passed by the Court of the learned District Judge on January 7, 1998 are set aside. The Trial Court is directed to proceed with the suit in accordance with law so as to dispose it of within a period of six months from the day of which the parties appear before it pursuant to this Court's order. F

20. The parties are directed to appear before the Court of the learned District Judge for further directions on June 11, 2007. G

S.K.S.

Appeal allowed.

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