

Harminder Singh Vs. Saroj Devi

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Court : Delhi

Decided On : Feb-28-2014

Judge : Valmiki J. Mehta

Appellant : Harminder Singh

Respondent : Saroj Devi

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + FAO No.266/2013 & CM97092013(stay) % HARMINDER SINGH Through:

28. h February, 2014Appellant Mr. S.P.Chauhan, Adv. VERSUS SAROJ DEVI Respondent Through: Mr. J.K.Jain, Adv. CORAM: HONBLE MR. JUSTICE VALMIKI J.MEHTA To be referred to the Reporter or not?. VALMIKI J.

MEHTA, J (ORAL) 1. This first appeal is filed under Order 43 Rule 1(d) CPC impugning the order of the court below dated 2.4.2013 which has dismissed the application filed by the appellant-defendant for setting aside the ex-parte judgment and decree of specific performance of agreement to sell dated 15.3.2007.

2. The facts of the case are that respondent-plaintiff filed the suit for specific performance with respect to the property admeasuring 50 sq. yds situated in K.No.330, Village Siraspur, Swaroop Nagar, Delhi. Total consideration under the agreement to sell was Rs. 3,50,000/- and by means of different paragraphs in the plaint, it is said that a total sum of Rs. 3 lacs was paid to the appellant-defendant.

The payments to the appellant- defendant were confirmed by the receipts executed by the appellantdefendant. Appellant-defendant appeared in the suit through his wife who was a special power of attorney holder, filed written statement, but thereafter since there was no appearance on behalf of the appellant and his wife, appellant was proceeded ex parte by the order dated 6.10.2009. Evidence was led on behalf of the respondent-plaintiff on 11.1.2010 and evidence was closed on that day. Final arguments were thereafter heard and the suit was decreed in terms of the judgment and decree dated 25.2.2010.

3. The court below has dismissed the application under Order 9 Rule 13 CPC on account of the admission made by the appellant-defendant in his application under Order 9 Rule 13 CPC which showed that appellantdefendant had appointed his wife as a special power of attorney holder in view of the fact that he used to remain out from his residence for long periods of time as he was a driver and his wife had appeared in the suit on the basis of the Special Power of Attorney(SPA). It is pleaded by the appellant/defendant that the SPA has not been filed. The relief in the application under Order 9 Rule 13 CPC has been denied on account of appellant/defendant admitting the factum of the appellant-defendant having executed a power of attorney in favour of his wife who had appeared and filed written statement in the suit. This is stated in para-3 of the application under Order 9 Rule 13 CPC and which reads as under:

3.

4. That the applicant/JD is the illiterate and Truck Driver used to remain away from his family and house up-to long period. Due to his non-availability, his the then counsel chose to file the written statement through his wife on 3.9.2009 as she had been authorized by him through SPA which had been prepared by him in favour of his wife for all purpose but the same had not been filed by his previous counsel, who is in J.C. since about four months back. But the plaintiff arose the dispute as the application was not authorized representative.

The court below has in view of the aforesaid facts dismissed the application under Order 9 Rule 13 CPC filed on behalf of the appellantdefendant. Paras 13 to 16 of the order dated 2.4.2013 make the relevant observations and the same read as

under:

13. In the instant case, applicant had engaged a lawyer during the pendency of suit and appeared through his wife being SPA, who had filed WS before the court during the trial and subsequently failed to appear before the court and was proceeded ex-parte vide order dt. 06.10.2009 and the decree was accordingly passed on 25.02.2010 by the court. It is worthwhile to mention herein that applicant/defendant was served with summons at the commencement of the hearing of suit on 06.08.2009 and WS was filed by the defendants wife namely Ranjeet Kaur on 03.09.2009 and subsequently applicant/defendant chose to stay away from hearing despite parte and decree was passed accordingly. It can be easily said that applicant/defendant/JD was aware about the proceedings and has neglected to appear in the said case and no proper justification has been given on the part of the applicant/defendant/JD for his non-appearance.

5. 14. Therefore, it can be concluded that applicant had no done all what was required of him to ensure that his counsel and attorney would represent him on all the necessary hearings and has also failed to show that he was diligent in his pursuit or acted bona fidely.

15. It is well settled proposition of law that the re-agitation may or may not be barred but if the same issue is sought to be reagitated, it amounts to an abuse of the process of the court. In these circumstances, I am of the view that no case has been made out under the provision of Order 9 rule 13 CPC as applicant has taken court proceedings in a very casual manner and no cogent reason or explanation is given by the applicant for his non-appearance.

16. I am also of the view that the present application has been moved without any plausible explanation for his nonappearance as he was aware about the proceedings and nonappearance on behalf of the applicant/defendant/JD is a case of negligence and in activeness and the present application is an after thought, misconceived, baseless and is the gross abuse of process of law.

(underlining added) Learned counsel for the appellant argued before me two main aspects. Firstly, it was argued that the Special Power of Attorney has not been

filed on record of the trial court, and secondly it is argued that the written statement of the appellant-defendant through his wife was removed from the record vide order dated 11.2.2010 and therefore, the appellants- defendants case has not been considered by the court which passed the decree and thus the appellant-defendant is entitled to have the ex parte judgment and decree set aside.

6. I cannot agree with any of the arguments urged on behalf of the appellant-defendant inasmuch as para-4 of the application clearly shows that appellant-defendant appeared in the suit through his wife, and therefore, appellant-defendant was duly served because the wife was admittedly a special power of attorney holder of the appellant-husband. The only argument urged on behalf of the appellant is that no power of attorney is filed and not that the wife was not a special power of attorney holder. Therefore, the first argument is rejected. Even the second argument that the case of the appellant-defendant was not wrongly considered in view of the fact that the order dated 11.2.2010 of the trial court removed the written statement from the record is once again an argument which only shows that the trial court may have wrongly passed the order dated 11.2.2010, because really the appellant-defendant was proceeded ex parte much earlier on 6.10.2009, and the respondent-plaintiff has already completed his evidence on 11.1.2010. Therefore, the wrongly taking off the written statement from the record on 11.2.2010 on the ground that wife is not a power of attorney holder of the appellant does not help the appellant because in an ex parte case, once the respondent-plaintiff proved his case by leading evidence, the court was justified in passing the judgment and decree dated 25.2.2010.

7. In view of the above, there is no merit in the appeal, and the same is therefore dismissed, leaving the parties to bear their own costs. FEBRUARY28 2014 ib
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