'REPORTABLE'

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2062 OF 2009

Vijay Singh ... Appellant(s)

Versus

Shanti Devi and Anr. ...Respondent(s)

J U D G M E N T

Deepak Gupta, J.

1. "Whether, in a suit for pre-emption, an ex parte decree which is later set aside, can be termed to be the decree of the court of first instance" is the question which arises for decision in this appeal.

2. The undisputed facts are that one Roop Chand sold the suit land in favour of Shanti Devi, respondent No. 1 herein. Vijay Singh, appellant who was a co-sharer with Roop Chand, filed a suit for possession on the basis of right of pre-emption granted to a co-sharer under the Punjab Pre-emption Act, 1913 (for short 'the 1913 Act') on 6th November, 1989. The defendant Shanti Devi was proceeded against ex parte on 6th April, 1990. Thereafter, an ex parte decree was passed against her on 10th April, 1990. Pursuant to the decree, execution petition was filed and the appellant Vijay Kumar took possession of the suit land on 7th June, 1990.

3. On the same day, i.e., 7th June, 1990, Shanti Devi filed an application under Order IX Rule 13 of the Code of Civil Procedure (for short 'CPC') for setting aside the decree dated 10th April, 1990 claiming that she had not received the summons and had no knowledge of the proceedings. It was alleged that only when possession was taken on 7th June, 1990 did she become aware that the appellant Vijay Kumar had initiated some legal

proceedings against her. The trial court dismissed the application filed by Shanti Devi for setting aside the ex parte decree on 4th October, 1993. Thereafter, Shanti Devi filed an appeal before the appellate court.

4. In the meantime, on 17th May, 1995 the State of Haryana amended Section 15 of the 1913 Act. The net effect of this amendment was that the amendment took away the right of pre-emption of a co-sharer and the right of pre-emption was only retained with a tenant.

5. The appellate court allowed the application filed by Shanti Devi and set aside ex parte decree on 28th August, 1998. The appellant herein challenged the order of the appellate court by filing civil revision petition in the Punjab and Haryana High Court, which was dismissed on 5th November, 1999. It would be pertinent to mention that the learned Judge, while dismissing the revision petition, also observed that in view of the amendment to the 1913 Act the appellant herein had no right to pre-empt the sale of the suit land. The appellant then filed Petition for Special Leave

to Appeal (Civil) No. 3488 of 2000 before this Court, which was disposed of on 10th March, 2000. This Court not only dismissed the petition but also ordered that the trial court would decide the suit afresh without being influenced by the observations on merit, made by the learned Judge of the High Court.

6. Thereafter, the suit was tried afresh and the main ground raised by Shanti Devi was that in view of the amendment made to the 1913 Act, the right of pre-emption was no longer available to the appellant. On the other hand, the appellant contended that the date of decree of the first court was 10th April, 1990 when the ex parte decree was passed and, therefore, the rights of the parties are governed by the law as it stood on that date.

7. After remand, the learned trial court dismissed the suit of the appellant on 27th November, 1999 on the ground that by virtue of amendment to the 1913 Act, the right of pre-emption stood extinguished. The appellant, thereafter, filed first appeal before the appellate court,

which was also dismissed. The regular second appeal also met the same fate.

8. The issue to be decided is a legal issue which stands in a narrow compass. Before dealing with the issue itself, it would be pertinent to refer to the Constitution Bench judgment of this Court in the case of ***Shyam Sunder & Ors.*** v***. Ram Kumar & Anr.,*** [1] wherein this Court considered the effect of the amendment made to the 1913 Act. This Court held that if Section 15 of the 1913 Act was amended during the pendency of the appeal before the Supreme Court, the decree of pre-emption would not be affected by such amendment. After discussing the entire law, the Constitution Bench culled out the following legal principles:

> "**10.** On an analysis of the aforesaid decisions referred to in the first category of decisions, the legal principles that emerge are these:
>
> 1. The pre-emptor must have the right to pre-empt on the date of sale, on the date of filing of the suit and on the date of passing of the decree by the court of the first instance only.
>
> 2. The pre-emptor who claims the right to pre-empt the sale on the date of the sale must

1 (2001) 8 SCC 24,

> prove that such right continued to subsist till the passing of the decree of the first court. If the claimant loses that right or a vendee improves his right equal or above the right of the claimant before the adjudication of suit, the suit for pre-emption must fail.
>
> 3. A pre-emptor who has a right to pre-empt a sale on the date of institution of the suit and on the date of passing of decree, the loss of such right subsequent to the decree of the first court would not affect his right or maintainability of the suit for pre-emption.
>
> 4. A pre-emptor who after proving his right on the date of sale, on the date of filing the suit and on the date of passing of the decree by the first court, has obtained a decree for pre-emption by the court of first instance, such right cannot be taken away by subsequent legislation during pendency of the appeal filed against the decree unless such legislation has retrospective operation."

9. In view of the decision of the Constitution Bench, it is not necessary to refer to various other judgments cited before us. A perusal of the principles laid down by the Constitution Bench clearly indicates that the pre-emptor should possess the right to pre-empt on three dates:

(i) the date of sale;
(ii) the date of filing of the suit; and
(iii) the date of passing of the decree by the court of first instance only.

As far as the first two conditions are concerned, there is no dispute that the appellant possessed the right of pre-emption on the date of sale as also on the date of filing of the suit since he was a co-sharer in the land in question. It is also not disputed that on 10th April, 1990 when the ex parte decree was passed in favour of the appellant he had a valid legal right of pre-emption in his favour.

10. The question to be decided is what is the effect of setting aside of the ex parte decree and the passing of fresh decree by the court of first instance on 27th November, 1999 on which date, admittedly, the appellant did not have a valid right to pre-empt the sale in view of the amendment to the 1913 Act.

11. Order IX Rule 6 of CPC, reads as follows:

> **"ORDER IX- APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE**
>
> xxx xxx xxx
>
> **6. Procedure when only plaintiff appears.-** (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then
>
> (a) **When summons duly served**—If it is

> proved that the summons was duly served, the court may make an order that the suit be heard ex parte;
>
> (b) **When summons not duly served**—If it is not proved that the summons was duly served, the court shall direct a second summons to be issued and served on the defendant;
>
> (c) **When summons served but not in due time**—If it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the court shall postpone the hearing of the suit to a future day to be fixed by the court, and shall direct notice of such day to be given to the defendant.
>
> (2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the court shall order the plaintiff to pay the costs occasioned by the postponement."

12. We are only concerned with clause (a), which provides that if summons are duly served and the defendant does not put in appearance, the court may make an order that the suit would be heard ex parte. In this case, this was the procedure followed and an ex parte decree was passed. There is no manner of doubt that an ex parte decree is also a valid decree. It has the same force as a decree which is passed on contest. As

long as the ex parte decree is not recalled or set aside, it is legal and binding upon the parties.

13. Order IX Rule 13, CPC reads as follows:

> **"ORDER IX- APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE**
>
> xxx xxx xxx
>
> **13. Setting aside decree ex parte against defendants—** In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;
>
> Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:
>
> Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.
>
> Explanation.—Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no

> application shall lie under this rule for setting aside the ex parte decree."

14. The aforesaid provision lays down the procedure for setting aside a decree passed ex parte. The court can set aside an ex parte decree only on two grounds – firstly, that the summons was not duly served; and secondly, that the defendant was prevented by sufficient cause from appearing when the suit was called out. Once an ex parte decree is set aside, it basically means that the parties are relegated to the same position on which they stood before the passing of the ex-parte decree.

15. In the present case, the stand of the respondent No. 1 is that she was never served in the suit and she came to know about the proceedings only on the date when the decree was executed and the possession of the land was taken from her. On the same day itself she filed an application for setting aside the ex parte decree. This application was dismissed by the trial court. The lower appellate court allowed the appeal filed by the respondent No. 1 herein and set aside the ex parte

decree on the ground that she had not been served properly in the suit and, therefore, she had a reasonable cause for not appearing on the date on which the suit was called up.

16. In the present case, the result would be that the respondent No.1, Shanti Devi would be relegated to the position at which she was when she was proceeded against ex parte which would be the date on which the written statement was to be filed. There is no manner of doubt that the effect of setting aside an ex parte decree is to restore the parties to the position at which they were prior to the passing of the decree and relegate them to the position on which they were when the defendant was proceeded against ex parte. The parties are restored to the position existing prior to the date the order proceeding against the defendant ex parte was passed. No authoritative pronouncement of this Court has been placed before us in this regard. However, we may refer to the judgments passed by various High Courts in the case of ***Kumararu***

Narayanaru v. ***Padmanabha Kurup Gopala Kurup***[2], ***Beerankoya Haji*** v. ***P.P. Mohammedkutty*** [3], ***Shah Bharat Kumar*** v. ***M/s. Motilal and Bharulal*** [4], ***Aziz Ahmed Patel*** v. ***I.A. Patel*** [5], ***Mst. Lakshmi Devi*** v. ***Roongta & Co***.[6], ***Venkatasubbiah*** v. ***Lakshminarasimhan*** [7], which have taken this view.

17. It would be pertinent to mention that the mere fact that the ex parte decree has been executed does not disentitle the defendant from applying under Order IX Rule 13, CPC to get the same set aside. Reference may be made to ***Sm. Sankaribala Dutta*** v. ***Sm. Asita Barani Dasi and*** **others**[8] and ***Mst. Fatima Khatoon*** v. ***Swarup Singh***[9]***.*** Once the decree is set aside, restitution or restoration can be ordered.

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2 AIR 1953 (TC) 426
3 AIR 1986 Ker 10
4 AIR 1980 Guj 50
5 AIR 1974 (A.P.) 1
6 AIR 1962 (All.) 381
7 49 Mad.L.J.273

8 AIR 1977 Calcutta 289
9 AIR 1984 Calcutta 257

18. On behalf of the appellant it has been urged that in ***Shyam Sunder's* case (supra)**, this Court made no exception for ex-parte decrees while setting out the principles which have been quoted hereinabove and the ex parte decree should be treated to be the decree of the court of first instance. That was not an issue raised before the Constitution Bench. This Court was only concerned with the issue whether the amendment to the 1913 Act taking away the right of pre-emption vested in the co-sharer introduced after the decree was passed by the court of first instance and the effect thereof. The issue which is raised in this case was neither directly nor impliedly the subject matter of decision in ***Shyam Sundar's* case (supra)**.

19. An ex parte decree is passed when the court believes that the defendant has been served but is not appearing in court despite service of summons. In the present case, the appellate court while setting aside the ex parte decree, has come to the conclusion that the defendant Shanti Devi (respondent no. 1 herein) was not served and, therefore, the court had wrongly

proceeded against her ex parte. That finding has been upheld till this Court. In our view, the effect of this would be that the ex parte decree, on its being set aside, would cease to exist and become non-est. After the ex parte decree is set aside, it is no decree in the eyes of law. The decree passed by the trial court on merits should be treated as the decree of the first court. We may make it clear that we are not dealing with those cases where a case has been decided on merits and the decree is set aside by the appellate court on any other ground and the matter remanded to the trial court for decision afresh. We leave that question open.

20. Here, we are dealing with a case where the defendant was proceeded against ex parte and that order has been set aside on the ground that she has not been served and, therefore, she has been relegated to the position existing on the date she was proceeded against ex-parte, i.e., 6th April, 1990. After the amendment was introduced on 17th May, 1995, there was no right existing in the plaintiff to file a suit for pre-emption. Since the decree on contest was passed

on 27th November, 1999 the plaintiff had no existing right of pre-emption on that date and the suit was rightly dismissed. This decree is the only subsisting decree of the first court.

21. Shri Amarendra Sharan, learned senior counsel appearing for the appellant urged that since possession of the property was taken as far back as 7th June, 1990, no restitution can be ordered at this belated stage and, therefore, there is no point in upholding the decree. On the other hand, Shri Shantwanu Singh, learned counsel appearing for the respondent No. 1 has urged that this Court should exercise its power under Article 142 of the Constitution of India and direct that the property be restored to the respondent No. 1, who has been litigating for many years.

22. We cannot accept either of the two submissions. The limitation for restitution under the Limitation Act is 12 years. The ex parte decree was set aside on 28th August, 1998 and thereafter, the appellant has been litigating at various levels. If the appellant had obtained stay order(s) during this period, obviously the

period for which the stay was granted, would have to be excluded while calculating the period of limitation. This is not the job of this Court. It is for the executing court to decide whether the restitution petition, if any filed, is within the limitation or not. It is only the court which passed the original decree, which can order restitution. Restitution cannot be granted by the Supreme Court, as held in the case of ***State Bank of Saurashtra*** v. ***Chitranjan Rangnath***[10].

23. In view of the above, we find no merit in the appeal, which is accordingly dismissed. Status quo granted vide order dated 27.11.2006, which was directed to be continued by order dated 30.03.2009, stands vacated.

.....J.
(MADAN B. LOKUR)

.....J.
(DEEPAK GUPTA)

New Delhi
September 08, 2017

10 (1980) 4 SCC 516.