

Before M.L. Singhal, J

GRAM PANCHAYAT V. SARSWATI KHERA,—*Petitioner*

versus

RAM KISHAN & OTHERS,—*Respondents*

C.R. No. 613 of 1987

10th November, 2000

Code of Civil Procedure, 1908—0.9 Rl. 13— Counsel pleading no instructions—Trial Court passing ex parte decree without issuing a notice to the Gram Panchayat—Whether negligence on the part of the counsel is a sufficient ground to set aside the ex parte decree—Held, yes.

Held, that the Court should have given notice to the Gram Panchayat after its counsel had pleaded no instructions and had stated that he did not wish to appear for the gram panchayat thus paving the way for *ex parte* proceedings being taken against the gram panchayat. The applicant got no intimation from the counsel or his clerk that he should appear on such and such date as his personal presence was required and also no intimation was given to the applicant by the counsel that he should come to him with the brief of the case. Applicant could not know what was happening in the case. Even otherwise, if the representative of the gram panchayat did not take proper interest in defending the suit filed against the gram panchayat, the gram panchayat should not suffer. Rules of procedure are mere hand made of justice. At the alter of procedure, substantive justice should not be sacrificed. If the defendant advances some cause for setting aside *ex parte* decree which does not seem to be false or frivolous, it should be accepted and *ex parte* decree set aside.

B.S. Kathuria, Advocate,—for the *appallat*

S.K. Goyal, Advocate,— for the *respondent*

JUDGMENT

M.L. Singhal, J

(1) This is revision agaisnt the order dated 16th October, 1986 of District Judge, Kurukshetra whereby he had dismissed the appeal of the gram panchayat of village Sarswati Khera against Ram Kishan

etc., from the order of Sub Judge first Class, Kaithal dismissing the application of the gram panchayat for the setting aside of the *ex parte* decree dated 2nd December, 1983 in civil suit No. 296 of 1983 titled Ram Kishan and others *vs.* Gram Panchayat for permanent injunction.

(2) Ram Kishan and others filed suit No. 296 of 1983 against gram panchayat of village Sarswati Khera for permanent injunction restraining it from interfering with their possession on *baras* in suit situated outside the abadi deh of village Sarswati Khera but inside the revenue estate of village Sarswati Khera. *Ex parte* stay was granted to the plaintiffs. Gram Panchayat passed resolution No. 1 dated 17th May, 1983 authorising Man Singh to get the stay vacated. Man Singh engaged Shri Y.K. Mangal and Shri S.K. Mangal, Advocates who moved application for vacation of stay on 15th June, 1983, the court passed consent order ordering the maintaining of *status quo* with regard to possession. Case was adjourned to 8th August, 1983 for written statement. On the said date written statement was again not ready. Case was adjourned to 29th August, 1983. Written statement was again not ready. Case was adjourned to 26th September, 1983 on payment of Rs. 20 as costs. On 26th September, 1983 again, neither written statement was filed nor cost was paid. Shri M.K. Mangal, counsel for the gram panchayat made statement pleading no instructions on behalf of the gram panchayat saying that the gram panchayat had taken away the brief of the case from him. Case was adjourned to 3rd November, 1983 and so on. On 2nd December, 1983, *ex parte* evidence was recorded and *ex parte* decree was passed.

(3) On 5th April, 1984, an application was made for the setting aside of the *ex parte* decree pleading that Man Singh had requested his counsel Shri Y.K. Mangal that he should inform him whenever his personal presence was required and Shri Y.K. Mangal accepted his request and told him that whenever his personal presence was required, he would be intimated through his Clerk. It was alleged in that application that no letter was received by Man Singh either from his counsel or his clerk. It was also mentioned that one Sita Ram of their village had also instituted suit against the gram panchayat in respect of the same land in which the gram panchayat had also engaged Shri Y.K. Mangal as their counsel. Some order was passed in that suit by the court against the Panchayat. Appeal against that order was pending in the court of Additional District Judge, Kurukshetra in which Shri Hem Chand Gupta was its counsel who had asked for the briefs of the lower court and he (Man Singh), accordingly took away the briefs i.e. the brief of this case as well from Shri Y.K. Mangal, Advocate. As such Shri Y.K. Mangal could not appear in court and the *ex parte* proceedings were taken and eventually, *ex parte* decree was passed. On 5th April,

1984 when the applicant came to kaithal, he came to know regarding the *ex parte* proceedings. On inquiry made by him from Shri Amar Chand Bhalla Clerk to Shri Y.K. Mangal, Advocate, he came to know of the *ex parte* proceedings and as such application was within time. Ram Kishan etc. contested this application. On the pleadings of the parties, the following issues were framed :-

1. Whether the impugned *ex parte* decree dated 2nd December, 1984 is liable to be set aside on the grounds mentioned in Para No. 2 of the application? OPA
2. Whether the application is within time? OPA
3. Relief.

(4). Vide order dated 14th March, 1986, Sub Judge First Class, Kaithal dismissed this application and refused to set aside the *ex parte* decree in view of his finding that there was no sufficient cause to set aside the *ex parte* decree. Application was found to be time barred also.

(5) Not satisfied with this order dated 14th March, 1986, gram panchayat went in appeal, —*vide* order dated 16th October, 1986, District Judge, Kurukshetra dismissed the appeal. Still not satisfied, gram panchayat has come up in revision to this court. I have heard the learned counsel for the parties and have gone through the record.

(6) It was submitted by the learned counsel for the gram panchayat that in suit titled Ram Kishan etc. vs. Gram Panchayat, the gram panchayat was represented by Shri Man Singh. He had engaged Shri Y.K. Mangal and Shri M.K. Mangal, Advocates. Shri Man Singh had requested Shri Y.K. Mangal, advocate that he should inform him whenever his personal presence was required. Shri Y.K. Mangal told him that whenever his personal presence was required, he would be intimated through his clerk. It was submitted that he was not informed either by Shri Y.K. Mangal or by his clerk. It was also submitted that one Sita Ram son of Ram Kishan had also instituted suit against the gram panchayat in respect of the same baras. Gram panchayat had engaged Shri Y.K. Mangal, Advocate as its counsel in that case also. Some order was passed in that case. Appeal was filed against that order which was pending in the court of Additional District Judge, Kurukshetra. Shri Hem Chand Gupta, Advocate was counsel for the gram panchayat in that appeal. He had asked for the brief of the lower court. Shri Man Singh took away the brief of this case from Shri Y.K. Mangal, advocate. As such, Shri Y.K. Mangal, Advocate could not appear in the court and *ex parte* proceedings were taken which culminated into *ex parte* decree. It was submitted that instead of writing

any letter or sending any intimation to Man Singh, Shri Y.K. Mangal, Advocate pleaded no instructions. Neither Shri Y.K. Mangal nor his clerk Shri Amar Chand Bhalla sent him any message that his personal attendance was required. It was submitted that this version of Man Singh stands supported by the statements of Shri Amar Chand Bhalla, Mohan Singh and Laxmi chand clerk of Shri Hem Chand Gupta, Advocate. It was submitted that Shri Y.K. Mangal, Advocate knew that the brief of case *Ram Kishan etc. vs. Gram panchayat* had been taken away by Shri Man Singh with a view to its being seen by Shri Hem Chand Gupta, Advocate who was counsel for the gram panchayat in appeal filed by the gram panchayat in suit titled *Sita Ram etc. vs. Gram Panchayat*. If that was so, Shri Y.K. Mangal or shri M.K. Mangal should have appeared before the court. He should not have made statement that he had no instructions to appear on behalf of the defendant as it had taken away the brief from him when he had known why the brief of this case had been taken away by Man Singh. It was also submitted that when Shri Y.K. Mangal, Advocate had made statement that he was pleading no instructions on behalf of the gram panchayat as it had taken away the brief of the case from him and he did not wish to appear on behalf of the gram panchayat, what the court should have done was not to order *ex parte* proceedings against the gram panchayat but should have issued notice to the gram panchayat calling upon the gram panchayat to appear in the case and take necessary steps and arrange some counsel for it. In support of this submission, he drew my attention to *Malkiat Singh vs. Joginder Singh and another* (1) where it was held that where the appellant's counsel had pleaded no instructions and consequently the case was decided *ex parte*, court should not have proceeded *ex parte* against the appellant, instead notice should have been issued to the appellant who was admittedly not present on the date. Appellants cannot be said to be at fault. In this case, Malkiat Singh etc. appellants had been tried for the murder of Harpal Singh and on conviction, they were sentenced to suffer imprisonment for life and to pay fine of Rs. 1,000. On 16th August, 1989, the respondents filed suit claiming damages from the appellants to the tune of Rs. 1 lac in the court of Sub Judge First Class, Samrala. Claim in the suit was contested by the appellants. They filed written statement and engaged counsel to defend the suit. The trial court, on the basis of the pleadings of the parties, framed a number of issues. After two witnesses of the plaintiffs in that case had been examined and cross examined, it transpired that on 18th November, 1991, counsel who had been engaged by the appellants for defending them in the suit pleaded no instructions before the court.

(1) J.T. 1997 (9) S.C. 642

As a result of the counsel not pleading any instructions, the appellants were proceeded *ex parte*. On 8th February, 1992, the learned trial court passed an *ex parte* decree against the appellants. Appellants went to inquire about the proceedings in the case from their counsel on 6th June, 1992. On their inquiry, their counsel informed them that he had pleaded no instructions, as a result of which they were proceeded *ex parte* and the suit had been decreed *ex parte* on 8th February, 1992. Appellants filed application on 10th June, 1992 under Order 9 Rule 13 CPC for the setting aside of the *ex parte* order dated 18th November, 1992 and *ex parte* judgment and decree dated 8th February, 1992. Hon'ble Supreme Court held that the appellants were neither careless nor negligent in defending the suit. They had engaged a counsel and were following the proceedings. In this fact situation, the trial court which had admittedly not issued any notice to the appellants after their counsel had reported no instructions, should have, in the interest of justice allowed that application and proceeded in the case from the stage when the counsel reported no instructions. In the facts and circumstances of the case, the appellants could not be said to be at fault and they should not suffer. For this view the Hon'ble Supreme Court relied upon *Tahil Ram Issardas Sadarangani & others vs. Ramchand Issardas Sadarangani & Anr. (2)* wherein the Bench opined :

“It is not disputed in the present case that on 15th March, 1974 when Mr. Adhia, advocate withdrew from the case, the petitioners were not present in court. There is nothing on the record to show as to whether the petitioners had the notice of the hearing of the case on that day. We are of the view, when Mr. Adhia withdrew from the case, the interests of justice required, that a fresh notice for actual date hearing should have been sent to the parties. In any case in the facts and circumstances of this case, we feel that the party in person was not at fault and as such should not be made to suffer.”

(7) It was submitted that the negligence on the part of Shri M.K. Mangal, Advocate, who had pleaded no instructions on behalf of the gram panchayat and allowed gram panchayat to be proceeded against *ex parte*, should not recoil upon the gram panchayat and the *ex parte* decree should be set aside.

(8) Where the defendant employs a counsel for the purpose of his appearance in the court and he neglects, his neglect would constitute a sufficient cause for the non appearance of the defendant. After all, the litigants rely upon the counsel for appearance on each date of

hearing.” was the view taken in *Shyam Lal Dhar vs. M/s Ply Board Industries* (3) by a Full Bench of the J&K High Court. Same view was taken by Hon’ble Supreme Court in case *Udayan Chinubhai vs. R.C. Bali* (4) where the Hon’ble Supreme Court held as under :

“Even otherwise, in the entire circumstances of the case disclosing sheer indifference, perhaps negligence on the part of the Advocate, Shri Bhartinder Singh and no laches, whatever, on the part of the appellant, we would have been inclined to condone the delay of 12 days under Section 5 of the limitation Act.”

(9) In my opinion, the court should have given notice to the gram panchayat after its counsel Shri M.K. Mangal had pleaded no instructions and had stated that he did not wish to appear for the gram panchayat thus paving the way for *ex parte* proceedings being taken against the gram panchayat, more so, when in this case, Man Singh had stated about the circumstances why he could not appear on 26th September, 1983 before the court. Gram panchayat is a public body. Shri M.K. Mangal should have stated before the court that the brief of the case was not with him as it had been taken away from him by Shri Man Singh because it was Shri Hem Chand Gupta, Advocate who was representing the gram panchayat in another case titled *Sita Ram vs. Gram panchayat* with regard to the same bars.

(10) Application for setting aside decree was made on 5th April, 1984. *Ex parte* decree was passed on 2nd December, 1983. Application for setting aside *ex parte* decree could be made either within 30 days of 2nd December, 1983 or within 30 days when the fact of *ex parte* decree came to be known to the applicant. *Ex parte* proceedings were taken on 26th September, 1983. Brief of the case was taken to Shri Hem Chand Gupta, Advocate in the appeal filed against Sita Ram by the Gram Panchayat. Ex. A1 is the certified copy of the final order passed in the appeal. Appeal was filed on 17th June, 1983. It was finally disposed of on 3rd October, 1983. Learned trial court felt that there was no ground for the applicant not to collect the brief of the case after the dismissal of the case on 3rd October, 1983 and there was no reason why the applicant could not come to Kaithal earlier to 5th April, 1984. As has been stated above, the applicant got no intimation from Shri Y.K. Mangal, Advocate or his clerk that he should appear on such and such date as his personal presence was required and also no intimation was given to the applicant by Shri M.K. Mangal that he should come to him with the brief of the case. Applicant could not know what was

(3) AIR 1981 J&K 95

(4) AIR 1977 SC 2319

happening in the case. Even otherwise, if the representative of the gram panchayat did not take proper interest in defending the suit filed against the gram panchayat, the gram panchayat should not suffer. Rules of procedure are mere hand-mades of justice. At the altar of procedure, substantive justice should not be sacrificed. Interpretation on the words "sufficient cause" used in Order 9 Rule 13 CPC which reads as follows :—"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." should be liberal. If the defendant advances some cause for setting aside *ex parte* decree which does not seem to be false or frivolous, it should be accepted and *ex parte* decree set aside. There was no delay in filing the application for setting aside *ex parte* decree. If there was any delay, in the interest of justice, the same should be condoned under section 5 of the Limitation Act. It would bear repetition that the Gram Panchayat should not suffer merely because there was negligence on the part of its representative or its counsel.

(11) For the reasons given above, the *ex parte* decree is set aside as also the proceedings which culminated in the *ex parte* decree, on payment of Rs. 3000 as costs.

Revision is accordingly allowed.

S.C.K.

Before M.L. Singhal, J

KHAZANI,—Appellant/Plaintiff

versus

RAM KISHAN,—Respondent/Defendant

R.S.A. No. 427 of 1988

29th September, 2000

Punjab Custom (Power to Contest) Act of 1920—Code of Civil Procedure, 1908—Collusive decree in favour of the defendant on the basis of family settlement—Defendant has no antecedent, title, claim or interest even a possible claim or title in the property—Without registration of such a decree has no effect—Plaintiff has a legitimate right being the only child of her father—Family settlement must be bona fide—Plaintiff entitled to succeed to the entire property of her