

MALKIAT SINGH AND ANR.

v.

JOGINDER SINGH AND ORS.

DECEMBER 2, 1997

[DR. A.S. ANAND AND V.N. KHARE, JJ.]

*Code of Civil Procedure, 1908 : Order 9 Rule 13.*

*Ex-parte decree—Setting aside of—Suit for damages filed by respondents (plaintiffs)—Suit contested by appellants (defendants)—During hearing Counsel for appellants pleaded no instructions—On that day appellants were not present in Court—Without issuing notice to appellants Trial Court proceeded ex-parte and passed ex-parte decree against the appellants—Application filed by appellants for setting aside ex-parte decree as soon as they came to know of it—Application dismissed by Trial Court—Appeal dismissed by District Judge—Revision dismissed by High Court in limine—Hence, appeal before this Court—Held: appellants were neither careless nor negligent in defending the suit—They cannot be said to be at fault and therefore should not suffer—Ex-parte decree set aside.*

*Tahil Ram Issardas Sadarangani & Ors. v. Ramchand Issardas Sadarangani & Anr., [1993] Supp. 3 SCC 256, relied on.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8474 of 1997.

From the Judgment and Order dated 13.12.96 of the Punjab & Haryana High Court in C.R. No. 5145 of 1996.

K.K. Mohan for the Appellants.

Ujagar Singh and Ms. Naresh Bakshi for the Respondents.

The following Judgment of the Court was delivered :

Special leave granted.

The appellants were tried for the murder of one Harpal Singh and on conviction, were sentenced to suffer life imprisonment and to pay a fine

A of Rs. 1,000 by the learned Special Court, Ludhiana vide judgment dated 1.4.1985. The respondents, it appears, on 16.8.89 filed a suit in the Court of learned Sub Judge, 1st Class, Samrala claiming damages from the appellants to the tune of Rs. 1,00,000 for deprivation of the income to the family members which they used to get from deceased Harpal Singh. The claim in the suit was contested by the appellants. They filed their written statement and engaged a 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 for the plaintiffs in that suit had been examined and cross examined, it transpires that, on 18.11.1991, learned counsel who had been engaged by the appellants herein for defending them in the suit, pleaded "no instructions" before the court. As a result of the counsel pleading no instructions, the appellants were proceeded *ex- parte*. On 8.2.1992, the learned trial court passed an *ex- parte* decree against the appellants.

D The appellants went to enquire about the proceedings in the case from their counsel. On 6.6.1992, on their enquiry, 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 8.2.1992. The appellants then engaged another counsel and on 10.6.1992, filed an application under Order 9, Rule 13, C.P.C. for setting aside the order dated 18.11.1991 and the *ex-parte* judgment and decree dated 8.2.1992. While that application was pending adjudication, the appeal filed by the appellants against their conviction and sentence was heard by this court. On 7.3.1995, the order of conviction and sentence was set aside.

F The trial court dismissed the application filed by the appellants under Order 9, Rule 13, C.P.C. on 22.1.1996. Their appeal failed before the learned District Judge on 18.10.1996. The High Court dismissed the civil revision petition filed by them in-limine on 13.12.1996. Hence this appeal by special leave.

G We have heard learned counsel for the parties in this appeal and perused the record.

H There is no denying the fact that the appellants had engaged a counsel to defend them in the civil suit. The counsel for the appellants pleaded "no instructions" but the court did not issue any notice to the appellants, who were admittedly not present on the date when their counsel

reported no instructions in the court. It is nobody's case that the counsel informed them after he had reported no instructions to the court. The appellants only come to know about the order dated 18.11.1991 and the *ex-parte* decree dated 8.2.1992 when they approached their counsel on 6.6.1992. It was within four days thereafter that the appellants filed an application under Order 9, Rule 13, C.P.C. for setting aside the order dated 18.11.1991 and the decree dated 8.12.1992.

The appellants in their application clearly pleaded that they were neither careless nor negligent and as soon as they learnt about the *ex-parte* decree dated 8.2.1992 and the order dated 18.11.1991, they filed the application to set aside the order and *ex-parte* decree. A perusal of the record also reveals 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. The appellants cannot, in the facts and circumstances of the case, be said to be at fault and they should not suffer. In taking this view, we are fortified by a judgment of this Court in *Tahil Ram Issardas Sadarangani & Ors. v. Ramchand Issardas Sadarangani & Anr.* [1993] Supp. 3 SCC 256, wherein the bench opined :-

"It is not disputed in the present case that on March 15, 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."

In view of what we have said above, this appeal succeeds and is allowed. The order of the trial court dated 18.11.1991 and the *ex-parte* decree dated 8.2.1992 are set aside. We also set aside the order of the

A District Judge and that of the High Court dismissing the civil revision petition. The case is remanded to the trial court for its disposal in accordance with law. The trial court shall proceed with the case from the stage, where the case was on 18.11.1991. There shall be no order as to costs.

B T.N.A.

Appeal allowed.