

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CR No. 1158 of 2015 (O&M)

Date of decision : 15.5.2015

Ismail Khan

... Petitioner

VS

Bir Singh and another

... Respondents

Coram: Hon'ble Mr. Justice Rajesh Bindal

Present: Mr. HPS Ghuman, Advocate, for the petitioner.

Mr. Avtar Singh Syan, Advocate, for respondent no. 1.

Mr. Sumit Batra, Advocate, for respondent no. 2.

Rajesh Bindal, J.

Defendant no. 1 has filed the present petition impugning the order dated 5.2.2015 (Annexure P-1) passed by the learned Court below whereby the application filed by him for permitting him to sign the written statement already filed and also to file affidavit in support of that, was declined.

Learned counsel for the petitioner submitted that in the suit for specific performance of the agreement to sell dated 11.4.2005 filed by respondent no. 1/plaintiff on 21.4.2006, the petitioner appeared on 5.11.2007. Subsequent thereto, the written statement was filed, which inadvertently was signed only by the counsel and not by the petitioner/defendant. The error was not noticed even by the plaintiff. It was not pointed out by counsel for respondent no. 1/ plaintiff at the time of filing replication or at any stage of proceedings. The plaintiff led his entire evidence. The witnesses produced by him were even cross-examined by the petitioner/ defendant. However, no objection was raised. It is when defendant no. 1 was to start his evidence that it was noticed that the written statement already filed had not been signed by the petitioner/ defendant. The error having been noticed, the application seeking permission to sign the

written statement already filed to rectify the defect was filed, which has been wrongly declined by the learned court below. While referring to judgments of Hon'ble the Supreme Court in Kailash vs Nanhku and others 2005 (2) R.C.R.(Civil) 379, Uday Shankar Triyar vs Ram Kalewar Prasad Singh and another 2006 (1) R.C.R. (Civil) 18, and judgments of this Court in Smt. Mukhtiar Kaur vs Smt. Ghulab Kaur AIR 1977 Punjab & Haryana 257 and Harbhajan Singh vs Mohan Singh 1992(2) PLR 482, he further submitted that the error being procedural, the same can be cured at any stage as the same is not fatal.

On the other hand, learned counsel for respondent no. 1/ plaintiff submitted that though after service the petitioner/ defendant appeared on 5.11.2007 but did not file his power of attorney. The written statement was not signed by him. It was pointed out later on. As there was no power of attorney on record filed by counsel for defendant no. 1, he was directed to be proceeded ex-parte on 24.3.2014. The application for setting aside the ex-parte proceedings was filed on 26.3.2014. On 9.4.2014, it was pointed out by counsel for the plaintiff that the written statement filed by the petitioner had not been signed by him. No steps were taken to correct the error, if any. The order directing ex-parte proceedings against the petitioner was set aside on 18.5.2014. Even thereafter, the steps were not taken to file a signed written statement. The application for the purpose was filed on 21.1.2015. The same was highly belated. Due diligence was not proved. In fact the object of the petitioner was only to delay the proceedings, in which he was successful. The suit was filed by respondent no. 1/ plaintiff way back in the year 2006, which is still at the evidence stage.

Learned counsel referred to the exceptions laid down by Hon'ble the Supreme Court in Uday Shankar Triyar's case (supra) wherein it has been observed that the defendants cannot be permitted to sign written statement in case the procedural defect is not rectified when it was pointed out and due opportunity was afforded for the purpose. The case in hand is the same. Hence, there is no error in the order passed by the learned Court below.

Heard learned counsel for the parties and perused the paper book.

The facts as have been placed before this Court are that after service, the petitioner/ defendant no. 1 appeared. The written statement already filed by him was not signed by him but was signed by his counsel only, is not in dispute. There was no objection raised by the plaintiff at any stage as the entire evidence of the plaintiff was concluded. The witnesses produced by him were even cross-examined by the petitioner/ defendant no. 1. As claimed by the petitioner, the error was noticed when defendant no. 1 was to lead his evidence. Immediately thereafter, the application was filed to rectify the defect. The issue which arises for consideration of this Court is as to whether at a later stage the petitioner/ defendant no. 1 can be permitted to sign written statement already filed when the case is at the stage of his evidence. An identical issue came up for consideration before Hon'ble the Supreme Court in Uday Shankar Triyar's case (supra), wherein it was opined that if the plaint or written statement is not signed by a party on account of a bonafide error, the defect can be directed to be rectified either by the trial court at any time before the judgment or even by the Appellate Court. Certain exceptions have been carved out. Relevant paras of the judgment are extracted below:-

“16. An analogous provision is to be found in Order 6 Rule 14 CPC which requires that every pleading shall be signed by the party and his pleader, if any. Here again, it has always been recognized that if a plaint is not signed by the plaintiff or his duly authorized agent due to any bona fide error, the defect can be permitted to be rectified either by the trial court at any time before judgment, or even by the appellate court by permitting appropriate amendment, when such defect comes to its notice during hearing.

17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice.

Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well recognized exceptions to this principle are :-

- (i) where the Statute prescribing the procedure, also prescribes specifically the consequence of non-compliance.
- (ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;
- (iii) where the non-compliance or violation is proved to be deliberate or mischievous;
- (iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court.
- (v) in case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant;

To similar effect are the earlier judgments of this Court in Smt. Mukhtiar Kaur and Harbhajan Singh's cases (supra). Once it has been opined by Hon'ble the Supreme Court that the defect of non-signing of written statement by the defendant is the procedural one, which can be rectified not only during the course of trial but even at the appellate stage, in my opinion, the rejection of the prayer of the petitioner/ defendant no. 1 to sign written statement already filed and to file affidavit in support thereof is erroneous, hence, the order deserves to be set aside.

The contention raised by learned counsel for the respondent/plaintiff that the case of the petitioner falls in exceptions carved out by Hon'ble the Supreme Court in Uday Shankar Triyar's case (supra), is merely to be noticed and rejected as in the case in hand after the defect was pointed out by respondent no. 1/plaintiff, neither there was delay in filing the application for correction of the error nor the act of the petitioner/ defendant no. 1 can be said to be deliberate or mischievous.

For the reasons mentioned above, the impugned order passed by the learned Court below is set aside. The application filed by the petitioner/ defendant no. 1 for permitting him to sign the written statement already filed and also file an affidavit in support thereof is allowed. The same shall be subject to payment of costs of ₹ 5,000/-, which shall be paid to respondent no. 1/ plaintiff, by way of bank draft.

The petition stands disposed of.

15.5.2015
vs

(Rajesh Bindal)
Judge

(Refer to Reporter)