

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

**Civil Revision No.3973 of 2014 (O&M)
Date of decision: 30.10.2015**

M/s HKS Developers Private Limited

.....Petitioner

Versus

Mahendra

.....Respondent

CORAM:HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. Ashok Aggarwal, Senior Advocate,
with Mr. Amit Aggarwal, Advocate,
for the petitioner.

Mr. Sanjay Vij, Advocate,
for the respondent.

Ritu Bahri, J.

Challenge in this petition is to the order dated 05.06.2012 (Annexure P-3) passed by the Civil Judge (Junior Division), Gurgaon, whereby plaint of the plaintiff-petitioner has been rejected and order dated 26.02.2013 (Annexure P-8), vide which application filed by the petitioner under Order 9 Rule 4 read with Section 151 of the Code of Civil Procedure (for short 'CPC') for restoration of the suit, has been dismissed.

M/s H.K.S. Developers Pvt. Ltd.-plaintiff (petitioner herein) filed a suit on 01.05.2010 (Annexure P-1) on the basis of agreement to sell dated 27.07.2006. Last date for registration of the sale deed was 27.09.2006. In the suit, the plaintiff-petitioner was claiming possession of the suit land as per terms of the agreement dated 27.07.2006. Upon notice, the defendant-respondent had appeared and filed an application for rejection of the plaint,

which was decided by the trial Court vide order dated 21.03.2012 and the

plaintiff was directed to deposit deficient Court fee within one month, failing which, the plaint would stand rejected. The plaintiff-petitioner did not file requisite Court fee within one month and thereafter, on 05.06.2012 the following order (Annexure P-3) was passed:-

“Present: None.

Plaintiff was ordered to deposit the Court fees within one month from the order dated 21.03.2012. But, the Court fees is not deposited till date. Now, in compliance of the order dated 21.03.2012, the plaint of the plaintiff is rejected. File be consigned to the record room after due compliance.

Sd/-
(Sandeep Yadav)
CJ (JD) GGN/05.06.12

A perusal of the aforesaid order shows that on account of non deposit of the Court fee, the plaint was rejected. Thereafter, the plaintiff-petitioner made an application (Annexure P-4) under Order 9 Rule 4 read with Section 151 CPC for restoration of the suit. Along with the same, an application under Section 5 of the Limitation Act (Annexure P-5) was also filed for condoning the delay in filing the application. Vide order dated 26.02.2013 (Annexure P-8) passed by the Civil Judge (Junior Division), Gurgaon, both the applications were dismissed.

Mr. Ashok Aggarwal, learned senior counsel, has vehemently argued that the order dated 05.06.2012 (Annexure P-3) was passed when parties had not appeared before the trial Court and the suit had been dismissed for non-prosecution. He has further contended that the application under Order 9 Rule 4 CPC was maintainable for restoration of the suit. Order 17 Rule 2 and 3 CPC lays down the procedure that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the modes directed under Order 9 CPC. The discretion to decide the suit is limited only in cases, where a party which is absent, has

led some evidence or has examined substantial part of its evidence. In support of his contention, he has referred to the judgments delivered in Prakash Chander Manchanda Vs. Smt. Janki Manchanda, AIR 1987 SC 42, Rameshwarnath Vs. Ranjit Singh, 1988 (2) RRR 26 (Pb.), B. Janakiramaiah Chetty Vs. A.K. Parthasarathi, AIR 2003 SC 3527 and Nallini Janardhanan Vs. Elamana, 2009 (5) RCR 544.

Learned counsel for the respondent, on the other hand, has referred to the judgment passed by a Full Bench of the Andhra Pradesh High Court in Molugu Ram Reddy Vs. Molugu Vittal Reddy, 2012 (3) RCR (Civil) 731, which has been followed by a Co-ordinate Bench of this Court in Mahesh and others Vs. Suresh and others, CR No.772 of 2014 (decided on 11.02.2015). He has further relied upon a judgment passed by this Court in Raj Kumar Vs. Maha Singh alias Mahesh and others, CR No.2327 of 2011 (decided on 14.08.2013) and contended that as per the order dated 05.06.2012, the trial Court had rejected the plaint of the plaintiff-petitioner on account of non deposit of Court fee. As per Section 2 (2) CPC, a decree includes rejection of the plaint. Hence, the said order was appealable under Section 96 of the CPC. Any interim or interlocutory order passed by the trial Court is appealable against final decree as per Section 105 CPC.

After hearing learned counsel for the parties and going through the record, the first question to be considered by this Court would be, “whether the impugned order dated 05.06.2012 rejecting the plaint would amount to a decree or not.”

Section 2 (2) CPC defines a decree, which is reproduced as under:-

“(2) “decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and

may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include--

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal of default.

Explanation.-- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”

As per definition, the impugned order, where the plaint was rejected would amount to a decree. Thereafter, under Section 96 CPC, only an appeal is maintainable against the order rejecting the plaint, before the lower appellate Court. Rejection of the plaint would form part of final disposal of the suit. In **Molugu Ram Reddy's** case (supra), the Full Bench of Andhra Pradesh High Court has held that an order of rejection of plaint would fall under Order 7 Rule 11 CPC and this order/decreed would be appealable under Section 96 CPC. However, after rejection of plaint, subject to law of limitation, the plaintiff can file a fresh plaint in respect of the same cause of action, if the rejection was for any curable defect. In paragraph 16 of the judgment, it has been held as under:-

“16. Insofar as the remedy of appeal under Section 96 of the CPC is concerned, there cannot be any distinction between a judgment of the Court dismissing the suit after full trial or the order of the Court rejecting the plaint for any curable or non-curable defects mentioned under Order 7 Rule 11. In either case, the effect would be the same except that under Rule 13 of Order 7, the rejection of the plaint shall not of its own preclude the plaintiff from presenting fresh plaint in respect of the same cause of action, subject however to law of limitation, doctrine of ouster of jurisdiction or doctrine of res judicata. If the rejection is for any curable defect, the plaintiff may move the Court seeking time to rectify the defects especially those referred to in Order 7 Rule 11 (b), (c), (e) or (f), and if the request is not acceded to, it would be an order amounting to dismissal of the suit.”

The Full Bench has further observed that rejection of plaint would

amount to dismissal of the suit. It was further held as under:-

“15. The Section 2 (2) of the C.P.C., in its inclusionary part, defines 'decree' as the formal expression of an adjudication of rejection of plaint as well. Obviously it refers the rejection of plaint under Order 7 Rules 11 and 12 of the C.P.C. Be it also noted that Order 41 Rule 10 (2) also empowers the appellate Court to reject the appeal where security as demanded by it is not furnished. The word 'reject' is not defined in C.P.C. Whether the word 'reject' or the term 'act of rejection' amounts to dismissal of the suit? As a verb 'reject' means – dismiss as inadequate or inappropriate – refuse to agree; and as a noun to reject a person or thing dismissed as failing to meet standards or satisfy the tests (see The New Oxford English Dictionary, 2002). Advanced Law Lexicon (Ramanatha Aiyer, 3rd edn., Book IV) defines the word 'reject'; to refuse to hear, receive or admit; to refuse to grant or accede to; to throw or cast away. To reject the appeal means to refuse to entertain an appeal. Thus to reject the plaint by passing a formal order under Order 7 Rule 12, conclusively means and has the effect of dismissing the suit.”

The judgments cited by learned counsel for the respondent are directly applicable to the facts of the present. In a suit filed by the petitioner for permanent injunction, defendant-respondent has made an application for rejection of the plaint. Trial Court, while deciding the said application vide order dated 21.03.2012, gave a direction to the plaintiff-petitioner to deposit the Court fee on the relief of specific performance within one month and in case of non deposit of the Court fee, the plaint would stand rejected. On 05.06.2012, none had appeared for the plaintiff-petitioner as well as defendant-respondent and on account of non compliance of order dated 21.03.2012, the plaint was rejected. As per the said order, for all intents and purposes, rejection of plaint/dismissal of suit would amount to a decree as per Section 2 (2) CPC and this order was appealable. According to the Full Bench judgment in **Molugu Ram Reddy's** case (supra), only appeal under Section 96 CPC was maintainable before the lower appellate Court.

The judgments cited by learned counsel for the petitioner are not

applicable in the facts of the present case, as it is not a case that merely on account of absence of the parties, the suit has been dismissed. The petitioner has tried to make out a case that the impugned order dated 05.06.2012, in the absence of learned counsel for the parties, was passed under Order 17 Rules 2 and 3 CPC (as amended by Act 104 of 1976). Order 17 Rules 2 and 3, as amended, is reproduced as under:-

“Order 17, Rule 2 : Procedure if parties fail to appear on day fixed:

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit.

Explanation – Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

Order 17 Rule 3 : Court may proceed notwithstanding either party fails to produce evidence, etc.

Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding, such default,-

- (a) If the parties are present, proceed to decide the suit forthwith, or
- (b) if the parties are, or any of them is absent, proceed under Rule 2.”

On 05.06.2012, none of the parties was present before the trial Court. As per Order 17 Rule 2 CPC, when on a day of hearing of the suit, the parties fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit. As per the language of aforesaid Rule, in the absence of any of the parties, the trial Court can proceed to decide a suit on merits on the basis of evidence led by the parties. In the alternative, if any party to the suit fails to produce its evidence or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, the Court

under Order 17 Rule 3 CPC, can proceed in the absence of the parties. The essential ingredients of this Rule is that some evidence must have been recorded before the trial Court to enable it to proceed under Order 9 CPC and make such order as it thinks fit.

In the absence of counsel for the parties, whether parties have led evidence or have performed any other act necessary to the further progress of the suit, the discretion is given to the Court to pass such order as it thinks fit. Reference can now be made to Order 9 Rule 4 of CPC, which reads as under:-

“4. Plaintiff may bring fresh suit or Court may restore suit to file.--

Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for [such failure as is referred to in rule 2], or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.”

Once, the trial Court has passed its order under Order 17 Rules 2 or 3 CPC in the absence of parties, an application under Order 9 Rule 13 CPC would be maintainable for restoration of the suit subject to trial Court recording its reasons with regard to the objection of limitation. The discretion to proceed with the suit is limited to the extent that the parties have led some evidence or has examined substantial part of their evidence, which in the present case is lacking. The application for setting aside the exparte order, passed under Order 17 Rules 2 and 3 CPC, was maintainable, if the decision had been given on merits by the trial Court. The facts of the present case are altogether different. No evidence had been led by either of the parties. Application for rejection of the plaint had been disposed of by the trial Court on 21.03.2012 by giving liberty to the plaintiff-petitioner to

stand rejected.” This was a conditional order and the consequence of non-deposit of the Court fee was that the plaint would be rejected. On 05.06.2012, in the absence of the parties, the trial Court did not proceed to decide the suit on merits under Order 17 Rules 2 and 3 CPC, rather for non-compliance of the order dated 21.03.2012, the plaint was rejected.

Since the suit of the plaintiff-petitioner was not dismissed on account of his non-appearance, the application for restoration of the suit under Order 9 Rule 13 CPC was not maintainable. Vide impugned order, the plaint has been rejected and under Order 7 Rules 11 and 13 CPC, the remedy available to the plaintiff was to present a fresh suit in respect of the same cause of action after filing an appeal under Section 96 CPC. Moreover, the impugned order rejecting the plaint was passed on 05.06.2012 and in the application under Section 5 of the Limitation Act (Annexure P-5), which was filed along with application under Order 9 Rule 4 CPC (Annexure P-4), no sufficient cause was given. These two applications have been rightly dismissed vide order dated 26.02.2013 (Annexure P-8) being not maintainable. The ratio of Full Bench judgment of Andhra Pradesh High Court in **Molugu Ram Reddy's** case (supra), is fully applicable to the facts of the present case.

In view of the above, no ground is made out to interfere in the impugned orders (Annexures P-3 and P-8).

Dismissed.

30.10.2015
ajp

(RITU BAHRI)
JUDGE