

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Civil Revision No. 4496 of 2015

DATE OF DECISION : August 11, 2015

Baldev Singh & anr.

..... PETITIONER(S)

VERSUS

Pal Singh & ors.

.... RESPONDENT(S)

CORAM : HON'BLE MR. JUSTICE ARUN PALLI

Present: Mr. S.S. Sahu, Advocate, for the petitioners.

...

1. Whether Reporters of local newspapers may be allowed to see the judgment? YES/NO

2. To be referred to the Reporter or not? YES

3. Whether the judgment should be reported in the digest? YES/NO

...

ARUN PALLI, J. (Oral)

Vide order being assailed, dated 09.01.2013, rendered by learned Additional Civil Judge (Senior Division), Ratia, as also judgment dated 27.04.2015, passed by learned Additional District Judge, Fatehabad, an application moved by the petitioner under Order IX Rule 13 of the Code of Civil Procedure (for short 'the Code'), for setting aside the ex-parte order dated 15.03.2008, as also the ex-parte decree dated 11.03.2010, has

since been dismissed.

In a suit filed by Pal Singh and others, they prayed for a decree for permanent injunction restraining the respondents from causing their forcible dispossession from a land measuring 65 kanals 11 marlas, situated in Village Khunan, Tehsil Ratia, District Fatehabad. Petitioners were arrayed as defendants No.3 and 4 in the said suit. In fact, defendant No.1 i.e. Trilok Singh, happened to be their father, and defendant No.2 i.e. Ranbir Singh, was/is their brother, and defendant No.5 i.e. Chhinda Singh alias Sukha, was son of defendant No.2. They engaged a common counsel; namely, Shri S.K. Dharnia, Advocate. However, as neither their counsel nor any of defendants No.1 to 5 appeared on the date fixed i.e. 15.03.2008, before the trial Court, they were proceeded against ex-parte. Eventually, a decree for injunction was passed by the trial Court on 11.03.2010. Subsequently, an application under Order IX Rule 13 of the Code was moved by the petitioners and their brother Randhir Singh (defendant No.2), for setting aside the ex-parte proceedings dated 15.03.2008, as also the decree dated 11.03.2010, stating:-

“.... that the respondent/plaintiff Pal Singh had filed a suit for permanent injunction wherein six defendants were arrayed out of which defendants no.1 to 5 including the applicants were represented by Sh. S.K. Dharnia Advocate and defendant no.1 was personally looking after the proceeding. It is the further contention of the applicants that being civil matter, they were advised by the counsel that their personal presence in the court is not required and moreover,

when defendant no.1 was personally coming to the court, they refrained themselves from the court proceeding but to their surprise when the notices in execution were served upon them. They came to know that the said suit had been decided at their back. They being *ex parte* on which they hired another counsel Sh. Ved Kamboj, advocate and advised him that he should not only file the objections in execution proceedings, but also move an application for getting *ex parte* order dated 15-3-2008 and decree dated 11-3-2010 set aside. But despite the specific instructions to the counsel, the counsel did not file an application for setting aside the *ex parte* order and decree and so, now the applicants cannot be burdened and deprived of their right to defend because of the negligence of the concerned counsel. Accordingly, a request for the condonation of delay in filing the application along with further request that the *ex parte* order and decree that was passed in their absence without their fault be set aside.”

In response, respondent-plaintiffs denied the averments set out in the application. It was maintained that the application was not only self contradictory but even concocted. Further, the application moved by the petitioners was nothing but an attempt to frustrate the execution proceedings. Particularly, when the objections filed by the petitioners had already been dismissed by the executing court.

On a consideration of the matter in issue and the material on record, learned trial Court arrived at a conclusion:-

“11. The above contention of the applicants go to show that they are well conversant with the law of

land. Their contention is not that they acted upon the instruction of the counsel but it is vice-versa. It is specifically stated that they advised their counsel to move two applications one for filing objections and another for setting aside the exparte order and decree, but the judicial record shows that Sh. Ved Kamboj, advocate did not move any application for setting aside the exparte order and decree but only filed objections. As per the arguments, the said objections were filed on 6-8-2011 whereas counsel appeared on 3-5-2011. If the instructions were given to the advocate on 3-5-2011 and he appeared on the said date, it means that applicants had knowledge of the exparte order and decree if not before but on 3-5-2011. There is no plausible explanation to show that why application for setting aside the exparte order and decree was not filed on that date and why it has been filed at such a belated stage. Though the counsel for the applicants was in loss of words to give any plausible reason for the same except for shifting the burden on the counsel Sh. Ved Kamboj, but the court is not convinced because it seems that the applicants are habitual in shifting the burden upon the advocates. The earlier burden was put upon the shoulder of Sh. Ved Kamboj, advocate and interestingly, as the applicants did not initiate any action against Sh. S. K. Dharnia. So, was the case with Sh. Ved Kamboj advocates. As it has been discussed above that no plausible reason was cited by the counsel Sh. N.K. Sachdeva, advocate for not filing the application for setting aside the exparte order and decree before. But it appears that the said application have been filed at the belated stage because the objections that were filed at the behest of applicants through Sh. Ved Kamboi advocate were dismissed vide detailed order dated 22-10-2011

wherein the court has specifically observed that the conduct of JD is such that they are bent upon to interfere in the peaceful possession of the decree holder over the suit property.

12. Accordingly as no plausible reason could be offered by the applicants for the condonation of delay more or less for setting aside an ex-parte order and decree and no such mistake could be cited by the applicants had done any professional misconduct or diligent Act, so, court does not find any good reason to allow the present application. On the contrary, the court is of the opinion that the applicant is an unscrupulous litigant who is enjoying while exploiting and misusing the process of the court. This transpires from the fact that when court had ordered for attachment of the property of JD, surprisingly Tehsildar got the property for attachment of the property of the Decree holder attached and then the concerned revenue official came in the court and pleaded ignorance. Accordingly, the court is of the opinion thus this application is nothing but a another mode adopted by a well conversant litigant to frustrate and impede the execution process. So, the present application is dismissed with costs of Rs.5,000/- to be paid by the applicants to the respondents."

Being aggrieved against the order dated 09.01.2013, vide which their application under Order IX Rule 13 of the Code was dismissed, petitioners preferred an appeal.

Learned Ist Appellate Court, reviewed the matter in issue, material on record and, on an analysis thereof, found itself in concurrence with the findings recorded by the trial Court. Accordingly, the appeal preferred by the petitioners was

dismissed on 27.04.2015.

I have heard learned counsel for the petitioners and perused the paper book.

Learned counsel for the petitioners simply seeks to reiterate the submissions that were advanced before the courts below and rejected after a due and comprehensive consideration. No other argument has been advanced.

On a due and thoughtful consideration of the matter in issue, I am of the considered view that the petition in hand is wholly devoid of merit and is, thus, liable to be dismissed for the reasons that are being recorded hereinafter.

As indicated above, petitioners herein were arrayed as defendants No.3 and 4 in a suit filed by Pal Singh and Others. Defendants No.1 to 5 engaged a common counsel and filed a written statement. Concededly, neither any of defendants No.1 to 5 nor their counsel chose to appear on the date fixed i.e. 15.03.2008, before the trial Court. As a result, they were proceeded against ex-parte. It would be apposite to point out at this juncture that it was not a case where the counsel for the petitioners appeared and pleaded no instructions, as in such an eventuality, the court was required to issue notice for an actual date to the defendants. Nothing was brought on record to show as to why he did not cause appearance on the date fixed and why did the petitioners not initiate any appropriate action against the counsel for the alleged professional misconduct. Nothing is indicated, whether they even contacted him and sought any explanation, after they acquired knowledge of ex-

parte decree. Because if it was indeed so, that would have been the natural reaction. Not just that, the case set out by the petitioners themselves is that their father; namely Trilok Singh (defendant No.1), personally monitored the proceedings and would attend court. Rather, this shows that the defendants as also their counsel did not choose to participate in the proceedings pursuant to a conscious and willful decision. Not just that, the order vide which the petitioners were proceeded against ex-parte was passed on 15.03.2008 and it was after almost two years that the trial court passed an ex-parte decree against the petitioners and other defendants. This seems wholly incredible that in a period of almost two years, neither did the petitioners choose to ascertain the status of the suit nor their counsel ever apprised them of the fate of the suit. Still further, vide order dated 15.03.2008, an ad-interim injunction that was granted in favour of the respondent-plaintiffs, was also made absolute, which remained operative till the suit was decided and a decree for injunction was passed. That being so, petitioners cannot be believed to suggest that they were ignorant of both i.e. the order dated 15.03.2008 as also an ex-parte decree dated 11.03.2010. Interestingly, father of the petitioners; namely, Trilok Singh, never moved any application for setting aside of the ex-parte order as also the decree. Even, defendants No.2 to 5 have not chosen to be a party to this revision. The case set out by the petitioners that they indeed acquired knowledge as regards an ex-parte decree dated 11.03.2010, on receipt of a notice in the execution proceedings,

and engaged another counsel; namely, Shri Ved Kamboj, Advocate, and instructed him to move not only the objections in the execution petition but also an application under Order IX Rule 13 of the Code, also does not inspire confidence. Concededly, the newly engaged counsel for the petitioners caused appearance before the executing court on 03.05.2001 and filed objections on 06.08.2011. Now, this just cannot be believed that once again neither did they ascertain the fate of the application under Order IX Rule 13 of the Code, that their counsel was instructed to move, nor he ever informed the petitioners of its status. It would be apposite to point out at this juncture that application under Order IX Rule 13 of the Code was indeed moved on 21.08.2012 i.e. after over one year and three months of the petitioners having caused appearance through their counsel in the executing court. It was rightly concluded by the trial court that the petitioners were habitual in shifting the burden upon their counsel, as earlier they accused Shri S.K. Dharnia, Advocate, for failing to appear in the suit and then Shri Ved Kamboj, Advocate, who despite instructions, did not move the necessary application for setting aside of the ex-parte decree. Ex-facie, the decision not to pursue the suit filed by the respondents, as also that the petitioners though filed objections in the execution proceedings and yet did not move an application under Order IX Rule 13 of the Code, was conscious and deliberate. Nothing was brought on record to even remotely indicate that they were prevented by any sufficient cause. Apparently, moving an application for setting

aside of the order dated 15.03.2008 as also the ex-parte decree, on 21.08.2012, was an afterthought, particularly when the objections filed by the petitioners before the executing court were dismissed on 22.10.2011. Not just that, even after dismissal of their objections, petitioners moved an application under Order IX Rule 13 of the Code, after almost a year. As recorded by the 1st Appellate Court, even an application for condonation of delay in moving the said application was not filed by the petitioners. In the normal parlance, one would always afford an opportunity to a party to contest the lis on merits but in the wake of the position sketched out above, I am dissuaded to tread that path.

Learned counsel for the petitioners could not point out as to how the conclusions that have concurrently been recorded by the courts below, were either contrary to the position on record or suffer from any material illegality. The petition lacks both i.e. merits as also the bona fides.

No interference in exercise of revisional jurisdiction is warranted. Petition be devoid of merit is, accordingly, dismissed.

AUGUST 11, 2015
Kang

(ARUN PALLI)
JUDGE