

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

**CR No.5296 of 2013 (O&M)
Date of Decision: 24.12.2015**

Prem Kumar

.....Petitioner

Versus

Rekha Sharma and another

... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. K.B. Rao, Advocate
for the petitioner.

Mr. Binderjit Singh, Advocate
for respondent No.1.

RAJ MOHAN SINGH, J.

[1]. In this revision petition, petitioner has assailed order dated 08.08.2013 passed by District Judge, Mansa wherein application under Section 5 of the Limitation Act filed along with appeal has been rejected along with the appeal filed against ex parte order dated 15.01.2013, wherein the trial Court allowed the application of applicant Rekha Sharma for sending respondent No.1/petitioner-Prem Kumar to undergo Civil Imprisonment for a period of one month for violation of order dated 13.11.2003 on depositing charges as per jail manual.

[2]. Rekha Sharma filed a civil suit for dissolution of firm and rendition of account. Said suit was decreed by the trial

Court in favour of Rekha Sharma-respondent No.1 on 30.08.1999 thereby declaring her to be entitled to share in the assets of the firm. Preliminary decree was passed. An application for passing of final decree was also moved to liquidate the assets. Ultimately, the offer of the petitioner to deposit an amount of Rs.1,45,000/- with an undertaking to demolish the building and to remove material within specified period was accepted.

[3]. Petitioner alleged that he along with respondent No.2 filed Civil Revision No.335 of 2003 in which proceedings regarding demolition were stayed. During the pendency of said revision petition, respondent No.1 filed an application on 30.09.2003 under Order 39 Rule 1 and 2 read with Section 151 CPC with a prayer that the petitioner and respondent No.2 be restrained from raising construction over the land in possession of the firm and further they be restrained from challenging the nature of the property before trial Court. On 13.11.2003, Civil Judge (Senior Divn.), Mansa ordered that since it is not the intention of the respondents No.2 and 3 to raise any construction and respondent No.3 has clarified that he has raised construction of the demolished wall not with any bad intention but was to protect the property of the firm so that cattle may not enter in the same. He had stated that he has no

intention to raise any construction. Respondent No.2 also stated that he has no such intention to raise any construction. It was ordered that none of the respondents shall raise any construction, nor will make any alteration in the property of cinema building without the consent of the applicant or without seeking leave of the Court.

[4]. Thereafter, on 13.06.2007, respondent No.1 filed an application under Order 39 Rule 2-A CPC to restore the status quo ante regarding the suit property. Vide order dated 05.06.2008, Civil Judge (Senior Divn.), Mansa ordered that interim mandatory injunction for restoring the status quo can be passed by ignoring or postponing action under Order 39 Rule 2-A CPC. Since the wall has been raised in place of iron gate and jet water pump has been installed in violation of order dated 13.11.2003, as such application was allowed and respondent was directed to remove the wall and water pump and restore the status quo ante by fixing a gate thereafter within a period of 3 months, failing which applicant was held entitled to proceed for the violation of order of the Court. On 21.11.2009, statement of respondent was recorded and the applicant withdrew the application in view thereof. Respondent made the statement that they have already undone the construction and have complied with the order dated 05.06.2008 and they have also

removed the pump. In view of said statement, learned counsel for the applicant withdrew the application dated 05.09.2008 by making a statement to that effect.

[5]. In the proceedings under Order 39 Rule 2-A CPC, counsel for the respondent pleaded no instructions on 22.02.2010. The case called repeatedly, as nobody came forward to represent respondent, therefore, respondent No.1 Prem Kumar was proceeded against ex parte. The applicant withdrew his application against respondent No.2, therefore, application against respondent No.2 was dismissed. The applicant closed her oral evidence and the case was adjourned for ex parte evidence for 02.03.2010. The aforesaid order was passed on 22.02.2010. Ultimately, vide order dated 15.01.2013, Civil Judge (Senior Divn.), Mansa passed an order under Order 39 Rule 2-A CPC on the basis of ex parte evidence of the applicant and allowed the application of the applicant for sending respondent No.1-Prem Kumar to undergo civil imprisonment for a period of one month for the violation of order dated 13.11.2003 on depositing charges as per jail manual.

[6]. Respondent No.1 offered charges for sending Prem Kumar in civil imprisonment for one month. Petitioner-Prem Kumar also filed appeal against the order dated 15.01.2013 passed by Civil Judge (Senior Divn.), Mansa before the Lower

Appellate Court along with an application for condonation of delay. In the application for depositing charges as per jail manual, learned counsel for the petitioner offered to file power of attorney but the same was not accepted because warrants had been issued against the present petitioner for detaining him in civil imprisonment. Learned counsel submitted that since the order is ex parte, therefore, he will get the same set aside and then to proceed in the matter. Prem Kumar did not turn up and therefore, his bail bonds and surety bonds were cancelled and forfeited to the State and non-bailable warrants were issued along with notice to the surety in accordance with law. A Civil Revision No.3152 of 2013 was filed in the High Court which was ordered to be withdrawn and District Judge, Mansa was directed to dispose of the application for stay. District Judge, Mansa vide order dated 21.05.2013 ordered that in view of Order 41 Rule 3-A CPC operation of the order dated 15.01.2013 cannot be stayed. The application was dismissed as operation of the order could not be stayed at this stage during pendency of application under Section 5 of the Limitation Act.

[7]. Again a Civil Revision No.3457 of 2013 was filed which was decided by the High Court on 28.05.2013. The petition was disposed of without issuing notice to the respondent with a view to impart substantive justice to the parties and to save

expenses, which may be incurred by the respondents and in order to avoid unnecessary delay in adjudication of the matter. It was directed that order dated 15.01.2013 passed by Civil Judge (Senior Divn.), Mansa shall remain stayed till disposal of the appeal by the District Judge, Mansa. District Judge, Mansa was directed to dispose of the appeal expeditiously, preferably within two months from the receipt of said order. Thereafter, District Judge, Mansa decided the application under Section 5 of the Limitation Act filed along with appeal and dismissed the same vide order dated 08.08.2013. Hence, the present revision petition.

[8]. Apparently on 22.02.2010, learned counsel for Prem Kumar pleaded no instructions. The case was called after lunch, but none appeared on behalf of Prem Kumar. At 3.45 PM, case was again called and thereafter, Prem Kumar was proceeded against ex parte. Applicant-Rekha Sharma withdrew her application qua Dr. Ram Nath. Applicant-Rekha Sharma thereafter proceeded to close her oral evidence and case was adjourned for remaining ex parte evidence of the applicant. From that stage onwards, the ex parte evidence was recorded and then order dated 15.01.2013 was passed for sending Prem Kumar to civil imprisonment and thereafter, applicant Rekha Sharma showed her willingness to deposit the charges as per

jail manual. Learned counsel for the petitioner contends that it was the basic stage where the Court should have issued notice to the petitioner-Prem Kumar in the event of pleading no instructions by his counsel. Court proceeded against him ex parte and allowed the applicant to lead ex parte evidence.

[9]. Learned counsel cites **Tahil Ram Vs. Ram Chand 1993(2) RCR (Criminal) 617, Ram Niwas Vs. Smt. Gita Devi, 2009(1) RCR (Civil) 175 and Kirpal Kaur Vs. Kulwant Kaur, 1993(2) PLR 689** to contend that withdrawal of Advocate from the case would have entailed issuance of notice to the party, particularly when at the time of withdrawal of instructions by the counsel for the party, he was not present in the Court. On first principle, the aforesaid argument seems logical that at the time of passing of order dated 22.02.2010 and order dated 15.01.2013, Civil Judge (Senior Divn.), Mansa could have secured presence of the present petitioner by way of issuing notice to him in the event of withdrawal of power of attorney by his lawyer. The second phase of litigation is the delay in filing the appeal before the Lower Appellate Court. The application under Section 5 of the Limitation Act was ordered to be decided on merits. The appeal itself was ordered to be decided expeditiously, preferably within two months from the date of receipt of order dated 28.05.2013 passed by this Court in Civil

Revision No.3457 of 2013. The lower Appellate Court while deciding the application under Section 5 of the Limitation Act held that the petitioner intentionally remained absent from the Court and was proceeded against ex parte and he did not appear thereafter till 15.01.2013. In the intervening period, the Court granted 59 adjournments. The applicant never moved any application under Order 9 Rule 7 CPC for setting aside the ex parte proceedings, nor moved any application under Order 9 Rule 13 CPC. The application under Section 5 of the Limitation Act along with appeal was filed just to escape punishment. The reasons for delay has not been explained by the petitioner, rather he mixed up the facts of two situations. Both the cases were meticulously contested, rather a criminal case was also being contested. The lower Appellate Court framed issue with regard to sufficiency of grounds for condonation of delay and after recording necessary reasons under issue No.1, held that delay is directly attributable to the conduct of the petitioner and the same cannot be held to be sufficient for condonation of delay for filing the appeal. The lower Appellate Court has discussed the necessary facts arising out of different proceedings and held that the delay in filing the appeal after excluding the time spent for getting certified copy of order has not been sufficiently explained. The conduct of the petitioner in

the proceedings under Order 39 Rule 2-A CPC has been highlighted even in the context of withdrawal of his Advocate by pleading no instructions on his behalf. The lower Appellate Court has also commented upon the fact that the statement made by his Lawyer, pleading no instructions on behalf of petitioner was calculated move, knowing fully well that he had failed to appear in the Court and false story was concocted that the application for restoration of status quo ante was withdrawn and therefore, he thought that instant case under Order 39 Rule 2-A CPC was also disposed of. While appearing as AW1 before the Lower Appellate Court, petitioner-Prem Kumar stated in his cross examination that he did not remember the dates i.e. 12.11.2008, 16.12.2008, 22.01.2009, 28.02.2009, 08.04.2009, 11.05.2009, 10.06.2009, 27.07.2009 and 25.08.2009 were fixed for hearing. He also pleaded ignorance about the said dates being fixed in the proceedings under Order 39 Rule 2-A CPC. Various orders Ex.R2 to R51 passed in criminal case pending against the applicant and in the application under Order 39 Rule 2-A CPC proved that the petitioner was having full knowledge of the pendency of the application under Order 39 Rule 2-A CPC and he intentionally did not appear in the Court in order to play smart and to claim discretionary relief of the Court. He did not move any application under Order 9 Rule 7 CPC for setting

aside the ex parte order but filed the appeal. Even though remedy of appeal was available but the same was not filed within limitation. Applicant did not give any cause for his absence, nor he explained any circumstance which prevented him from appearing in the Court.

[10]. It is a common case between the parties that the application under Order 39 Rule 2-A CPC and application for restoration of status quo ante in respect of suit property were pending between the parties. A criminal case was also pending arising out of FIR No.133 dated 29.06.2007, under Sections 452, 323, 506 read with Section 34 IPC, Police Station City Mansa. In view of order dated 05.06.2008, petitioner was directed to remove wall and water pump and restored the status quo ante by fixing gate therein. The statement dated 21.11.2009 and order dated 21.11.2009 show that application for restoration of status quo ante as per order dated 05.06.2008 was withdrawn. It is not the case of the petitioner-Prem Kumar that he did not receive summons from the Court. He contested the case and on 22.02.2010, his lawyer pleaded no instructions. In the backdrop of "pleading no instructions" by his lawyer, the minimum requirement was to issue notice to the person. This Court would have appreciated the aforesaid ground, had it been not related to the overall conduct of the petitioner. From

22.02.2010 till passing of order dated 15.01.2013, the Court adjourned the case on numerous occasions and thereafter, ultimately held that from unrebutted and unchallenged evidence on record, violation of order dated 13.11.2003 stands proved. Application filed by the applicant was allowed for sending Prem Kumar to undergo civil imprisonment for a period of one month for violation of order dated 13.11.2003 on depositing the charges as per jail manual.

[11]. Filing of appeal before the Lower Appellate Court, factum of delay in filing the appeal and dismissal of the application under Section 5 of the Limitation Act in considered opinion of this Court has direct bearing on overall assessment of the case. The conduct of the petitioner was never above board. The material on record is suggestive of the fact that petitioner tried to take discretionary benefit of the Court by not doing equity. Even if, it is to be held that the trial Court was obligated to issue notice to the petitioner in the event of pleading no instructions by his lawyer subsequent to 22.02.2010 till 15.01.2013 and thereafter, filing the appeal late before the lower Appellate Court are the instances of direct aspersions on the conduct of the petitioner which do not make the petitioner entitled for the relief in this revision petition. This Court could have exercised indulgence in condoning the delay in filing the

appeal if that was the solitary misconduct of the petitioner, but in the present case delay is a relatable issue, exposing the mindset of the petitioner in violating the order with impunity. Accordingly, this revision petition is dismissed.

24.12.2015
prince

(RAJ MOHAN SINGH)
JUDGE