

102

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

Civil Revision No.6195 of 2014 (O&M)

Date of Decision: 18.11.2015

Amit Kapoor

.....Petitioner

vs

Ashu and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. C.L. Verma, Advocate
for the petitioner.

Mr. Namit Gautam, Advocate
for the respondents.

1. *Whether Reporters of local papers may be allowed to see the judgment ?*
2. *To be referred to the Reporters or not ?*
3. *Whether the judgment should be reported in the Digest?*

RAJ MOHAN SINGH, J.

[1]. Petitioner has assailed order dated 08.11.2013 (Annexure P-4) passed by Civil Judge (Jr. Divn.), Ludhiana in Civil Suit No.120 dated 17.5.2012 titled as Ashu vs. Poonam Gupta and others in which application under Order 9 Rule 7 CPC for setting aside the order dated 02.07.2013 and for permitting the defendant to contest the suit on merits, has been dismissed.

[2]. Plaintiff moved an application under Order 9 Rule 7

CPC seeking setting aside of *ex parte* order dated 02.07.2013 and for permitting the defendants/applicants to contest the suit on merits.

[3]. Applicant/petitioner alleged that on 02.07.2013 the defendants No.3, 4 and 5 had received the summons issued by the trial Court and their counsel filed memo of appearance on behalf of appellants/defendants. The case was adjourned to 24.07.2013 for filing power of attorney as well as written statement. On 24.07.2013, the case was further adjourned to 12.08.2013 and thereafter again adjourned to 27.08.2013 for filing power of attorney and written statement.

[4]. On 27.08.2013, when the counsel for the defendants filed power of attorney, then it came to his knowledge that the defendants No.3, 4 and 5 had already been proceeded against *ex parte* on 02.07.2013. Defendants/petitioners alleged that the memo of appearance filed by the counsel on their behalf was not found on record due to some clerical mistake.

[5]. The application was contested by the plaintiff/respondents. Preliminary objection No.3 of the reply reads as under:-

“3. *That the application is totally false and frivolous. After receiving summons in this case, the defendants appeared through counsel in this Hon'ble Court and the counsel*

filed memo of appearance, thereafter the defendants did not appear in this case intentionally and deliberately, nor filed power of attorney nor filed written statement and as such, in view of the intentional and wilful absence of the defendants, the application is liable to be dismissed.”

[6]. On the one hand, the plaintiff/respondents have admitted the factum of appearance of defendants/petitioners through their counsel by way of filing memo of appearance and thereafter they did not appear in the case, but on the other hand they have also contested the application on merits, thereby denying the very filing of memo of appearance on record. The plaintiffs/respondents have denied that on 27.08.2013 factum of order dated 02.07.2013 came to their knowledge.

[7]. I have heard the arguments of both the sides and have carefully perused the record.

[8]. The trial Court came to the conclusion that as per interlocutory orders on record defendants No.3, 4 and 5 have not filed any memo of appearance on 02.07.2013 and no sufficient cause has been mentioned by the defendants for setting aside the *ex parte* order dated 02.07.2013, however the application was disposed of with the observation that the defendants are allowed to join the proceedings without setting aside the order dated 02.07.2013.

[9]. Apparently no substantial proceedings have been undertaken before the trial Court during the intervening period. In the event of allowing the defendants only to join the proceedings without filing written statement would definitely cause material prejudice to the defendants and in the absence of written statement it would be futile to even join the proceedings of the case. Foundation has to be laid in order to defend the case. No amount of evidence can be looked into without there being foundation of pleading in a civil suit.

[10]. I am of the view that substantial justice would only be met if the defendants are allowed to file written statement and to contest the suit on merits subject to imposition of Rs.10,000/- as cost. Even the mandatory period of three opportunities for the purposes of filing written statement and to adduce evidence in terms of Order 8 Rule 1 CPC stands diluted in **Salem Advocate Bar Association T.N. vs. Union of India, (2005) 6 SCC 344.** Even at the stage of granting the adjournments for adducing evidence the provision in terms of proviso to Order 17 Rule 1 CPC has been diluted on the same principles by the Hon'ble Apex Court.

[11]. Keeping in view the facts and circumstances of the case, it would be just and expedient to set aside the order dated 08.11.2013 (Annexure P-4) and allow the petitioner/defendants

to file written statement and to contest the suit on merits, subject to payment of Rs.10,000/- as cost which shall be paid to the plaintiff/respondents.

[12]. With the aforesaid observations, the impugned order is set aside. Both the parties are directed to appear on the date fixed before the trial Court and on their appearance the trial Court shall give one opportunity to the petitioner/defendants to file written statement and then it will proceed to decide the suit in accordance with law.

November 18, 2015

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**(RAJ MOHAN SINGH)
JUDGE**