

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CR No.7853 of 2014.

Decided on:-May 27th, 2015.

Bishamber Dayal Yadav and anotherAppellants.

Versus

Manish and anotherRespondents.

CORAM: HON'BLE MR. JUSTICE DR. BHARAT BHUSHAN PARSOON.

Argued by:- Mr. Rakesh Dhiman, Advocate
for the petitioners.

Mr. Ashish Gupta, Advocate
for respondent No.1.

Dr. Bharat Bhushan Parsoon, J.

Restoration of the suit which had been dismissed under Section 35-B CPC vide order dated 26.9.2014, forms genesis of this revision petition.

2. Manish, plaintiff in the court below and one of the respondents in this petition had filed a suit against his parents seeking declaration that he is entitled to 1/3rd share in the suit property being ancestral; relief of permanent injunction had also been sought. The suit land, however, was transferred vide Award dated 11.11.2010 by his parents (now petitioners) in favour of their daughter viz. Ms. Shalini Yadav. Sequelly, the respondent-plaintiff had moved an application under Order I Rule 10 CPC for impleadment of his sister as well, as a party to the suit. This application was

accepted. She was impleaded as one of the respondents.

3. Sequel to such amendment in the plaint, new title was to be furnished by the respondent-plaintiff for which he sought adjournment which was granted subject to payment of costs of Rs.100/-. On the appointed day i.e. 12.3.2013 when counsel for the respondent-plaintiff neither paid the costs nor filed the amended title, suit of the respondent-plaintiff was dismissed under Section 35-B CPC.

4. An application was moved firstly for restoration of the suit under the impression that the same had been dismissed for non-prosecution but later on, when it was discovered that the suit had been dismissed under Section 35-B CPC, yet another application was moved for restoration of the suit and for payment of the costs.

5. Considering the entire set of facts, the learned lower court had come to a firm opinion that since the entire fault was of the previous counsel of the applicant-plaintiff who had neither informed him about the developments in the suit nor had himself paid the costs to be recovered later from the respondent/plaintiff, it was felt that the applicant-plaintiff should not suffer for the negligence of his previous counsel. It was in these circumstances that the suit was restored at its original number and was ordered to proceed further from the stage at which it was dismissed.

6. Stand of the petitioners in the present revision petition is that the application for restoration of the suit could not have been entertained because the same was beyond limitation. It is also claimed that the lower court had taken shelter under Article 167 of the Limitation Act, 1963 (for short, the Act) whereas there was no such provision in the Act.

7. Counsel for the contesting respondent, on the other hand, has urged that the petitioners have not come to the Court with clean hands. It is claimed that actually, Article 137 of the Act is applicable and not Article 167

of the Act. It has been urged that the impugned order was rectified on 17.10.2004 whereby Article 167 of the Act was changed to Article 137 holding it to be a typographical error and that this required rectification. It is urged that under Article 137 of the Act, there is three years' period for restoration of a suit under Section 35-B CPC as it is a residuary clause and there is no specific limitation provided for restoration of the suit dismissed under Section 35-B CPC. It is claimed that even otherwise, it is a case where for the fault of his counsel, the plaintiff was suffering and that too for non-payment of Rs.100/- only by the counsel, when the plaintiff absolutely had no information about the proceedings which were going on in the Court. The suit, in fact, was dismissed about which also no information was sent by his counsel to the plaintiff.

8. During the course of arguments, while going through the paper book as also through the status report received from the Court, it transpires that not only the costs have already been paid and thus the reason for which the suit was dismissed i.e. non-payment of costs, is no more existent but the Court has even proceeded further and five witnesses of the plaintiff have been recorded after framing of issues on 12.12.2014. The case was fixed for conclusion of evidence of the plaintiff for 23.4.2015.

9. The petitioners in this revision petition never disclosed that the impugned order of 26.9.2014 had been rectified vide order dated 17.10.2014 of the lower court and mentioning of Article 167 in the impugned order had been substituted by mentioning of Article 137 of the Act. It is rather to be specifically noticed that on 25.11.2014 when the rectification order had already been made by the court below to the knowledge of the contesting defendants, now petitioners, as the same was made in their presence, even then the petitioners had insisted that the impugned order had been made wrongly as it had made reference to Article 167 of the Act, which was non-existent. There is no explanation forthcoming as to why this Court was not

informed about this rectification in the impugned order which to their knowledge had been made on 17.10.2014. It was only on receipt of status report called by this Court on 12.3.2015 that this fact emerged on the record of this petition that the impugned order had been rectified on 17.3.2014 and Article 167 appearing in the impugned order had been ordered to be read as Article 137 of the Act. Article 137 of the Act is a residual clause. As there is no limitation specifically provided for restoration of a suit dismissed under Section 35-B CPC, it is the residuary clause which is applicable providing limitation of three years.

10. It is worth notice that the petitioners had earlier instituted a Civil Revision Petition No.7551 of 2014 in this Court which was dismissed as withdrawn with liberty to file a fresh one with better particulars vide order dated 10.11.2014.

11. Even if we go by the parameters propounded by the petitioners-plaintiff wherein he has vehemently argued that the limitation of only 30 days is provided, it is to be noticed that the suit was dismissed on 12.3.2013 whereas application for restoration of the same had been filed on 30.5.2013. When for fault of the counsel for the plaintiff, he was neither knowing exact order of the Court passed at the time of dismissal of his suit on 12.3.2013, nor there was any information given by his counsel to him, it is a good ground for condonation of delay. When the petitioner-plaintiff had come to know that their suit had been dismissed not for want of prosecution but for non-payment of costs under Section 35-B CPC, an application in addition to the one already made on 30.5.2013, was made immediately for payment of costs.

12. Looking from any angle, there is no merit in the petition. Rather, the petitioners had merely been gaining time one way or the other. The impugned order is only innocuous as it had merely restored the suit without adjudication of substantive rights of the parties. Sequel, affirming

the impugned order dated 26.9.2014 passed by the lower court, this petition, being devoid of any merit, is dismissed.

13. Keeping in view the nature of the suit as also the delay caused by filing of the present petition by the petitioners, the lower court is called upon to decide the suit within a period of six months, even by conducting day to day proceedings, if so required, by giving three opportunities to the defendants to conclude their evidence, if evidence of the plaintiffs has already been concluded. However, if evidence of the plaintiffs is not concluded, one opportunity may be given to the plaintiffs to conclude entire oral as well as documentary evidence as the case was already fixed for conclusion of evidence of the plaintiffs.

May 27th, 2015
'Yag Dutt'

(Dr. Bharat Bhushan Parsoon)
Judge

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