

Civil Revision No.3556 of 2015

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In the High Court of Punjab and Haryana at Chandigarh

Civil Revision No.3556 of 2015

Date of Decision:3.8.2016

Ram Kumar and another

---Petitioners

vs.

Duli Chand since deceased through Lrs and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Rajesh Bansal, Advocate
for the petitioners

Mr. Arun Singal, Advocate
for respondent Nos. 1(i), (ii) and 2(i), (ii) and (iv)

Rekha Mittal, J.

By invoking Article 227 of the Constitution of India, the
present petition directs challenge against orders dated 6.11.2009 (Annexure

P-1), dated 5.2.2013 (Annexure P-2) passed by the trial court and dated 23.7.2014 (Annexure P-3) passed by the Additional District Judge, Panipat whereby suit of the petitioners/plaintiffs was dismissed on 6.11.2009, application for restoration of the suit was dismissed on 5.2.2013 and appeal preferred against order dated 6.11.2009 was dismissed on 23.7.2014 respectively.

The petitioners filed a suit for declaration to assail judgment and decree dated 5.11.1986 passed by the Sub Judge IInd Class, Panipat in case 'Duli Chand and others vs. Hukmi and others' being null and void abinitio and not binding upon rights of the plaintiffs in regard to land, detailed in head note of the plaint. Simultaneously, relief of permanent injunction restraining the defendants from changing nature of the suit property by raising construction or otherwise was also prayed for. The suit was instituted in the year 2002 but the same was dismissed on 6.11.2009 and a relevant extract from the impugned order reads as follows:-

“Waited sufficiently. None appeared for and on behalf of the plaintiffs. However, the perusal of the file reveals that after framing of the issues on 8.4.2005 the case was fixed for evidence of the plaintiffs and thereafter several

effective opportunities have been granted for evidence of the plaintiff. Even today in the morning the request was made by the learned counsel that he would place the witness in the witness box after lunch but it is already 3.30 p.m. none has appeared on behalf of the plaintiffs. The case is already included in the list of 200 oldest cases identified to be disposed of within current year as per to the order of the Hon'ble High Court. No ground for adjournment made out.

Since there is no evidence on record to substantiate the case of the plaintiffs, the suit of the plaintiffs must fail and it is accordingly ordered. Suit of the plaintiffs is dismissed for want of evidence. File, after needful, be consigned to the record.”

The petitioners filed an application for restoration of the suit but the same was dismissed by the Additional Civil Judge (Senior Division), Panipat and a relevant extract therefrom, reads as follows:-

“It is relevant to mention that admittedly, the suit in question had been dismissed on 6.11.2009 and the present application was moved on 7.12.2009. Thus, the application is barred by law of Limitation, as per which, the period of filing such like application is one month.

It is also relevant to mention that on

6.11.2009, as per zimni order of the said date, the suit was dismissed for want of appearance on behalf of the plaintiffs as also for want of any evidence in support of the case set up by them. Thus, only an appeal in the matter would be, if so, maintainable. In view of the aforesaid discussion, the application in hand is dismissed.”

Later, in view of order dated 5.2.2013 whereby it was held that only an appeal would be maintainable, the petitioners preferred an appeal before the Addl. District Judge, Panipat against order dated 6.11.2009 which came to be dismissed by holding that the appeal is not maintainable. However, it was observed by the Court of Appeal that the order shall not debar the appellants from pursuing legal remedy in accordance with law against order dated 5.2.2013 passed by the Court on application for restoration of the suit.

After having lost in their effort to seek restoration of the suit for a period of about five years, the petitioners knocked at the door of this Court seeking redressal of their grievance.

Counsel for the petitioners has submitted that lot of harassment has been caused to the petitioners due to failure of the courts below, passed

orders dated 6.11.2009 and 5.2.2013 to examine the relevant provisions of the Code of Civil Procedure (in short “CPC”) and appreciate them in right perspective. It is further submitted that the trial court dismissed the suit in absence of the plaintiffs but by making reference that they had failed to adduce evidence and thus, the suit is dismissed for want of evidence, thus, created confusion as to whether the suit was dismissed under Order 9 Rule 8 CPC or Order 17 Rule 3 CPC. The confusion was further compounded by the Court that disposed of the application for restoration of the suit and held that the only remedy available to the petitioners is to file an appeal on the basis whereof, the petitioners preferred an appeal before the Court of District Judge but eventually failed as it was held that the appeal is not maintainable. It is further submitted that order dated 5.2.2013 passed by the trial court may be set aside and the matter may be remitted to the trial court for decision of the application for restoration of the suit afresh.

Counsel for the contesting respondents, on the contrary, has submitted that as the petitioners failed to adduce any evidence despite number of opportunities granted for the purpose and intentionally absented

from the proceedings on 6.11.2009, there was no option with the court except to pass the impugned order with the observations that the suit is also liable to be dismissed for want of evidence by the plaintiffs.

I have heard counsel for the parties, perused the paper book particularly the orders impugned.

At the very outset, this Court has a serious concern to express that the trial court while dismissing the suit adopted a very casual and callous approach in dismissing the suit for want of evidence. The trial court did not bother to examine the provisions of Order 17 Rule 3 CPC before passing such an order. It further appears that the trial court disposed of the suit in a tearing hurry to get rid of one of the cases out of 20 oldest cases, identified to be disposed of within that year, may be a case of 'action plan'.

To misfortune of the petitioners, the things did not rest there. The Court that dealt with the application for restoration of the suit also did not bother to examine the relevant provisions of CPC and committed a gross error by holding that the only remedy available to the petitioners is to file an appeal against the order dated 6.11.2009. Had both the Courts put a

little effort to go through the relevant provisions of CPC, the petitioners would have been saved of unnecessary harassment and expense that they had to bear with, owing to blatant mistake committed by both the courts. The agony of the petitioners is further aggravated as they did not get proper legal advice and decided to prefer an appeal against order dated 6.11.2009 having been misguided by the order dated 5.2.2013 passed by the Additional Civil Judge (Senior Division), Panipat. The Court of Appeal has rightly held that the appeal against order dated 6.11.2009 is not maintainable and the petitioners have been left at liberty to pursue their appropriate remedy, in accordance with law.

Order 17 CPC provides for adjournments. Rule 3 of Order 17 deals with, Court may proceed notwithstanding either party fails to produce evidence etc. A relevant extract therefrom reads as follows:-

“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 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.”

Clause (b) of Rule 3 unequivocally provides that if the parties or any of them is absent, the Court may proceed under Rule 2. Rule 2 of Order 17 CPC provides for procedure if parties fail to appear on day fixed and the same reads as follows:-

“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 IX 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.”

Rule 2 clearly lays down that if on the adjourned date, the

parties or any of them failed to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by order IX or make such other order as it thinks fit. The words 'make such other order as it thinks fit' in the circumstances of the present case (as no evidence was adduced by the petitioners to invoke explanation to rule 2, reproduced hereinbefore) cannot be construed to mean that the court was competent to proceed under Order 17 Rule 3 CPC even where clause (b) of Rule 3 is attracted.

Order 9 Rule 8 provides for procedure where the defendant only appears. A relevant extract from Rule 8 is reproduced hereunder for ready reference:-

“ Procedure where defendant only appears.- Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an Order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.”

As counsel for the petitioner/plaintiff was not present, counsel

for the defendants was present, the petitioners had not adduced any evidence and claim of the petitioners was not admitted by the defendants either in part or whole, in such a situation, there was no option with the trial court except to dismiss the suit by invoking Order 9 Rule 8 CPC and the plaintiff(s) could seek restoration thereof by filing an application under Rule 9 thereof. Reference in this context can be made to judgment of Hon'ble the Supreme Court *Parkash Chander Marchanda and another vs. Smt. Janki Marchanda AIR 1987 SC 42.*

As the trial court was not competent to proceed under Order 17 Rule 3 CPC in the given circumstances the trial court committed a gross error rather illegality by holding that the suit has been dismissed for want of evidence. Similarly, the Court that decided the application for restoration committed a blatant error by holding that only an appeal in the matter would be maintainable.

This apart, the court dismissed the application for restoration on the ground of limitation as well without considering plea of the petitioners that non-appearance on 6.11.2009 was due to misunderstanding of the date of hearing as 6.12.2009 in place of 6.11.2009.

In view of the above, order dated 5.2.2013 passed by the trial court dismissing application for restoration cannot be allowed to sustain and accordingly set aside. The matter is remitted to the trial court for decision of the application afresh after hearing counsel for the parties. As the matter pertains to restoration of a suit instituted in the year 2002, the trial court is directed to dispose of the application within a period of one month from the date of receipt of certified copy of the order.

For the foregoing reasons, the petition stands disposed of in the aforesaid terms. A copy of the order be sent to the concerned District Judges where Ms. Kumud Gugnani and Mr. Anmol Singh Nayar, the then Additional Civil Judges (Senior Division) are presently working.

(Rekha Mittal)
Judge

3.8.2016
paramjit

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No