

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

CR No.4035 of 2016

Decided on: 26.07.2016

Prince Walia

....Petitioner

Versus

Hardeep Singh and another

....Respondents

CORAM: HON'BLE MRS JUSTICE REKHA MITTAL

Present : Mr. Sanjeev Gupta, Advocate
for the petitioner.

REKHA MITTAL, J.

The present petition has been directed against order dated 15.03.2016 (Annexure P-1) passed by the Additional Civil Judge (Sr. Division), Kharar whereby application dated 25.09.2015 (Annexure P-6) filed by the respondents/defendants for condonation of delay has been allowed and application of even date (Annexure P-4) filed by the petitioner for passing the judgment and decree has been dismissed.

Counsel for the petitioner would contend that Prince Walia has filed a suit under Order 37 of the Code of Civil Procedure (in short 'CPC') for recovery of Rs.25,00,000/- i.e. refund of earnest money along with interest @ 12% per annum on the basis of agreement to sell dated 28.12.2011 executed by the respondents in favour of the petitioner in respect of land measuring 03 kanals 12 marlas detailed in the plaint. The respondents/defendants were served in the suit on 13.5.2015 but failed to put in appearance within a period of 10 days from the date of service in compliance with procedure prescribed in sub-rule (3) of Rule 2 of Order 37 CPC. On the contrary, for the first time, they caused appearance through their counsel Sh. Harish Chand Rathore, Advocate on 21.08.2015, the date fixed in the proceedings by

the trial Court on 21.05.2015. Counsel for the petitioner raised an issue with regard to appearance of the respondents on the premise that they were bound to appear within 10 days from the date of service as prescribed under Order 37 CPC and the said fact has been duly recorded in the order dated 21.08.2015 passed by the trial Court. Later, an application was filed by the petitioner for passing the judgment and decree and on that day, another application was filed by the respondents for condonation of delay and granting leave to defend.

The application filed by the respondents for condonation of delay has been allowed and the application filed by the petitioner for passing the judgment and decree due to failure of the respondents to put in appearance within 10 days from the date of service, has been dismissed. It is argued with vehemence that as the respondents were duly served through notice, copies whereof are available on page 14 and 15 of the paperbook and had failed to put in appearance within 10 days of service, there was no reason for the trial Court to condone delay and dismiss the application filed by the petitioner for passing the judgment and decree in compliance with sub-rule (3) of Rule 2 of Order 37 CPC. Another submission made by counsel is that the learned trial Court has misdirected itself by holding that as the respondents were not served with a copy of agreement to sell dated 28.12.2011 annexed with the plaint, the same can form the basis for condoning delay particularly in the circumstances that no such plea was raised by the respondents in the application dated 25.09.2015 (Annexure P-6). In support of his contentions, he has referred to judgment of Rajasthan High Court **“Nainmal vs Maganmal”, 2000(2) Rajasthan LR 834**. Further

reference has been made to judgments of the Delhi High Court ***“D.C.M. Toyota Limited vs Geetanjali Enterprises”***, 1994(1) RRR 529, ***“Syndicate Bank vs M/s. Parerhat Papers”***, 1995(1) RRR 34, ***“Maruti Udyog Limited vs M/s. Pentafour Products Limited”***, 2002(4) RCR (Civil) 648, ***“Agarbandhu Footwears Private Limited vs Dayanand Jain”***, 2013(7) RCR (Civil) 2238.

I have heard counsel for the petitioner and perused the paperbook particularly the documents annexed with the petition.

To decide the controversy if the discretion exercised by the trial Court in condoning delay envisaged by sub-rule (7) of Rule 13 of Order 37 is well founded or otherwise, it is pertinent to note that the suit was registered on 07.07.2015 and summons in Form No.4 in Appendix B appended with CPC were ordered to be issued to the respondents for 28.05.2015 as required under Order 37 Rule 2, subject to filing of process fee (PF), copies of plaint and documents. On 28.05.2015, there were no proceedings in the case as the case was already taken up by the Presiding Officer on 21.05.2015 and a relevant extract from order dated 21.05.2015 reads as follows:-

“Present : None.

File taken up today as I shall be availing joining time from 25.5.2015 to 29.5.2015 (22.5.2015 to 24.5.2015 being holidays). Accordingly, case is adjourned to 21.08.2015 for purpose already fixed. Reader is directed to inform the parties through their counsel.”

On the adjourned date i.e. 21.08.2015, the respondents/defendants caused appearance through Sh. Harish Chand

Rathore, Advocate, who filed Power of Attorney. Perusal of the summons issued for service would make it evident that a note was appended that copy of plaint and documents attached therewith. However, the report made by the Process Server (Annexure P-3 colly.) would show that summons were not personally served upon the defendant and were received by Devinder Singh with copy of plaint at his own responsibility. Similar is the report with regard to service of Hardeep Singh son of Surjit Singh.

Firstly, the report made by the Process Server leaves no manner of doubt that copy of agreement dated 28.12.2011 was never served upon Devinder Singh. Order 37 Rule 3 provides for procedure for appearance of defendant. A relevant extract from Rule 3, reads as follows:-

“3. Procedure for the appearance of defendant.-

(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexure thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in court an address for service of notice on him.”

A reading of the aforesaid extract makes it evident that a mandatory obligation has been imposed upon the plaintiff that the plaintiff together with the summons under Rule 2 shall serve on the defendant a copy of the plaint and annexure(s) thereto and thereafter, the defendant may at any time within 10 days of service enter an appearance either in person or by pleader. In the case at hand, once the

respondents/defendants have not been served in compliance with the mandatory procedure prescribed in Rule 3, the petitioner cannot take advantage of their (respondents) failure to appear within 10 days from the date of service. This apart, on 21.05.2015, the Court itself adjourned the case for 21.08.2015 for the purpose already fixed. The said purpose contained in order dated 07.05.2015 was issuance of summons as required under Order 37 Rule 2 CPC subject to filing of process fee, copies of plaint and documents. Admittedly, the respondents were not served afresh in compliance with order dated 21.05.2015. In addition, the mere fact that the respondents in the application for condonation of delay has not raised a plea that copy of the document annexed with the plaint was not served upon Hardeep Singh would neither create an estoppel against them to raise such a plea during the course of arguments nor the Court is debarred from examining that mandatory requirement in law while exercising judicial discretion to condone delay in entering appearance by the respondents. In this view of the matter, the petitioner cannot derive any advantage to his contentions from the judgments rendered by other High Courts, in the peculiar facts and circumstances obtaining in those cases.

On the contrary, the learned trial Court has relied upon judgment of this Court ***“Ram Karan vs Rattan Singh Ranga”***, CR No.6246 of 2008 decided on 20.11.2012. A relevant extract therefrom, reads as follows:-

“Technically speaking, if the defendant fails to appear within ten days of service of summons, the plaintiff becomes entitled to decree. However, in the same manner,

technically speaking, if service of summons is not effected as provided by Order 37 Rule 3(1) CPC, the suit cannot be decreed under Order 37 Rule 2(3) CPC. In the instant case, as per photostat copy of the summons shown by counsel for the petitioner as well as according to report of Process Server (Annexure P-1) regarding service of summons, it is manifest that only copy of plaint was served with the summons but copy of pronote-cum-receipt which was annexed with the plaint was not served on defendant with the plaint.”

The Court further held that in view of interest of both the parties, ends of justice would be met if the defendant is permitted to move an application before the trial Court for leave to defend the suit on payment of costs.

When the facts and circumstances of the present case are examined in the light of observations made in ***Ram Karan's case (supra)***, the discretion exercised by the trial Court condoning delay can neither be held to be arbitrary nor perverse or absurd. That being so, I do not find any reason to interfere in the impugned order.

For the foregoing reasons, the petition fails and is accordingly dismissed *in limine*. No order as to costs.

26.07.2016
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(REKHA MITTAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No