

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

CR No.4141 of 2016(O&M)
Date of decision: 11.07.2016

A.B.B. Limited

... Petitioner

Versus

M/s Techno Tech Engineers

... Respondent

CORAM: HON'BLE MR. JUSTICE ARUN PALLI

Present: Mr. Akhilesh Vyas, Advocate for the petitioner.

ARUN PALLI J. (Oral)

Application, under Order 9 Rule 13 of the Code of Civil Procedure, moved by the petitioner-defendant, to set aside the ex parte judgment and decree, dated 01.11.2013, was dismissed by the trial court, vide order dated 09.12.2015 (Annexure P12). For, even the appeal preferred against the said order failed, and was dismissed vide order and judgment dated 08.04.2016 (Annexure P14), petitioner-defendant is before this court.

Briefly, the case set out by the petitioner-defendant has been that it had engaged Sh. P.S. Bhinder Advocate, who even filed the written statement on its behalf. But, the petitioner was told by its counsel that its presence was not necessary, for he will pursue the matter, and he shall call the defendant if and when required. Believing in the assurance held out by the counsel, defendant never appeared in the court, but had been contacting its counsel on phone, who in turn assured the petitioner that the matter was being pursued. However, the petitioner was proceeded against ex parte on

08.10.2012, for its counsel did not appear. The application moved by the petitioner for setting aside the said order was also dismissed on 30.08.2013. And, it was only on 10.02.2014, when the defendant received a communication from the plaintiff that an ex parte judgment and decree, dated 01.11.2013, has been passed in its favour, and it had already moved the executing court, the petitioner acquired knowledge of the said decree. Thus, absence of the defendant was neither intentional nor willful, but only because it was kept in dark by its counsel. Further, the order vide which the trial court declined to set aside the ex parte judgment and decree, dated 01.11.2013, was also erroneous, for the same was passed in undue haste, and without affording an adequate opportunity to the defendant to adduce evidence. The matter was listed, in the proceedings arising out of an application under Order 9 Rule 13 of the Code of Civil Procedure, for recording petitioner's evidence for 05.12.2015. The petitioner was to examine Mr. Rahul Aggarwal, Advocate, who was to come by an Air India flight to Amritsar, but due to bad weather the flight returned to New Delhi, and the matter was adjourned to 09.12.2015. However, on the adjourned date, when the said witness appeared in court, his statement was not recorded, for he was told that the matter was listed for pronouncement of orders. And, that is how, on 09.12.2015, the application moved by the defendant, under Order 9 Rule 13 CPC, was dismissed by the trial court.

Learned counsel for the petitioner-defendant merely reiterates the submissions that were advanced before the trial court as also the appellate court. Further, he submits that after the defendant was proceeded against ex parte on 08.10.2012, the application moved by the plaintiff under Order 6 Rule 17, of the Code of Civil Procedure, for amendment of the

plaint was allowed by the trial court. As a result, suit filed by the plaintiff for rendition of accounts was altered to a suit for recovery and, therefore, before proceeding with the amended suit, the trial court ought to have issued notice to the defendant once again. Reliance is placed upon a decision of this court reported as 2007(2) RCR (Civil) 146 - Harbans Singh and others v. Sowinder Kaur and others.

As opposed to this, learned counsel for the plaintiff-respondent submits that the petitioner-defendant has miserably failed to show that there, indeed, exists a sufficient ground to set aside the judgment and decree dated 01.11.2013. He contends that the records show that the defendant had full knowledge of the proceedings in the suit, which was eventually decreed on 01.11.2013. Thus, he submits that the revision lacks bonafides and the same be dismissed.

I have heard learned counsel for the parties and perused the paper book.

On a due and thoughtful consideration of the matter in issue, I am of the considered view that the petition in hand is wholly devoid of merit and is, thus, liable to be dismissed for the reasons that are being recorded hereinafter.

Concededly, petitioner-defendant had caused appearance in the suit on 10.08.2009, through its counsel Sh. P.S. Bhinder, Advocate. The written statement was also filed on its behalf on 11.10.2009. However, on 08.10.2012, neither the counsel nor anyone on behalf of the petitioner-defendant appeared in court to pursue the matter. Records show that the matter was passed over, and again taken up for hearing, post lunch, at 3:30

p.m. For the position was not any different, the trial court was choice-less, but to proceed against the defendant ex parte. The plea that counsel for the defendant neither appeared nor informed the defendant of the ex parte decree, dated 01.11.2013, and it was only on 10.02.2014, the defendant acquired knowledge thereof, is apparently false and misconceived. Significantly, defendant had earlier moved an application, through the same counsel, namely, Sh. P.S. Bhinder, Advocate, to set aside the order, dated 08.10.2012, vide which it was proceeded against ex parte. And, the trial court, vide order dated 30.08.2013 (Annexure P8), dismissed the said application. What needs to be noticed is that just two months thereafter, the trial court decreed the suit on 01.11.2013. That being so, it is conclusively proved that the defendant had complete knowledge of the order dated 08.10.2012, vide which it was proceeded against ex parte, the stage the proceedings had reached in the suit, and also the necessary consequence of the ex parte proceedings. Apparently, even after 30.08.2013, when its application for setting aside of the order, dated 08.10.2012, was dismissed, petitioner-defendant still had two months to assail the said order, before the ex parte judgment and decree, dated 01.11.2013, was passed by the court. But it did not and by its own volition, let the ex parte decree dated 01.11.2013 follow. Rather, it appears that even earlier, it was on instructions of the defendant that its counsel did not appear on 08.10.2012. And, this is fortified, for the petitioner-defendant had moved an application for setting aside of the ex parte order, dated 08.10.2012, through the same counsel. That is how, though the case set out by the petitioner, in its application under Order 9 Rule 13, was that its counsel kept the petitioner in dark and remained absent, but nothing was brought on record to show that the

defendant, indeed, proceeded against the counsel or made any complaint against him. Not just that, petitioner had even preferred objections against the ex parte decree, dated 01.11.2013, which are purportedly pending before the executing court.

Likewise, the submission that the defendant was not afforded adequate opportunity to lead its evidence, in proceedings under Order 9 Rule 13 of the Code of Civil Procedure, is equally erroneous and lacks conviction. Records show that the matter was posted for recording defendant's evidence for 02.03.2015. And, thereafter, the matter remained pending for 27.03.2005, 28.04.2015, 27.05.2015, 28.05.2015, 22.07.2015, 24.08.2015, 29.09.2015, 15.10.2015, 05.11.2015 and thereafter on 05.12.2015, when the evidence of the petitioner-defendant was closed by order in the presence of the counsel for the petitioner-defendant. Resultantly, the matter was posted for 09.12.2015, for pronouncement of orders, thus, there was no occasion to still provide an opportunity to the defendant to examine Sh. Rahul Aggarwal, Advocate. The only witness examined by the defendant i.e. Rakesh Kumar (AW1) on 28.05.2015, though bound down was never produced for cross-examination. Apparently, despite 11 opportunities, defendant failed to lead any evidence, in support of its application under Order 9 Rule 13, to set aside the ex parte decree, dated 01.11.2013.

The reliance placed by the learned counsel for the defendant upon a decision of this court in Harbans Singh's case (supra) is also misplaced, for despite the absence of the defendants in the said case, no order was passed vide which they were proceeded against ex parte, no notice of the application, seeking amendment in the plaint, was issued to the defendants, as it was presumed that the defendants were duly represented by

the counsel. No doubt, the court had observed that even if the defendants were proceeded against ex parte, but once the prayer for amendment in the suit was granted, notice ought to have been issued to the defendants to file the amended written statement. Apparently, the purpose and concern was to apprise the defendants of the amended claim and to provide an opportunity to contest the amended suit.

However, that is not the position in the matter in hand, for after the trial court granted the prayer for amendment of the suit on 23.03.2013, the defendant moved an application for setting aside of the order, dated 08.10.2012, vide which it was proceeded against ex parte, and the said application was dismissed by the trial court on 30.08.2013, in the presence of its counsel. Meaning thereby, defendant was not only conscious of the ex parte proceedings, but also had complete knowledge of the amendment that has been granted by the court. Ex facie, neither did the defendant choose to appear and pursue the suit nor led any evidence in support of its case, to set aside the ex parte decree. Thus, the only and the inevitable conclusion the courts could reach was to decline the application moved by the petitioner.

In conspectus of the position, as set out above, the petition, being devoid of merit, is dismissed.

July 11, 2016
Rajan

(Arun Palli)
Judge

Whether speaking/reasoned: YES/NO

Whether reportable: YES/NO