

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

**Civil Revision No.4453 of 2016 (O&M)
Date of Decision: 28.09.2016**

M/s Bansal Rice Mills Babain

.....Petitioner

Vs

Vijay Goods Carrier and another

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Ravinder Malik, Advocate
for the petitioner.

Mr. Deepak Girotra, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. In this revision petition, petitioner has assailed the order dated 24.05.2016 (Annexure P-5) passed by Additional Civil Judge (Sr. Divn.), Shahbad, District Kurukshetra whereby application under 9 Rule 13 CPC for setting aside the *ex parte* judgment and decree dated 21.04.2014 was allowed.

[2]. Brief facts as gathered from the record are that the plaintiff/petitioner filed a suit for recovery of Rs.1,88,050/- along with interest @ 18% per annum from the date of consignment till payment. The summons were issued to the defendants, who

appeared through their counsel, but later on absented from the Court and as a result of that they were proceeded against *ex parte*. Defendant No.2 being proprietor of defendant No.1, was the person who absented from the Court and was proceeded against *ex parte* on 10.01.2014. Thereafter *ex parte* evidence of the plaintiff was recorded and suit of the plaintiff for recovery of Rs.1,88,050/- was decreed *ex parte* along with interest @8% per annum from the date of institution of the suit till final realization of the decretal amount vide judgment and decree dated 21.04.2014.

[3]. The application was filed by the decree-holder under Order 21 Rule 3 read with Section 151 CPC by way of detention of the judgment debtor in civil imprisonment. The defendants moved an application under Order 9 Rule 13 CPC for setting aside the *ex parte* order dated 10.01.2014 and *ex parte* judgment and decree dated 21.04.2014. In the application, the defendants specifically took the following grounds:-

“3. That the applicants had engaged the counsel to defend the above noted case on their behalf who had received lump sum expenses and his fees to conduct the case and had obtained the signatures of the applicants on many blank papers and printed papers and disclosed that there is no need to come to the court by the applicants on each and every dates of

hearing and assured that he will contest the case himself properly. The applicants had handed over all the documents etc. of the said case to the said counsel to submit the same in this Hon'ble court but about a week ago the applicants have come to know that the above noted case has been decided ex parte against the applicants and exparte order has been passed on 10.01.2014 by this Hon'ble court against the applicants and exparte judgment and decree has been passed on 21.04.2014 against the applicants. The applicants came to know of the abovesaid order and judgment and decree about a week ago from their new counsel when they handed over the copy of execution to the new counsel who disclosed that the earlier counsel has not appeared in the Court. The applicants/defendants were not called by the said counsel on any date nor any date of hearing was disclosed to the applicants by the said counsel. The applicants were not informed about any evidence to be lead by the applicants in this case. Hence the absence of the applicants in this case is not intentional and rather bona fide and genuine. Hence the applicants are filing this application without any delay from the date of knowledge.”

[4]. Additional Civil Judge (Sr. Divn.) Shahbad vide order dated 24.05.2016, accepted the application on the premise that it was the assurance of the counsel which prevented the defendants from coming to the court. The ruralist background of the defendants was considered to be sufficient for presuming

faith in the Lawyer. The fault of the counsel was also construed to be a ground for not punishing the party.

[5]. At the time of issuance of notice of motion, following order as passed by this court:-

“Learned counsel for the petitioner contends that ex parte judgment and decree dated 21.04.2014 has been set aside on conjectures and surmises. Learned counsel states that civil suit was filed on 08.05.2013 for recovery of Rs.1,88,050/- along with interest @ 18 % per month from the date of consignment till actual realisation of the amount. Upon notice, Sh. R.K. Chaudhary, Advocate appeared and filed memorandum of appearance on behalf of defendants. Case was adjourned for 29.09.2013, 14.10.2013, 14.11.2013, 07.12.2013 and 14.01.2014, but the written statement was not filed and therefore, defendants were proceeded against ex parte on 14.01.2014. Case was adjourned for ex parte evidence of the plaintiff. Evidence was led. Suit was decreed ex parte vide judgment and decree dated 21.04.2014. In the application under Order 9 Rule 13 CPC, the defendants alleged that the previous counsel did not inform them regarding progress of the suit, rather got their signatures on blank papers and told them that their presence was not required. An attribution was made on the conduct of the counsel. In the application, defendants further alleged that on engaging new counsel, they came to know about the status of the suit. No name of new counsel has come forth on record, rather Sh. R.K. Chaudhary, Advocate appeared in the application under Order 9 rule 13 CPC and the impugned order came to be passed even in his presence, attributing something to his

conduct.

Notice of motion for 01.09.2016.

Dasti as well.

In the meanwhile, trial Court is directed to adjourn the proceedings beyond the date fixed by this Court.”

[6]. I have heard learned counsel for both the parties.

[7]. On a pointed query, learned counsel for the respondents conceded that despite number of adjournments, written statement was not filed by the previous counsel and the defendants were proceeded against *ex parte* on 10.01.2014. Thereafter on the basis of *ex parte* evidence, suit was decreed on 21.04.2014. In the application for setting aside the *ex parte* judgment and decree, a specific stand was taken by the defendants in para No.3 of the application that after engaging a new counsel, defendants came to know that the earlier counsel did not appear in the court. Learned counsel for the respondents admitted the fact that even, an application under Order 9 Rule 13 CPC was filed by the same original counsel, who allegedly did not inform the defendants regarding the progress of the case. No new counsel filed the application for setting aside the *ex parte* proceedings and judgment and decree. Original counsel Sh. R.K. Chaudhary appeared in the original suit as well as in the application under Order 9 Rule 13

CPC. This fact has been conceded by the learned counsel.

[8]. Learned counsel for the petitioners on the strength of **GMG Engineering Industries and Ors. vs. ISSA Green Power Solution and Ors., 2015(3) RCR (Civil) 366** contended that the judicial discretion is always available to *bona fide* litigant, but such a discretion has to be exercised with vigilance and circumspection. The discretion cannot be exercised in an arbitrary, vague and fanciful manner. The test for showing indulgence in favour of a party is based on whether the party has acted with due diligence or not?

[9]. By relying upon the aforesaid precedent, learned counsel for the petitioner submitted that the indulgence should not have been granted in favour of the respondents where the conduct of the respondents was not found to be diligent and *bona fide* as falsehood was sought to be introduced in para No.3 of the application. Learned counsel also highlighted that in the absence of any sufficient cause shown by the defendants, the *ex parte* judgment and decree cannot be set aside. The application for setting aside the *ex parte* proceedings and judgment and decree was based on vague, evasive and falsehood, therefore, the same was not sufficient to invoke jurisdiction of the court. Learned counsel also relied upon **Pal**

News Media (P) Ltd., vs. Super Cassettes Industries Ltd.,

2015(5) RCR (Civil) 724 (Delhi) to contend that the conduct of the defendants was grossly negligent.

[10]. The story of *bona fide* of the defendants on the basis of communication received through their Lawyer was however on fanciful ground. The trial Court has granted indulgence in favour of the defendants on the premise that 65% of the population lives in the countryside and this population having rural background has more faith in their counsel than anybody else. The filing of application under Order 9 Rule 13 CPC was the act of the Lawyer himself. Even if, the faith was eroded to some extent, the defendants kept on reposing faith in the Lawyer.

[11]. In **GMG Engineering Industries and Ors'** case (supra) the one of consideration was that on showing sufficient cause, a liberal construction was taken so as to advance substantial cause of justice. At the same time, it was held that in case of no negligence inaction and want of *bona fide*, if something cannot be imputed to the party, then delay has to be condoned. The judicial discretion has to be exercised with vigilance and circumspection.

[12]. The facts and circumstances of the case do not make out a case of due diligence in favour of the defendants from the

very beginning. On proper service, defendants appeared through their counsel. After appearing in the trial court, the case was adjourned for 29.09.2013, 14.10.2013, 14.11.2013, 07.12.2013 and 10.01.2014. The counsel for the defendants did not appear after his initial appearance in the trial Court. Defendants were proceeded against *ex parte* on 10.01.2014. The *ex parte* evidence was led and suit was decreed *ex parte*. The same Lawyer filed the proceedings under Order 9 Rule 13 CPC and thereafter also kept on representing the party. The ground for setting aside *ex parte* proceedings, judgment and decree was on false premise.

[13]. Defendants asserted that they engaged new Lawyer. The original counsel obtained their signatures on blank papers as well as on printed papers and disclosed that there was no necessity of coming to the Court on each and every date and he assured the defendants that he will contest the case properly. The *ex parte* judgment and decree came to be noticed by defendants only when new counsel told them about the conduct of the earlier counsel. A party, who has not come to the Court with clean hands, does not deserve any equitable relief. Even though indulgence has been shown by the trial Court, but in considered opinion of this Court, the same was not required to be given to a party whose conduct was not found to be *bona*

fide.

[14]. In view of aforesaid, the impugned order is set aside. This revision petition is allowed. Application for setting aside ex parte proceedings and judgment and decree is accordingly dismissed.

September 28, 2016
Atik

(RAJ MOHAN SINGH)
JUDGE

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