

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

CR No.8345 OF 2015
DATE OF DECISION : 10TH MAY, 2016

Fateh Jang Singh & others

.... Petitioners

Versus

Gurmail Singh & others

.... Respondents

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

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

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Present : Mr. Amit Jain, Advocate and
Mr. Chetan Salathia, Advocate for the petitioners.

Mr. Vikas Mehsempuri, Advocate for the respondents.

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DARSHAN SINGH, J.

1. The present revision petition has been preferred against the order dated 06.08.2014 passed by learned Additional Civil Judge (Senior Division), Patiala vide which the application, moved by the petitioners for restoration of suit, has been dismissed and the order dated 04.09.2015 passed by learned Additional District Judge, Patiala vide which the appeal filed by the petitioners against the aforesaid order has been dismissed.

2. The petitioners filed a suit for declaration and permanent injunction against the respondents. The said suit was dismissed in default by the learned Trial Court under Order 9 Rule 3 of the Code of Civil Procedure 1908 (hereinafter referred as 'CPC') vide order dated 26.08.2009. The petitioners moved application for restoration of the

said suit on 14.11.2011 on the grounds inter alia that petitioners had authorized Harbans Singh to pursue the suit on their behalf but during the pendency of the suit Harbans Singh lost his young son on 11.10.2007. Due to that reason he went under depression. The petitioners/plaintiffs remained under belief that Harbans Singh had been pursuing their suit and they do not feel any necessity to contact their counsel to know about the proceedings of the suit. They did not receive any information from their counsel for a long period and they contacted him on 27.10.2011 when it was told that the said suit has been dismissed in default. Thereafter, they engaged their counsel who made the enquiry and it was revealed that the suit filed by them had been dismissed in default on 26.08.2009. Hence the application.

3. The said application was contested by the legal representatives of respondent No.2 on the grounds inter alia that all the plaintiffs were pursuing their suit. It was denied that petitioner Harbans Singh had undergone any depression due to death of his son. Thus they plead that there is no ground for restoration of the suit.

4. After hearing learned counsel for both the parties the learned Trial Court, finding no sufficient cause for restoration of the suit, dismissed the application vide impugned order dated 06.08.2014. Aggrieved with the aforesaid order the petitioners preferred appeal. The same has also been dismissed by the learned Additional District Judge, Patiala vide impugned order dated 04.09.2015. Hence this revision petition.

5. I have heard Mr. Amit Jain, Advocate with Mr. Chetan Salathia, Advocate counsel for the petitioners and Mr. Vikas Mehsempuri, Advocate counsel for the respondents and peruse the paper book.

6. Learned counsel for the petitioners contended that Harbans Singh was authorized to pursue the suit on behalf of the plaintiffs, but in the month of October, 2007 he lost his young son and went under depression. Due to this reason he could not pursue the suit. The other plaintiffs/petitioners were under bonafide impression that Harbans Singh might be pursuing the suit and they do not felt any necessity to contact their counsel. But when they did not hear anything about the case for long they contacted their counsel and came to know that their suit has been dismissed in default. Learned counsel for the petitioners contended that when the suit was dismissed in default it was pending at the stage of plaintiffs' evidence. There was no reason for the deliberate absence of the petitioners. Thus, he contended that the impugned orders are illegal and the suit filed by the petitioners deserves to be restored.

7. On the other hand, learned counsel for the respondents contended that all the plaintiffs were pursuing the suit. Son of Harbans Singh had allegedly died in the month of October, 2007, whereas, suit has been dismissed in default on 26.08.2009 i.e. much thereafter. So, that cannot be a ground for the non-appearance of the plaintiffs/petitioners and their counsel. Thus he contended that the petitioners have not been able to establish the sufficient ground

for restoration of the suit and their application has been rightly dismissed by the learned Courts below.

8. I have duly considered the aforesaid contentions. It is evident from the copy of the order dated 26.08.2009 Annexure P-1 that the suit filed by the petitioners was dismissed in default under Order 9 Rule 3 CPC. The application for restoration of the suit dismissed in default under Order 9 Rule 3 lies under Order 9 Rule 4. As per order 43 Rule 1 CPC the order rejecting an application under Order 9 Rule 4 is not an appealable order. Thus the learned Additional District Judge, Patiala while entertaining the appeal has not taken into consideration this legal position.

9. As per the provisions of Order 9 Rule 4 where a suit has been dismissed in default under Order 9 Rule 3, the plaintiff may apply for an order to set aside the dismissal if he satisfies the court that there was sufficient cause for his non-appearance and on being so satisfied the court shall make an order setting aside the dismissal. In the instant case, the petitioners have taken the stand that they have authorized petitioner No.2-Harbans Singh to pursue the suit but he lost his young son on 11.10.2007 during the pendency of the suit and went under depression. But they remained under belief that Harbans Singh might be pursuing the suit. But this ground, pleaded by the petitioners, for their non-appearance does not inspire any confidence. The son of Harbans Singh has died on 11.10.2007. The application for amendment of the plaint was moved on 07.11.2007 which was even allowed by the trial Court vide order dated

10.10.2008. Prior to that after framing the issues on 19.01.2006 the petitioners availed number of opportunities to produce the evidence but they did not produce any evidence and ultimately moved an application for amendment of the plaint on 07.11.2007. Thus the said application has been moved by the petitioners just within one month of the date of the death of son of Harbans Singh. It shows that the death of the son of Harbans Singh was not the cause for their non-appearance. If that would have been so, then how the application for amendment of plaint could have been moved on 07.11.2007, which was also signed by Harbans Singh. Which falsifies the stand of the petitioners that Harbans Singh went under depression.

10. It is not the case of the petitioners that they were not aware about the pendency of the suit and were unable to pursue the same. If Harbans Singh, who happens to be real brother of petitioner No.1, was unable to pursue the case due to death of his son then the other plaintiffs could have easily contacted their counsel but the petitioners have pleaded that they did not receive any information from their counsel and ultimately they contacted him in October, 2011. This explanation given by the petitioners is palpably false and has only be projected to gain the time to move application. It is not believable that the petitioners did not come to know about the dismissal of their suit for a period of more than two years. If the petitioners would have been vigilant in pursuing the suit they could have easily got the information about the status of their suit. But they did not bother for a period of more than two years.

11. The suit was dismissed in default on 26.08.2009 and the application for restoration of the suit was filed in November, 2011 i.e. after more than two years. Whereas, as per Article 122 of the Limitation Act, 1963 the application should have been filed within 30 days from the date of dismissal for restoration of the suit. Thus the petitioners have not been able to establish the sufficient cause for their non-appearance on the date when their suit was dismissed in default.

12. Consequently, the present revision petition is without any merits and the same has been dismissed.

10th MAY, 2016
'raj'

(DARSHAN SINGH)
JUDGE