

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

Civil Revision No.4098 of 2015

Date of Decision: 20.04.2017

Renu Gupta

....Petitioner

Versus

Vipin Garg

....Respondent

BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Gagandeep Rana, Advocate
for the petitioner.

Mr. Vikas Behl, Sr. Advocate
with Ms. Japneet Kaur, Advocate
for the respondent.

DAYA CHAUDHARY, J.

The present revision petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 13.05.2015 (Annexure P-5) passed by Additional District Judge, Karnal, whereby, the application moved by the petitioner for setting aside the ex-parte order dated 13.02.2015 has been dismissed.

Briefly, the facts of the case are that the marriage of the petitioner was solemnized with the respondent on 30.05.2013 but no issue was born from their wedlock. Thereafter, some differences arose between the parties and petitioner-wife left the matrimonial home due to alleged harassment and got registered FIR No.346 dated 29.04.2014 at Police Station Civil Lines, Karnal under Sections 323/498-A/406/506/34 IPC against respondent and his family members. Thereafter, the petitioner filed a

complaint under Section 12 of the Protection of Women from Domestic Violence Act and a petition under Section 125 Cr.P.C for grant of maintenance at Civil Courts, Panipat.

Respondent-husband filed a petition under Section 13 of the Hindu Marriage Act, 1955 for dissolution of marriage by a decree of divorce on the ground of cruelty. Subsequently, an application was filed for transfer of the divorce petition from the Courts at Karnal to the Court having competent jurisdiction at Panipat. The petition for divorce was fixed for hearing on 12.02.2015 before the Court of Additional District Judge, Karnal but the counsel for the petitioner did not appear. The case was adjourned on various dates for filing written statement and ultimately, the petitioner was ordered to be proceeded against ex-parte by the trial Court vide order dated 13.02.2015. An application was moved for setting aside the ex-parte order dated 13.02.2015 stating therein that the petitioner could not appear in the Court as her father was admitted in Apollo Hospital, New Delhi. However, the said application was dismissed vide order dated 13.05.2015 on the ground that ample opportunities were given to the petitioner-wife for filing written statement but she failed to appear herself or through her counsel. The impugned order of dismissal of application for setting aside the ex-parte order dated 13.05.2015 is under challenge in the present petition.

Learned counsel for the petitioner submits that while passing the impugned order, wrong facts have been mentioned, whereas, the delay in not filing the written statement was not the only reason but the circumstances were beyond the control of the petitioner. Even the medical record was also placed on record before the trial Court but the same was not

taken into consideration. Learned counsel also submits that there were sufficient reasons for non-appearance by the petitioner before the Court on 13.02.2015 but neither those documents nor the ground for non-appearance were considered. Learned counsel further submits that the petitioner could not be punished for inaction/fault on the part of the counsel. At the end, learned counsel for the petitioner submits that the ex-parte order as well as order of dismissal of application for setting aside the ex-parte order are liable to be set aside.

To support his contention, learned counsel for the petitioner has relied upon the judgment of Hon'ble the Apex Court in case ***G.P. Srivastava vs R.K. Raizada and others 2000(2) RCR (Civil) 161*** in support of his contentions.

Learned senior counsel for the respondent submits that the impugned order is well reasoned and more than reasonable opportunities were granted to the petitioner but neither the written statement was filed nor the counsel for the petitioner was present. The Court was having no option but to proceed the petitioner as ex-parte. Learned counsel also submits that the impugned order was passed by mentioning that the petitioner-wife could not satisfy the Court for setting aside the ex-parte order dated 13.02.2015 as no sufficient reasons were mentioned in the application and accordingly, the application was rightly dismissed. Learned Senior counsel has also brought to the notice of this Court the *zimni* orders passed by the trial Court.

Learned senior counsel has relied upon the judgments of Hon'ble the Apex Court in cases ***B.V. Smitha Rani vs M.K. Girish 2011(7) RCR (Civil) 222, M/s Shiv Cotex vs Tirgun Auto Plast P. Ltd. and others***

2011(4) RCR (Civil) 807 and Mohammed Yusuf vs Faij Mohammad and others 2009(1) RCR (Civil) 633, in support of his contentions.

Heard the arguments of learned counsel for the parties and have also perused the impugned order as well as other documents available on the file.

In the present case, the petitioner was proceeded *ex-parte* as the written statement was not filed by her in spite of having sufficient opportunities and thereafter, the application for setting aside the *ex-parte* order was also dismissed. Undisputedly, the Court has to write a judgment and the same must be in conformity with the provisions of the Code or at least set out the reasoning with the controversy in hand.

Hon'ble the Apex Court in **Bogidhola Tea and Trading Co. Ltd. & Anr. V. Hira Lal Somani 2008(3) RCR (Civil) 257**, has held that a decree under Order 8, Rule 10 Civil Procedure Code should not be passed unless the averments made in plaint are established. In the facts and circumstances of a case, the court must decide the issue of limitation also, if so, involved.

It is a settled legal proposition that the relief under Order 8 Rule 10 Civil Procedure Code is discretionary, and court has to be more cautious while exercising such power where defendant fails to file the written statement. The Court must give reasons while passing such judgment/order, however, short it be, but by reading the judgment, a party must understood as to what were the facts and circumstances on the basis of which the court must proceed and under what reasoning the suit has been decreed.

In the present case, the trial Court has failed to meet the laid

down parameters to proceed under Order 8 Rule 10 of Civil Procedure Code.

Hon'ble the Apex Court in ***Parimal vs Veena @ Bharti 2011***

(3) **SCC 545** has held as to when *ex-parte* decree can be set aside. In that judgment, scope of Order 9 Rule 13 has been explained, which is as under :-

(i)An ex-parte decree against a defendant has to be set aside if the party satisfies the Court that summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the sufficient time to appear in the court.

(ii)It is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.

Undisputedly, under Order 9 Rule 13, the Court has power to set aside the decree, in case, the party was prevented by sufficient cause from appearing. In said judgment, sufficient cause has been defined. Paras 9, 10, 11 and 12 of said judgment are relevant, which are reproduced as under :-

“9. “Sufficient Cause” is an expression which has been used in large number of Statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, word “sufficient” embraced no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the

facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was a want of *bona fide* on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive”. However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide” ***Ramlal & Ors. v. Rewa Coalfields Ltd., AIR 1962 SC 361; Sarpanch, Lonand Grampanchayat v. Ramgiri Gosavi & Anr., AIR 1968 SC 222; Surinder Singh Sibbia v. Vijay Kumar Sood, 1991(2) R.C.R. (Rent) 576; and Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation & Another, 2010(2) R.C.R. (Civil) 284: 2010(2) R.A.J. 205: (2010) 5 SCC 459.***

10. In ***Arjun Singh v. Mohindra Kumar & Ors., AIR 1964 SC 993***, this Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a “good cause” and “sufficient cause” is that the requirement of a good cause is complied with on a lesser degree of proof than that of a “sufficient cause”. (See also: ***Brij Indar Singh v. Lala Kanshi Ram & Ors., AIR 1917 PC 156; Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee & Ors., AIR 1964 SC 1336; and Mata Din v. A. Narayanan, AIR 1970 SC 1953.***

11. While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide: ***State of Bihar & Ors. v. Kameshwar Prasad Singh & Anr.***, 2000(2) S.C.T. 889; ***Madanlal v. Shyamlal***, 2002(2) R.C.R. (Civil) 361; ***Davinder Pal Sehgal & Anr. v. M/s Partap Steel Rolling Mills (P) Ltd. & Ors.***, 2002(1) R.C.R. (Civil) 555; ***Ram Nath Sao alias Ram Nath Sao & Ors. v. Gobardhan Sao & Ors.***, 2002 (2) R.C.R. (Civil) 337; ***Kaushalya Devi v. Prem Chand & Anr.*** (2005) 10 SCC 127; ***Srei International Finance Ltd., v. Fair growth Financial Services Ltd., & Anr.***, (2005) 13 SCC 95; and ***Reena Sadh v. Anjana Enterprises***, 2008 (3) R.C.R. (Civil) 62; 2008(2) R.C.R. (Rent) 125; 2008(3) R.A.J. 290.

12. In order to determine the application under Order 9, Rule 13 Civil Procedure Code, the test has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application.”

Order 9 Rule 13 of Civil Procedure Code has two limbs. The

first limb is that ex-parte decree can be set aside if the Court is satisfied that summons were not duly served. The second limb of said provision is that if party is prevented by sufficient cause from appearing in response to summons, then also ex-parte decree can be set aside.

In the present case, the facts and circumstances of the case falls under second limb of aforesaid provision.

The same issue was there before Hon'ble the Apex Court in **G.P. Srivastava's** case (supra). The observations made by Hon'ble the Apex Court in said judgment is in para No.7, which is reproduced as under:-

“7. Under Order 9 Rule 13 C.P.C an ex-parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any 'sufficient cause' from appearing when the suit was called on for hearing. Unless 'sufficient cause' is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex-parte decree. The words “was prevented by any sufficient cause from appearing” must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as elastic expression for which no hard and fast guidelines can be prescribed. The Courts have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The 'sufficient cause' from non-appearance refers to the date on which the absence was made a ground for proceeding ex-parte and cannot be stretched to rely upon other circumstances anterior in time. If 'sufficient cause' is made out for non-appearance of the defendant

on the date fixed for hearing when ex-parte proceedings initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.”

In the present case, there was sufficient reasons for not filing written statement. The case was fixed for hearing on 12.02.2015. On that date, the arguing counsel for the petitioner could not appear as the Presiding Officer before whom the case was listed was transferred and the case was adjourned for filing written statement for the next date i.e 13.02.2015. On that date, the counsel for the petitioner was busy at Panipat and asked the petitioner to attend the Court in person along with written statement. However, on said date, the petitioner could not attend the Court as there was sudden deterioration of the health of her father in the early morning and he had to be taken to the Apollo Hospital, New Delhi by the petitioner and her mother as they were the only family members. Several tests were conducted and ultimately, the father of the petitioner was admitted in Apollo Hospital on 23.02.2015 for transplantation of kidney. The petitioner was proceeded ex-parte on 13.02.2015 and it was fixed for ex-parte evidence. On 13.03.2015, the petitioner filed an application for setting aside the *ex-parte* order dated 13.02.2015 and consequential proceedings but the petitioner could not appear in the Court because of ill health of her father. The non-appearance of the petitioner on 13.02.2015 was not intentional but due to circumstances, which were beyond her control. The impugned order was

passed by holding that ample opportunities were given to the petitioner for filing written statement and no sufficient reason has been given for her failure to appear in person or through her counsel.

In view of the facts as mentioned above and by considering the submissions made by learned counsel for the petitioner and ratio of judgments as mentioned above, the impugned order dated 13.05.2015 passed by the Additional District Judge, Karnal is set aside and the application filed under Order 9 Rule 13 CPC stands allowed. The petitioner is directed to file her written statement positively within a period of two weeks from the date of receipt of certified copy of the order.

However, it is made clear that in case, the written statement is not filed within said period, the dismissal order passed by the trial Court shall stand affirmed.

Keeping in view the facts and circumstances as mentioned above, the petitioner is also directed to pay ₹ 20,000/- as costs to the respondent by way of bank draft before filing of the written statement. The parties, through their counsel, are directed to appear before the trial Court on 01.05.2017.

(DAYA CHAUDHARY)
JUDGE

20.04.2017
gurpreet

Whether speaking/reasoned

Yes

Whether Reportable

Yes