

In the High Court of Punjab and Haryana at Chandigarh

CR- 4725 of 2017(O&M)

Date of Decision:6.9.2017

Urmila and others

---Petitioners

vs.

Krishan Chand and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Deepak Sabharwal, Advocate
for the petitioners.

Mr. Gaurav Aggarwal, Advocate
for respondent No. 1

Rekha Mittal, J.

The present petition has been directed against order dated 12.5.2017 (Annexure P-4) passed by the Civil Judge (Senior Division), Nuh whereby application under Section 151 of the Code of Civil Procedure (in short “the Code”) for recalling order dated 2.12.2010 (wrongly mentioned as 12.12.2010) and allowing the petitioners to file the written statement has been dismissed.

Counsel for the petitioners, in line, with the averments raised in the application (Annexure P-3) has submitted that as their previous counsel Mr. Tahir Hussain, Advocate, never informed the petitioners/applicants/defendant Nos. 2, 7 to 9 that their defence has been struck off vide order dated 2.12.2010 till dismissal of the suit in default and

this fact came to their knowledge when they appeared before the trial court after receiving summons of application for restoration of the suit, the petitioners cannot be denied their valuable right to file the written statement and contest the proceedings, in accordance with law.

Another submission made by counsel is that procedure is a handmaid to administration of justice and technicalities cannot be allowed to stand in the way of substantial justice. In addition, it is argued that the provisions of Order 8 Rule 1 of the Code are directory and not mandatory in nature, therefore, failure of the petitioners to file the written statement within the stipulated period should not result in grave injustice particularly in the circumstances that previous counsel for the petitioners made them to understand that written statement would be filed by them after service of all the defendants is complete and service of the remaining defendants was completed in the year 2013 whereas defence of the petitioners was struck off on 2.12.2010.

Counsel representing the respondent/plaintiff has supported the impugned order with the submission that though he does not dispute the position in law that provisions of Order 8 Rule 1 of the Code are not mandatory or may be directory in nature but as the petitioners neither filed the written statement despite number of opportunities granted for the purpose nor challenged the order dated 2.12.2010 till filing of the instant application in the year 2017, the petitioners are not entitled to indulgence of this Court in exercise of limited revisional jurisdiction. It has further been argued that suit filed by the respondent/plaintiff was dismissed for non-prosecution on 4.3.2015 but immediately thereafter application for

restoration was filed on 25.3.2015. The trial court without correctly examining the order dated 4.3.2015, issued notice to the respondents in the application for restoration of the suit when otherwise no such notice was required to be issued to the defendants/respondents who were not attending to the proceedings in the suit for the past 2/3 years before it was dismissed on 4.3.2015. In addition, it is argued that the present petitioners caused appearance in the application for restoration on 1.9.2016 but the instant application has been filed in May 2017, sufficient to show that the petitioners did not pursue their remedy diligently and cannot be rewarded for the same. In support of his contention, he has placed reliance upon judgment of Hon'ble the Supreme Court *Mohammed Yusuf vs. Faij Mohammad and others* 2009(1) RCR (Civil) 633.

Before advertng to the submissions made by counsel for the parties, it is pertinent to mention at the out set that perusal of the zimni orders passed by the trial court since institution of the suit till decision of the application for recalling order dated 2.12.2010 demonstrates a very disappointing state of affairs i.e. the manner in which the case has been repeatedly adjourned without application of mind, may be, it never received personal attention of the presiding officer(s) concerned. One of the Presiding Officers namely Ravi, Civil Judge (Junior Division), Mewat adjourned the case on 22 occasions for ex parte arguments and the same order was being repeated. Due to single default on the part of counsel representing the respondent/plaintiff to appear in the Court on 4.3.2015, the suit was dismissed in default by the same Presiding Officer. The application filed by the respondent/plaintiff for restoration of the suit remained pending

for report of the Ahlmad on number of dates and thereafter for awaiting the main file without any effort by the Presiding Officer to examine as to why the Ahlmad did not make a report or the file was not received. Without appreciating that order dated 4.3.2015 dismissing the suit was passed in absence of the defendants, the Officer ordered for issuance of notice to the defendants and this is how the petitioners could get an opportunity to file the present application in May 2017, though they appeared in response to notice in September, 2016.

The Registry is directed to call for explanation of the concerned Presiding Officer as to why he could not hear the arguments and adjourned the case 22 times for hearing ex parte arguments.

Perusal of the zimni orders further makes it evident that the petitioners caused appearance in the suit on 17.5.2010 and the case was adjourned to 22.7.2010 for filing written statement. They were allowed to file the written statement on or before 6.9.2010 subject to payment of costs of Rs. 200/-. Again another opportunity was provided to file the written statement on or before 19.10.2010 subject to last opportunity. Still another opportunity was provided to file the written statement upto 2.12.2010 but subject to costs of Rs. 200/-. The petitioners neither filed the written statement nor paid the costs resulting in striking off their defence vide order dated 2.12.2010. The case remained pending for service of the remaining defendants and eventually service of the remaining defendants was completed on 14.3.2013. The suit remained pending till 4.3.2015 when the same was dismissed in default. There is nothing on record suggestive of the fact as to what effort was made by the petitioners to contact their counsel to

know about status/fate of the proceedings. The fact that the petitioners did not bother about the case until they received summons qua application for restoration of the suit in 2016 would go a long way to show that after engaging a counsel, they just slumber on their rights and did not bother about the case. Court cannot inquire into belated and stale claims on the ground of equity. Delay defeats equity. The Court helps those who are vigilant and do not sleep over their rights. In this view of the matter, the trial Court has rightly denied its indulgence to the petitioners.

Hon'ble the Supreme Court of India in **Mohammed Yusuf's case (supra)** set aside the order passed by the High Court whereby the respondents were allowed to file the written statement after a period of three years. The Court by taking into consideration its earlier judgment **Kailash vs. Nanhku and others 2005(2) RCR(Civil) 379** and Judgment **Allen vs. Sir Alfred McAlpine and Sons, (1968) I All ER 543**, has held in paras 15 and 16, reads as follows:-

“15. In view of the authoritative pronouncements of this Court, we are of the opinion that the High Court should not have allowed the writ petition filed by the respondent, particularly, when both the learned trial judge as also the Revisional Court had assigned sufficient and cogent reasons in support of their orders.

16. As indicated hereinbefore, the High Court allowed the writ petition and thereby set aside the orders passed by the trial Court as also the Revisional Court without assigning any reason therefor. The jurisdiction of the High Court under Article 226 and 227 of the Constitution of India is limited. It could have set aside the orders passed by the learned trial Court and the Revisional Court only on limited ground, namely, illegality, irrationality and procedural impropriety.

The High Court did not arrive at a finding that there had been a substantial failure of justice or the orders passed by the trial Court as also by the Revisional Court contained error apparent on the face of the record warranting interference by a superior Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India.”

When the facts and circumstances of the present case are examined in the light of enunciation laid down in **Mohammed Yusuf's case (Supra)**, I find myself unable to accept submissions of the petitioners that the order passed by the trial court suffers from an error apparent on the face of record warranting interference in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

For the foregoing reasons, the petition fails and is accordingly dismissed.

Before parting with this order, it is pertinent to mention that the Registry would ensure that the explanation by the Judicial Officer (Ravi) must be received on or before 15.10.2017.

(Rekha Mittal)
Judge

6.9.2017
paramjit

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