

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No.7597 of 2015 (O&M)

Date of Decision: 30.10.2017

Suresh Kumar

..Petitioner

Vs.

Ranbir and another

..Respondents

CORAM: HON'BLE MR.JUSTICE B.S.WALIA

Present: Mr.Sushil Kumar Verma, Advocate for the petitioner.

Mr.P.S.Jammu, Advocate for respondent No.1.

B.S.Walia, J.(Oral)

1. Challenge in the revision petition is to order dated 30.9.2015 (Annexure P-5) passed by the learned Civil Judge (J.D.) Sirsa in CIS No.0002170/2013 case No.16-misc. in case tilted as Suresh Kumar Vs. Ranbir and another whereby the learned Civil Judge allowed the application filed by the defendant-respondent under Order 9 Rule 13 CPC and set aside ex parte order dated 7.9.2010 as well as ex parte judgment and decree dated 22.9.2012.

2. Brief facts of the case leading to the filing of the instant petition are that the plaintiff-petitioner filed civil suit No.206 of 2010/2012 for possession by way of specific performance of agreement dated 29.5.2009. As per plaintiff-petitioner, notice was served on defendant No.1-respondent No.1 on 16.7.2010 but respondent-defendant No.1 intentionally and deliberately neglected to appear and contest the suit whereupon

respondent/defendant No.1 was proceeded ex parte by the learned trial court vide order dated 7.9.2010 (Annexure P-10) eventually leading to passing of ex parte judgment and decree dated 22.9.2012 (Annexure P-2).

3. Pursuant to the ex parte judgment and decree dated 22.9.2012 the plaintiff-petitioner instituted execution proceedings for the execution of the judgment and decree dated 22.9.2012. Notice in the same was served on respondent JD/defendant whereafter, respondent-defendant No.1 filed an application under Order 9 Rule 13 read with Section 151 CPC for setting aside ex parte proceedings dated 7.9.2010 and ex parte judgment and decree dated 22.9.2012 alongwith an application for condonation of delay in filing the application under Order 9 Rule 13 CPC. The following issues were framed vide order dated 22.1.2015.

- i) Whether the delay in filing the present application be condoned by the Court? OPA.
- ii) If the previous issue is answered in affirmative, whether the present application deserves to be allowed and the exparte judgment and decree dated 22.9.2012 are liable to be set aside? OPA.
- iii) Whether the present application is not maintainable? OPR
- iv) Whether the applicant hasno locus standi and cause of action to file the present application? OPR.
- v) Relief.

4. On the parties adducing their oral as well as documentary evidence and after closing of the evidence, learned CJ (J.D.) Sirsa passed order Annexure P-5 dated 30.9.2015 setting aside the ex parte order dated 7.9.2010 as well as ex parte judgment and decree dated 22.9.2012 subject to payment of costs of Rs.5000/- to be paid by the respondent-defendant to the plaintiff-petitioner.

in pursuance of the order of the learned Civil Judge (Jr.Divn.) Sirsa dated 30.9.2015 allowing the application under Order 9 Rule 13 of the CPC subject to payment of costs of Rs.5000/- by the respondent to the petitioner, the defendant-respondent paid costs of Rs.5000/- to the plaintiff-petitioner on 6.11.2015 whereafter, written statement was also filed by the defendant-respondent and the same was taken on record by the learned trial Court. Issues were framed whereafter the instant revision petition was filed. Learned counsel contends that without disclosing the aforementioned facts, the petitioner obtained stay of the proceedings on 10.3.2016. Learned counsel contends that not only is the petition liable to be dismissed on account of plaintiff-petitioner having accepted the costs in terms of the impugned order for setting aside of the ex parte proceedings thereby having forfeited his right to challenge the impugned order but also on account of intervening circumstances such as the written statement having been filed and taken on record and issues having been framed and the case having been fixed for plaintiff's evidence. Learned counsel for the defendant-respondent further contended that apart from dismissal of the revision petition on merits it was also liable to be dismissed on the grounds of concealment and suppression of material facts.

6. Learned counsel for the plaintiff-petitioner disputed plaintiff-petitioner having accepted the costs whereupon learned counsel for the defendant-respondent produced certified copy issued against application No.6598 dated 18.7.2016 wherein the statement of counsel for plaintiff (respondent) accepting costs of Rs.5000/- on account of allowing of application under Order 9 Rule 13 of the CPC is recorded. Faced with the aforementioned situation, learned counsel for the plaintiff-petitioner had no

answer to the same. Once the position is as aforesaid, then challenge by the plaintiff-petitioner to the impugned order setting aside ex parte order and ex parte judgment and decree does not survive particularly in view of the fact that no right was reserved by the plaintiff-petitioner nor were the costs accepted under protest. Reference in this connection is made to a decision of this Court in **Sandeep and others Vs. Surender and others 2010(1) Law Herald 259**. Relevant extract of the same is reproduced hereunder:

“At the outset, learned counsel for the contesting respondents contended that the plaintiff have accepted the cost amount of Rs.2000/- pursuant to impugned judgment dated 7.3.2009 without any protest, and therefore, the petitioners are debarred from challenging the impugned judgment. There is considerable merit in the contention. Learned counsel for the respondents, in support of the aforesaid contention, has placed reliance on a judgment of Hon'ble Supreme Court in the case of **Krishan Kumar Khanna Vs. International Society for Krishna Consciousness reported as Vol.CXXVII-(2001-1) PLR 704** and on various judgments of Single Bench of this Court namely, **Sushil Kumar Vs. The Panchayat Samiti Kaithal reported as 1989 PLJ 451**, an unreported judgment dated 15.7.2008 passed in Civil Revision No.4286 of 2007 and also a judgment of Division bench of this Court in the case of **Amar Singh Vs. Perhlad and others reported as 1989 PLJ 496**. The ratio of all these judgments is that if cost amount is accepted, the party accepting the cost amount is debarred from challenging the order. Even if cost amount is accepted under protest, even then the order cannot be challenged by the party accepting the cost. In the instant case, the cost amount was accepted unconditionally and therefore, the petitioners are debarred from challenging the impugned judgment of the Appellate Court.”

Accordingly, in view of the position as noted above, the revision petition is dismissed. Interim directions dated 10.3.2016 as continued from time to time are vacated.

(B.S.Walia)
Judge

30.10.2017
Meenu

Whether speaking/reasoned - Yes/No
Whether Reportable - Yes/No