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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No.7254 of 2017

Date of Decision : 07.11.2017

DARSHAN SINGH AND OTHERS

....PETITIONERS

VERSUS

GURMEET SINGH

....RESPONDENT

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

Present: Mr. Atul Goyal, Advocate for the petitioners.

B.S. WALIA, JUDGE (ORAL)

[1] Petitioners have challenged order dated 17.05.2017 (Annexure P-11), passed by the Civil Judge (Jr. Divn.), Ludhiana in suit bearing No.CS-4133-2016, whereby the defence of the defendants-petitioners was struck off as also order dated 14.09.2017 (Annexure P-17), whereby review filed by the defendants-petitioners against the order striking off defence was also dismissed.

[2] Brief facts of the case leading to the filing of the instant revision petition are that on 22.03.2017, counsel engaged by the defendants-petitioners in supersession of their former counsel filed his power of attorney in the case listed before the Court of the learned Civil Judge (Jr. Divn.), Ludhiana. Learned counsel contends that on the said date, apart from the main suit, application under Order 39 Rule 2(a) was also listed. However, defendants-petitioners counsel who was filing power of attorney by superseding the former counsel was not aware of the

aforementioned position nor had any notice been received by the defendants-petitioners or their former counsel with regard to the application under Order 39 Rule 2(a) of the CPC. In the circumstances, the power of attorney came to be placed in the matter pertaining to the application under Order 39 Rule 2(a) of the CPC and adjournment of the same to 10.05.2017 was noted as the date in the civil suit by the counsel for the defendants-petitioners while adjournment of the civil suit on the said date to 24.04.2017 along with imposition of costs of Rs.500/- did not come to the notice of the counsel before the learned trial Court. Consequently on 24.04.2017, none was present in the civil suit on behalf of the defendants-petitioners.

[3] Learned counsel further contends that although new counsel had been engaged in the matter, yet the presence of the former counsel was marked in routine in the zimni order on 24.04.2017 and on the said date, the suit was adjourned to 17.05.2017 with costs of Rs.1000/-. Learned counsel contends that unaware of the listing of the civil suit on 24.04.2017 or for that matter of the same having been adjourned to 17.05.2017, counsel for the defendants-petitioners appeared in the case under Order 39 Rule 2(a) of the CPC on 10.05.2017 assuming it to be the main civil suit. However, on 10.05.2017 the application under Order 39 Rule 2(a) was adjourned to 10.07.2017.

[4] As has been noted above, the civil suit had been adjourned on 24.04.2017 to 17.05.2017, subject to payment of cost of Rs.1000/-. However, on account of being unaware of the position in the background of events as noted above, counsel engaged on behalf of the defendants-

petitioners could not put in appearance before the Court of the learned Civil Judge (Jr. Divn.), Ludhiana in Civil Suit No.CS-2133-2016 titled as '*Gurmeet Singh versus Darshan Singh and others*' on 17.05.2017. Consequently, impugned order dated 17.05.2017 i.e. Annexure P-11 was passed, striking off the defence of the defendants-petitioners on account of their failure to file the written statement as well as to pay the costs.

[5] Learned counsel contends that the counsel for the defendants-petitioners conducting the case before the learned trial Court came to know about the situation on 06.07.2017 when he noticed the civil suit reflected in the cause list while appearing in another case in the said Court. On coming to know of the aforementioned position, defendants-petitioners counsel filed memo of appearance in the civil suit on 06.07.2017. Thereafter the defendant petitioner filed Civil Revision No.4860 of 2017 but the same was dismissed as withdrawn by this Court vide order dated 27.07.2017, with liberty to approach the learned trial Court by moving an appropriate application. Thereafter, the defendants-petitioners filed a review petition before the learned Civil Judge (Jr. Divn.), Ludhiana, praying for recall of order dated 17.05.2017 i.e. Annexure P-11, whereby the defence of the defendants-petitioners was struck off. However, the review petition was dismissed by the learned Civil Judge (Jr. Divn.), Ludhiana vide order dated 14.09.2017, i.e. Annexure P-17, by observing that order dated 17.05.2017 was passed after taking all factual aspects of the matter into account and there was no legal defect in order dated 17.05.2017. In the aforementioned background, instant revision petition has been filed praying for grant of

one opportunity for filing of written statement on the ground that non-appearance before the learned trial Court leading to passing of impugned order dated 17.05.2017 i.e. Annexure P-11 was on account of circumstances beyond the control of the defendants-petitioners and not on account of any ulterior motive or *mala fide* consideration.

[6] Despite notice having been served on the respondent, none has put in appearance. Consequently, the respondent is proceeded against *ex parte*. Learned counsel for the defendants-petitioners further contends that the proceedings are listed before the trial Court for today itself.

[7] I have considered the submissions made by learned counsel for the defendants-petitioners. Learned counsel contends that since the defendants-petitioners counsel was not able to appear in the civil suit due to a *bona fide* mistake, therefore, the impugned order was liable to be recalled and the defendants-petitioners granted one opportunity to file the written statement. Learned counsel contends that despite the entire factual position as has been referred to above having been brought to the notice of the learned Civil Judge (Jr. Divn.), Ludhiana, by way of review petition, the petition for review was dismissed by a cryptic and non speaking order by recording that the impugned order dated 17.05.2017 i.e. Annexure P-11 had been passed after taking all factual aspects of the case into account and there was no legal defect in order dated 17.05.2017. Learned counsel contended that the defendants-petitioners were willing to pay costs as had been ordered by the learned trial Court besides any further costs in addition thereto in order to show their *bona fide* for being granted one opportunity to file the written statement by setting aside the

impugned order particularly in view of the fact that non appearance was solely due to absence of knowledge on account of the mistake as referred to above.

[8] Learned counsel contended that no doubt in view of the decision of the Hon'ble Full Bench in 'Shri Anand Prakash versus Shri Bharat Bhushan Rai and another', 1981 PLR 555, in the absence of a party paying costs for adjournment on the adjourned date, it was mandatory for the Court to disallow prosecution of the suit or defence as the case may be but the aforementioned decision had been considered by a subsequent Full Bench of this Court in 'Prem Sagar versus Phul Chand', 1983 PLR 797 wherein it was held that if the question of payment of costs was not raised on the crucial date fixed for the payment of the same and the case was allowed to proceed further then the same would amount to implied waiver by the party having the right to seek bar to the further prosecution of the suit or defence. On the basis of the same, learned counsel contended that since no objection had been raised by the respondent-plaintiff on the adjourned date and the suit had been allowed to proceed further on account of adjournment from 22.03.2017 to 24.04.2017 and thereafter from 24.04.2017 to 17.05.2017, the right to bar further prosecution of defence was impliedly waived by the respondent-plaintiff. Learned counsel relied upon paragraph No. 16 of the aforementioned. The same is reproduced as under:-

“To conclude, both on principle and precedent, as also on the language of Section 35-B, the answer to the question posed at the very outset is rendered in the

negative. It is held that the party defaulting in the payment of costs on the date fixed for the payment thereof (on which date this issue is not at all raised) cannot on subsequent date or dates be barred afresh from further prosecuting the suit or the defence, as the case may be.”

[9] On the basis of the same, it is contended that inadvertent and unknowing default by the defendants-petitioners to pay the costs on 24.04.2017 and 17.05.2017 did not debar them from further prosecuting the defence.

[10] Learned counsel also relied upon the decision of a Single Bench of this Court in '**Municipal Committee, Kharkhoda** versus **Bhim Singh**, 1987 (1) PLR 435 to contend that an application for recall of order striking off defence for non deposit of costs was maintainable and the said order could be recalled if the Court was satisfied about sufficiency of the cause shown. Learned counsel refers to paragraph No.4 of the aforementioned decision. The same is reproduced as under:-

“For the aforesaid view I draw analogy from Order 9, Rule 4; Order 9, Rule 7; Order 9, Rule 9; and Order 9 Rule 13 of the Code. It is true that in all these rules specific provision is made permitting the defaulting party to move the Court for recalling or modifying the order. Since there is no specific provision under section 35-B of the Code, section 151 of the Code would be attracted under its inherent jurisdiction, if

the Court is satisfied that there was a sufficient cause for the defaulting party for not paying the costs on the date fixed, the Court can enlarge the time under section 148 of the Code. That is why there are certain observations in the Full Bench judgment of this Court, reported as Shri Anand Parkash v. Shri Bharat Bhushan Rai, 1982(1) R.C.R. (Rent) 1 : 1981 P.L.R. 555 which are to the following effect:-

“.....However, where the costs are not paid as result of the circumstances beyond the control of the defaulting party, then the Court will be well within its jurisdiction to exercise its power under section 148 of the Code in favour of the defaulting party if a strong case is made out for the exercise of such jurisdiction.”

[11] On the basis of the same, learned counsel contended that sufficient cause having been made out by showing the circumstances in which the impugned order dated 17.05.2017 came to be passed, it would have been in the interest of justice and upholding of the majesty of law if the learned trial Court had reviewed the order dated 17.05.2017 but the application for review of order striking off defence was dismissed by the learned Civil Judge (Jr. Divn.) by passing a cryptic and non-speaking order. Learned counsel contends that in view of sufficiency of cause having been shown by the defendants-petitioners for non appearance on the date fixed for filing written statement as well as for non payment of

costs, order dated 17.05.2017 i.e. Annexure P-11 striking off the defence of the defendants-petitioners as well as order dated 14.09.2017 i.e. Annexure P-17, whereby review filed by the defendants-petitioners against the order dated 17.05.2017 had been dismissed are liable to be set aside and the defendants-petitioners granted one opportunity to file the written statement.

[12] I have considered the submissions made by learned counsel and am of the considered view that in view of the position as has been noted above, it is apparent that *bona fide* error occurred in the matter, as a result of which the defendants-petitioners went unrepresented in the main suit. The *bona fide* of the defendants-petitioners is evident from the fact that their counsel filed a memo of appearance on 06.07.2017 in the civil suit on noticing the same having been listed while appearing in another case in the same Court. Copy of order recording the filing of memo of appearance by the counsel for the defendants-petitioners on 06.07.2017 has been placed on record as Annexure P-12.

[13] In the circumstances, in order to avoid a technical approach, particularly in view of the civil suit being at the initial stage besides application having been moved under Order 6 Rule 17 of the CPC for amendment of the plaint, the revision petition is allowed, impugned order dated 17.05.2017, i.e. Annexure P-11, striking off the defence of the defendants-petitioners is set aside as is the order dated 14.09.2017, i.e. Annexure P-17, whereby review filed by the defendants-petitioners against order dated 17.05.2017, i.e. Annexure P-11, was dismissed. As a consequence of the setting aside of the impugned orders, the defendants-

petitioners are granted one opportunity for filing written statement,
subject to payment of Rs.10,000/- as costs to the respondent.

[14] Revision petition allowed in aforementioned terms.

(B.S. WALIA)
JUDGE

November 07, 2017
rajneesh

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