

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

CR No.6039 of 2016 (O&M)
Date of Decision : 27.08.2018

Anchal Singh

...Petitioner

versus

Jagdish Kumar

....Respondent

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

Present: Mr. J.K. Chauhan, Advocate for the petitioner.
Dr. Naresh Kaushik, Advocate for the respondent.

B.S.WALIA, J. (Oral)

1. Prayer in the revision petition is for setting aside order (Annexure P-5) dated 31.07.2015 dismissing the application for setting aside ex parte order dated 21.05.2015 (dismissal in default) and (Annexure P-10) dated 29.04.2016 passed by the learned District Judge, Panchkula, dismissing application (Annexure P-6) dated 15.10.2015 moved by the petitioner for setting aside order dated 21.05.2015 dismissing the appeal for non prosecution as well as application (Annexure P-7) dated 15.10.2015 for condonation of delay in filing application Annexure P-6 for setting aside order dated 21.05.2015 Annexure P/11, for accepting the aforesaid applications and deciding the appeal on merits.

2. Learned counsel contends that the petitioner who was then 87 years old and now is 90 years filed a petition for ejectment of the respondent in the year 2009. On dismissal of the ejectment petition, the petitioner filed an appeal before the learned District Judge, Panchkula. However, the same was dismissed vide order dated 21.05.2015 (Annexure

P-11), on account of non-prosecution. Application (Annexure P-4) dated 30.07.2015 was moved for setting aside order dismissing the appeal for non-prosecution. The said application was dismissed vide order dated 31.07.2015 (Annexure P-5), on the ground that while appeal had been dismissed for want of prosecution, application had been moved for setting aside ex-parte proceedings. The learned District Judge, Panchkula, dismissed the application by holding that the application was vague and had been filed with incomplete facts and in fact there was no order proceeding ex-parte against the petitioner. Learned counsel contends that a perusal of application (Annexure P-4) reveals that there was only an error in the head note of the application, wherein prayer for recalling of order dated 21.05.2015, proceeding ex parte against the petitioner was made, whereas a perusal of paragraph No.4 of the application reveals that prayer was in fact made for setting aside order dismissing the appeal for non-prosecution.

3. Learned counsel further contends that the petitioner thereafter moved application (Annexure P-6) dated 15.10.2015 for setting aside order dated 21.05.2015 along with an application for condonation of 75 days' delay in late filing of aforesaid application. Learned counsel contends that the learned District Judge, Panchkula vide order dated 29.04.2016 (Annexure P-10) dismissed the application seeking condonation of delay and consequently the application for setting aside order dated 21.05.2015 on the ground that delay had not been properly explained. In the aforementioned background, prayer is for setting aside the impugned order, for restoration of the appeal and for hearing of the same on merits.

4. Per contra, learned counsel for the respondent contended that the impugned orders had been correctly passed and did not warrant intervention by this Court.

5. I have considered the submissions of learned counsel for the parties and am of the view that for the reasons recorded hereunder, the revision petition is liable to be accepted, impugned orders set aside, appeal restored and heard on merits.

6. Admittedly as on date the petitioner is 90 years of age. Application (Annexure P-4) was moved by the petitioner on 30.07.2015 on the ground that his counsel had informed him about the date of hearing as 21.05.2015, but he had wrongly noted the same as 21.07.2015, therefore, he could not appear on 21.05.2015 and it was only on 21.07.2015, when he went to the office of his counsel that he learnt that the appeal had been dismissed for want of prosecution on 21.05.2015. Application moved for restoration of appeal was dismissed by the learned District Judge, Panchkula, by observing that the application was vague as the same sought setting aside of ex parte proceedings, whereas no such order was passed. However, perusal of application (Annexure P-4) reveals that in paragraph No.4, it has been categorically mentioned that the appeal had been dismissed for non-prosecution on 21.05.2015. In the circumstances, the prayer in the application was for the appeal to be restored to its original number.

7. Thereafter, the petitioner filed an application (Annexure P-6) dated 15.10.2015 for setting aside order dated 21.05.2015 dismissing the appeal of the petitioner for non-prosecution. The said application was filed

along with an application (Annexure P-7) for condonation of 75 days' delay in late filing of the application. In the application seeking condonation of delay, it was mentioned that an application had been filed on 30.07.2015 for restoration of the appeal but the same was dismissed vide order dated 31.07.2015 on the ground that the application was vague. It was further mentioned in the application that the petitioner was 87 years old, bed ridden and after filing of the aforesaid application, the petitioner could not rectify the aforesaid application nor could contact his counsel nor his counsel was having his contact number and it was only on the petitioner contacting counsel through his son on 14.10.2015 that the orders passed by the learned District Judge on 31.07.2015 came to his notice, whereafter application was got drafted and filed on 15.10.2015 along with an application for condonation of delay. However, the learned District Judge, Panchkula vide order dated 29.04.2016 (Annexure P-10) dismissed the application for condonation of delay on the ground that initially the application filed on 30.07.2015 was dismissed on 31.07.2015, while the application dated 15.10.2015 had been filed after expiry of limitation with no valid reason and justification.

8. Having considered the matter as also the submissions of learned counsel for the parties, I am of the view that vide the impugned order substantial justice has been sacrificed at the altar of technicality. Application (Annexure P-4) very categorically reveals that it was for setting aside dismissal of the appeal for non-prosecution. Application ought not to have been dismissed merely on the basis of prayer in the head note but on a reading of the application as a whole. Besides, an appellant is not

required to be present for pursuing the appeal on each and every date once counsel has been engaged, unless otherwise directed by the Court. In the circumstances, it is apparent that the petitioner who is now 90 years old and bed ridden could not be expected to be present in Court on each and every date once he had engaged a counsel to file and argue the appeal. Counsel not having been present at the time of hearing of the appeal, the petitioner could not have been prejudiced as the appellant could not be penalized for the absence of his counsel. In the light of the position as noted above, the application should have been allowed but was not so allowed by the learned District Judge, Panchkula.

9. In view of the position as noted above, I am satisfied that in the circumstances instead of adopting a technical stand, the appeal ought to have restored subject to imposition of costs. Accordingly, the revision petition is allowed. Impugned orders are set aside subject to payment of costs of ₹1,000/- to be paid to the respondent. Appeal is ordered to be restored to its original number and position. Parties are directed to cause appearance before the learned District Judge, Panchkula on 03.10.2018 whereupon the learned District Judge, Panchkula, shall proceed to decide the appeal in accordance with law.

10. Revision petition allowed in aforementioned terms.

(B.S.WALIA)
JUDGE

27.08.2018

rajesh.k.khurana

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No