

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

CR No.1054 of 2015

Date of decision: 12.09.2019

Nasib Kaur and others

....Petitioners

Versus

Thana Singh and others

....Respondents

Coram: Hon'ble Mr. Justice B.S. Walia

Present: Mr. M.K. Garg, Advocate for the petitioners.

Mr. Harsh Aggarwal, Advocate for respondent Nos.2, 3 and 5.

B.S. Walia, J.

1. Prayer in the petition under Article 227 of the Constitution of India is for setting aside order Annexure P-5 dated 17.05.2011 passed by the learned Civil Judge (Jr. Division), Faridkot whereby the application for restoration of the civil suit which was dismissed in default was dismissed. Prayer is also for setting aside order Annexure P-7 dated 03.09.2014 passed by the learned Additional District Judge, Faridkot dismissing the appeal u/s 43 (1) (c) of the CPC against order Annexure P-5 dated 17.05.2011.

2. Brief facts of the case leading to the filing of the present petition are that the civil suit filed by the petitioners was dismissed in default vide order dated 21.07.2009 by the learned Civil Judge (Jr. Division) Faridkot. Application for restoration of the suit was filed by one of the 26 plaintiffs on the ground that he had gone to meet his relatives in Rajasthan but due to ill health, he had sent a message to his counsel and instructed him to appear in the case but the counsel did not appear and as such the suit was dismissed in default vide order of the learned trial Court dated 21.07.2009. He returned from Rajasthan on 24.09.2009 and on the next date i.e. 25.09.2009, came to know that the suit had been dismissed

in default on 21.07.2009. After applying for certified copy of the order, in the

evening of 25.09.2009, he again received message that his relative Jasvir Singh was in very serious condition in Rajasthan due to cancer and as such he again went to meet him on 26.09.2009 and returned on 26.10.2009. After receiving copy of the order, he filed an application for restoration of the suit. The application was dismissed on the ground that petitioner No.2/plaintiff No.14 was having knowledge of the suit and had deliberately not put in appearance nor his counsel had appeared in the suit, as such, the suit was rightly dismissed in default. Reference was also made to photocopy of DDR No.34 dated 10.09.2009 lodged by petitioner No.2/plaintiff No.14 stating that on 08.09.2009 while returning from Ludhiana, he met with an accident and on said basis, it was contended that petitioner No.2/plaintiff No.14 was very well present in the area on 08.09.2009 and a wrong plea had been raised in the application. The learned trial Court held that the DDR proved that petitioner No.2/plaintiff No.14 was very well present in Punjab on 08.09.2009 and 09.09.2009 and further that he had admitted that he had come to know about dismissal of the suit on 25.09.2009 whereas the application for restoration was filed on 29.10.2009 i.e. after expiry of the prescribed period of limitation of one month from date of knowledge. No application for condonation of delay had been filed as required under law therefore, the application was prima facie barred by law of limitation. The learned trial Court also recorded that the case had been fixed for last four dates of hearing for recording of compromise between the parties but none of the plaintiffs had come present therefore, the suit was dismissed in default under Order 9 Rule 8 CPC and that although there were 26 plaintiffs, yet application for restoration had been filed by plaintiff No.14 only. In the light of the above, the learned trial Court dismissed the application vide order Annexure P-5 dated 17.05.2011.

3. Petitioner No.2/plaintiff No.14 filed an appeal under Section 43 (1)

(c) CPC against order Annexure P-5 dated 17.05.2011 which was also dismissed

on the ground that the petitioner had concealed material facts in as much as he was in Ludhiana on 08.09.2009 and 09.09.2009 as evident from DDR No.34 dated 10.09.2009 but had taken up a wrong plea just to bring his application within period of limitation.

4. Learned counsel for the petitioner has relied upon the decision of a Coordinate Bench of this Court in CR No.7972 of 2016 in case titled as **Mahant Darshan Dass Chella of Mahant Brahm Dass Chela of Pritam Dass versus Krishan Gopal** decided on 15.05.2018 in which an application filed by the defendant under Section 10 of the Code of Civil Procedure for stay of the suit was pending consideration for a period of almost 2 years and the case was adjourned for consideration on the application. The main suit was not listed for any proceedings on the day when it was dismissed in default. The Coordinate Bench held that order dismissing the suit in default could not have been passed as the Court could pass an order under Order 9 Rule 8 of the CPC only if the suit was listed for some proceedings and at the most, the learned trial Court could have allowed the application under Section 10 of the CPC filed by the defendant which was listed before the Court on 08.04.2010. Accordingly, in the light of the position as noted above, order dated 08.04.2010 dismissing the suit in default was set aside and the suit restored to its original number.

5. Learned counsel has also relied upon the decision of Hon'ble the Rajasthan High Court in **Gulabo versus Nagar Palika, Phalodi** 2003 (1) CivCC 315 to contend that in case of dismissal of suit in default where the provisions of Order 9 Rule 8 CPC are not applicable, the restoration application would be maintainable under Section 151 CPC and period of limitation for filing application in said case would be 3 years under Article 137 of the Limitation Act. In **Gulabo's** case (supra) it was held that the suit was dismissed in default on the day when it was not listed for hearing but for settlement of issues, therefore,

application for restoration was maintainable u/s 151 CPC for which the period of limitation was governed by Article 137 of the Limitation Act. It was also held that since the suit was fixed for settlement of issues, the plaintiff was not to do anything, therefore, there was hardly any necessity for the plaintiff to be present in Court, thus, the trial Court erred in dismissing the suit even if the counsel appearing for the plaintiff pleaded no instructions. Relevant extract of the decision in **Gulabo's** case (supra) is reproduced as under :

“13. The next point for consideration is whether trial court further erred in dismissing the application filed by the appellant for restoration of suit on the ground that it was barred by limitation. Though the application for restoration of the suit was titled under Order 9 Rule 8 read with Section 151 Civil Procedure Code but from the perusal of the application, it is revealed that the said application was under Section 151 Civil Procedure Code. The application under Order 9 Rule 8 Civil Procedure Code would lie where appellant does not appear when the suit was called on for hearing. In the instant case, the date when the suit was dismissed, it was not called on for hearing but it was for the settlement of the issues and, therefore, the application for restoration filed by the appellant was under Section 151 Civil Procedure Code for which the period of limitation is governed by Article 137 of the Limitation Act. Article 137 provides three years period of limitation for filing such application. The provision contained in Article 137 of the Limitation Act, 1963 provides a period of limitation of 3 years for application for which no period of limitation is provided elsewhere in the schedule or by Section 48 of Civil Procedure Code. Thus, it cannot be said that the application was beyond period of limitation.”

6. In the instant case, the suit was fixed for recording of compromise of the parties. In absence of the plaintiff, the Court at best could have recorded the non-feasibility to effect a compromise and fixed the case for hearing. Application moved by petitioner No.2/plaintiff No.14 does not record the provisions under which it had been moved but it is apparent that the application for restoration was under Section 151 CPC for which the period of limitation under Article 137 of the Limitation Act is 3 years on account of dismissal of the suit in default on a date

when it was not fixed for hearing but only for recording of compromise whereas sine qua non for exercise of powers under Order 9 Rule 8 CPC is that the case should have been fixed for hearing.

7. To similar effect is the decision of a Coordinate Bench of this Court in CR No.750 of 1979 in case titled as **Dalipa vs Rulia 1980(2) ILR (Punjab) 329**.

Relevant extract of the aforementioned decision is reproduced as under :

“4. I have heard the learned counsel and given thoughtful consideration to the arguments. I, however, agree with the contention of the learned counsel for the petitioner. The facts of the case are not disputed. The case was fixed for evidence of the plaintiff for June 6, 1972 and on that date it was adjourned for his evidence for August 28, 1972. Before that date, a miscellaneous application of the plaintiff came up for hearing on July 19, 1972. On that date the plaintiff was not present. Instead of dismissing that application the Court, through oversight, dismissed the suit. The Court could not do so under Order 9, Rule 8, as it provides that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, we Court shall make an order that the suit be dismissed. The words "the suit is called on for hearing" are important. These words show that the suit must be fixed for hearing for the date on which action is taken under the aforesaid rule in the present case, however, the suit was not fixed for hearing. On the other hand miscellaneous application was fixed on that date and in default of the presence of the plaintiff that application could be dismissed. Article 122 of the Limitation Act provides a period of 30 days for restoration of a suit in case it has been dismissed fur default of appearance of the plaintiff.

5. The Article 122 will be applicable it the suit is fixed for hearing and dismissed on account of default of appearance of the plaintiff. In case the suit is not fixed for hearing and the Court dismisses it on that ground it cannot be said that there was default of the plaintiff to appear within the meaning of that Article. In that situation, Article 137, which is a residuary Article and provides a limitation of three years for making applications, will apply. It may also be clarified that the application in such circumstances shall be under Section 151 of the Code. In the aforesaid view I am fortified by the observations of a Division Bench in Rahimuddin Sheikh's case (supra) wherein it was held that where a date for hearing is not fixed or is not notified to the plaintiff or the petitioner, Order 9 Rule 8 has no application and the period of limitation for restoration of the application would be three years under Article 181 of

*the Limitation Act, 1908, which is a residuary article. It was further held that in such a case the restoration application could only be made under Section 151 and not under Order 9 Rule 9 and Article 163 would not apply. Similar view was taken by a Division Bench of Hyderabad High Court in Ram Reddy's case (supra). It may be mentioned that Articles 163 and 181 of the Limitation Act, 1908 are equivalent to Article 122 and 137 of the Limitation Act, 1963. I am in respectful agreement with the above observations. The observations in **Vishwanath Nagnath Andaye's** case (supra) are, however, not of much assistance.”*

8. Learned counsel for the petitioner has also relied upon decision of Hon'ble the Supreme Court in **Rafiz and another versus Munshilal and another 1981 (2) SCC 788** to contend that appeal dismissed in default on account of default of appellant's counsel to put in appearance should not prejudice the interest of an innocent party for misdemeanour or inaction of the counsel. Learned counsel contends that in the instant case, petitioner No.2/plaintiff No.14 had requested his counsel to put in appearance on the date fixed but the counsel did not put in appearance as a result of which the suit was dismissed in default whereas in view of decision in **Rafiz's** case (supra), the petitioner ought not to be prejudiced.

9. Learned counsel for the respondent, on the other hand, has relied upon the decision of a Coordinate Bench of this Court in **Smt. Dev Bala Sehgal versus Devinder Pal Sehgal 2001 (1) PLR 775** to contend that application for restoration of suit dismissed in default could have been filed within 30 days from the date of dismissal in terms of Article 122 of the Limitation Act and the Court could not restore the suit by by passing the mandatory provisions and by invoking the inherent powers under Section 151 CPC.

10. I have considered the submissions of learned counsel for the parties.

11. Admittedly, suit was not fixed for hearing but for recording of compromise on the date the order was passed dismissing the suit in default on account of non-appearance of the plaintiff. In the circumstances, at best, the learned trial Court could have recorded that the compromise was not feasible and

ought to have listed the suit for hearing. The same was not done. Instead the suit was dismissed in default under Order 9 Rule 8 CPC despite the fact that it was not listed for hearing.

12. In the circumstances, application for restoration was not required to be filed under Order 9 Rule 9 CPC for which period of limitation of 30 days is provided under Article 122 of the Limitation Act but under Section 151 for which period of limitation is 3 years under Article 137 of the Limitation Act. Since the Courts below proceeded on the basis that dismissal in default was under Order 9 Rule 8 CPC, and, the application for restoration was maintainable within 30 days under Article 122 of the Limitation Act whereas since the suit was not fixed for hearing, the case could not have been dismissed in default under Order 9 Rule 8 CPC, consequentially, the application was maintainable u/s 151 CPC for which period of limitation under Article 137 is 3 years. Consequentially, the impugned order's are unsustainable and are accordingly set aside. The matter is remanded to the learned trial Court to consider and decide the application for restoration afresh by treating it to be an application under Section 151 CPC for which period of limitation is 3 years under Article 137 of the Limitation Act. Needless to mention, nothing said in this order shall be taken as an expression on the merits of the application and the claim for restoration would be subject to petitioner No.2/plaintiff No.14 establishing before the learned trial Court sufficient cause for not putting in appearance at the time when the case was called out for hearing.

September 12, 2019

ps

(B.S. Walia)
Judge

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No