

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

**CR No.212 of 2016(O&M)
Date of Decision: 29.10.2019**

**Ram Nath Kushal Kumar and another Petitioners
Versus
M/s Ram Kishan and brothers and another Respondents**

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. S.S. Salar, Advocate
for the petitioners.

Mr. Abhinav Goel, Advocate
for respondent No.2.

RAJ MOHAN SINGH, J.

[1]. Petitioners have preferred this revision petition against the *ex parte* judgment and decree dated 11.10.2018 passed by Additional Civil Judge (Senior Division), Nabha, order dated 16.10.2014 passed by Additional Civil Judge (Senior Division), Nabha and order dated 17.09.2015 passed by Additional District Judge, Patiala, vide which application under Order 9 Rule 13 CPC for setting aside the *ex parte* judgment and decree dated 11.10.2008 was concurrently dismissed.

[2]. Plaintiff(s)/respondent(s) filed a suit for recovery under Order 37 CPC on the ground that the defendant took cash loan of Rs.2,18,000/- on 23.12.2001 and Rs.2,18,000/- on

27.01.2002 total amounting to Rs.4,36,000/- from the plaintiff and executed a writing on a pad of his firm in his own handwriting under his signatures. The said amount was entered in the account book of the plaintiff which was maintained in regular course of the business. Defendant agreed to pay the interest @ Rs.1.5% per month on the said amount. Initially, defendant appeared through his counsel, but subsequently, he was allowed leave to defend the suit vide order dated 27.07.2007. Subsequently, the defence of the defendant was struck off vide order dated 25.10.2007 and the case was fixed for evidence of the plaintiff. Learned counsel for the defendant pleaded no instructions on 29.08.2008 and the defendant was proceeded against *ex parte* vide order dated 29.08.2008.

[3]. Trial Court decreed the suit *ex parte* vide judgment and decree dated 11.10.2008 even without adhering to Section 3 of the Limitation Act. Under Section 3 of the Limitation Act, the Court was under legal obligation to see whether the suit was within limitation or not irrespective of the fact whether ground of limitation was set up by the defendant as a defence in the written statement. It was the onerous duty of the Court to see whether the suit filed on 17.01.2005 was within limitation qua the advances allegedly made by the plaintiff on 23.12.2001 and 27.01.2002.

[4]. Application under Order 9 Rule 13 CPC filed by the petitioners has been dismissed concurrently on the premise that the defendant was proceeded against *ex parte* after appearance in the Court and even after the order dated 27.07.2007, vide which leave to defend was granted in favour of the defendant. At the fag end of the suit, learned counsel for the defendant pleaded no instructions and the defendant was proceeded against *ex parte* vide order dated 29.08.2008. The suit was decreed for recovery of Rs.4,36,000/- (principal amount) with interest @ 1% per month from the date of both transactions of Rs.2,18,000/- each i.e. 23.12.2001 and 27.01.2002 till the date of decision i.e. 11.10.2008 and future interest @ 6% per annum from the date of decree till final realisation of the amount.

[5]. Perusal of the material on record would show that the trial Court has passed the *ex parte* judgment and decree on 11.10.2008 without adverting to law of limitation in terms of Section 3 of the Limitation Act. It is true that the statement made by learned counsel for the defendant pleading no instructions on 29.08.2008 did not cast any obligation on the Court to issue notice to the defendant in person because the defence of the defendant had already been struck off vide order dated 25.10.2007. The fact remains that even if, the defendant was proceeded against *ex parte*, the trial Court was under legal

obligation to visualize whether the suit filed by the plaintiff was within limitation or not.

[6]. Vide order dated 14.01.2016 passed by the Co-ordinate Bench, learned counsel for the petitioners was required to obtain instructions whether the petitioners were willing to deposit the entire amount as decreed by the trial Court as condition for affording an opportunity to have the hearing whether the decree must be set aside or not. In continuation of the aforesaid order, the Court again passed an order dated 21.01.2016, requiring the petitioners to furnish security of immovable property to the credit of the suit for the amount in question. The value of the property for depositing the security will be tested by the Court before accepting the security. Interim direction was issued on compliance of the aforesaid requirement. Thereafter, with reference to order dated 02.02.2016 passed by the Civil Judge (Junior Division), Nabha, learned counsel for the petitioners stated before this Court on 02.11.2018 that the order dated 21.01.2016 has already been complied with and necessary security has been executed to the satisfaction of the trial Court. This fact has not been denied by learned counsel for respondent No.2.

[7]. In view of aforesaid peculiar position on record, I deem it appropriate to set aside the *ex parte* judgment and decree

dated 11.10.2008 passed by the trial Court and give opportunity of hearing to the petitioners subject to the condition that the amount of security so deposited by the petitioners shall be treated to be a credit to the suit in the form of attachment before judgment in terms of Order 38 Rule 5 CPC and shall be paid to the successful party only after decision of the suit on merits. At this stage, no opinion is being formed in respect of limitation, as the trial Court would advert to the mandatory requirement of law in accordance with law.

[8]. Since the orders passed under Order 9 Rule 13 CPC are the off-shoots of *ex parte* judgment and decree dated 11.10.2008, therefore, I deem it appropriate to set aside both the orders passed by the trial Court under Order 9 Rule 13 CPC and restore the suit subject to further costs of Rs.25,000/- to be paid to the plaintiff(s)/respondent(s). Payment of costs shall be the condition precedent for granting indulgence by the trial Court in the aforesaid context. Both the parties are directed to appear before the trial Court on 22.11.2019.

29.10.2019

*Prince***(RAJ MOHAN SINGH)
JUDGE****Whether reasoned/speaking****Yes/No****Whether reportable****Yes/No**