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

**Civil Revision No.5864 of 2018
Date of Decision: 11.02.2019**

Ram Kumar

.....Petitioner

Vs

Maya Devi and another

....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. Mukand Gupta, Advocate
for the petitioner.

Mr. J.S. Khiva, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. Plaintiff/petitioner has filed this revision petition against the order dated 20.08.2018 passed by the Civil Judge (Sr. Divn.) Mansa vide which the application under Order 9 Rule 13 CPC filed by the defendants for setting aside the *ex parte* judgment and decree dated 05.11.2015 was allowed and the suit was restored to its original number subject to payment of costs of Rs.6,000/- to be paid to the plaintiff/petitioner.

[2]. Learned counsel for the petitioner submitted that initially the defendants were served through substituted mode of service. They were proceeded against *ex parte* vide order dated 30.10.2013 and the plaintiff was asked to lead *ex parte* evidence on 17.12.2013. The *ex parte* evidence of the plaintiff

was closed and the case was fixed for arguments for 27.05.2014 vide order dated 23.05.2014. On the date fixed i.e. 27.05.2014, Sh. Inderjit Singh, Advocate appeared on behalf of the defendants and an application for setting aside the ex parte order dated 30.10.2013 was filed. Notice of the application was issued to the plaintiff.

[3]. Learned counsel further submitted that in due course, learned counsel for the plaintiff made a statement showing no objection against setting aside of ex parte evidence against the defendants subject to payment of costs. In view of statement made by learned counsel for the plaintiff, *ex parte* evidence led by the plaintiff was set aside subject to payment of costs and the case was adjourned for filing written statement and for making payment of costs. Written statement was not filed and last opportunity was granted vide order dated 15.04.2015. The case was adjourned for 05.05.2015. On 05.05.2015, again written statement was not filed, nor the amount of costs was paid. Last opportunity was granted to the defendant to file written statement on 15.05.2015, still written statement was not filed.

[4]. Learned counsel for the defendants did not appear in the case on 15.05.2015. The Court had no alternative, but to proceed *ex parte* against the defendants and the case was

adjourned for ex parte evidence of the plaintiff. Plaintiff closed his evidence and argued the case on 05.11.2015 and ex parte judgment and decree was passed.

[5]. The application dated 08.12.2015 under Order 9 Rule 13 CPC was filed after two months of the passing of the ex parte judgment and decree beyond the period of limitation.

[6]. The trial Court found that the application under Order 9 Rule 13 CPC was moved on 22.01.2016 after more than two months from the date of judgment and decree dated 05.11.2015. The trial Court after noticing the fact that the shop was taken on lease by the plaintiff from Thakar Dwara and there was no need for the plaintiff to array defendant in the suit. The Court by compensating the plaintiff set aside the *ex parte* judgment and decree dated 05.11.2015.

[7]. I have considered the submissions made by learned counsel for the parties.

[8]. Perusal of orders dated 24.03.2015 and 05.05.2015 would show that the amount of costs imposed upon the defendants was never paid. In view of **Shri Anand Parkash vs. Shri Bharat Bhushan Rai and another, 1982 (1) RCR (Rent)**

1, Full Bench of this Court held that in the event of non-payment of cost(s) on the adjourned date, it is mandatory on the part of the Court to disallow prosecution of suit or defence as the case

may be. Awarding of cost(s) to the aggrieved party, though is the subject matter of discretion of the Court in terms of Section 35-B CPC, but once that discretion is exercised and the same is not complied with by the defaulting party, it shall become mandatory on the part of the Court to disallow further prosecution of the suit or the defence as the case may be. The defendants were firstly proceeded against *ex parte* on 30.10.2013. The *ex parte* proceedings were set aside on the basis of consent given by learned counsel for the plaintiff on 24.03.2015 subject to payment of costs. Thereafter written statement was not filed on 15.05.2015, even learned counsel for the defendants did not appear in the Court and the defendants were proceeded against *ex parte*.

[9]. In view of proviso to Order 9 Rule 13 CPC, defendants were in the knowledge of the proceedings. Though there is no irregularity in summoning of the defendants particularly, when they had appeared through their counsel Sh. Inderjit Singh on 27.05.2014 and initially *ex parte* proceedings were set aside on the basis of concession given by the plaintiff. It was thereafter that the written statement was not filed on behalf of the defendants and they along with their counsel absented on 15.05.2015 and they were again proceeded against *ex parte* on second time. In view of proviso to Order 9 Rule 13 CPC and

non-payment of costs, the defendants are not entitled to be given indulgence by this Court.

[10]. The application under Order 9 Rule 13 CPC filed on 22.01.2016 was patently time barred in view of Article 123 of the Limitation Act. Even if the date of limitation is computed from the date of knowledge, the same cannot be stretched beyond 30 days. The defendants had the knowledge of pending proceedings as the original *ex parte* order was set aside on 24.03.2015 and thereafter learned counsel for the defendant kept appearing on 15.04.2015 and 05.05.2015, however ultimately learned counsel did not appear on 15.05.2015.

[11]. In view of proviso to Order 9 Rule 13 CPC, the defendants had the knowledge regarding pending proceedings, therefore, mere irregularity, if any, would not entail in any favourable order in favour of the defendants. There is no irregularity on record as the defendants had already appeared through counsel on 27.05.2014 and thereafter kept on appearing through their counsel on 24.03.2015, 15.04.2015 and 05.05.2015. In view of non-appearance of the counsel and non-filing of written statement, defence of the defendants was rightly struck off and they were proceeded against *ex parte*. The impugned order is found to be against the ratio of **Shri Anand Parkash's** case (supra), therefore, the same is not legally

sustainable.

[12]. For the reasons recorded hereinabove, I deem it appropriate to set aside the impugned order dated 20.08.2018 passed by the Civil Judge (Sr. Divn.) Mansa as the further prosecution on behalf of the defendants in view of non-payment of costs cannot be granted. Normal consequences to follow.

February 11, 2019

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Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No