

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

CR No.3067 of 2019 (O&M)

Date of Decision : November 18, 2019

Manorama Devi

.....Petitioner

Versus

Meena and another

.....Respondents

CORAM : HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present : Mr. D.K. Prajapati, Advocate
for the petitioner.

Ms. Rahish Pahwa, Advocate
for respondent No.1.

SUDIP AHLUWALIA, J.

CM No.23184-CII of 2019

For the reasons mentioned in the application, the applicant/
respondent No.1 is permitted to place on record the documents
(Annexures R1 and R2), subject to all just exceptions.

CR No.3067 of 2019

This Revision Petition is directed against the Orders passed
by Ld. Civil Judge (Junior Division), Faridabad in respect of
Petitioner's Application filed under Order 9 Rule 13 of the Civil
Procedure Code (for short, 'the CPC') and also of by the Ld. District
Judge, Faridabad in Civil Appeal No.209 of 2018 on 26th April, 2019,
vide which the impugned order of the Ld. Civil Judge, dismissing the

Petitioner's aforesaid Application, was upheld.

2. Background of the matter is that the Petitioner had filed a Suit for Declaration and Permanent Injunction against the present Respondents, who from their side filed a Counter Claim in the form of a Suit for similar reliefs against the Petitioner/Plaintiff herself. The Petitioner's original Suit was dismissed for default on 21st March, 2016, on account of her absence, while she was proceeded against *ex parte* on the same date in the Counter Claim, filed against her. The Counter Claim of the Respondents was finally decreed in their favour by the Ld. Trial Court on 25th April, 2017 vide its Judgment and Decree (Annexure P-1).

3. The Petitioner, thereafter, filed her aforesaid Application under Order 9 Rule 13 of the CPC, in which she sought setting aside the *ex parte* order passed against her on 21st March, 2016 and the Judgment and Decree subsequently pronounced on 25th April, 2017. Such Application (Annexure P-2) was filed on 2nd August, 2017, in which it was contended that she claimed to know about the fate of her Suit as well as the Counter Claim of the Respondents only on 30th July, 2017, after the Respondents apparently told her about the same.

4. It was also the case of the Petitioner, in her aforesaid Application, that her absence in the original proceedings was not intentional, and actually it was the omission on the part of her Counsel

which had resulted in passing of the adverse orders against her. The entire text of the factual background as narrated in the Petitioner's aforesaid Application, is set out as below :-

“1. That in the above mentioned case the defendant/plaintiff could not appear before this Hon'ble court on 21.3.2016 as such previous counsel did not inform the defendant/plaintiff about her case. It is also submitted that the husband of the plaintiff is residing in a Southi Arabia and who was pursuing the matter and when he was India and thereafter the husband of the defendant/plaintiff went to Baharin and previous counsel assured to the husband of the defendant/plaintiff that he will call the defendant/plaintiff whenever the presence of the defendant/plaintiff would be must and on believing the words of the previous counsel husband of the plaintiff/defendant went to Baharin and he regularly making the calls to previous counsel but previous counsel did not pick up the phone and due to the negligency on the part of the previous counsel and due to non-appearance of the defendant/plaintiff the counter claim of the counter claimant has been decreed by the Hon'ble court on 25.4.2017 and the suit of the defendant/plaintiff has been dismissed on 21.3.2016 and this very much facts was also not in the knowledge of the defendant/plaintiff as the counsel did not inform about the same and the Hon'ble court has proceeded ex parte order dt.21.3.2016 and also passed the ex parte judgement dated 25.4.2017 with a direction to handover the vacant possession to the counter claimant.”

5. The Ld. Trial Court, however, relying upon a decision of

the Hon'ble Supreme Court in '**Arjun Singh vs. Mohindra Kumar and others**', AIR 1964 SC 993, was of the opinion that on the basis of the evidence led before it, the Petitioner had been unable to make out a credible case to satisfy the Court that she was prevented by any “sufficient cause” from appearing in the original proceedings when undisputedly she was initially the Plaintiff herself and service of the Counter-Claim of the Defendants was also effected. The relevant observations of the Ld. Trial Court in this regard are set out as below :-

“18. The applicant has not led any evidence to show what deprive her not to contact her Advocate. Mere self serving statement is not sufficient unless corroborative with any other evidence. Even she has not got examined her husband. Whereas the respondents have asserted that husband of the applicant had filed a suit titled as Dhurp Singh V. Jagna Devi and others regarding the same suit property and the suit was dismissed vide order dated 22.09.2016. The said Judgment is placed on record as Ex. R-1 and perusal of the same reveals that the counsel for the applicant Sh. Tajender Kharbanda was putting his appearance in each hearing. Hence, the applicant's version of not knowing the proceedings is not tenable. As the ingredients of the above stated order and Rule is not fulfilled. The applicant is not entitled for any relief.”

6. Even in relation to an additional Issue No.3(a), the Ld. Trial Court was of the view that the Application under Order 9 Rule 13 of the CPC, was in any case time barred since it was not accompanied by

any Application for condonation of delay. This decision was in the backdrop of the fact that in the first place the Ld. Trial Court had determined that the Petitioner's claim of having derived the knowledge of dismissal of her Claim and Decree of the counter Claim on 30th July, 2017, was not proved and it was found that she had intentionally abstained from the proceedings. The Ld. Lower Appellate Court also found no impropriety in the said decision of the Ld. Trial Court.

7. Ld. Counsel for the Petitioner has placed reliance upon the decision of the Hon'ble Supreme Court in '**Tahil Ram Vs. Ramchand, 1993(2) R.C.R.(Criminal) 617**, in which it was held that where an Advocate withdraws from a case the Litigant should not be made to suffer for his Advocate's fault, rather the Court ought to send a notice upon the concerned parties for the factual date. The said decision was thereafter followed by the Supreme Court in '**Malkiat Singh Vs. Joginder Singh**', 1998(1) R.C.R.(Civil) 277, in which similarly an *Ex parte* Decree and Order of the Trial Court, proceeding *ex parte* against the Appellant/Defendant, was set aside after the Apex Court had observed -

“A perusal of the record also reveals that the appellants were neither careless nor negligent in defending the suit. They had engaged a counsel and were following the proceedings. In this fact situation, the trial court, which had admittedly not issued any notice to the appellants after their counsel had reported no

instructions, should have, in the interest of justice, allowed that application and proceeded in the case from the stage when the counsel reported no instructions. The appellants cannot, in the facts and circumstances of the case, be said to be at fault and they should not suffer. In taking this view, we are fortified by a judgment of this Court in Tahil Ram Issardas Sadarangani & Ors. Vs. Ramchand Issardas Sadarangani & Anr. 1993(2) R.C.R.(Criminal) 617: 1993(Supp.) 3 SCC 256.”

8. Reliance has also been placed upon similar decisions of Co-ordinate Benches of this Court in **M/s AA Enterprises Vs. Er. J.S. Sekhon, Purchase Officer-V, PSEB, Patiala, 2009(3) R.C.R.(Civil) 144**, '**M/s. N.K. Electronics Vs. Narinder Kumar**', 2013(4) R.C.R. (Civil) 143, and **Harpal Singh Vs. Kartar Singh, 2017(3) Law Herald 2134**, in which cases, similarly adverse orders, against the absenting party by the Trial Court, were set aside when they were not represented by their engaged Counsel.

9. The facts and circumstances of the present case are however distinguishable from the ratio of the cited decisions. As already noted by the Supreme Court in **Malkiat Singh's case (supra)**, the *Ex parte* Order and Decree against the Appellants, was set aside after it was otherwise satisfied about the diligence of the concerned Defendant which is clear from the observation already reproduced earlier to the effect, “*A perusal of the record also reveals that the*

appellants were neither careless nor negligent in defending the suit. They had engaged a Counsel and were following the proceedings”.

But the case of the Petitioner herself in her restoration Application under Order 9 Rule 13 of the CPC was that she was actually dependent upon her husband for pursuing her Suit and the Counter-Claim filed against her. Further, as reproduced from her pleadings in Para 4 above, the Petitioner's husband, who was pursuing the matter when in India, went to Saudi Arabia, after which he went to Baharin, and the previous Counsel had assured him that he will call the Petitioner whenever her presence was must, and that her husband had gone to Baharin and he regularly kept on making calls to the previous Counsel who did not take the calls, and as such, due to negligence on the part of the Counsel, the Counter-Claim was decreed by the Trial Court. Admittedly, the Petitioner was proceeded against *ex parte* in the Counter-Claim on 21st March, 2016, on which date her own Suit was also dismissed for default. The *Ex parte* Judgment and Decree was passed against her more than one year later on 25th April, 2017. She has however not mentioned about the dates on which her husband had gone either to Saudi Arabia or Baharin as claimed in her Application, but the impression is sought to be created that during the relevant period all along he was based abroad, and repeatedly tried to contact the Petitioner's Counsel telephonically, who however did not take his calls.

10. But this version of the Petitioner is falsified from the Documents (Annexures R1 and R2), placed on behalf of Respondent No.1. These happen to be the certified copy of the Civil Appeal No.179 of 2016, filed by the Petitioner's husband, namely, Sh. Dhruv Singh, against his parents (since deceased) and other siblings, after his original Suit was dismissed on merits by the concerned Trial Court on 22nd September, 2016. The Appeal was filed on 21st October, 2016 and perusal of Page Nos.13 and 14 of the same (Annexure R1) shows that it was filed through the same Counsel namely Sh. Tajinder Kharbanda, Advocate, who was the previous Counsel for the Petitioner, and the Petitioner's husband had signed on Memorandum of Appeal as also its supporting Affidavit on 20th October, 2016, which signatures were attested by the Oath Commissioner, Faridabad, which goes to show that the Petitioner's husband was very much present not merely in India but in Faridabad itself on that date, which fell almost in the middle of the period between 22nd March, 2016 and 25th April, 2016 i.e. the dates on which the Petitioner's Suit was dismissed for default, and when the Counter-Claim was finally decreed *ex parte* in favour of the Respondents.

11. In the circumstances, the Petitioner's story of her husband having repeatedly telephoned her previous Counsel from abroad or that the said Counsel did not accept those calls, stands completely falsified

when undoubtedly the Petitioner's husband was himself present in India and filed his own Appeal through the very same Counsel.

12. Consequently, this Court has no tangible reason to disagree with the decisions of both the Ld. Courts below that absence of the Petitioner from the proceedings is not attributable to any negligence on the part of her Counsel, but that the Application to set aside the *ex parte* Judgment and Decree, which was passed against her more than one year after she was proceeded against *ex parte*, is only a device to linger on the matter and deny the fruits of Decree to the Respondents, although absence from the proceedings is attributable to her own negligent conduct.

13. For this reason, the citations relied upon on behalf of the Petitioner are not found to be helpful to her in the peculiar facts of the present case, when her own version of being dependent upon her husband, whose calls from abroad were not taken by her previous Counsel, are falsified from the documentary material on record.

14. This Court, thus, finds no merits in the present Revision Petition and the same, therefore, stands dismissed.

November 18, 2019

Dpr

(SUDIP AHLUWALIA)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No