

111 CM No.16833-34-CII of 2019 in
RA-CR No.137 of 2019 in
CR No.5864 of 2018

Ram Kumar Vs. Maya Devi and another

Present: Mr. Harsh Aggarwal, Advocate
for the applicant.

CM No.16833-CII of 2019

For the reasons mentioned in the application, the same is allowed. Delay of 133 days in filing the review application is condoned.

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[1]. Vide order dated 11.02.2019, revision petition was accepted and impugned order dated 20.08.2018 passed by Civil Judge (Senior Division), Mansa was set aside. Against the order dated 11.02.2019 passed by this Court, review applicant ventured to file Special Leave to Appeal(C) No.12534 of 2019, in which, following order was passed:-

“Learned Senior Counsel appearing for the petitioners seeks permission to withdraw the Special Leave Petition with liberty to file review application before the High Court.

In view of the request made, the Special Leave Petition is dismissed as withdrawn with the aforesaid liberty.”

[2]. The present review application has been filed under Order 47 Rule 1 read with Section 151 CPC for review of order dated 11.02.2019 passed by this Court.

[3]. Plaintiff/petitioner filed the revision petition against the order dated 20.08.2018 passed by Civil Judge (Senior Division), Mansa, vide which 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.

[4]. While deciding the revision petition, this Court took notice of the fact that defendants were proceeded against *ex parte* on two occasions. They were served through substituted mode of service and were proceeded against *ex parte* vide order dated 30.10.2013 for the first time. Plaintiff was asked to lead *ex parte* evidence on 17.12.2013. *Ex parte* evidence was led by the plaintiff and was closed. Thereafter, the case was adjourned to 27.05.2014 for arguments vide order dated 23.05.2014. On the adjourned date i.e. 27.05.2014, Sh. Inderjit Singh, Advocate appeared on behalf of the defendants and moved an application for setting aside the *ex parte* order dated 30.10.2013. The *ex parte* proceedings were set aside on the basis of no objection made by learned counsel for the plaintiff subject to payment of costs. The case was adjourned for filing written statement and for payment of costs. Written statement

was not filed and last opportunity was granted on 15.04.2015. The case was accordingly adjourned to 05.05.2015. Still the written statement was not filed on 05.05.2015, nor the amount of cost(s) was deposited/paid. Last opportunity was granted to the defendants to file written statement on 15.05.2015. Still the written statement was not filed and learned counsel for the defendants did not appear on 15.05.2015. The Court had no alternative, but to proceed *ex parte* against the defendants on second time vide order dated 15.05.2015.

[5]. In view of proviso to Order 9 Rule 13 CPC, the defendants had the knowledge of the proceedings from the very beginning as they were already appearing through counsel on 27.05.2014 and even first *ex parte* proceedings were set aside on the basis of concession given by learned counsel for the plaintiff. Defendants exhibited their conduct in not filing the written statement despite imposition of costs.

[6]. Consideration was made by this Court firstly on the ground of knowledge in view of proviso to Order 9 Rule 13 CPC and the omission was not considered to be mere irregularity. Even in view of aforesaid proviso, mere irregularity, if any, would not entail in favourable consideration. Defendants kept on appearing through their counsel on 24.03.2015, 15.04.2015 and

05.05.2015. Non-appearance of the counsel and non-filing of the written statement despite imposition of costs, would not give any equitable right in favour of the defendants.

[7]. Secondly, non-payment of costs would disentitle the defendants from filing written statement. It is mandatory on the part of the Court to disallow the prosecution of the suit or defence as the case may be in the event of non-payment of costs. In terms of Section 35-B CPC, the subject matter is discretionary, but once the 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 facts and circumstances of the case did not warrant exercise of any indulgence in favour of the defendants.

[8]. Thirdly, filing of application dated 22.01.2016 was patently time barred in view of Article 123 of the Limitation Act. Since the defendants had the knowledge of pending proceedings as they were proceeded against *ex parte* firstly on 30.10.2013 and secondly on 15.05.2015, therefore, keeping in view the proviso to Order 9 Rule 13 CPC and non-payment of costs, they are not entitled for any indulgence.

[9]. It would be relevant to observe that the main case

was argued by Mr.J.S. Khiva, Advocate for the respondents. The present application has been filed by Mr. Harsh Aggarwal, Advocate after seeking no objection from the earlier counsel. The practice of filing review application with the change of counsel has been deprecated by the Hon'ble Apex Court in **T.N. Electricity Board and another Vs. N. Raju Reddiar and another, 1997 AIR (SC) 1005.**

[10]. In **M. Poornachandran and another Vs. State of T.N. and others, 1997 AIR (SC) 1285**, the practice of filing review application without obtaining no objection certificate from the original counsel was criticised.

[11]. In the present case, no objection certificate has been obtained from the original counsel and the learned counsel for the review applicant sought to re-argue the civil revision on merits.

[12]. After hearing, learned counsel for the review applicant and in view of reasons recorded hereinabove, I do not find any ground to review the order dated 11.02.2019 passed by this Court in CR No.5864 of 2018 on facts as well as in law. This review application is accordingly dismissed. Since review application has been dismissed, therefore, there is no necessity to pass any order in CM No.16834-CII of 2019 and the same is

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accordingly disposed of.

August 29, 2019
Prince

(RAJ MOHAN SINGH)
JUDGE