

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

C.R. No. 70 of 2020 (O&M)

Date of Decision: 19 .2.2020

Naga Estate & Developers Pvt. Ltd. & another

...Petitioner

Vs.

Mahipal and others

...Respondents

CORAM:- HON'BLE MR.JUSTICE RAJIV NARAIN RAINA

Present: Mr. Lokesh Sinhal, Advocate
for the petitioners.

RAJIV NARAIN RAINA, J.

1. Challenge in the present petition is to the order dated 23.11.2019 (P-6), passed by the learned Civil Judge (Junior Division), Gurugram, whereby application filed by the plaintiff under Order 9 Rule 4 CPC read with Section 151 CPC was accepted against order dated 23.7.2018 (P-2) passed under Order 9 Rule 2 CPC.

2. Facts relevant for the purpose of decision of the present petition are that the plaintiff (respondent No.1 herein) had filed a suit on 20.5.2013 for declaration with the relief of possession relating to suit property against the present petitioner along with others. Initially, the defendants could not be summoned as the plaintiffs failed to file the process fee. Thereafter, even defendants No.3 to 6 were served but defendants No.1 & 2 could not be served. The trial Court vide order dated 6.11.2015 directed that summons are required to be served upon defendants No.1 & 2 by all modes except publication. However, defendants No.1 & 2 could not be served by the plaintiff. On 2.7.2018, the trial Court granted one last opportunity to the plaintiff to furnish complete/correct addresses of defendants No.1 & 2 failing which necessary consequences under O.9 Rl.2 CPC would follow.

However, the plaintiff still could not serve the defendant and the trial Court on 23.7.2018 passed the following order:-

“Notice not issued to defendant Nos.1 & 2 as the plaintiff has failed to furnish correct address/complete address of the aforesaid defendants. On the last date of hearing this court had made it clear that if non-service of notice upon defendant Nos.1 & 2, is on account of default on the part of the plaintiff to furnish complete address/correct address of the defendant Nos.1 & 2, then necessary consequences under law would follow. Accordingly, in view of repeated defaults on the part of the plaintiff in furnishing correct address/complete address of defendant Nos.1 & 2, the plaintiff’s suit qua defendant Nos.1 & 2 stands dismissed. Now to come up on 28.8.2018 for filing written statement and reply on behalf of defendant Nos.5 & 6.”

3. After dismissal of the suit against defendants No.1 & 2, pleadings were completed. The plaintiff also failed to lead its evidence and the same was closed by order dated 11.2.2019. During the period of recording of evidence led by the defendant, the plaintiff filed an application under O.9 R1.4 CPC read with S.151 CPC for restoration of the suit against defendants No.1 & 2 and under O.5 R1.20 CPC for issuance of notice to them through publication. Notice of the said application along with application for condonation of delay was issued to defendants No.3 & 4, who filed their reply to the said applications. After hearing arguments of counsel for the parties, the trial Court passed the impugned order dated 23.11.2019 (P-6) allowing the application of the plaintiff.

4. Mr. Lokesh Sinhal, learned counsel for the petitioner argues that the plaintiff after accepting the order dated 23.7.2018 (P-2) dismissing the suit against defendants No.1 & 2 could not file an application for restoration of suit qua

defendants No.1 & 2, even after closing of evidence of the plaintiff by order dated 11.2.2019 and during the evidence being led by defendants No.3 & 4.

5. Mr. Sinhal further argues that the application under O.9 Rl.4 CPC was not even maintainable. Significantly, the suit was dismissed by the trial court under O.9 Rl.5 CPC and not under O.9 Rl.2 CPC. O.9 Rl.2 CPC would be applicable only when suit is dismissed where summons have not been served upon the defendants in consequence of the failure of plaintiff to pay court fee or postal charges or to submit copies of the plaint. Mr. Sinhal further submits that the plaintiff was given one last opportunity to furnish complete/correct addresses of the unserved defendants which could be done only under O.9 Rl.5 CPC and there is no provision to restore the suit if the same has been dismissed under O.9 Rl.5 CPC. Mr. Sinhal relies on the following judgments on the point that the application for restoration of suit is not maintainable if the suit is dismissed under O.9 Rl.5 CPC:-

- (i) ***Kapoor Singh vs. Sinder Kaur and others, 2011(5) RCR (Civil) 635(Punjab and Haryana)***
- (ii) ***Smt. Madhuri Prasad & another vs. Nakul Lal, 2012 (4) Civil Court Cases 717 (Jharkhand High Court)***
- (iii) ***Vishwanath Satwaji Gaikwad vs. Laxman Abaji Kavale & others, 2001(2) Civil Court Cases 550 (Bombay High Court)***

6. The following two questions of law arise in the present petition for adjudication of this Court:

- “1. *Whether the application filed by the plaintiff under O.9 Rl.4 CPC is not maintainable?*
- 2. *Whether the plaintiff after dismissal of the suit against defendants No.1 & 2, closing its evidence by order and during the evidence led by the defendants can file an application for restoration of the suit against said defendants?*

7. In order to determine the present controversy, it would be appropriate to reproduce the provisions of O.9 Rls.2 & 5 of the CPC:-

“2. Dismissal of suit where summons not served in consequence of plaintiffs failure to pay cost- Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court fee of postal charges (if any) chargeable for such service, or failure to present copies of the plaint or concise statements, as required by rule 9 of order VII, the Court may make an order that the suit be dismissed :

Provided that no such order shall be made, if notwithstanding such failure the defendant attends in person (or by agent when he is allowed to appear by agent) on the day fixed for him to appear and answer.”

“5. Dismissal of suit where plaintiff after summons returned unserved, fails for (seven days) to apply for fresh summons-

(1) Where after a summons has been issued to the defendant, or to one of several defendants, and returned unserved the plaintiff fails, for a period of (seven days) from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that-

(a) he has failed after using his best endeavours to discover the residence of the defendant, who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.”

8. Suit of the plaintiff against defendant Nos.1 and 2 was dismissed vide order dated 23.7.2018 for default on the part of the plaintiff to furnish correct/complete addresses of defendants No.1 & 2 and non-compliance of the order dated 2.7.2018. Relevant part of order dated 2.7.2018 is reproduced as under:-

“In these circumstances in order to avoid further delay this Court grants one last opportunity to the plaintiff to furnish complete/correct address of the defendant Nos.1 and 2, so that notices could be served upon them, failing which necessary consequences under Order 9 Rule 2 of the CPC, qua defendant Nos.1 & 2 would follow.”

9. It is clear from the order dated 2.7.2018 that the trial Court would have had to invoke the provisions of O.9 Rl. 2 CPC in case the plaintiff failed to serve the defendants. Therefore, the consequential order dated 23.7.2018 dismissing the suit of the plaintiff was passed under O. 9 Rl.2 CPC and not under O.9 Rl.5 CPC as argued by Mr. Sinhal. Hence, the application filed for restoration of the suit is held to be maintainable.

10. As far as delay in filing the application for restoration is concerned, the learned trial Court has rightly observed that technicalities should not come in the way for the cause of advancement of justice. The relevant part of the impugned order dated 23.11.2019 reads as follows:-

“It is clear from the aforesaid facts that the main grievance of the applicants in the present case is against defendant Nos.1 & 2 in whose favour incorrect entries had been recorded. Defendant Nos.3 & 4 against whom the present suit is being continued have merely acquired rights in the suit property through defendant Nos.1 & 2. In light of the aforesaid fact, the applicants cannot be said to be having any direct cause of

action against defendant Nos.3 and 4 and their suit would invariably be dismissed on technical grounds against defendant Nos.3 & 4. In these circumstances, this Court is of the view that the applicants will be prejudiced irreparably if their suit against defendant Nos.1 and 2 is not restored.”

11. As regards the limitation period and delay in filing the application, the Supreme Court in ‘**Collector, Land Acquisition, Anantnag and another v. Mst. Katiji and Others**’ AIR 1987 SC 1353 and ‘**Firdous Omer (D) by LRs. and others v. Bankim Chandra Daw (D) by LRs. and others**’ 2006(4) RCR (Civil) 120, have observed that in such like matters, application should not be dismissed on the ground of limitation and a lenient view is to be taken while condoning the delay. In ‘**Karam Pal v. Ramesh Jain**’ 2009(2) RCR (Civil) 613, a liberal view was taken by this Court on the point of condoning delay holding that even if there is some lapse on the part of petitioner or his counsel, party should not be made to suffer who is regularly appearing in the Court especially when other party can be compensated with the payment of costs. Thus, the Court below has rightly accepted the application subject to payment of costs to defendants No.3 & 4 so as to give finality to the litigation because plaintiff may not move any application for de novo trial at a subsequent stage and would be irreparably prejudiced.

12. In view of the discussion made above, the present petition is without any merit and the same stands dismissed in *limine*.

(RAJIV NARAIN RAINA)
JUDGE

19.2.2020

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Whether speaking/reasoned : *Yes*
Whether reportable : *Yes/No*