

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

CR No.634 of 2018(O&M)

Date of decision: 27.1.2020

Rohtash

.....Petitioner

VERSUS

Harbhajan (deceased) through LRs and others

.....Respondents

CORAM: **HON'BLE MRS. JUSTICE REKHA MITTAL**

Present: Mr. Ajay Jain, Advocate for the petitioner.

Mr. Bhupinder Bagga, Advocate for respondents No.1 to 4.

REKHA MITTAL, J.

Challenge in the present petition has been directed against order dated 22.01.2018 (Annexure P-5) passed by the Civil Judge (Senior Division), Rewari vide which application filed by plaintiffs No.2 to 4/respondents No.2 to 4 for restoration of the suit qua them has been allowed.

A brief backdrop of the case is that Harbhajan and his three grandsons filed suit for declaration, permanent injunction and in the alternative for partition by metes and bounds of suit property in the year 2011. Harbhajan died during pendency of suit and Bhim Singh, father of plaintiffs No.2 to 4, was impleaded as his legal representative on the basis of Will. The suit filed by plaintiffs No.2 to 4 was dismissed in default vide order dated 19.07.2016.

A relevant extract therefrom reads as follows:-

“Case called several times since morning but none has appeared on behalf of plaintiff No.2 to 4. Waited sufficiently. It is already 3 PM, no further wait is justified. It seems that plaintiff No.2 to 4 are not interested in pursuing the matter further, hence, the present suit is dismissed in default qua plaintiff No.2 to 4.”

The suit continued to be prosecuted on behalf of Harbhajan (since deceased) – plaintiff No.1. When the case was fixed for evidence in rebuttal, respondents/plaintiffs No.2 to 4 filed the instant application by invoking Order 9 Rule 9 and Section 151 of the Code of Civil Procedure, 1908 (in short 'the Code') seeking restoration of the suit dismissed in default qua them. Later, they also filed an application under Section 5 of the Limitation Act, 1963 for condonation of delay in filing the application for restoration of the suit. Both applications were decided vide order dated 22.01.2018, impugned in the present petition.

Counsel for the petitioner would argue that as suit of respondents No.2 to 4 was dismissed under Order 9 Rule 10 of the Code, application filed under Order 9 Rule 9 of the Code is not maintainable. It is further argued that application under Order 9 Rule 9 of the Code could be maintained had the suit been dismissed under Order 9 Rule 8 of the Code.

Another submission made by counsel is that application seeking restoration of the suit was filed at the fag end of trial, therefore, the same should not have been allowed. In addition, it is argued that since respondents/plaintiffs No.2 to 4 failed to avail appropriate remedy to file

revision against order dated 19.07.2016, the impugned order suffers from illegality and liable to be set aside.

Counsel, in response to a query, that this Court can examine order dated 19.07.2016 in exercise of its revisional jurisdiction under Section 115 of the Code or power of superintendence under Article 227 of the Constitution of India, would argue that this Court is not competent to examine the order in exercise of power under Article 227. For this purpose, reliance has been placed upon judgment of Hon'ble the Supreme Court **Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil, 2011 (1) RCR (Civil) 566.**

Counsel representing respondents No.2 to 4 has supported the order with the submission that the trial Court without appreciating that cause of grievance expressed by plaintiffs No.2 to 4 is common and identical to that of plaintiff No.1 and suit could be allowed to continue on their behalf as if they were present but still dismissed the same. It is further argued that the trial Court has taken into consideration various facts and circumstances on record to uphold plea of the respondents/plaintiffs that they did not have knowledge of dismissal of suit on their behalf or they were under bona fide impression that suit was proceeding on their behalf as well and for that reason Mahesh Kumar – plaintiff No.3 examined as a witness in the year 2013 was cross examined in the year 2017. Counsel would further argue that no prejudice shall be caused to the petitioner (defendant No.19 therein) even if suit on behalf of plaintiffs No.2 to 4 is restored as the plaintiffs do not want to lead any further evidence.

I have heard counsel for the parties, perused the paper-book particularly various annexures appended with the petition and copies of documents supplied during the course of hearing.

Indisputably, the plaintiffs of the suit, filed way back in the year 2011, are closely related. The original plaintiff No.1 Harbhajan is the grandfather of plaintiffs No.2 to 4. On death of Harbhajan in 2014, Bhim Singh father of plaintiffs No.2 to 4 was impleaded his LR on the basis of Will. The plaintiffs filed the suit pleading a common cause of action in respect of their entitlement to seek declaration, permanent injunction and in the alternative partition by metes and bounds.

Order 9 Rule 10 of the Code deals with a situation where there are more than one plaintiff in a suit and one or more of several plaintiffs became absent. A relevant extract therefrom reads as follows:-

“10. Procedure in case of non-attendance of one or more of several defendants.- Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the court may, at the instance of the plaintiff or plaintiffs appearing permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such Order as it thinks fit.”

Perusal of the aforesaid extract leaves no manner of doubt that even if one or more than one plaintiffs out of several plaintiffs did not appear, the Court has the discretion to proceed in the same manner as if all the plaintiffs had appeared but at the same time the Court may make such an order as it thinks fit. In the case at hand, the Court has not assigned any reason for passing an order dismissing the suit on behalf of plaintiffs No.2

to 4 even though it could proceed with the suit as if all the plaintiffs had appeared.

The first contention raised by the petitioner that application under Order 9 Rule 9 of the Code is not maintainable is patently misconceived for the reason that mere mentioning of a wrong provision would not make the application non-maintainable. Since in the Code, there is no provision that if a suit has been dismissed on behalf of absentee plaintiff or plaintiffs out of several plaintiffs how the absentee plaintiff(s) can seek restoration of the suit, provision of Section 151 of the Code can be invoked.

Section 151 of the Code deals with inherent powers of the Court and says “nothing in this code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of the justice or to prevent abuse of the process of the court”. In this view of the matter, it can safely be held that the trial Court exercised its inherent jurisdiction for allowing application filed by respondents/plaintiffs No.2 to 4. This apart, since the suit has been filed for grant of declaration, permanent injunction and in the alternative for partition by metes and bounds, the same otherwise cannot be decided in absence of plaintiffs No.2 to 4 who have claimed themselves to be co-owners of the suit property. Indisputably, in a suit for partition, in case one or more co-owners in the joint property are not impleaded as a party, the Court on its own motion can permit addition of such party for the purpose of complete and effective adjudication of the matter in controversy. In the given circumstances, I find it difficult to accept contention of the petitioner

that the order impugned suffers from any legal flaw that would call for intervention in exercise of extra-ordinary jurisdiction of the Court.

Though in view of discussion made hereinbefore, I have not examined the second aspect of the matter as to whether the Court should exercise its revisional or powers of superintendence to examine order dated 19.07.2016 but the judgment relied upon by counsel for the petitioner has got no bearing in the given facts and circumstances.

For the foregoing reasons, finding no merit, the petition fails and is accordingly dismissed. However, nothing stated hereinbefore shall be construed as an expression of opinion on merits of the case.

JANUARY 27, 2020

‘D. Gulati’

(REKHA MITTAL)

JUDGE

Whether speaking/reasoned	:	yes/no
Whether reportable	:	yes/no