

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Civil Revision No.7077 of 2018

Date of Decision: 06.01.2023

Darshan Singh & Others

..... Petitioners

Versus

Malkiat Singh & Others

..... Respondents

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr. Sandeep Arora, Advocate for the petitioners.

Mr. Rishabh Gupta, Advocate for the respondents.

Nidhi Gupta, J.

Prayer in the present Revision Petition is for setting aside impugned order dated 07.10.2018 Annexure P14 whereby application filed by the petitioners (Annexure P12), seeking setting aside of order dated 11.07.2018 (Annexure P11) vide which they were directed to be proceeded against ex parte has been dismissed.

Brief facts of the case are that the respondent No.1/plaintiff had filed a suit for recovery of Rs.6 lakhs as damages/compensation on account of malicious and false complaints allegedly filed against him by the petitioners and respondents No.2 and 3 herein. The evidence of the plaintiff was closed by order dated 19.12.2017. An application filed by the petitioners before the learned trial court to recall the plaintiff for cross-examination was allowed on 7.4.2018. Ultimately the matter was listed for 13.7.2018 for cross-examination of the plaintiff. However on 10.7.2018 an application (Annexure P-9), was moved by the plaintiff for preponement of hearing of the matter which was

allowed by the trial court and matter was fixed for 11.7.2018. Purportedly notice of the said application was issued to counsel for the petitioners for 11.7.2018. It is the pleaded case of the petitioners that counsel for the petitioners never received any notice of the application for preponement and neither had he refused to accept the summons. However, the application for preponement was allowed and matter was preponed to 11.7.2018 itself whereupon all the petitioners were directed to be proceeded against ex-parte. Thereafter, petitioners immediately filed application dated 13.7.2018 (Annexure P12) for setting aside of above said order dated 11.7.2018 whereby they had been directed to be proceeded against ex-parte. However the same has been dismissed by the learned Court below vide impugned order dated 7.10.2018.

It is submitted by learned counsel for the petitioners that the learned Court below has acted in a most irregular and arbitrary manner and that even if there had been some misunderstanding in receiving summons on behalf of counsel for the petitioners then fresh notice ought to have been issued to them and the matter could not have been decided in their absence. It is further submitted that even if it is accepted that there had been any refusal on the part of counsel for the petitioners to accept summons, the petitioners cannot be made to suffer on this account. Moreover, it is submitted that grave injustice will be caused to the petitioners if impugned order is not set aside.

In response, it is submitted by learned counsel for the respondent No.1/plaintiff that perusal of the impugned order shows that it has been very clearly found that learned counsel for the

petitioners/defendants had refused to accept the said notice and it is well settled that when notice is refused it is deemed as proper service.

I have heard learned counsel for the parties.

A brief sequence of events is required to be noticed in order to properly appreciate the matter. On 05.07.2013, the learned trial Court gave last opportunity to respondent No.1/plaintiff to file RC/AD for service of the petitioners/defendants subject to cost of Rs.500/- and adjourned the case for 21.08.2013. However, on 21.08.2013, no one appeared on behalf of respondent No. 1/plaintiff and no cost was deposited and accordingly, the suit was dismissed in default for non-appearance of respondent/plaintiff.

Subsequently, the suit was restored and petitioners/defendants No.1, 2 and 4 appeared through counsel and filed written statement on 28.11.2016. Thereafter, respondent No.1/plaintiff was afforded numerous opportunities i.e. - on 31.07.2017, 17.08.2017, 13.09.2017, 22.09.2017, 23.10.2017, 30.11.2017, 13.12.2017, 18.12.2017 and 19.12.2017 - for leading evidence however, examined only himself as PW1. Whereafter, the evidence of plaintiff was closed by order of the Court on 19.12.2017.

On 16.2.2018, an application under Section 151 CPC was filed by the petitioners for granting permission to recall the witness of the plaintiff and case was adjourned to 9.3.2018 for filing reply to the said application. On 9.3.2018, reply was not filed and case was adjourned to 7.4.2018 for filing reply. The said application was ultimately allowed by the

Court below vide order dated 7.4.2018 by granting opportunity to the petitioners to cross examine the witness and case was adjourned to 14.5.2018 for the said purpose. Thereafter, case was adjourned to 13.7.2018 for cross- examination of the plaintiff.

However, in the meantime on 10.7.2018, an application (Annexure P-9) for pre-poning the case was filed by the plaintiff on the ground that on 13.7.2018, which was the date fixed, the plaintiff had to go abroad and therefore, case be pre-poned for his cross examination. The Ld. Court below vide order dated 10.7.2018 itself (Annexure P-10) issued notice of the pre-poning application to the Counsel for the petitioners namely Sh. SK Kapoor for 11.7.2018.

On 11.7.2018 at time of hearing, it was reported by the process server that Counsel for the petitioners had refused to accept notice by saying that *'he is not counsel for defendants no. 1, 2 and 4'/* petitioners. Acting upon the said report of process server, the Ld. Court below vide order dated 11.7.2018 proceeded Ex-parte against the petitioners/ defendants no.1,2 & 4 observing that *"Sh. SK Kapoor, Advocate, has refused to accept the summons in the present case and it will be deemed he and through him defendant no. 1, 2 and 4 who had been served with the notice in the present case. It further appears that denial of Shri SK Kapur, Advocate is just to delay the proceedings of this case."*The case was then adjourned for further evidence for 13.7.2018, the date already fixed.

On 13.7.2018, when Sh. SK Kapoor the Counsel for the petitioners appeared before the Court, it came to notice that the

petitioners had been proceeded against ex-parte on 11.7.2018. Immediately on the same day, Counsel moved an application for setting aside the ex-parte order inter-alia on the ground that due to some misunderstanding, report of refusal of summons had been made, whereas, Counsel had never made such refusal and it was only on 13.7 2018, when the Counsel went to the Court to mark his presence, he came to know regarding the ex-parte order dated 11.7.2018 passed by the Id. Court below. Reply to said application was filed by the respondent no. 1 through his counsel thereby denying the averments made and praying for dismissal of the application. However, vide Impugned order dated 7.10.2018, the Id. Court below dismissed the petitioners' application to set aside the ex-parte proceedings against them by observing that the plaintiff has already gone abroad and in case ex-parte proceedings against the petitioners is set aside, the plaintiff will suffer much loss as he will have to return to India only for the present case for his cross examination.

Accordingly, a perusal of the record of the case as noted above shows that petitioners have pursued the matter diligently. In my view, the Id. Court below erred in passing impugned order as it is clear from the above facts that the petitioners were proceeded against ex-parte post haste.

Evidence of the plaintiff was closed vide order dated 19.12.2017 and thereafter, the case was adjourned to 14.05.2018 for the petitioners/defendants 1, 2 and 4 to cross-examine respondent No.1/plaintiff; whereafter, the case was adjourned to 13.07.2018 for said purpose. Application for preponement of the case was moved by the

respondent/plaintiff only on 10.07.2018 on the ground that on 13.07.2018 which was the date fixed, he had to go abroad and therefore, the case be preponed for his cross-examination.

In my view, it is unlikely that the respondent/plaintiff was not aware of the fact that he had to travel abroad on 13.07.2018 and could well therefore, have moved the application for preponement of the case any time in the intervening two months between 14.5.2018 and 13.7.2018. It is not the case of respondent No. 1/ plaintiff that he had to leave suddenly due to some emergency and was therefore, constrained to move application for preponement at the last minute only on 10.7.2018. It is also further unlikely that the respondent No.1/plaintiff being NRI has not come to India during the intervening period.

Moreover, the fact that application for setting aside order dated 11.7.2018 was moved by same counsel for the petitioners namely Sh. SK Kapoor belies the statement of the process server. Even if that be not the case, the petitioners cannot be made to suffer on account of any inadvertent/purported error on part of their counsel. In this regard, reliance may be placed upon law laid down by the Hon'ble Supreme Court in **Civil Appeal No.1415 of 1981** titled as **"Rafiz and another Vs. Munshilal and another"**; **Civil Appeals No.1027---1028 with 1029-1030 of 1992** and **CA Nos.8465-8466 of 2022** titled as **S. Amarjit Singh Kalra (dead) by LRs and others Vs. Smt. Pramod Gupta (dead) by LRs and others WITH Smt. Ram Piari (dead) by LRs and others Vs. Smt. Pramod Gupta (dead) by LRs and others & Sahib Singh Rathi and others Vs. Smt. Gulab Sundri Bapna (dead) by LRs and others"** wherein it has been held that interest of the

innocent party should not suffer for misdemeanor or inaction of his counsel.

In view of the above facts, the impugned order dated 07.10.2018 is set aside and the present Revision Petition stands allowed.

06.01.2023
Sunena

(Nidhi Gupta)
Judge

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No