

CR-4095-2017 (O&M)

201

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR-4095-2017 (O&M)

Date of decision: April 26, 2023

Naranjan Singh and another

....Petitioners

versus

Kuldeep Kaur

....Respondent

CORAM: HON'BLE MR. JUSTICE ARUN MONGA**Present:-** None for the petitioners.

Mr. G.C. Dhuriwala, Advocate,
 Ms. Alisha Sharda, Advocate for the respondent.

None for applicants/proposed respondents No.2 to 5.

ARUN MONGA, J. (ORAL)

Challenge herein is to impugned order dated 17.05.2017 (Annexure P-1) whereby application filed by petitioner-plaintiffs under Section 5 of Limitation Act for condonation of delay in filing first appeal against order 07.03.2015 (Annexure P-3) was dismissed being not maintainable. Further relief sought is to set aside impugned order dated 07.03.2015 (Annexure P-3) passed by learned Civil Judge (Junior Division), Rajpura whereby application (Annexure P-4) filed by respondent-defendant under Order IX Rule 13 of Code of Civil Procedure, 1908 (for short 'CPC') seeking to set aside *ex parte* order dated 28.09.2010 (Annexure P-14) as well as judgment/ decree dated 11.11.2011 (Annexures P-15 and P-16) passed in Civil Suit No.99-T/21.12.2006/ 24.04.2009, was accepted and period of limitation for filing aforesaid application was also condoned.

2. None appears on behalf of petitioners. I have heard learned counsel appearing on behalf of respondent and perused the case file.

3. It is averred in the revision petition that application under Order IX Rule 13 of CPC filed by respondent-defendant is misuse of process of law since the same was based on concealment of certain material facts. Impugned order dated 07.03.2015

CR-4095-2017 (O&M)

(Annexure P-3) has been passed without appreciating evidence on file. It is further asserted in the instant petition that petitioners had filed CR-3550-2015 against aforesaid order, which was dismissed as withdrawn vide order dated 10.09.2015 (Annexure P-22). Impugned order dated 17.05.2017(Annexure P-1) has been passed illegally while declining to condone the delay in filing appeal against order dated 07.03.2015 before learned First Appellate Court.

4. From the perusal of impugned order dated 07.03.2015 (Annexure P-3) passed by learned trial Court accepting the application under Order IX Rule 13 of CPC, it is borne out that not only specific issues were framed, but threadbare evidence was allowed to be adduced by rival sides and it is only after due appreciation of the same, aforesaid application was allowed. In other words, a separate elaborate trial was conducted before giving cogent findings *qua* following issues No.1 to 3 and 3A:

- “1. *Whether there are sufficient grounds for setting aside the ex parte judgment and decree dated 11.11.2011*” OPA
2. *Whether present application is not maintainable*” OPR
3. *Whether applicant has not come to the court of equity and has suppressed the true facts from the Court*” OPR
- 3A. *Whether the present petition is beyond the period of limitation?* OPR
4. *Relief.*”

5. After analyzing and evaluating the evidence, the learned trial court determined that the case was suddenly rescheduled from November 21, 2011 to November 11, 2011. However, the defendant and her counsel were not ever informed or served notice of the rescheduled date, which resulted in an *ex parte* judgment being passed. It was discovered through evidence that the defendant became aware of this only on December 27, 2011. Subsequently, an application was filed on January 10, 2012 to recall *ex parte* judgment and decree, which was within the time limit from the date of knowledge. The trial court thus correctly made the decision to set aside the *ex parte* judgment and decree, and there is no reason for this decision to be challenged.

6. Relevant extract of another impugned order dated 17.05.2017, dismissing the application for condonation of delay in filing appeal against order

CR-4095-2017 (O&M)

dated 07.03.2015 filed by plaintiff/petitioner herein, for ready reference, is reproduced herein below:

“7. The learned counsel for the applicants has argued that there are sufficient reasons to condone the delay in filing the present appeal. He further contended that the applicants have approached the Hon'ble High Court and the Hon'ble High Court has dismissed the revision filed by the applicants but ordered that the period consumed before the Hon'ble High Court shall be favourably considered for condition of delay. Therefore, he argued that the delay in filing the appeal be condoned.

8. Sh. L.K. Utreja advocate, learned counsel for the respondent has argued that the present appeal along with application for condition of delay is not maintainable as under order 43 rule 1(d) the appeal is maintainable against the order, under order 9 rule 13 of CPC if the application was rejected. If the application under order 9 rule 13 CPC is allowed then the appeal cannot be filed. Therefore, he argued that the present application is not maintainable and he relied upon the authority titled as *Tirtha Kumbhar v Koili Kumbharin & another*, reported at 1998 (2) Civil Court Cases 94 (Orissa) in support of his contentions.

9. This court has considered the contentions made by the learned counsels for the parties.

10. The Hon'ble High Court has also passed the following order in revision filed by applicants which reads as follows

“Learned counsel for the petitioners contends that the impugned order dated 7.3.2015 (Annexure P-1) passed in an application filed under order IX Rule 13 CPC for setting aside ex parte judgment and decree is appealable. Therefore, he wishes to withdraw the present revision petition with liberty to file an appeal before the learned District Judge.

Dismissed as withdrawn with aforesaid liberty.

However, the time consumed before this court in erroneously pursuing the proceedings shall be favourably considered for condition of delay”.

11. However, under order 43 rule 1(d) CPC the appeal is only maintainable if the application under order 9 rule 13 of CPC is rejected on merit. But in the present case the application filed by the respondent under order 9 rule 13 of CPC was allowed. It was held in case titled as *Tirtha Kumbhar v Koili Kumbharin & another* (supra) in para 3 which reads as follows:-

(3) Order 43, Rule 1(d), Code of Civil Procedure, contemplates filing of an appeal against an order under Order 9, Rule 13 rejecting an application for setting aside a decree passed ex parte. The language of Order 43, Rule 1(d) leaves no room for doubt that an appeal is contemplated only when application under order 9, Rule 13 is rejected. It does not contemplate filing of an appeal when an application under Order 9, Rule 13 is allowed. As such, there is no escape from the conclusion that the appeal filed before the lower appellate court was not maintainable.”

12. If we go through the ratio of the authority relied upon by the learned counsel for the respondent the present appeal along with the

CR-4095-2017 (O&M)

application for condonation of delay is not maintainable. The order of the Hon'ble High Court does not help the applicants because the appeal is not maintainable before this court. Therefore, this court finds no merit in the arguments of the learned counsel for the applicants and the argument of the learned counsel for the respondent carries weight. Therefore, in view of this the appeal along with the application for condonation of delay is not maintainable before this court. This court refrains from giving its opinion on the merits of the case, as the application for condonation of delay is not maintainable before this court. Therefore, issue no.1 is decided against the applicants."

7. Having heard the arguments of learned counsel for respondent, there is no room for interference in the aforesaid valid reasons recorded by learned appellate Court below for dismissal of petitioners' application for condonation of delay in filing the appeal, with which I am inclined to agree.

8. Even otherwise, having perused the trial Court order dated 07.03.2015 (Annexure P-3) vide which *ex parte* judgment/ decree was recalled/ set aside, I am of the view that same was rightly done based on valid reasons stated therein. Be that as it may, dismissal of the appeal on the ground of limitation to challenge the same order and/ or non-entertaining the revision petition *qua* the same does not render petitioners remediless. It is merely recalling of an *ex parte* judgment/ decree passed on the basis of unilateral evidence adduced by petitioners. Needless to say in the absence of any opportunity given to the defendant to rebut the same, one would wonder about veracity of the same. In case, the plaintiff/ petitioners' stand is genuine, they have nothing to fear if the defendant is given opportunity to defend herself and adduce her evidence in support of her defence, because the result would be the same regardless whether *ex parte* or otherwise. In the totality of circumstance, I am of the view that defendant ought to be given an equal opportunity to contest trial as the same would be in the larger interest of justice and would meet ends of justice.

9. No grounds are made out for indulgence in exercise of extraordinary revisional jurisdiction herein.

10. Dismissed.

CR-4095-2017 (O&M)

CM-4394-CII-2010

This is an application for impleading applicants-Jasminder Kaur w/o Jarnail Singh, Gurpreet Kaur w/o Rajinder Singh through their attorney Malagar Singh, Amritpal Singh through attorney Harvinder Singh and Pritam Kaur widow of Manjit Singh as respondents No.2 to 5 in the instant petition, on the ground that they are purchasers of suit property and have direct interest in the suit property.

2. There is no representation on behalf of applicants/proposed respondents No.2 to 5.
3. They have already filed their own separate civil suit against present petitioners, namely, Naranjan Singh and Gurmeet Singh. In the premise, I am of the view that applicants are neither proper nor necessary parties and their presence is not essential for effectual and complete adjudication of the instant proceedings. In any case, *apropos* afore-stated order of even date passed in instant petition, no grounds for impleadment, as prayed, are made out, at this stage.
4. Dismissed.
5. Pending application(s), if any, shall also stand disposed of.

(ARUN MONGA)
JUDGE

April 26, 2023
mahavir

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No