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

CR-775-2023 (O&M)

Date of Decision : 25.09.2024

Jamil Ahmed & Ors

... Petitioner(s)

Versus

Akhtar Hussain & Ors

... Respondent(s)

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present: Mr. Rajiv Sharma, Advocate for the petitioners.

Mr. Kulbhushan Sharma, Advocate for respondent Nos.1 to 5.

ALKA SARIN, J. (Oral)

1. The present revision petition has been preferred under Article 227 of the Constitution of India challenging the impugned order dated 18.01.2023 (Annexure P-14) whereby the appeal filed by the defendant Nos.6 to 9-petitioners herein has been dismissed by the First Appellate Court on the ground of limitation.

2. The brief facts relevant to the present *lis* are that the plaintiff-respondent Nos.1 to 5 herein filed a suit for partition which was decreed vide judgment and decree dated 07.02.2014. Thereafter an application for passing of the final decree was made wherein the defendant Nos.6 to 9-petitioners herein were proceeded against *ex parte* and vide judgment and decree dated 31.10.2017 the final decree was passed. An application was filed by the defendant Nos.6 to 9-petitioners herein for setting aside the *ex parte* order dated 12.10.2017 as well as the *ex parte* judgment and decree dated 31.10.2017. In the said application the ground taken was that the defendant Nos.6 to 9-petitioners herein had engaged Mr. V.S. Dagar, Advocate to

represent them and that he had assured them that as and when the presence of the defendant Nos.6 to 9-petitioners herein would be necessary, they would be intimated. It was further the case that they were not informed about the date and they were also not intimated about the Local Commissioner's report. The counsel had not appeared and hence a prayer was made for setting aside the *ex parte* order dated 12.10.2017 and the judgment and decree dated 31.10.2017. The said application was contested by the plaintiff-respondent Nos.1 to 5 herein and vide order dated 07.08.2019 (Annexure P-10) the said application was dismissed. An appeal was preferred against the said order which was also dismissed vide order dated 13.09.2022 (Annexure P-11). Though at various fora a plea was raised that a revision petition had been filed, however, no revision petition was ever preferred by the defendant Nos.6 to 9-petitioners herein and the order dated 13.09.2022 attained finality. Thereafter, in the execution petition, objections were filed by the defendant Nos.6 to 9-petitioners which were dismissed on 17.08.2022. A second set of objections were filed which were also dismissed on 27.05.2022. An appeal challenging the order dismissing the objections was also dismissed. Subsequently an appeal was preferred by the defendant Nos.6 to 9-petitioners herein challenging the preliminary decree dated 07.02.2014 and the final decree dated 31.10.2017 alongwith an application for condonation of delay of 08 years and 08 months. The said appeal was dismissed being barred by limitation vide the impugned order dated 18.01.2023 (Annexure P-14). Hence, the present revision petition.

3. Learned counsel for the defendant Nos.6 to 9-petitioners has vehemently contended that in para 1 of the application for condonation of

delay in filing the appeal it was stated that the contents of the appeal be read as part and parcel of the application and in the grounds of appeal a specific ground was raised that a fraud had been played on the defendant Nos.6 to 9-petitioners herein and that the plaintiff-respondent Nos.1 to 5 and proforma defendant Nos.1 to 5 and 10 (respondent Nos.6 to 11 herein) had colluded with each other and that the defendant Nos.6 to 9-petitioners herein had never engaged any counsel for appearing in the case and they never signed or thumb-marked any *vakalatnama* nor they signed any written statement at any point of time. Much emphasis has been laid by the learned counsel for the petitioners on the alleged fraud stated to have been committed by the respondents. It is further the contention of the learned counsel that the defendant Nos.6 to 9-petitioners herein were not aware of their rights to file an appeal challenging the preliminary decree dated 07.02.2014 as well as the final decree dated 31.10.2017 and hence the delay in filing the appeal.

4. *Per contra*, the learned counsel for respondent Nos.1 to 5 has contended that the defendant Nos.6 to 9-petitioners herein were well aware of their rights and had infact filed an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 for setting aside the *ex parte* order dated 12.10.2017 and final decree dated 31.10.2017. The said application was dismissed on 07.08.2019 and thereafter the appeal was also dismissed. The said orders attained finality as the same were not challenged thereafter. Even the objections filed by the defendant Nos.6 to 9-petitioners herein were dismissed and the appeal dismissing the objections preferred by the defendant Nos.6 to 9-petitioners was also dismissed. Hence, it is not a case where the

defendant Nos.6 to 9-petitioners were not aware of their rights to file an appeal.

5. I have heard the learned counsel for the parties.

6. In the present case, though the learned counsel for the defendant Nos.6 to 9-petitioners has vehemently argued that a fraud had been committed upon the defendant Nos.6 to 9-petitioners and that there was a collusion between the plaintiff-respondent Nos.1 to 5 and proforma defendant Nos.1 to 5 and 10 (respondent Nos.6 to 11 herein), however, a perusal of the application filed on behalf of the defendant Nos.6 to 9-petitioners herein for setting aside the *ex parte* order dated 12.10.2017 as well as the *ex parte* judgment and decree dated 31.10.2017 clearly reveals that the alleged fraud was never averred in the application for setting aside the *ex parte* order dated 12.10.2017 as well as the *ex parte* judgment and decree dated 31.10.2017. Rather, the case set up was that they were never intimated about the date by the counsel. In the application for condonation of delay filed alongwith the appeal, the case set up was that they were not aware that an appeal was maintainable and hence the delay of 08 years and 08 months. The argument of the learned counsel for the defendant Nos.6 to 9-petitioners that the defendant Nos.6 to 9-petitioners herein were not aware of their rights is unacceptable in view of the fact that the defendant Nos.6 to 9-petitioners were well aware of their rights inasmuch as they were pursuing their legal remedies by filing an application under Order 9 Rule 13 CPC for setting aside the *ex parte* order dated 12.10.2017 as well as the *ex parte* judgment and decree dated 31.10.2017 and even preferred an appeal against the order of dismissal of the application dated 07.08.2019.

They also filed objections before the Executing Court which were also dismissed on 17.08.2022. The second set of objections were yet again dismissed on 27.05.2022 and the appeal challenging the said orders was also dismissed, hence, it cannot be said that they were never aware of their legal rights. The argument of the learned counsel for the defendant Nos.6 to 9-petitioners that a fraud had been committed upon the defendant Nos.6 to 9-petitioners also deserves to be rejected in view of the fact that this was not the case set up by the defendant Nos.6 to 9-petitioners herein in their application filed under Order 9 Rule 13 CPC. It is only for the first time in the grounds of the appeal that such a plea was raised.

7. In view of the above and in view of the inordinate delay of 08 years and 08 months in preferring the appeal, no fault can be found with the impugned order dated 18.01.2023 (Annexure P-14) passed by the First Appellate Court. The present revision petition being devoid of any merit is accordingly dismissed. Pending applications, if any, also stand disposed off.

25.09.2024
Yogesh Sharma

(ALKA SARIN)
JUDGE

NOTE: Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO