

(2010) 04 DEL CK 0359
In the Delhi High Court
Case No : CS (OS) No. 1213 of 2005

Anant Raj Agencies Pvt. Ltd.

APPELLANT

Vs

Shri Harwinder Singh Saini and Another

RESPONDENT

Date of Decision : 21-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151
Limitation Act, 1963 — Section 5

Citation : (2011) 7 RCR(Civil) 1048

Hon'ble Judges : V.K. Shali, J

Bench : Single Bench

Advocate : Harish Malhotra, Neeraj Malhotra and Biji Rajesh, for the Appellant;
Sudhir Nandrajog Laliet Kumar and Deepak Vohra, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Shali, J.

IA Nos. 15804/2009 & 3558/2010

1. This order shall dispose of the application bearing IA No. 15804/2009 under Order 9 Rule 13 read with Section 151 CPC. Along with this IA, another application bearing IA No. 3558/2010 was filed u/s 5 of the Limitation Act for condonation of 65 days" delay in filing the application seeking setting aside the ex parte decree.

2. Briefly stated, the facts leading to the filing of the application are that the plaintiff filed a suit for specific performance against the defendants who are husband and wife in respect of the agreement dated 6th March, 2003 and permanent injunction in respect of property No. B-5/96, Safdarjung Enclave, New Delhi measuring 199 sq. yds. The total sale consideration of the agreement was Rs. 62.00 lakhs, out of which a sum of Rs. 60.00 lakhs was paid on 5th March, 2003. It is alleged that defendants did not perfect the title of the plaintiff and accept the balance amount of Rs. 2.00 lakhs and consequently the plaintiff was

constrained to file the present suit. The defendants were served and they contested the matter. On 18th January, 2007, issues were framed and the case was set for trial. The plaintiff in support of his case examined only one witness, namely PW-1, Anil Sarin, Managing Director of the plaintiff company. No witness was examined by the defendants' Counsel on the ground that he had no instructions. After hearing the learned Counsel for the plaintiff as well as the defendants, a judgment was passed on 4th September, 2009 decreeing the suit in favour of the plaintiff and against the defendants. It is this decree dated 4th September, 2009 which has been prayed to be set aside by the defendants by virtue of the present IA under Order 9 Rule 13 by contending that this was an ex parte decree and it deserves to be set aside. The ground for setting aside the ex parte decree set up by the defendants in the application is that the defendant No. 1 was not in touch with his Counsel prior to his moving to Ropar, Punjab where he had to shift on account of some exigencies. It is alleged that he was down with Hepatitis at Ropar because of which he was unable to move. It is also alleged that during the period he shifted to Ropar, he also suffered from joint dislocation of his shoulder which further aggravated his problem as a consequence of which he could not give instructions to his Counsel and lost the track of the matter which culminated into passing of the judgment. It is alleged that he learnt about the judgment and the decree having been passed only on 16th November, 2009 whereupon he filed application for setting aside the present decree under Order 9 Rule 13 on 1st December, 2009. Originally along with the application under Order 9 Rule 13, the plaintiff had not filed any application seeking condonation of delay but subsequently on 23.3.2010 when the matter was taken up for arguments, an application u/s 5 of the Limitation Act was filed seeking condonation of delay of 65 days from the date of his alleged knowledge about the decree having been passed.

3. The plaintiff has filed the reply to the application under Order 9 Rule 13 and contested the claim of the defendants for setting aside the decree on the ground that it cannot be treated as an ex parte decree. It has been stated in the reply that the defendants were represented before the learned Joint Registrar at the time of the recording of the evidence. It is urged that the learned Counsel for the defendants when called upon to cross examine the witness, simply stated that he has no instructions. The matter was listed before the Court and even on enquiry by the Court, the learned Counsel for the defendants stated that he has no instructions as to why the defendants did not choose to adduce evidence in rebuttal of the evidence of the plaintiff, but he contested the matter and argued before the learned Judge whereupon this culminated into the judgment dated 4th September, 2009 against the defendants.

4. Thus in nutshell, it was contended since the learned Counsel for the defendants had stated before the learned Joint Registrar that he has no instructions, but he had argued the matter on merits before the Court and therefore it could not be said to be an ex parte judgment.

5. With regard to the application for seeking condonation of delay in filing the application for setting aside the ex parte decree, the learned Counsel stated that although no formal reply to the said application seeking condonation of delay has been filed, but the fact of the matter is that the defendant himself is saying that he learnt about the ex parte decree having been passed on or about 16th November, 2009, yet he was careless and did not choose to file the application for setting aside the alleged ex parte decree till 1st December, 2009 and this culminated into delay of 65 days, for which no cogent explanation has been given by him.

6. I have heard Mr. Harish Malhotra and and Mr. Sudhir Nandrajog, learned senior Counsel on behalf of the plaintiff and the defendants. I have also perused the record. Mr. Nandrajog, learned senior Counsel on behalf of the defendants strenuously contended that although the Counsel for the defendants, may have appeared before the learned Joint Registrar or even before the Court, but the very fact that the learned Counsel had specifically stated that he has no instructions, clearly shows that this was a judgment which was passed without there being any instructions from the side of the defendants and such judgment has to be construed as an ex parte judgment. The learned senior Counsel has relied on two judgments ? one of the Apex Court and the other of the Allahabad High Court to support his submission that even in cases where the Counsel for the defendant may have appeared and stated that he has no instructions, the decree which has been passed by the Court has been treated to be an ex parte decree and the same has been set aside by the Court and opportunity has been given to the concerned party to adduce evidence and contest the matter.

7. The first judgment which has been relied upon by the learned senior Counsel is a case titled Malkiat Singh v. Joginder Singh AIR 1998 SC 258 and the other is Allahabad High Court judgment titled Smt. Kalindri Devi Vs. Balloo and Others,

8. So far as the question of condonation of delay in filing the application is concerned, the learned senior Counsel contended that the law regarding condonation of delay in filing the application has been construed by the Apex Court very liberally and what has to be seen is not the quantum of delay but only the bona fides of the party in pursuing the matter. In the instant case, the defendant in his application for seeking condonation of delay has given the explanation for delayed filing of the application under Order 9 Rule 13 and the reason was that he was suffering from Hepatitis and accordingly was confined to bed. Therefore there was some delay in filing the application which may be condoned.

9. Mr. Malhotra, learned senior Counsel for the plaintiff has very vehemently contested the submissions made by the learned senior Counsel on behalf of the defendants. It has been contended by him that this judgment/decreed which has been passed by the Court on 4th September, 2009 by no stretch of imagination can be said to be an ex parte judgment/decreed. It has been urged by him that an ex parte decree is the one where the defendant is not at all represented before

the Court while as in the instant case the defendant was not only represented but his counsel contested the matter by arguing before the learned Judge. The learned Counsel has referred para 9 of the impugned judgment which reads as under:

9. I have heard the submissions made at the bar by Mr. Neeraj Malhotra, the learned Counsel for the plaintiff and Mr. Ravi Gupta, the learned Counsel for the defendants and my findings on the issues framed for adjudication are as follows.

10. It was also contended by the learned Counsel that the two judgments which have been relied upon by the defendants are distinguishable on the facts of the case.

10A. I have considered the rival submissions. In Malkiat Singh's case (supra), the Counsel who had appeared before the Court had made a statement that he has no instructions from his client and it was a case where the appellant who had prayed for setting aside the ex parte decree was admittedly in jail and further in para 7 of the said judgment, it was specifically observed that the appellant in the said case, namely the defendant was not careless or negligent in pursuing the matter which was pending before the Court and therefore the Court was inclined to consider it to be a case where the judgment/ decree which was passed against the appellant in the said case was considered to be an ex parte decree.

11. As against this, in view of the facts of the present case, the learned Counsel appearing on behalf of the defendants had stated that he has no instructions as to why the defendant does not want to cross examine the plaintiffs witness or adduce his defence. Thus, there is a marked difference between a case where the Counsel appears where he does not have instructions from his client and a case where the Counsel only says that he does not have instructions as to why the defendant does not want to cross examine the witness or adduce his defence. In the latter case, it cannot be said to be a case of no instructions so as to fall within the parameters of what has been held by the Apex Court in Malkiat Singh's case.

11A. The case of Smt. Kalindri Devi (supra) is also distinguishable from the present case on the ground that in the said case in absence of instructions to the pairkar, it was held that it was an ex parte decree, but in the instant case the absence of instructions pertained only to the non-production of witnesses, yet the matter was argued by the learned Counsel on merits which has been taken note of by the learned Judge.

11B. An ex parte proceedings are proceedings by one party for his own benefit and without contest by the other party. Hariram Rewachand v. Pribhdas Mulchand and Ors. AIR 1945 Sind 98. In the present case, the judgment indicates that there was a contest and therefore it could not be said to be ex parte.

12. Moreover, in the present case, the learned Counsel appearing on behalf of the defendants who had stated that he has no instructions has actually argued

the matter before the learned Single Judge despite the defendant having chosen not to cross examine the witness and not adducing any witness. Therefore, this is a very distinguishing feature of the present case from the case reported which has been relied upon by the learned senior Counsel for the plaintiff.

13. Because of these reasons, I feel that the judgment/decreed in the instant case can by no stretch of imagination be said to be an ex parte decree. It was a judgment and a decree which was passed after the defendant contested through his Counsel though the defendant for the reasons best known to him had chosen not to adduce any defence or cross examine the plaintiffs witness on his own peril.

14. In addition to this, even though for the sake of arguments if it is assumed that learned Counsel for the defendants did not have instructions and it is treated as an ex parte decree against the defendants, even then one can proceed ahead and examine as to whether this is a fit case where the ex parte decree should be set aside against the defendants or not.

15. Order 9 Rule 13 lays down that an ex parte decree may be set aside if the defendant has not been served or that the defendant has been prevented by sufficient cause to appear before the Court concerned. The exact language of Order 9 Rule 13 is as under:

13. Setting aside decree ex parte against defendants. ? In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons were not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided....

16. A perusal of the aforesaid provision would show that the case of the defendant is not falling in the first category, meaning thereby that it is not a case where the defendant says that he has not been served at all. The contention of the learned Counsel for the defendants is that he was prevented by "sufficient cause" from appearing before the Court, although the word "sufficient cause" was not used at all in the application and the only terminology used in the application is that his Counsel did not have instructions. The reason which has been given for these non-instructions by the defendant in the application are that the defendant had to shift to Ropar on account of ill-health of his mother whereupon he suffered from infection of Hepatitis and dislocation of his shoulder which kept him immobilized. It is also stated in the application that because of this reason that he was also not able to give instructions to his counsel and he lost the track of the case. It is stated that it is only on 16th or just before 16th November, 2009 that he learnt about the decree having been passed, but he

could file the application for setting aside the decree for the aforesaid reasons belatedly on 1st December, 2009.

17. The reply to the application has been filed by the plaintiff, who has contested the claim of the defendants that it constitutes "sufficient cause". It has been specifically stated by the plaintiff in his reply that the Counsel who are representing the defendants before he was proceeded ex parte are the same Counsel who were representing the plaintiff now on filing the application under Order 9 Rule 13 CPC. Therefore, it is stated that this is one of the grounds to show and suspect the bonafides of the defendants.

18. I have considered this aspect of the matter also. I feel that not only the bonafides of the defendant are suspect but even his intentions to prosecute the matter are also doubtful. The defendant seems to be making contradictory averments in the different applications as well as in the same application. To illustrate this, the defendant in his application under Order 9 Rule 13 has stated that he had to shift to Ropar where he was down with Hepatitis because of which he could not talk to his Counsel. He is also making a reference to the dislocation of his shoulder. Photocopies of the medical certificates and medical papers have been annexed by the defendants along with the application.

19. I have perused these medical papers. First of all, even if the defendant No. 1 is given the benefit of doubt that he had migrated to Ropar and that he was down with Hepatitis, at least he was not physically prevented to talk to his Counsel on telephone and the same could have been done, but the defendant in his application says that he was incapacitated to contact his lawyer and instruct him to lead evidence.

20. One fails to understand as to how if a person is down with fever or infection, he gets incapacitated. In the application seeking condonation of delay in filing, it has been stated by the defendant that even earlier also he was not in touch with his Counsel when he had not shifted to Ropar, meaning thereby that after entrusting the matter to his Counsel, he was grossly negligent and careless in pursuing the matter. Further, so far as the medical certificates which have been produced by him are concerned, the first certificate dated 30th October, 2009 which is issued by Dr. Yashpal Puri is concerned, it shows that defendant No. 1 is suffering from infection of Hepatitis and has been advised rest from 30th October, 2009 to 28th November, 2009 while as the certificates which have been adduced to indicate that he was under his treatment are issued from 1st July, 2008 onwards. The medical certificates bear a printed note that these certificates are not to be used for legal purposes. Therefore, this clearly shows that either the certificates are procured ones or the certificates have been obtained by the defendant from the said doctor without disclosing the purpose for which he was getting the certificates issued by him. It is common knowledge that these kind of self-serving documents can be manufactured by any person in any quantity and number, especially from the doctors who are obliging and who only thrive in issuing such certificates for consideration. Therefore, these certificates are not

the type of certificates, which inspire confidence or are not of the nature which can be construed to be Constituting "sufficient cause" which might have prevented the defendant from not giving instructions to his Counsel.

21. Even if it is assumed in favour of the plaintiff for the sake of arguments that these were the grounds on the basis of which he was not in a position to give instructions to his Counsel, we may proceed further and see as to whether the defendants were genuinely and in a bona fide manner prevented by sufficient cause in pursuing their matter. For this purpose, if one sees the averments made in the application filed u/s 5 of the Limitation Act, the only irresistible conclusion which one can draw is that not only the defendant was negligent and careless but he had practically taken for granted that this is the methodology which he will follow to indulge in dilatory tactics to avoid the decree being suffered by him. In the application seeking condonation of delay in filing the application for setting aside the ex parte decree, though defendant No. 1 has stated that he learnt about the decree having been passed which is just before 16th November, 2009, yet he chose to wait for almost more than two months before he filed the application under Order 9 Rule 13 for setting aside the ex parte decree on 1st December, 2009. This aspect becomes relevant because the judgment in Malkiat Singh's case (supra), which was a case of no instructions, the Apex Court has specifically observed that the party had specifically stated that he was not careless or negligent and further the record also showed that there was no carelessness or negligence on the part of the appellant in the said case in pursuing the matter while as in the instant case, not only there is no such averment but there is prima facie ample proof to the contrary that the defendants were not only careless but also negligent in pursuing the matter and this gets fortified by his own averment where he says that he was not in touch with his Counsel even before filing of the application for setting aside the ex parte decree.

22. For the reasons mentioned, I am of the considered opinion that the decree dated 4th September, 2009 which has been passed in the instant case cannot be said to be an ex parte decree which will warrant entertaining of the application of the defendants under Order 9 Rule 13 and even if it is assumed for the sake of arguments that this is an ex parte decree falling within the ambit of Order 9 Rule 13, even then it is held that this is a case where the defendant has not been able to prove that he was prevented by "sufficient cause" from appearing before the Court much less was the "sufficient cause" shown by the defendant in filing the application seeking condonation of delay in filing Order 9 Rule 13 application. On the contrary, one gets a feeling that this was an application filed only to delay the execution of the decree in a well-planned and thought-out manner first to absent from the Court proceedings by taking the false, frivolous plea of no instructions and then file an application for setting aside the ex parte decree. The Court is of the opinion that both the applications seeking condonation of delay as well as for setting aside the ex parte decree are totally false, frivolous and accordingly both these applications are dismissed with a cost of Rs. 25,000/-

each.