

(1993) 02 DEL CK 0016

In the Delhi High Court

Case No : Civil Revision Appeal No. 91 of 1979

Arun Berry

APPELLANT

Vs

Hindustan Pilkington Glass Works Ltd. and Others

RESPONDENT

Date of Decision : 23-02-1993

Acts Referred:

Citation : (1993) 1 BC 489 : (1993) 50 DLT 175

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Advocate : J.K. Seth and S.K. Taneja, for the Appellant;

Judgement

Usha Mehra, J.

(1) By this revision, Mr. Arun Berry, revisionist has as sailed the order of Commercial Sub-Judge, Delhi, dated Jan. 6 1979, on the ground that the Court below passed the impugned order by not properly exercising its jurisdiction vested in it under the law. The impugned order has been passed by exercising the jurisdiction with material irregularity when it held that the application of the revisionist under Order 37, R. 4 CPC was barred by time and that no sufficient . ground has been made. The respondent herein filed a summary suit against the revisionist and two other son 30/07/1973. Summons were issued on 31/07/1973 for 20th September, 1973, under Order 37 CPC. .On 20/09/1973, in the proceeding ,it is recorded that respondent not served, hence fresh summons be issued for 24/10/1973. Case was not taken up on 24/10/1973 because 24-10-1973 was declared a holiday; hence it was taken up on 26/10/1973, on which date it is recorded "respondent not served", fresh summons for 11-12-73. On 11/12/1973, it is recorded that respondent served by registered cover on 7/11/1973, and since the application for leave to defend by the defendants has not been filed within 10 days, Therefore, suit was decreed against defendants on 11-12-73 itself.

(2) I The execution of the decree was taken out by the Decree holder and when

the decree holder Along with the bailiff came to the residence of the applicant/ revisionist on 6/12/1973 the acquired the knowledge of decree ,having been passed against him. After gaining this knowledge, he got the file inspected on 9/12/1975, and found that no service had been effected on him. The Court had proceeded ex-parte against him without looking into the record. After having inspected the file, he filed an application under Order 37, Rule 4 read with Order 9, Rule 13 and Section 151 CPC for setting aside ex-parte decree. This application was contested by the respondent herein. Following issues were framed on 7/05/1976.

1. Whether there are sufficient cause to set aside the decree ?2. Whether the application is within time ?3. Whether the application is maintainable ?4. Relief.

(3) Shri Arun Berry, the present revisionist, appeared his own witness as JDW-1. He stated that he was partner in M/s. Baluja Glass Company from 7/04/1972 to 31/08/1973. The said partnership stood dissolved w.e.f. 31-8-73. That after 31-8-73 he never visited the business premises i.e. the shop. He also testified that he did not receive summons nor had any knowledge of the pendency of the suit. He learnt it for the first time on 6-12-75. On behalf of the decree holder, Shri Dharam Pal Sharma appeared as RW-1 and stated that the report on the summons was correct regarding service of the defendants and summons were duly served on the defendants.

(4) So far issue No. 2 i.e. the question of limitation, Mr. S.K. Taneja, appearing for the respondent stated at the Bar that he is not pressing this issue and the observation of the Trial Court on this issue may be set aside. In view of this statement coupled with the legal submission made by the Counsel for the revisionist that on the basis of facts in question it is residuary Art. 181 of the Limitation Act which would apply and the limit for moving the application would be three years, I hold that the application filed by the Judgment Debtor was within time.

(5) The other limb of the controversy is whether revisionist could prove "special circumstances" for setting aside the impugned order. There visionist had filed the application under Order 9. Rule 13 CPC and under Order 37, Rule 4 read with Section 151 CPC. The provisions of Order 9. Rule 13 and Rule 4 of Order 37 are not synonymous, because if it was under Order 37 Rule 4, then he had to prove "special circumstances" and not "sufficient cause" as required to be proved under Order 9, Rule 13 CPC. Under Rule 13 of Order 9, the Court has power to set aside the ex-part decree if the defendant succeeds in satisfying the Court that he was prevented by any "sufficient cause" from appearing in the Court. Whereas under Rule 4 of Order 37 Judgment Debtor has to show that special circumstances exist to set aside the decree. Mere "sufficient cause" cannot be equated with "special reasons". "Sufficient cause" and "special circumstances" appearing in Rule 13 of Order 9 and Rule 4 of Order 37, respectively are quite different and carry different meaning. Legislature in its wisdom has used the word "special circumstances" and not "sufficient cause" in Rule 4 of Order

37. "Cause" cannot be equated with "reasons" nor "sufficient" can be equated with "special". Special circumstances can be when the party is prevented from appearing in Court on account of the unavoidable circumstances, beyond his control. It is admitted case of the parties that this application was under Order 37, Rule 4 and not Order 9, Rule 13. Therefore, it is not the "sufficient cause" which was to be proved by the applicant, but the "special circumstances" for his non-appearance. "Special circumstances" has been given by the revisionist in his application where he stated that he came to know for the first time when bailiff came to his house on 6-12-75 that a suit was filed against him and a decree had been passed against him. Appearing as his own witness, JDW-1, he categorically stated that no summons by ordinary process or by registered process were ever served upon him, either at the shop or at his residence. That partnership firm stood dissolved w.e.f. 31-8-73 and after 31-8-73 he never visited the shop. From his cross-examination, nothing has been elicited which could prove that he was deposing falsely. He denied the suggestion that he had any knowledge of the pendency of the suit. Even the decree holder's own witness, Shri Dharam Pal Sharma, appearing as RW-1 has not stated that the applicant had any knowledge of the pendency of suit. Rather he testified that the summons were duly served on the applicant, which fact is contrary to the record. The record depicts that no summons had been served on the applicant. As observed above, the Court in its proceeding itself has recorded that respondent had not been served, and Therefore, first summons be issued. It is only on 11-12-73 that the Court observed that the respondent have been served by registered cover on 7/11/1973. The perusal of the registered cover on record shows that the registered A.D. letter was returned by the Postman with the remarks "A.D. returned" however, on the front side of the registered envelope, word used is "Refused". To my mind, the contention of the Counsel for the petitioner has force when he submitted that the Court below made the observations which are not supported from the record. The Trial Court fell in grave error when it observed that the applicant had acquired the knowledge prior to 6-12-75 about the pendency of the suit. The observations are not based on record. It is nothing but the imagination of the Court based on surmises and conjectures. The decree holder's witness R.W. 1 even does not support this version. He nowhere stated that the Judgment Debtor had any knowledge about the pendency of the suit.

(6) Mr. S.K Taneja, appearing for the respondent on the other hand contended that the Court in revision cannot reappraise the evidence already appreciated by the Trial Court. The revisionist has not raised any substantial question of law; hence on this ground itself revision be dismissed. There cannot be any quarrel with legal submission made. But from the facts discussed above, it is apparent that the Trial Court committed a grave error by arriving at a conclusion which conclusion is contrary to record. In such an eventuality, if the impugned order is allowed to stand, it would occasion a failure of justice.

(7) In this view of the matter, I accept the Revision, set aside the impugned order and remand the case back to the Trial Court to decide the leave to defend

application of the revisionist in accordance with law. Trial Court file be sent back.