

(1978) 05 DEL CK 0022

In the Delhi High Court

Case No : Civil Appeal No. 758 of 1977 and Civil Petition No. 15 of 1977

A.S. Bhatti

APPELLANT

Vs

K.L. Gambhir etc.

RESPONDENT

Date of Decision : 15-05-1978

Acts Referred:

Citation : (1979) 49 CompCas 312 : (1978) 14 DLT 20 : (1978) RLR 438

Hon'ble Judges : D.K. Kapur, J

Bench : Single Bench

Judgement

D.K. Kapur, J.

(1) An ex-parte order was passed on 4.11.77 in C.P. No. 15 of 1977. The present application has been moved under Order 9 rule 13 and Section 151 of the CPC . CPC and also u/s 5 of the Limitation Act for setting aside that ex-parte order. The allegation in the application is that the notices served on the applicants were incomplete in respect of the date of hearing and only later the applicants learnt of the disposal of the petition by inspection of the record. It is claimed that the petitioner had no information regarding the contents of the petition because no copy of the petition was enclosed and hence Rule 26 of the Companies (Court) Rules, 1959, had been infringed. It is said that though the notice stated that a copy of the petition is enclosed, actually no copy was enclosed. It is claimed that the affidavit of service is not a valid affidavit and in not is the prescribed form and is not correct. It is claimed that the petition should have been dismissed for want of service or some other order should have been passed. It is said that there is sufficient cause for setting aside that order.

(2) It appears that the applicants were aware of the petition and were trying to negotiate a settlement with the petitioner. Certain terms are also stated to have been agreed between the parties and the respondents did not appear in the case because the petition was likely to be settled outside the Courts. On this impression, the respondents did not appear to contest the matter. It is further stated that Shrimati Promila Gambir, who has been held to be an improperly

appointed director was appointed properly and an extract from the Minutes is enclosed. The original minutes Books have also been perused by me. .

(3) Although the ex-parte order was passed on 4.11.77 the present application was filed on 20.12.77. In the reply on behalf of the petitioner, it is claimed that the ex-parte order was passed on 13.5.77 and the application was hopelessly barred by time. It is pointed out that there were several adjournments till the final order was passed on 4.11.77. It is further stated that Mr. V. V. Shastri, Advocate had been appointed Commissioner to make an inventory of the account books and at that time the order was shown to Shri K. L. Gambhir, Managing Director of the company, and hence, the respondents had notice of the contents of the case. It is claimed that there is no Explanation for the delay and there is no ground for setting aside the ex-parte order. It is further denied that there was an agreement to settle the matter outside the Court. On the other band, it is claimed that a copy of the petition was given to Shri K.L. Gambhir, who did not like to contest the matter and hence he did not put in appearance. It is denied that there was any fraud and it is further denied that the appointment of Shrimati Promilla Gambhir was in accordance with law. It is pointed out that the said Shrimati Promilla Gambhir has been held to be not a director and this order could not be varied.

(4) The first question for decision is whether this petition is within time. Article 123 of the Limitation Act gives a period of only 30 days to set aside an ex-parte decree or rehear an appeal decreed or hear ex-parte. It is urged by learned counsel for the petitioner that this Article does not apply to a proceeding U/S 397 or Section 398 of the Companies Act, 1956, because no decree is passed in the case and nor is it an appeal decided ex-parte. Reliance is placed on Hindustan Bank Ltd. V. Mehraj Din A. I. R. 1920 Lah 51. That was a case under the Companies Act, 1882. An order was passed by the District Judge U/S 150 of that Act directing certain payments to be made by one Mehraj Din. The order was passed on 20.6.16 and on 5.10.18 Mehraj Din made an application for setting aside the ex-parte order. The District Judge held that the application for setting aside the ex-parte was barred by time, but did not refer to any particular provisions of law. On an appeal being taken to the High Court, Shadi Lal J. (as he then was) said that Article 164 of the Limitation Act relating to the period for setting aside an ex-parte did not govern an application under the Companies Act and held that Article 181 was the only residuary Article applicable. Accordingly, it was held that the application was within time and the order of the District Judge was set aside. An appeal was taken to the Division Bench who upheld the decision. Thus, this is an authority for the proposition that Article 164 of the Limitation Act did not apply to a case like the present. I hold, this particular case can also be decided in the light of the decision just referred to. Article 123 of the Limitation Act is (to set aside a decree.....). The Limitation period is 30 days. The Limitation Act does not give any Article relating to any other case. Thus, I would also hold that the present application is not barred by time, as it is not concerned with a decree.

(5) This brings me to the question whether I should interfere with the decision recorded. It is quite clear from the facts stated in the application that the applicants were fully aware that the case was pending in this Court. Not only was a Commissioner appointed to go and sign the books of the company, but even negotiations took place between the parties for settling the matter. The only claim of the applicants is that they thought that the matter was being settled outside the Court and Therefore they did not attend the Court. That does not seem to be sufficient cause for holding that they were unaware of the proceedings or that they were taken by surprise. Strictly speaking, the provisions of Order 9, Rule 13 of the Code are not attracted to the case.

(6) However, there is an important question involved in this case relating to the running of the company. There are two groups being the Gambhir Group and the Bhatti Group represented by the petitioner. By reason of the order passed by me I have held that Shrimati Promila Gambir is not a director and only two remaining directors are Shri K.L. Gambir and Shri A.S. Bhatti. I have reached the conclusion that Shrimati Promila Gambir was never appointed as a director. The original Minute Book of the Director's Meetings has been produced and it appears that my impression is not well-founded and there is prima facie material to show Shrimati Primal Gambir was appointed as a director. The allegation in the petition that she was never appointed is not sound. The validity of the appointment will have to be gone into on the merits if the matter is re-heard.

(7) Although I am doubtful of the applicability of Order 9, Rule 13 of the Code to the case before me, there is one overriding principle that must govern cases of this type. If an order has been passed by the court on a misrepresentation, it is the duty of the Court to correct that injustice. It so happens that on looking at the Director's Minutes Book, I find that Shri A.S. Bhatti had not attended any meeting of the Board before 27th March, 1978, The company appointed Shri Bhatti as director on 5th December, 1978, and for five years he did not attend any meeting, and Therefore, he was completely unaware of the fact that Shrimati Promila Gambir had been appointed a director. But this is no reason for the Court to come to the conclusion that Shrimati Promila Gambir was not appointed.

(8) In the ex-parte judgment which is sought to be set aside, I observed :- If there is any difficulty in implementing this and execution has to be made through the Court, then the Court may appoint a third, person as a temporary member. This observation in the judgment was to meet a contingency like the present. I can, Therefore, appoint Shrimati Promila Gambir as a director, because from other material on record I find that Shri Gambir and Shri Bhatti cannot possibly operate together as directors by themselves, because there are serious differences between them. As I have said, the Court has power u/s 151 of the Code to pass such orders as would do justice to the case. On the particular facts of the present case, I find that the respondents did not put in appearance because there were negotiations taking place between them and the petitioner which led them not to appear in the Court. Taking advantage of this, the

petitioner represented to the Court that Shrimati Promila Gambir was never appointed as director and acting on this, an order has been passed. That part of the order is based on the assumption that the statement before the Court was correct. Actually, it is not and, Therefore, justice demands that the case should be re-heard. I accordingly think that this is a case in which there is sufficient cause for setting aside the ex-parte order whether it strictly falls under Order 9, Rule 13 of the Code or not and, certainly this is a case in which the order can be passed under u/s Section 151, of the Code. I accordingly accept the application and set aside the ex-parte and direct the matter to be re-heard. No order as to costs.