

(2006) 03 DEL CK 0169

In the Delhi High Court

Case No : IA No. 4108 of 2005 in CS (OS) No. 1886 of 2003

Bhushan Steel and Strips Ltd.

APPELLANT

Vs

Shri Jai Kishan Bansal

RESPONDENT

Date of Decision : 01-03-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2(2), Order 37 Rule 4, Order 5 Rule 20

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2006) 128 DLT 616 : (2006) 89 DRJ 20

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Rajesh Banati and Hari Mohan, for the Appellant; Manohar Lal, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—This is an application filed on behalf of the defendant under Order 37 Rule 4 seeking the setting aside of the decree passed on 29.07.2004 claiming that there are special circumstances in favor of the defendant/applicant for seeking the setting aside of the decree.

2. The background of the present application is that on 08.09.2003, the plaintiff instituted the present suit under Order 37 of the Code of Civil Procedure, 1908 based upon a dishonoured cheque. The summons were not being served on the defendant in the ordinary way and, Therefore, on 26.04.2004, substituted service under Order 5 Rule 20 was directed to be effected by publication in "The Statesman" (New Delhi Edition) as also by affixation at the last known address of the defendant and also by affixation on the notice board of the court. On 14.07.2004, the Joint Registrar recorded that the defendant had been served with summons for appearance in the proforma prescribed under Order 37 Rule 2 (2), CPC by way of the publication in the newspaper "The Statesman" (New Delhi Edition) dated 12.05.2004). The Joint Registrar also recorded that the defendant

was served by way of affixation on the notice board and that despite service, the defendant had failed to put in appearance, although the period of 10 days from the date of service of summons for appearance had elapsed. On 29.07.2004, when the matter was placed before the court, the suit was decreed for a sum of Rs. 26,72,262/- with costs and with pendente lite and future interests at 9% per annum till realisation of the amount.

3. This application (IA No. 4108/2005) was filed by the defendant on 11.05.2005 when, according to the defendant, the factum of the decree having been passed was disclosed by the plaintiff to the defendant in the proceedings in respect of a complaint u/s 138 of the Negotiable Instruments Act, 1881 pending before the concerned Metropolitan Magistrate. The special circumstance pleaded and urged by the defendant is that the summons were issued and reportedly served on the defendant on an address at which the defendant did not reside. It is also pleaded and urged by the defendant that the defendant had no knowledge of the proceedings in the present suit.

4. According to the learned counsel for the defendant, the address given in the plaint, i.e., 460, Mundka Village, Main Rohtak Road, New Delhi was a previous address of the defendant and that the defendant had left that address some time in the year 2002. According to him, this suit was instituted in September, 2003 showing the previous address of the defendant and all summons and notices were sent to this address which was no longer the address of the defendant in the year 2002 onwards. Therefore, he contended that the defendant did not receive any summons and the occasion for service by way of publication under Order 5 Rule 20, CPC did not arise inasmuch as the correct address of the defendant was not shown. It is, Therefore, submitted by him that the service by way of the publication would also be of no consequence. It is submitted that as soon as he came to know of the proceedings in the present suit on 07.05.2005, the defendant wasted no time and filed the present application on 11.05.2005 for setting aside the decree dated 29.07.2004.

5. The learned counsel for the plaintiff submitted that these pleas raised by the defendant are without any foundation or basis whatsoever and are contrary to what has been admitted by the defendant himself. He straightway drew my attention to the affidavit in support of the present application of the defendant (J.K. Bansal). The affidavit which has been verified at New Delhi on 13.05.2005 begins with the following words:-

I.J.K. BANSAL S/o Sh. P.D. BANSAL R/o 460, Village Mundka, New Delhi, do hereby solemnly affirm & declare as under:

6. Then the learned counsel for the plaintiff pointed out that similar affidavits disclosing the address of the plaintiff as 460, Village Mundka, New Delhi have been filed in support of the other applications being Nos.4106/2005, 4107/2005 and 4109/2005. The learned counsel for the plaintiff further pointed out that Along with the application (IA No. 4109/2005), the defendant has filed a

copy of a writ petition said to have been filed by the defendant before this court being CrI. WP No. 329/2004. It is obvious that the said writ petition was filed in the year 2004. The address indicated of the defendant, who was the petitioner therein, is as under:-

SH. J K BANSAL, S/O SH. P D BANSAL,
R/O 460 VILLAGE MUNDKA,
MAIN ROHTAK ROAD,
NEW DELHI.

7. Furthermore, according to the defendant, it had filed a criminal complaint in the year 2004 in the court of the Additional Chief Metropolitan Magistrate under Sections 403, 406, 420 IPC, inter alia, against the plaintiff. A copy of the alleged complaint is also filed Along with is No. 4109/2005. The address given by the defendant, who was the complaint therein, is as under:-

SH. J. K. BANSAL,
R/O SH. P. D. BANSAL,
R/O PROP. M/S J.K. BANSAL INDUSTRIES,
AT 460, MUNDKA VILLAGE,
MAIN ROHTAK ROAD,
NEW DELHI.

8. Thus, according to the learned counsel for the plaintiff, the entire case sought to be set up by the defendant of the non-receipt of summons and of an incorrect address being given on the plaint is without any foundation or basis even on the admissions of the defendant himself.

9. The submissions made by the counsel for the parties clearly indicate that those made by the defendant are without any foundation. The plaintiff has clearly demonstrated that the address in the plaint is the address of the defendant even after 2002 inasmuch as the affidavits filed in 2005 by the defendant give the same address. The writ petition filed by the defendant in 2004 as well as the purported complaint filed by the defendant in 2004 also give the same address, i.e., 460, Mundka Village, Main Rohtak Road, New Delhi. Therefore, the very foundation of the application for setting aside the decree is non-existent.

10. As to what is a special circumstance under Order 37 Rule 4 has been explained by the Supreme Court in the case of Rajni Kumar Vs. Suresh Kumar Malhotra and Another, . The supreme Court observed as under in paragraph 9 thereof:-

9. The expression "special circumstances" is not defined in the CPC nor is it capable of any precise definition by the court because problems of human beings

are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extraordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37 Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extraordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to pre-decree matters viz. to give leave to the defendant to appear to the summons and to defend the suit.

11. Considering the facts of the present case, no such special circumstances have been disclosed by the defendant for setting aside the decree dated 29.07.2004. On the contrary, the submissions of non-service of the summons and that an incorrect address had been provided in the plaint had been belied by the documents filed by the defendant / applicant himself. As such, this application stands dismissed with costs.