

(2004) 03 DEL CK 0078

In the Delhi High Court

Case No : CO. 17 of 1993 and I.A. No's. 49 and 50 of 2003

Dharshan Lal Dhuper

APPELLANT

Vs

Smt. Motia Rani and Others

RESPONDENT

Date of Decision : 24-03-2004

Acts Referred:

Citation : (2004) 110 DLT 516

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Monmohan Singh and Surinder Singh, for the Appellant; Mohinder Rana, for the Respondent

Final Decision : Dismissed

Judgement

Dr. Mukundakam Sharma, J.—These applications have been filed by the respondents 1 and 2 and Smt. Neena Oberoi, widow of Mr. Virender Kumar for herself and her minor children and partnership firm Plaza Cosmetics (India). A rectification petition for cancellation of the registered trade mark No. 374796 in Class-III was filed in this Court. The said petition was filed under Sections 46 and 56 of the Trade and Merchandise Marks Act for cancellation of the registered trade mark No. 374796 in Class-III. Notice was issued on the said petition. The said notice was served on the respondents and a Counsel appeared on behalf of respondents 1 to 3. At the request of Counsel who appeared for respondents 1 to 3 time was granted to file the power of attorney and the reply by order dated 24th August, 1994. However, the power of attorney came to be filed only on behalf of respondent No. 3. The Registry of this Court took notice of the same and passed an order on 23rd January, 1995 directing for filing of reply by the respondents. However, thereafter none of the respondents appeared nor filed any reply. On 1st December, 1995 an order was passed by this Court that despite service no one was present on behalf of the respondents and, Therefore, the matter was ordered to be proceeded ex parte as against the respondents. At the request of Counsel for the petitioner, permission was granted to lead evidence by

filing affidavit. Accordingly, affidavit by way of evidence in the aforesaid manner was filed. The matter was listed before this Court for arguments when the Counsel for the petitioner was heard on 20th August, 2002. However, after hearing the arguments on the said petition, order was reserved. On 2nd September, 2002, an order was passed by this Court holding that the registration granted in respect of trade mark PLAZA in favor of respondents 1 to 3 was contrary to the provisions of the Trade and Merchandise Marks Act, 1958 and, Therefore, the same was required to be removed and/or cancelled. In terms of the aforesaid finding an order was issued directing the respondent No. 4 to remove and cancel the registered trade mark No. 374796 in Class-III and to rectify the Register of Trade Marks in terms of the observations made therein.

2. An application came to be filed on behalf of respondents 1 and 2 and Smt. Neena Oberoi, widow of Mr. Virender Kumar for herself and her minor children and partnership firm Plaza Cosmetics (India). The said application was filed in this Court on 2nd January, 2003. The said application is shown to have been filed under Order 9 Rule 13 read with Section 151 of the Code of Civil Procedure. Along with -the said application another application u/s 151 of the CPC was also filed praying for stay of operation of the aforesaid judgment and decree dated 2nd September, 2002. The aforesaid two applications are registered in this Court as I.A. Nos. 49/2003 and 50/2003 respectively.

3. A reply is filed by the petitioner as against the application filed by the respondents 1 and 2 under Order 9 Rule 13 read with Section 151 of the CPC enclosing therewith certain documents which shall be considered and referred to at the appropriate stage.

4. It was submitted by the Counsel appearing for the respondents/applicants that although the aforesaid judgment and order was passed, the same was indeed an ex parte order passed on 2nd September, 2002. It is stated that the said applicants came to learn about the aforesaid order only on 27th November, 2002 when a letter was written by the Advocate Amarjit Singh and Associates. By the said letter Mr. Amarjit Singh, Advocate informed the applicants that a judgment and decree had been passed by this Court on 2nd September, 2002 directing for removal and cancellation of the registered trade mark No. 374796 in Class-III from the Register of Trade Marks, which is an ex parte order as no one appeared on behalf of the respondents since 1993. It is further stated in the said letter that immediately after coming to know about the said order the respondent filed the aforesaid application in this Court.

5. It was also pointed out by the Counsel for the respondents 1 and 2 that Shri Virender Kumar, respondent No. 3, died on 10.1.1999 and the petitioner did not take any steps to get the legal heirs of the deceased respondent No. 3 substituted and brought on record and, Therefore, the aforesaid proceeding has abated so far respondent No. 3 is concerned. Counsel also relied upon the averments made in the application wherein the entire blame for non-appearance in the main proceeding and for allowing the proceeding to go ex parte, was put

on the Counsel contending, inter alia, that the respondents 1 and 2 never received any intimation or communication from their Advocate Anand & Anand about the progress of the matter. It is also stated that even the records pertaining to the case were not transferred by Anand & Anand Associates to Amarjit Singh & Associates. It is further stated in the application that the respondents were not informed by their Advocates Anand & Anand about the proceedings and that they also did not seek any permission of this Court to get themselves discharged from the present case and, Therefore, the respondents are not liable to suffer on account of acts of omission and negligence of M/s. Anand & Anand, Advocates. It is also submitted that the said respondents were not at all aware of the pendency of the aforesaid petition in this Court and never received any intimation from their erstwhile Advocate about the pendency of the said case.

6. I have considered the aforesaid statements made in the application, which are reiterated by the Counsel appearing for the respondents during the course of his arguments. In order to appreciate the said contentions, I have referred to the records and also perused the same very carefully in order to find out the correctness of the statements made by the respondents in their application. As per the records the respondents 1 to 3 were duly served on 1st March, 1994 and on 24th August, 1994 Counsel appeared for respondents 1 to 3 and sought time to file power of attorney and reply. In fact, respondents 1 to 3 filed Vakalatnama on 25th August, 1994 engaging M/s. Anand & Anand and their partners. Incidentally, Mr. Amarjit Singh, Advocate is also the Counsel, whose name is shown in the said Power of Attorney filed on behalf of the respondents. However, till 23rd January, 1995 no reply was filed by the respondent and when the matter was listed on 23rd January, 1995 the Joint Registrar of this Court, on his own motion and in the interest of justice, gave four weeks further time for filing the reply. The matter was thereafter directed to be listed before the Court on 1st December, 1995 when an order was passed by this Court directing for proceeding the matter ex parte as against the respondents as despite service no one was present on behalf of the respondents on the said date and as no reply was filed. It further transpires from the records that on 19th July, 1996 and 24th July, 1996 two applications for inspection were made by the Counsel appearing for respondents 1 to 3. The petitioner filed affidavit by way of evidence and final arguments were addressed to the Court on 20th August, 2002 and the final order and judgment was pronounced on 2nd September, 2002. It is also a matter of record that respondents 1 to 3 were proceeded ex parte on 1st December, 1995 and the judgment and order was pronounced on 2nd September, 2002. Thereafter, an application has been filed by the respondents under Order 9 Rule 13 of the Code of Civil Procedure, which is beyond the period of limitation as prescribed under Article 123 of the Limitation Act. However, no application praying for condensation of delay is filed. The period of limitation, in a matter where the respondents were served, starts from the date of judgment and order and not from the date of knowledge and, Therefore, the present application filed

under Order 9 Rule 13 of the CPC is barred by limitation and cannot be entertained unless an application for condensation of delay showing sufficient cause is filed. However, since arguments have been advanced by the Counsel appearing for the petitioner and the respondents, I may proceed to consider the arguments of the Counsel appearing for the parties on the merit of the said application. As it is pointed out in the foregoing paragraphs, the power which was filed on behalf of respondents 1 to 3, also contained the name of Mr. Amarjit Singh, Advocate. A letter of M/s. Anand & Anand, Advocates is also annexed by the petitioner with the reply wherein it is clearly shown that the applicants were dealing with Mr. Amarjit Singh, Advocate when Mr. Amarjit Singh was with M/s. Anand & Anand Associates and that even after Mr. Amarjit Singh, Advocate left M/s. Anand & Anand Associates the respondents continued to be client of Mr. Amarjit Singh, Advocate. It is contained in the said letter that M/s. Plaza Cosmetics was all along dealing throughout with Mr. Amarjit Singh, Advocate. Therefore, the blame that is sought to be put by the respondents on M/s. Anand & Anand Associates is ex facie found to be without any merit. Respondents 1 and 2 as also the predecessor-in-interest of the respondents/ applicants were fully aware about the aforesaid proceedings as they were all served with notices issued from this Court. However, they did not take any steps either for contesting the matter or for filing a reply to the petition. I am also of the considered opinion that action on the part of the respondents in putting the entire blame for their negligence, on their Counsel is found to be without any justification and merit.

The aforesaid view is also fortified by the very fact that the respondents never proceeded to file any complaint as against their Advocate Mr. Amarjit Singh before the Appropriate Authority. A similar plea taken by a litigant in a similar matter was negated by this Court in the decision of M/s. Gobind Parshad Jagdish Parshad Vs. Shri Hari Shankar and Others, . Therefore, the defense raised is vexatious and unwarranted.

7. An order was passed directing for proceeding the master ex parte as against all the respondents. Although respondent No. 3 died some time in the year 1999 it was not necessary for the petitioner to bring on record the legal representatives of deceased respondent No. 3 in view of the provisions of Order 22 Rule 4 of the Code of Civil Procedure. In this connection, reference may also be made to the decision of this Court in Shri Sham Bihari v. State and Ors. in Test Case No. 29/1993 decided on February 4, 2004 wherein it was held by this Court that it is not necessary to bring on record the legal representatives of the deceased defendant once an order is passed for proceeding ex parte as against the said defendant. The provision of Sub-rule (4) of Order 22 Rule 4, CPC could be made applicable to a case where a party even after receipt of notice did not appear and contest the proceeding nor filed any objection against the prayer of the petition. Therefore, the contention of the Counsel appearing for the respondents that the proceedings as against the respondent would stand vitiated, as no substitution of the legal representatives of the deceased respondent No. 3 was made, is devoid of merit and is rejected.

8. The records to which reference is made hereinabove, Therefore, clearly disclose that the respondents have been negligent in contesting the matter and there has been laches on their part. In that view of the matter, there is no merit in these applications filed by the respondent and the same stand dismissed.