

(2005) 08 DEL CK 0072

In the Delhi High Court

Case No : IA No"s. 8972 and 8973/03 in CS (OS) 2835 of 2000 and Ex.P. 109 of 2002

DSV Chemicals Pvt. Ltd.

APPELLANT

Vs

Northern Resins and Another

RESPONDENT

Date of Decision : 11-08-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 7, 151
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2005) 08 DEL CK 0072

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : Vikram Kapoor, for the Appellant; Sanjeev Mahajan, for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, J.—is 8972/2003 is an application filed by defendant Nos. 1 and 2 under Order IX Rule 13 read with Order IX Rule 7 and Section 151 of the CPC for setting aside the ex parte decree dated 12.02.2002 passed against the defendants as well as the order dated 30th August, 2001 whereby the defendants were ordered to be proceeded against ex parte, while is 8973/2003 is an application u/s 151 of the CPC for stay of operation of ex parte decree and judgment passed by the court during the pendency of is 8972/2003.

2. Execution 109/2002 relates to the execution filed by the plaintiff/decreed holder after passing of an ex parte decree dated 12th February, 2002. The said execution is also pending before the court. However, vide order dated 14th September, 2004, the judgment debtor was directed not to dispose of assets as disclosed in the affidavit of evidence till further orders. Thus, it will be appropriate to dispose of both the IAs as well as the Execution Petition No. 109/2002 by same order.

3. plaintiff filed a suit for recovery of Rs. 63,21,263/- along with pendente lite

and future interest and costs. Vide order dated 20th December, 2000, the summons were issued to the defendants in the suit and notice in the applications. On 23rd April, 2001, counsel appeared for defendant No. 3, however, defendant Nos. 1 and 2 were not served. They were ordered to be served afresh. Vide Order dated 30th August, 2001, the court directed ex parte proceedings against defendant Nos. 1 and 2 as nobody had appeared on their behalf despite service. The case was fixed for ex parte evidence on 12th February, 2002 on which date, the ex parte evidence was recorded and a decree as afore-noticed was passed on that very day.

4. The plaintiff filed execution on the basis of the said judgment and decree of the court on which warrants of attachment were issued on 10th April, 2002 in relation to the properties specified in Annexure "A". Nobody appeared on behalf of the judgment debtor even in the execution proceedings. The execution petition was dismissed in default vide order dated 25th November, 2002 which again was restored by EA 408/2003 on 3rd September, 2003. Vide order dated 20th May, 2004 in the execution petition, the court directed as follows:-

In was ordered in this case that in case the judgment debtor deposit Rs. 5,00,000/-, warrants of attachment need not be issued. There is a failure on the part of the judgment debtor to deposit the said amount of Rs. 5 lacs. Accordingly, the Execution Petition shall proceed in accordance with law.

Warrants of attachment be issued on the decree holder filing a list of assets of the judgment debtor. The judgment debtor is also directed to file an affidavit in this court within four weeks disclosing all the assets which he has and possesses.

Renotify on 14th September, 2004.

5. In the meanwhile, the judgment debtor filed the above mentioned applications praying for setting aside the ex parte decree as well as for interim stay. These applications came up for hearing for the first time on 3rd September, 2003. Reply to these applications have been filed and they were finally heard on 19th July, 2005.

6. The case of the applicants is that they had been served with the notice and summons of the case, whereafter, they engaged Shri Sachin Puri and Sh. Gaurav Puri, Advocates to appear on their behalf and to represent them in the proceedings. The fee of the advocates was paid as per agreed terms. Even the documents required were handed over to the counsel. However, for the reasons best known to the aforesaid counsel, Mr. Sachin Puri put in appearance on behalf of defendant No. 3 who did not even exist in the memo of parties. The defendants were informed by the counsel that they had no case and they should amicably settle the dispute with the plaintiff failing which there was every likelihood of the decree being passed immediately thereafter. The defendants informed their counsel that claim of the plaintiff was totally false and was not even maintainable. Despite such instructions, no written statement was filed. The counsel still insisted and told defendant No. 2 and his son that compromise

proposal should be submitted to the court and another connected matter titled as "M/s. United Inks and Chemicals Pvt. Ltd. v. M/s. Print Links International Pvt. Ltd. and another being Suit No. 2729/2000 was also filed by the sister concern of the plaintiff company against the defendants. However, the counsel had assured that they will continue to appear in the court. In this good belief, the defendants awaited the guidance from the counsel who had also engaged them to appear in Suit No. 2729/2000 and their fees for even that case was paid. Even in criminal cases which were filed in relation to dishonouring of cheques, Mr. Gaurav Puri was engaged as a counsel. Defendant No. 2 along with his son held several meetings with the plaintiff company and its representatives but the matter could not be resolved and no settlement was arrived at. According to the applicants, they had paid, the following amounts to their counsel by cash or by cheques:-

1. Cheque No. 047948 dated 16.1.2001 for Rs. 5,000/- 2. Cheque No. 047987 dated 15.02.2001 for Rs. 5,000/- 3. Cheque No. 048259 dated 07.3.2001 for Rs. 2,000/- 4. Cheque No. 054779 dated 31.7.2001 for Rs. 5,000/- 5. Cheque No. 054780 dated 25.8.2001 for Rs. 5,000/- 6. Cheque No. 067569 dated 2.9.2002 for Rs. 3,200/- 7. Cheque No. 067571 dated 5.9.2002 for Rs. 5,500/- 8. Cheque No. 056435 dated 2.12.2002 for Rs. 6,000/- 9. Cheque No. 058632 dated 10.1.2003 for Rs. 2,000/- 10. Cheque No. 055556 dated 24.1.2003 for Rs. 2,000/- 11. Cheque No. 055570 dated 8.2.2003 for Rs. 7,000/- 12. Cheque No. 055578 dated 21.2.2003 for Rs. 4,000/- 13. Cheque No. 055587 dated 27.2.2003 for Rs. 4,000/- 14. Cheque No. 0555549 dated 25.4.2003 for Rs. 2,000/- 15. Cheque for Rs. 4,000/- dated 12.5.2003/- 16. Cheque for Rs. 2,000/- dt. 17.5.2003 17. Cheque No. 62990 dated 20.5.2003 for Rs. 6,500/- 18. Cheque No. 102875 dated 16.7.2003 for Rs. 2,000/- 19. Cheque No. 102886 dated 21.7.2003 for Rs. 2,000/- 20. Rs. 20,000/- in cash on four occasions in installments of Rs. 5,000/- each.

7. The defendant No. 2 had clearly informed the counsel that claim of the plaintiff was neither due nor payable and the case should be contested. There was no question of settlement.

8. Further, it is stated in the application that there was a statement as the plaintiff was not ready to settle the matter as terms were not suitable to them. The Defendants had requested their Counsel to prepare their written statement and reply and to take such steps as are required in that account.

9. However, the Counsel were insisting on settlement with the plaintiff and they even threatened not to appear in the cases. Applicants/Defendants claim to have paid nearly a sum of Rs. 1 lakh to the above said Counsel in various Installments and had also informed the Counsel that they cannot pay in lump-sum the entire amount. Thereupon the Counsel refused to appear in future and told the Defendants to take back their files on 1st August, 2003. The request of the Defendants to appear in cases including in the Criminal Complaint u/s 138 of the Negotiable Instruments Act was not accepted so the Defendant could not get time to engage their Counsel.

10. Subsequently, they approached Shri C.S. Bhandari, Advocate in the criminal matter. Thereafter, the Defendants were informed by the Counsel that the matter was being listed for compromise. After engaging new Counsel, they filed Power of Attorney in favor of the Counsel on 18th August, 2003 and moved an inspection application in the Suits. The files were made available for inspection on 28th August, 2003 and it is thereafter that it was revealed to the Defendant that a decree has already been passed on 12th February, 2002 by the Court. Mr. Sachin Puri, Advocate on 23rd April, 2001 had got his presence recorded for Defendant No.3 while, when there was no such Defendant and did not appear for Defendants No.1 & 2 despite the fact that they had been served and instructed the Counsel to appear. It is the case of the applicant that they never instructed their Counsel not to appear. The Counsel despite having accepting the money and for reasons best known to him did not appear and permit the ex-parte decree to be passed against the Defendants. After having come to know of the passing of the decree on 28th August, 2003, Defendants/Judgment Debtors filed the present application for setting aside the ex-parte decree on 1st September, 2003. Reply to this application has been filed on behalf of the plaintiff. The averments made in the application have been denied. However, it is not disputed that settlement talks were going on between the parties. The other averments made by the applicant could be verified from the record. It is stated that applicant had offered to pay about Rs. 10 lakhs by selling one of their properties and continued to pay a sum of Rs. 3 lakh till the offered amounts in the two High Court matters was paid to the Defendants. This offer, according to the plaintiff/applicant, was not accepted by the plaintiff and the plaintiff wanted that the Defendant should pay Rs. 60 lakhs in the above two Suits which were the legitimate dues of the plaintiff. It is also stated that there have been total negligence on the part of the Defendant. Their Counsel had been appearing in the criminal matters on innumerable dates and no cause, much less a sufficient cause, has been shown for setting aside the ex-parte decree.

11. Rejoinder to this reply was filed reiterating the averments made in the application. From the pleadings of the parties in the application under consideration it is obvious that Defendants were served in accordance with law and they had engaged Counsel to appear on their behalf in the Suit. However, it is also clear from the record that Mr. Sanjiv Puri has got his presence recorded for Defendant No.3 on 23rd April, 2001 while in the title of the Plaint there are only two Defendants. On 30th August, 2001 nobody had appeared on behalf of the Defendants and an order was passed. None was present for Defendant No.3 and Defendants No.1 and 2 were served but again nobody was present on their behalf and as such all of them were proceeded ex-parte. Ex-parte decree was passed against the Defendants on 12th February, 2002. From the averments made in the application the Defendants were making payment to their Counsel even till July, 2003 and all these payments were made by cheques. The Defendants, thus, had taken all appropriate steps as they ought to have taken in accordance with law. They had engaged Counsel, paid at least partial fee to the

Counsel by cheques and have requested the Counsel to appear on behalf of the Defendants.

12. For reasons best known to the Counsel he did not appear in the Suit right from the initial stages of the Suit and the Defendants were ordered to be proceeded ex-parte on 30th August, 2001. Thereafter, an ex-parte decree was passed against the Defendants. Partial case pleaded by the applicant Defendants in the application under consideration stands admitted even by the plaintiff. It is an admitted case to that extent that compromise talks were going on between the parties and offers/counter-offers were made by the parties. But, however, there was a statement and no final compromise can be effected. During this period, the Defendants were well within their rights to believe that their Counsel must be appearing in the Court in the Suits pending before the High Court. The plaintiff while has admitted the meetings but have not given any date as to when these meetings were held. Thus, the Court would have no reason to disbelieve the dates which have been indicated by the applicant in the application. Immediately, after the applicant engaged another Counsel and came to know of the contents of the ex-parte decree on 28th August, 2003, they filed present application on 1st September, 2003 without any delay.

13. Learned Counsel appearing for the applicant relied upon the Judgment of the Supreme Court in the case of Rafiq and Another Vs. Munshilal and Another, to contend that the parties should not be made to suffer for fault of the Counsel and particularly when, whatever were the obligations of the applicant in terms of the non legal system, he had complied with the same. It would be unfair if the applicant is made to suffer for inaction, deliberate omission or the misdemeanour of his Counsel. He has also relied upon another judgment of the Supreme Court in Prakash Seshmal Jain Vs. Sukhmal and Sons and Others, to further substantiate his plea that the applicant should not be made to suffer for the default of the Counsel particularly in the peculiar facts and circumstances of the present case.

14. The learned Counsel appearing for the plaintiff/non-applicant relied upon the case of M/s Northern Carners Pvt. Ltd., Jullundhur Vs. M/s United India Insurance Company Ltd. and Anr. AIR 1986 P & H 1975 and on the case of Prakash Bhagwani Vs. Sammati Food Products Pvt. Ltd., Sagar, to contend that there was intentional lapse and error on the part of the applicant and as such their application should be dismissed and in any case cannot be allowed unless they are directed to deposit the decretal amount. It is also contended that mere inability to pay due to circumstances would not justify recalling of the order.

15. During the course of arguments, it was also pointed out on behalf of the applicant that a complaint had been made to the Bar Council against the Counsel. The complaint is still pending.

16. Good or sufficient cause would depend on the facts and circumstances of each case. The bonafide of the applicant would always be a relevant

consideration for the Court while exercising such a jurisdiction. The relevancy of mistake of a Counsel again would constitute a sufficient cause and would be relatable to the events of case. In a case where the Counsel has pleaded no instructions and notice was issued to the parties, and an ex-parte decree was passed against the party, the application of the Defendant for setting aside the ex-parte decree was allowed by the Supreme Court in the case of Malkiat Singh and Another Vs. Joginder Singh and Others, . Reference can also be made to the judgment of this Court in the case of Gloria Chemicals Vs. R.K. Cables and Others,

17. The facts and circumstances of the present case clearly show that the applicant had acted bonafide and the averments made in the application as per the order sheet of the file have been partially correct and as per the admission of the non-applicant. If the parties were negotiating for a compromise, the plea of the Defendant that his Counsel would be appearing in the case regularly cannot be faulted with. The interest of justice would demand that the Defendant should be granted an opportunity to defend the case. The case is still to be adjudicated on merits with which the Court is not concerned at this stage while deciding the present application.

18. In view of my above discussion, is 8972/2003 is allowed and the ex-parte order dated 30th August, 2001 is set aside subject to payment of Rs. 5,000/- as costs.

19. Accordingly, the application stands disposed of.

IA NO. 8973/2003

This application has become infructuous and is dismissed as such.

Ex.P. 109/2002 & E.A. 398/2004

In view of the fact that I have allowed is 8972/2003, Execution Petition No. 109/2002 as well as E.A. 398/2004 has also become infructuous, and as such both are dismissed, while leaving the parties to bear their own costs.