

(2006) 04 DEL CK 0087

In the Delhi High Court

Case No : IA No. 9489 of 2003 in CS (OS) No. 2774 of 2000

D.S.V. Chemicals Pvt. Ltd.

APPELLANT

Vs

Print Link International Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 20-04-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 7, 148, 151
Limitation Act, 1963 — Article 123
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2006) 04 DEL CK 0087

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

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

Judgement

Anil Kumar, J.—This is an application by the defendants under Order 9 Rule 13 read with Order 9 Rule 7 and Section 151 of the CPC for setting aside ex-parte decree dated 31.1.2003 passed against the defendants.

2. The plaintiff have filed the suit for recovery of Rs. 42,39,344/- on account of price of goods and interest thereon. The defendants were proceeded ex-parte on 6.9.2002 on the premise that Mr. R.Tuli, Director has been served with the summons on behalf of the company and being a representative of the company he is also deemed to have been served himself and, Therefore, no need for publication and thereafter after considering the ex-parte evidence filed by the plaintiff the suit was decreed on 31.1.2003.

3. The application for setting aside the ex-parte decree dated 31.1.2003 is filed by the defendants contending that they were never served with any notice or summons in the matter nor they were earlier aware of the pendency of the present suit before 24.8.2003 when the applicants were confronted with the decree passed in the criminal complaint pending u/s 138 of the Negotiable Instruments Act before Sh. I.A. Mehta when the defendants came to know about

the ex-parte decree passed against them and thereafter the application for setting aside the ex-parte judgment and decree was passed on 16.9.2003.

4. The applicant defendants categorically contended that prior to 24.8.2003 the defendants/applicants were not aware of pendency of any suit nor summons of the suit have been served on the defendants in any manner. The applicants contended that the plaintiff has obtained the decree by misleading the Court as the address of defendant No. 1 applicant was furnished as 213-215, Aggarwal Chambers, Vikas Marg, New Delhi and the address of defendant No. 2 is A- 45, Vivek Vihar, New Delhi. The summons were not served on the defendants and thereafter by order dated 31.5.2002 on an application of the plaintiff being is No. 5495/2002 the defendants were ordered to be served by substituted service by publication in the newspaper ?Hindustan Times? in the prescribed form and the plaintiff was directed to take steps within four weeks.

5. The applicants contended that the plaintiff did not take steps pursuant to order dated 31.5.2002 and again sought time on 2.9.2002 for effecting the publication on or before 17.12.2002 and the matter was renotified for 21.2.2003.

6. The matter was again taken up on 6.9.2002 when the learned Counsel for the plaintiff contended that Mr. R.Tuli, Director had been served and without verifying whether Mr. R.Tuli, Director had been served or not the Court proceeded ex-parte against the defendants and listed the matter for ex-parte evidence. The defendants/applicants in the circumstances contended that there has not been any service on the defendants and consequently the ex-parte judgment and decree dated 31.1.2003 passed against the defendants is liable to be set aside.

7. The application is contested by the plaintiff/non-applicant who filed a reply. The plaintiff asserted that the application is barred by time and is highly belated as the defendants had notice of the progress of the suit in question and were pursuing negotiations for compromise and settlement out of Court. It was alleged by the non-applicants that no sufficient cause has been made out by the defendants for non appearance. The defendants have also given the dates on which the defendants had appeared in the Criminal Court before A.S. Dateer, Metropolitan Magistrate and subsequently before I.S. Mehta, Additional Sessions Judge and in the circumstances the plaintiff/non-applicant contended that the defendants had the knowledge of the pendency of the suit and consequently the application be dismissed with exemplary cost. The non-applicant also contended that two other suits were pending where also the applicants had been defending their suits and, Therefore, the applicants have not come before the Court with clean hands and the allegation made by the defendants that they had no knowledge about the pendency of the suit is incorrect as they had been negotiating settlements.

8. The plaintiff/non-applicant also contended that the substituted service by publication was not necessary in view of the summons already served upon the defendants and, Therefore, the Court was justified in proceeding ex- parte

against the defendants and passing an ex-parte judgment and decree.

9. The applicants/defendants filed a rejoinder denying the averments made by the plaintiff/non-applicant. The applicant categorically stated that no negotiation for compromise/settlement out of Court in respect of present matter were ever carried out at the behest of answering defendants. It was categorically contended that the negotiations were in respect of two other suits filed by the sister concern of the plaintiff and during the negotiations nothing was disclosed about the pendency of the present suit and before 24.8.2003 the defendants were not aware of the pendency of the present suit.

10. I have heard the learned Counsel for the parties at length and have also perused the pleadings and the application filed by the defendants for setting aside the ex-parte decree and the judgment.

11. The learned Counsel for the non-applicant contended that the summons were sent at the address of defendants a number of times, however, it was stated to the process server that Mr. Tuli is out of town and on 2.8.2002 notice was served by affixation and on 20.7.2002 the notice was served by affixation on the notice board. From the perusal of order dated 31.5.2002 it is apparent that the substituted service was ordered by publication in newspaper Hindustan Times and by affixation at his last known address and display at the notice board of the Court and the matter was adjourned to 5.8.2002. On 5.8.2002 the matter was adjourned at the presiding officer was on leave and thereafter on 2.9.2002 the matter was listed before the Joint Registrar, however, it was not disclosed that service has been effected by affixation on 2.8.2002 at the last known address of the defendants and the service has also been done by affixation on the notice board on 20.7.2002. On 2.9.2002 rather time was sought for effecting substituted service by publication.

12. The plaintiff had sought substituted service by publication on 2.9.2002 despite the alleged affixation of summons on the notice board on 20.7.2002 and affixation on the last known address on 2.8.2002 as these affixations were not sought to be sufficient service on the defendants and, Therefore, more time was sought to serve the defendants by substituted service on 2.9.2002. Though the matter was renotified for 21.2.2003, however, the matter was again taken up on 6.9.2002 on an application of the plaintiff being is No. 6730/2002 under Sections 148 and 151 of CPC seeking direction to the manager, Hindustan Times-Newspaper, New Delhi to publish the summons in the newspaper before 10.8.2002.

13. Perusal of the report dated 20.7.2002 also reflects that there were no witnesses to the affixation of notice on the Court notice board and the report given is that no witnesses were available at the site whereas the report of the affixation on 2.8.2002 at about 11.45 AM is also without any witness.

14. The learned Counsel for the plaintiff/non-applicant was emphatic about the affixation of the notice on the Court board and the last known address on

20.7.2002 and 2.8.2002, however, surprisingly in the reply to the application nowhere it was alleged that the defendants had been served by affixation of notice on the notice board and affixation of the notice on the last known address of the defendants. The order dated 6.9.2002 proceeds on an entirely different assumption which has the statement of the counsel for the plaintiff contending that Mr. R.Tuli, Director has been served with the summons on behalf of the company. From all these facts and circumstances what emerges unequivocally is that the defendants were not served with the summons of the suit. The affixation reports are not substantiated by any independent witness; the plaintiff himself did not rely on the service of these affixations as the time was sought for substituted service of publication on 2.9.2002 and just four days after that while considering the application being is No. 6730/2002 u/s 148 and 151 of CPC seeking direction to the manager, Hindustan Times- Newspaper, New Delhi to publish the notice for substituted service prior to 10.8.2002, on the statement of the counsel for plaintiff that the defendants had been served with the summons the Court had proceeded ex-parte against the defendants. Taking it from any angle it is apparent that the defendants have not been served and consequently they could not be proceeded ex-parte.

15. The plaintiff is also unable to show that defendants had knowledge about the pendency of the suit prior to 24.8.2003. Though the plaintiff had given various dates on which criminal proceedings were conducted before the Metropolitan Magistrate, however, none of these proceedings have been produced to show that there was mention about the decree passed in Civil suit or the knowledge of the defendants about the pendency of the suit or the decree dated 31.3.2003 passed against the defendants.

16. In the facts and circumstances the inevitable inference is that the defendants have been able to make out a sufficient case for their non appearance as they were never served with the summons of the suit and consequently neither they could be proceeded ex-parte nor an ex-parte judgment and decree could be passed against them. Under Article 123 of the Limitation Act an application for setting aside the ex-parte decree can be filed within 30 days from the date when the applicant had knowledge of the decree. In the circumstances the defendants had knowledge of the decree on 24.8.2003 when the defendants were confronted with the decree during the cross examination and thereafter within 30 days the application for setting aside the ex-parte decree was passed on 16.9.2003 which is within time.

17. Therefore, the defendants/applicants have been able to make out a sufficient cause for non-appearance and for setting aside the ex-parte judgment and decree dated 31.1.2003 and the application for setting aside the ex-parte decree is also filed within time.

18. Therefore, for the reasons stated hereinabove, the application for setting aside the ex-parte judgment and decree dated 31.1.2003 is allowed and the ex-parte judgment and decree dated 31.1.2003 is set aside and the suit No.

2774/2000 is restored to its original number.

CS(OS) No. 2774/2000

A complete set of paperbook be supplied to the learned Counsel for the defendants who seeks time to file the written statement. Written statement be filed within four weeks. Replication, if any, within two weeks thereafter. The defendant is also directed to file original documents or certified copies thereof relied on by him within four weeks. List before the Joint Registrar for admission/denial of the documents on 30.5.2006.

List before the Court for framing of the issues on 26.7.2006.