

(2009) 09 DEL CK 0293

In the Delhi High Court

Case No : F.A.O. No. 289 of 2009 and C.M. No. 13132 of 2009

G.D.R. Enterprises and Shri Prem Chand Jain, Partner, G.D.R. Enterprises APPELLANT

Vs

Neelkanth Traders RESPONDENT

Date of Decision : 23-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3(5), Order 37 Rule 4, Order 9 Rule 13

Citation : (2009) 09 DEL CK 0293

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Ramesh Kumar Shokin and Yashpal, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

V.B. Gupta, J.—In this appeal there is challenge to orders dated 13th August and 7th September, 2009, of Additional District Judge, Delhi. Vide order dated 13th August, 2009, appellants' application under Order 9 Rule 13 read with Order 37 Rule 4 CPC (for short as "Code") was dismissed. Thereafter, appellants' application under Order 47 of the Code, for review was also dismissed.

2. Brief facts are that Respondent herein, filed suit for recovery of Rs. 5,55,232/- under Order 37 of the Code, against appellants who did not appear, despite service of summons. Trial court, vide order dated 23rd May, 2009, decreed the suit of respondent.

3. It is contended by learned Counsel for appellants that Respondent nowhere stated in the suit as to who wrote amount and name of drawee in the cheque. Appellants came to know about theft of a blank cheque and they immediately reported the matter to Police.

4. Appellants did not receive any notice of suit. They came to know only on 21st

July, 2009, when notice for execution was received by their employee, Dharmender, who informed them, that in April, 2009 he had also received a notice and same is lying in his bag. On inquiry, appellants came to know that said Dharmender after receiving summons on 29th April, 2009, did not deliver the same to them. It was due to negligence on the part of Dharmender, that appellants could not pursue the suit since he never communicated about summons to the appellants.

5. In support, learned Counsel for appellants cited;

(i) Sushil Kumar Sabharwal Vs. Gurpreet Singh and Others, ;

(ii) G.P. Srivastava v. R.K. Raizada And Ors. (2002) 3 SCC 54 and;

(iii) Grafitek International v. K.K. Kaura and Ors. 88 (2000) DLT 56.

6. As apparent from order dated 23rd May, 2009, despite service of summons, appellants did not appear before the trial court. The court rightly decreed suit of the respondent. As per appellants' own case, summons was duly received by their employee, Dharmender on 29th April, 2009 but he did not inform them. When service of summons has been duly effected upon employee of the appellants, they were duty bound to contest the suit. Appellants despite service, did not contest. Trial court thus, rightly decreed the suit in favour of respondent.

7. The court also held that, no sufficient ground has been shown for setting aside the judgment and decree. Relevant findings of trial court in this regard are;

It is settled proposition of law that such like application as filed by the applicants/ Defendants under Order 9 Rule 13 CPC is not sufficient ground enough to set aside the judgment and decree passed under Order 37 CPC as Defendants/ applicants have to submit sufficient facts so as to constitute special circumstances under Order 37 Rule 4 CPC to set aside the judgment and decree passed under Order 37 CPC. In catena of judgments it has been observed that special circumstance could only be the defence on merits of the case which the Defendants have to put forward in addition to the sufficient grounds for the absence so as to get the judgment/decreed set aside passed under Order 37 CPC.

In the present case, no defence on merits of the case has been raised except vague averment as referred to above that the plaintiff has not approached this Court with clean hands and has concealed the material and vital facts. These allegations are not sufficient grounds so as to consider even the defence of the Defendants/applicants on merits of the case on which basis the Defendants are entitled for leave to defend the suit under Order 37 Rule 3 Sub Rule 5 CPC. The vague defence as put forward in the application under Disposal by the Defendants does not convince this Court that the applicants/Defendants have got any defence to raise who were admittedly duly served with the summons through their employee but failed to make appearance to defend the suit for such a long time and waited for notice of the execution of the decree as the present application was filed after the receipt of the notice of the execution of the

impugned judgment and decree. The application is accordingly held to be devoid of any merits and substance and the same is hereby dismissed.

8. Now, coming to order dated 7th September, 2009, the court rightly observed that there has to be an error apparent on the face of record of the order, of which review is sought. It held;

In the present case, no error on the face of the record is alleged whereas also it is not the case of the Defendant/applicant that the facts as now narrated in the application so as to defend the suit were not within the knowledge of Defendant/applicant or the same were discovered after passing of the impugned order. The Defendant/applicant is neither diligent nor was able to exercise his rights when he filed earlier application which was dismissed by detail order dated 13.8.09. The application as such has got no merit and substance and liable to be dismissed.

9. It is well settled that "sufficient cause" (as per Order 9 Rule 13 of the Code) for non appearance in each case, is a question of fact.

10. This Court in New Bank of India Vs. M/s. Marvels (India), , held;

No doubt the words "sufficient cause" should receive liberal construction so as to advance substantial justice. However when it is found that the applicants were most negligent in defending the case and their non-action and want of bonafide are clearly imputable, the Court would not help such a party. After all "sufficient cause" is an elastic expression for which no hard and fast guide-lines can be given and Court has to decide on the facts of each case as to whether the Defendant who has suffered ex-parte decree has been able to satisfactorily show sufficient cause for non-appearance and in examining this aspect cumulative effect of all the relevant factors is to be seen.

11. In various judgments referred by learned Counsel for appellants, it has been clearly laid down;

- (i) that ex-parte decree can be set aside on ground of non service of summons;
- (ii) that Defendant was prevented by any sufficient cause from appearing and;
- (iii) that dasti service is an insufficient service.

12. In the present case, admittedly, summons was duly received by an employee of the appellants, namely Dharmender, as early as on 29th April, 2009. Despite service, appellants did not contest the suit. Under the circumstances, trial court rightly decreed the suit of respondent. Appellants have not been able to show sufficient cause for setting aside ex-parte decree. Findings of the trial court, are based on evidence on record and there appears no ground to interfere.

13. There is no merit in this appeal and same is liable to be dismissed with costs. This appeal is nothing, but is gross abuse of law. Appellants had no intention to pay the decretal amount and have been resorting to litigation on one pretext or

the other. To certain extent, they have been successful in frustrating respondent's claim, by filing one application, after the other. Under these circumstances, this appeal is dismissed with costs of Rs. 25,000/-.

14. Appellants are directed to deposit costs, within four weeks, with the trial court, failing which it shall recover the same, in accordance with law.

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15. Dismissed.

16. Copy of this order be sent to trial court.