

(2009) 09 DEL CK 0284

In the Delhi High Court

Case No : I.A. No's. 8325 and 8327 of 2008 in CS (OS) No. 1205 of 2006

Lachhman Das Behari Lal

APPELLANT

Vs

Ghanshyam Das Jetha Nand and Others

RESPONDENT

Date of Decision : 11-09-2009

Acts Referred:

Central Excise Rules, 1944 — Rule 9

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20, Order 9 Rule 13, 151

Limitation Act, 1963 — Section 5

Citation : (2009) 09 DEL CK 0284

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Sudershan Rajan, for the Appellant; Anil Goel, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—By this order, I shall dispose of the three applications being I.A. No. 8325/2008 under Order 9 Rule 13 for setting aside the judgment and decree dated 6th September, 2007; I.A. No. 8326/2008 u/s 5 of the Limitation Act for condonation of delay in filing the application under Order 9 Rule 13 and I.A. No. 8327/2008 u/s 151 CPC for stay of the operation of judgment and decree dated 6th September, 2007.

2. The plaintiff has filed the present suit for permanent injunction to restrain the defendants from infringing the plaintiff's registered trademark, copyright, passing off and for rendition of accounts. By order dated 16th May, 2007 the defendants were proceeded ex parte. The affidavit of Mr. Manohar Lal Wadhwa, a partner in the plaintiff firm, was produced as evidence in support of the claim made by the plaintiff. The suit was decreed by the judgment and decree dated 6th September, 2007. The defendants have filed an application under Order 9 Rule 13 r/w Section 151 CPC on 11th July, 2008 to set aside the judgment and decree dated 6th September, 2007.

3. The main contentions of the defendant Nos. 1 and 2 who have filed the

application for setting aside the ex parte decree are: (i) that the defendant Nos. 1 and 2 never received the summons/notice in this case and they were not aware about the pendency of the present suit; (ii) the defendant No. 1, on 12th January, 2008, after release from the judicial custody/jail came to know through his nephew Shri Mohnish Moorjani that an ex parte judgment and decree had been passed by this Court against the defendant Nos. 1 and 2 who came to know of the said fact on 22nd November, 2007 when Mr. Sushil Aggarwal, Advocate on behalf of the plaintiff appeared before the High Court of M.P. (Jabalpur Bench) and objected to the grant of bail to defendant No. 1 in the criminal revision case bearing No. 2107/2007 arising out of the said criminal case, on the ground that a decree for the sum of Rs. 50 lakh has been passed against the defendants by this Court.

4. It is mentioned that the defendant No. 1 is a permanent resident of Jabalpur and is a patient of sugar and blood pressure due to which he could not appoint an Advocate in Delhi immediately and he found the present advocate only on 27th January, 2008 after great efforts. After inspection being conducted on 12th February, 2008 the defendants came to know that service of the summons in the suit was effected on the defendants by way of publication in the newspaper Navbharat. dated 13th March, 2007. It is stated that the defendant No. 1 was never served personally with the summons of the said suit.

5. It is stated that the defendant No. 1 came to Delhi on 8th March, 2008 and after narration of the facts by the defendant No. 1, the counsel took 2-3 days time for preparing the present application for setting aside the ex parte judgment and decree dated 6th September, 2007. It is stated that the non-appearance of the defendant No. 1 on any date of hearing was due to aforesaid reasons only which are bonafide, unintentional and beyond his control. Therefore, the ex parte decree should be set aside otherwise the defendant No. 1 will suffer irreparable loss and injury and would be forced to pay the amount to which he is not liable to pay to the plaintiff.

6. Along with the application under Order 9 Rule 13, the defendants have also filed an application u/s 5 of the Limitation Act with the prayer that the delay in filing of the application under Order 9 Rule 13 be condoned and opportunity be given to the defendants to contest the case on merits. The grounds stated in the application u/s 5 of the Limitation Act are almost the same as those mentioned in the application filed under Order 9 Rule 13.

7. The application is strongly opposed by the plaintiff in his reply. It is stated in the reply that the defendants were duly served and that they have not shown any good cause or reason for setting aside the ex parte decree against the defendants. In para Nos. 5 to 7 of the reply, the plaintiff has given details of the various cases filed by the plaintiff against the defendants wherein interim orders have been passed. In spite of the orders of this Court, the defendants continue to violate them from time to time and many criminal as well as contempt petitions are pending against the defendants. It is stated that the defendant is a

habitual offender and has no respect for the orders passed by this Court and in view thereof, the conduct of the defendants also disentitles them to the relief of setting aside the ex parte decree.

8. In para 2 of the application being I.A. No. 8325/2008, the defendants have stated that till 15th of February, 2005 they were working for gain at LIG-671, Katangi Road, M.T. Nagar, Jabalpur (M.P.) and then they shifted to Plot No. 12, Katangi Road, Jabalpur, M.P. It is stated in the reply that the said statement made by the defendants is false as is apparent from the Trade Mark office as well as Excise office. That there is a record of such cases shows that the defendant is giving false information and is giving wrong details about the changing of his office premises. In fact, there has been no such change of premises as alleged but the defendants are trying to create evidence of change of its premises while it is not so. It is stated that while filing the application for registration of the trademark bearing No. 1274106 dated 22nd March, 2004, the address given by the defendant No. 1 was as follows: 502, Vishwakarma Colony, Opposite Akashvani, Sharda Nagar, Karmeta, Jabalpur..

9. It is also stated that according to the report of the Central Excise Department, the defendant No. 1 has obtained on 5th May, 2003, the Central Excise Registration No. AHYP00392AXM001 with address as 502, Vishwakarma Colony, Opposite Akashvani, Sharda Nagar, Karmeta, Jabalpur. According to Sub-clause (2) of Clause I of the notification under Central Excise Rule 9, the central excise licence ought to have been obtained in the name of Jabalpur Industries, LIG-671, Katangi Road, M.T. Nagar, Jabalpur-482002 (M.P.) which is contrary to law. It is stated by the plaintiff in the reply that on 9th July, 2004 the defendant No. 1 got the address changed to LIG-671, Katangi Road, M.T. Nagar, Jabalpur (M.P.) and similarly, on 22nd February, 2008 the address was again changed by the defendant No. 1 to Plot No. 12, Katangi Road, By Pass, Jabalpur (M.P.). It is stated that only on 22nd February, 2008 has the defendant given the address of Plot No. 12, Katangi Road, By Pass, Jabalpur, M.P. to the Central Excise Department which clearly establishes that the defendant continued to operate from LIG-671, Katangi Road, M.T. Nagar, Jabalpur (M.P.) until 21st February, 2008. The defendant has only changed the above mentioned address in February, 2008 and has made an excuse in the application to get the decree set aside.

10. It is also stated in the reply that in spite of the interim orders passed by this Court, the defendant is again violating the decree passed by this Court in the present suit. During the hearing of the applications, certain packing was shown by learned Counsel for the defendant which is presently used by the defendant but it appears that the present label is almost the same against which the decree has been passed by this Court.

11. As regards the contention of the defendant regarding service of summons and notice in the case is concerned, it is mentioned that initially the service was effected on the defendants by registered post at the address given by him in the

infringing packing i.e. LIG-671, Katangi Road, M.T. Nagar, Jabalpur (M.P.). This address is also given by the defendant with the Central Excise Department from 9th July, 2004 to 21st February, 2008. This address was changed by the defendant with the Central Excise Department to Plot No. 12, Katangi Road, By Pass, Jabalpur only in February, 2008. Till then, the defendant was operating from the address LIG-671, Katangi Road, M.T. Nagar, Jabalpur (M.P.) which was given in the plaint. Thus, the defendant was served at the right address but he was violating the service of summons and for this reason, the substituted service was allowed upon him which was effected in Navbharat., Jabalpur Edition which is a newspaper having wide circulation in the area where the defendant resides and is also carrying out his work for gain. Further, the defendants were also served through affixation of summons at their known address through the District Court, Jabalpur, M.P. Thus, the service of summons on the defendant is complete as per Order 5 Rule 20 of the Code of Civil Procedure.

12. It is argued by learned Counsel for the plaintiff that even the learned Single Judge has passed the decree and has observed in the judgment that since the defendants have chosen not to appear, the evidence filed on behalf of the plaintiff has gone uncontroverted.

13. It is also argued that even after service of summons was complete, this Court afforded two opportunities to the defendants to enter appearance. However, the defendants failed to appear despite opportunities and were rightly proceeded ex parte. It has also been argued by the plaintiff that the defendant has not shown any sufficient cause for absence. It is argued that the defendant has averred in the application that the defendant No. 1 had shifted from LIG-671, Katangi Road, M.T. Nagar, Jabalpur (M.P.) to Plot No. 12, Katangi Road, Jabalpur, M.P. in the year 2005. However, the same has been proved to be false. It is also argued that after coming to know about the decree passed by this Court, there is total negligence on the part of the defendant to approach this Court and the defendant has filed the present application with unclean hands by giving incorrect facts as stated comprehensively in the reply to the application.

14. It is also stated that the defendants have failed to produce any evidence that the defendant has left the previous address altogether and there is also no evidence of running the business from the new address. It is further stated that the explanation given by the defendant about the change of address is totally false and frivolous as per the following reasons:

- a) That he has given the said address in his containers/packing.
- b) The photocopy of stamp paper filed by the defendant before this Court is manipulated and forged and has been created to obtain favourable orders from this Court.
- c) The defendant has himself given the address LIG 671, Katangi Road, M.T. Nagar, Jabalpur, M.P. to the Central Excise Department on 9th July, 2004 which means that he had been in the above said premises since 9th July, 2004 as per

Central Excise record.

15. Lastly, learned Counsel for the plaintiff has argued that there has been an unexplained delay in filing of the application and the defendant has to give the explanation of each day in filing the present application after having the knowledge of the judgment and decree passed by this Court.

16. Considering the facts and circumstances, it is not possible to decide the issues which have arisen only on the basis of the affidavits filed by the parties in support of the application and replies to the application and facts alleged therein without recording the evidence.

17. Therefore, on the pleas and contentions raised in the applications, the following issues are framed:

1. Whether there is sufficient cause for setting aside the ex parte judgment and decree passed against the defendant and delay, if any, is liable to be condoned?
O-applicant

2. Relief.

18. Parties are directed to file their list of witnesses within two weeks and thereafter the applicant to file his evidence on affidavit within four weeks. The applicant and non-applicant shall also be entitled to summon the witnesses, if any, before the Joint Registrar.

19. As regards the application u/s 151 CPC being I.A. No. 8327/2008 for stay of the operation of judgment and decree dated 6th September, 2007 is concerned, by decreeing the suit, the court has granted the permanent injunction against the defendants in terms of para 37 of the plaint. The court has also passed a decree of Rs. 25 lakhs towards compensatory damages as well as a decree in the sum of Rs. 25 lakhs on account of punitive and exemplary damages in favour of the plaintiff and against the defendants. Since the matter is now sent for trial in the application under Order 9 Rule 13, the operation of the judgment and decree dated 6th September, 2007 shall be stayed subject to the condition that the defendants shall deposit 50% of the decretal amount within the period of four weeks from today. Upon failure to do so by the defendants, there shall not be any stay of the operation of the judgment and decree dated 6th September, 2007. As far as interim injunction restraining the defendants to infringe the trademark and copyright are concerned, that shall continue till the disposal of the application under Order 9 Rule 13 as such, I.A. No. 8326/2008 shall be treated as dismissed.

20. List before the Joint Registrar for fixing the date for recording of the evidence on 22.10.2009.