

(2014) 11 DEL CK 0031

In the Delhi High Court

Case No : FAO 320/2014

M. Padma Narayan Singh

APPELLANT

Vs

Renu Sharma

RESPONDENT

Date of Decision : 07-11-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 10, Order 5 Rule 12, Order 9 Rule 13

Citation : (2014) 11 DEL CK 0031

Hon'ble Judges : A.K. Pathak, J

Bench : Single Bench

Advocate : Rakesh Tikku, Sr. Adv., Gursharan Singh, Aditya Bhardwaj and Paranjay Chopra, Advocate for the Respondent

Judgement

A.K. Pathak, J.—After arguing for five minutes appellant submits that matter be transferred to some other Bench. I do not find any reason to rescue myself from the case. When appellant was requested to submit arguments she declined to assist the court, inasmuch as left the court in a huff. Accordingly, I have heard learned senior counsel for the respondents, perused the material placed on record and proceed to dispose of the appeal by this order, after condoning the delay in filing the appeal.

2. Factual matrix, as emerges from the records, is that respondents filed a suit for possession of a room adjoining to the kitchen in the property, bearing SFS Flat No. 1260 (1st Floor) Category III, Pocket-I, Sector D, Vasant Kunj, New Delhi shown in the red colour in the site plan; as well as for recovery of mesne profits amounting to Rs. 3.60 lacs together with interest and future mesne profits @ Rs.15,000/- per month. It was further prayed that appellant be restrained from creating third party interest in the suit property and from creating any interference in the possession as well as ingress and egress of respondents in the remaining portion of flat more particularly shown in green colour in the site plan. Respondents alleged that their father, namely, Shri Sharma Nand Sharma acquired lease hold rights in DDA SFS Flats No. 1260, (1st Floor) Category III,

Pocket-I, Sector D, Vasant Kunj, New Delhi from the Delhi Development Authority (DDA), vide allotment letter dated 11th November, 1987. Subsequently, DDA executed a registered conveyance deed dated 18th August, 1998 in favour of Shri Sharma Nand Sharma. Later on, Shri Sharma Nand Sharma gifted the said flat to respondent no.1 vide registered gift deed dated 5th February, 2010. Respondent no.1 gifted half portion of the said flat to her sister, that is, respondent no.2 vide registered gift deed dated 2nd June, 2011. Thus, respondents were joint owners of the said flat. Sometimes in the year 2003- 04 Shri Sharma Nand Sharma had permitted the appellant to stay in the suit property as appellant was known to him and was raising construction of her house in Gurgaon (Haryana). However, appellant did not vacate the suit property even after completion of construction of her house. In the year 2007 Shri Sharma Nand Sharma withdrew permission granted to appellant to occupy the suit property but appellant continued to occupy the same. On 30th June, 2010 a team of BSES officials inspected the suit premises and found that appellant was indulging in direct theft of electricity. Appellant also got a frivolous FIR registered against the son of Shri Sharma Nand Sharma as well as caretaker of the suit property. Appellant threatened that in case anybody comes near the flat he will be implicated in criminal cases. Appellant had no right to occupy the suit property and to interfere in the peaceful possession as well as in the ingress and egress of the respondents to portion of the flat shown in green colour. Vide legal notice dated 31st October, 2011 respondents called upon the appellant to vacate the suit property but to no effect, hence, the suit.

3. Trial Court issued summons to appellant. When process server tendered the summons to appellant she refused to accept the same on the pretext that she had engaged an advocate and further that she was unwell. Process server reported that appellant refused to accept summons. Appellant did not even appear in Court even through her lawyer and was proceeded against ex-parte vide order dated 23rd November, 2011. Respondent no.1 examined herself as PW1. She filed her affidavit in her examination-in-chief. Affidavit was filed by her in her individual capacity and also as attorney of respondent no.2. Challan and covering letter was proved as PW1/1. Allotment letter was proved as Ex. PW1/2. Certified copy of conveyance deed dated 19th September, 1998 was proved as PW1/3. Certified copy of gift deed dated 5th February, 2010 was proved as PW1/4. Certified copy of gift deed dated 6th February, 2011 was proved as PW1/5. Copy of legal notice dated 31st October, 2011 was proved as PW1/7. Postal receipts were proved as PW1/8 to PW1/11. Certified copy of registered lease deed dated 30th July, 2011 in respect of another premises of the same area was proved as PW1/12.

4. After hearing the arguments and perusing the record trial court passed ex-parte decree on 15th February, 2012. It was held that respondents had succeeded in proving their case. Trial court was satisfied that appellant was permitted to occupy the suit premises by the father of respondents. Respondents had also placed and proved on record copy of writ petition no. 666/2010 filed by

the appellant as Ex. PW 1/6. In the para 1 of the petition appellant had stated that she was occupying one room in the guest house (suit property). In para 2 it was further stated that the accommodation was provided to her by Shri Ashok Sharma, Director of Agglomerated Pharmaceutical Company. In para 8 appellant stated that she was only a guest in one room of the said guest house. Trial court has concluded that the averments made in the writ petition also indicated that appellant was merely a guest in one room of the suit property and was not paying anything towards the user charges. Trial court has further concluded that appellant was permitted to live in the suit property and which permission was withdrawn by serving a legal notice on her. Consequently, decree of possession was passed. Decree of mesne profits was also passed. Appellant was also restrained from creating third party interest and/handing over possession of the suit property to any third party. She was further restrained from interfering in the possession as well as in the ingress and egress of the respondents in DDA, SFS Flat No. 1260 (1st Floor) Category-III, Vasant Kunj, New Delhi as shown in green colour in the site plan-Ex. PW1/2.

5. Decree was passed on 15th February, 2012. After about two years of passing of the decree, that is, in the month of March, 2014 appellant filed an application under Order 9 Rule 13 CPC before the trial court for setting aside the ex-parte decree dated 15th February, 2012, which has been dismissed by the trial court by the order impugned in this appeal.

6. It may be noted that prior to filing of the application under Order 9 Rule 13 CPC by the appellant, respondents had already filed an execution petition in the month of March, 2014 wherein warrants of possession were issued on 12th February, 2014.

7. Appellant alleged in the application that she was elderly ailing woman and had engaged a counsel to send reply to the legal notice dated 5th November, 2011 of the respondents, thus, court ought to have served the summons on the said counsel. Due to her ailment appellant could not get involved in the said proceedings resulting in passing of ex-parte decree.

8. Learned trial court has held that for deciding the application under Order 9 Rule 13 Court is required to consider as to whether summons was duly served on the defendant or not and that appellant was prevented by any sufficient cause from appearing when the suit was called on for hearing. Factum of issuance of summons was not in dispute, inasmuch as, endorsement made by the appellant in her own handwriting on the back of summons was also not in dispute. Appellant had made following endorsements on the rear page of the summons:-

"The matter has been delegated to my Advocate. The copy of reply to the legal notice is being furnished herein for perusal of the Hon"ble Court".

Meena P.N. Singh

22.11.2011

PS : The Hon"ble Court may kindly take note that I am very ill and physically incapacitated.

9. Trial court has further observed that appellant had perused the summons and was aware of the date fixed in the matter. It was for her to have accepted the summons and inform her counsel to appear in the matter. She could not have refused to accept the summons on the ground that she had engaged a counsel and summons be served on him. Trial court has further noted that appellant had failed to show any document to indicate that she was physically incapacitated to appear in the court on the date fixed or to instruct her counsel to appear on her behalf to contest the suit. It has been further held that appellant was no stranger to the court proceedings as she had been pursuing other litigations in the past as well. Reliance has also been placed on Parimal Vs. Veena @ Bharti, wherein it has been held that "in order to determine the application u/O 9 Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straitjacket formula of universal application."

10. Trial court has further relied on the second proviso to Order 9 Rule 13 CPC which provides that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.

11. For the reasons to follow, I am of the view that impugned order does not suffer from any illegality or perversity. In fact view taken by the trial court is a possible view and cannot be interfered with. From the facts narrated above, it is, clear that process server had gone to serve the summons on the appellant, inasmuch as, she met him at the address given in the summons but declined to accept the same on the grounds mentioned on the reverse page. She made an endorsement to the effect that she had delegated the matter to her advocate and notice be furnished to him. She further claimed that she was very ill and physically incapacitated. She had made this noting after perusing the summons. Once the summons was tendered to her by the Process Server she could not have refused to accept the same on the pretext that in her place service be affected on her counsel. She ought to have accepted the summons and contacted her counsel on phone or otherwise and instructed him to appear in Court on the date fixed. The endorsement made by her amounts to refusal to acceptance of service of summons. Refusal is due and proper service and has been rightly accepted by the trial court.

12. Appellant has failed to place any document on record before the trial court to show that she was ailing and if so, from which disease. No documentary evidence

was led by her before the trial court to show that she was confined to bed and was not in a position to even instruct her counsel on phone. In the present appeal appellant has placed on record certain medical prescriptions but the same do not relate to the period involved in this case. These medical prescriptions do not pertain to the years 2010, 2011 and 2012. In any case she could not have refused to accept the summons on the ground that she was unwell. After receiving summons it was for her to instruct the counsel to take appropriate steps. Despite having knowledge of the pendency of suit and the date fixed in the matter, appellant slept over the matter for almost two years for which no explanation has been offered. It is not the case that trial court acted in hasty manner and pronounced the judgment on the same very day for which summons was made returnable. Summons was made returnable for 23rd November, 2011; whereas ex-parte decree has been passed on 15th February, 2012, that is, after about three months and that too after affording opportunity to the respondents to lead evidence. Appellant had knowledge of the date and court as well and could have participated in the proceedings.

13. Order V Rule 10 provides that service of summons shall be made by delivery or tendering a copy thereof. Order V Rule 12 further envisages that whenever it is practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. A conjoint reading of the above provisions makes it clear that as far as practicable service shall be made on the defendant and if defendant also has an agent service of summons on such agent shall be sufficient service on the defendant. This does not mean that service cannot be effected on the defendant even if he/she has an agent. Meaning thereby tendering the summons to the appellant was within the four corners of law. Thus, appellant could not have refused to accept summons on the pretext that she had engaged a lawyer and such refusal amounts to due service.

14. Order IX Rule 13 reads as under:-

"13. Setting aside decree ex parte against defendant.-In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

XXXXXXXXXXXXXXXXXX

Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim."

15. In Parimal Vs. Veena @ Bharti, , Supreme Court in the context of second proviso to Order IX Rule 13 has held thus:-

"It is evident from the above that an ex parte decree against a defendant has to be set aside if the party satisfies the court that summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court. The legislature in its wisdom, made the second proviso mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein."

(emphasis added)

16. In this case appellant had notice of the dates as she had perused the summons. She also had sufficient time to appear in court before passing of the ex-parte decree. She did not participate in the proceeding even through the lawyer who she had allegedly engaged. She slept over the matter all most for about two years which shows her callousness and gross negligence, inasmuch as grounds taken by her lacks bonafides.

17. In view of above discussions, appeal is dismissed.

18. Order dictated and announced in open Court.