

(2009) 10 DEL CK 0360

In the Delhi High Court

Case No : F.A.O. No. 294 of 2009 and C.M. No. 13496 of 2009

Mahalaxmi Sales Corporation

APPELLANT

Vs

Shri Satish Kumar, Proprietor, Sat Narain Naveen Kumar

RESPONDENT

Date of Decision : 08-10-2009

Acts Referred:

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

Citation : (2009) 10 DEL CK 0360

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Asit Tiwari, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

V.B. Gupta, J.—This appeal has been filed by the appellant against order dated 16th May 2009 vide which Additional District Judge, Delhi dismissed appellant's under Order IX Rule 13 read with Section 151 of CPC (for short as "Code").

2. Brief facts are that, respondent filed a suit for recovery against appellant under Order XXXVII of the Code, in which leave to defend was granted. Respondent closed his evidence on 17th April 2008. On 23rd May 2008, matter was fixed for appellant's evidence, but no witness of appellant was present and adjournment was prayed. Accordingly, matter was adjourned to 1st August 2008. On that day again, no witness of appellant was present nor any affidavit was filed. Adjournment was prayed on the ground that appellant is not well, the same was granted subject to cost of Rs.500/- to be deposited with Delhi Legal Services Authority within 7 days.

3. On 12th September, 2008 none appeared for appellant at first call. Again on second call none appeared on behalf of appellant. On third call at 1.25 PM, when case was taken up, nobody was present on behalf of the appellant nor any witness was present. The appellant was thus proceeded ex-parte and matter was adjourned to 27th September, 2008 for final arguments.

4. On 27th September, 2008 again none appeared for appellant. Final arguments were heard and matter was adjourned to 4th October, 2008 for Orders. On that date, suit of the respondent was decreed.

5. It is contended by learned Counsel for appellant that non-appearance of the appellant on 12th September, 2008 was due to inadvertent error/mistake of counsel which was beyond the control of the appellant. On 1st August, 2008 due to inadvertence, counsel for appellant erroneously noted next date of hearing in his case diary as 3rd November, 2008, instead of 12th September, 2008 and accordingly informed appellant about the next date. As per case diary, counsel for appellant, visited the Court on 3rd November, 2008, but the case was not listed on that date and he found that the same has been decreed on 4th October, 2008. Thus, there was a bonafide mistake on the part of the counsel and trial court wrongly dismissed the application of the appellant for setting aside the ex-parte decree.

6. Application under Order IX Rule 13 of the Code, filed by appellant before trial court, is supported by affidavit of appellant as well as his counsel. Appellant in his affidavit has nowhere stated as to why he did not appear in the Court on 12th September, 2008, when the matter was fixed for his evidence. As already stated above, many dates were given for appellant's evidence, but not on a single date, appellant appeared for his evidence nor did he produce any witness.

7. Though counsel for appellant in his affidavit, filed along with application has stated that on 1st August, 2008, inadvertently and due to bonafide mistake, wrong date of hearing was noted as 3rd November, 2008, instead of 12th September, 2008 in his case diary. However, appellant in his entire affidavit, has nowhere given any explanation for his non-appearance in the Court on 12th September, 2008, nor he has stated at all that he had also noted wrong date.

8. Order IX Rule 13 CPC of the Code, which is relevant, read as under:

Rule. 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; Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[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.] [Explanation - Where there has been an appeal against a decree passed ex parte under this rule, and

the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]

9. According to this provision, appellant has to show that "he was prevented by sufficient cause from appearing when the suit was called for the hearing".

10. There is no explanation at all on behalf of appellant, as to why he did not appear on 12th September, 2008 when matter was listed for his evidence nor there is any explanation as to why no witness was produced or summoned.

11. Appellant has relied solely on the diary of his counsel. The file cover of appellant's counsel has not been produced before the trial court. It is not that, only counsel of the appellant was negligent, but appellant himself too has been grossly negligent in conducting his case. Appellant did not appear in the Court on 23rd May, 2008, 1st August, 2008 and 12th September, 2008, when matter was listed for his evidence.

12. It is well settled that failure of lawyer to appear is necessarily not a sufficient cause, conduct of parties has also to be seen.

13. In *New Bank of India v. Marvels (India) and Ors.* 2001 VI AD (Delhi) 536 this Court observed:

There is no absolute proposition of law that all cases of mistakes on the part of the advocate or pleader would constitute sufficient cause. What is to be seen is as to whether absence of the advocate was bonafide. This is to be examined in conjunction with the conduct of the party who had engaged advocate viz. whether he was perusing his case diligently or the conduct and approach was so callous that it amounted to negligence. If this is so then non-appearance would not be bonafide and it would not constitute sufficient cause within the meaning of Order IX Rule 13 of the Code of Civil Procedure. It was further observed:

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.

14. Trial court in this regard held:

It is pertinent to mention that matter was adjourned to 12.9.2008. As per the order sheet dated 1.8.2008 as per request of Sh. Asit Tiwari, Adv. for the defendant the case was adjourned for 12.9.08 and there is no phonetic resemblance in 12.9.08 and 3.11.2008. On behalf of the applicant/defendant Id.

Counsel has pleaded that he wrongly noted the date as 3.11.2008 in his case diary and copies of the case diary have been produced. The original case diary has not been shown and file cover has also not been produced, nor the copy thereof has been placed on record for obvious reason. There is no explanation whether the cost has been deposited with Delhi Legal Services Authority within 7 days from 1.8.2008 or not. No documentary evidence has been filed by the defendant to corroborate the contention that the defendant had actually noted next date as 3.11.2008 instead of 12.9.2008. There is no iota of assertion if the defendant had visited the Court on 3.11.2008 or not. Para-10 of the application makes a mention only about the counsel for the defendant having visited the Court and is silent about the appearance of the defendant/applicant. Therefore, the plea taken in the application has not been supported by conduct of the defendant and by not filing the file cover of the case file maintained by the defendant's counsel. Keeping in view the fact that defendant did not appear in the Court on any of the date fixed for defendant's evidence. No medical regarding sickness of the defendant was produced. There is no disclosure of the fact whether the cost imposed on the defendant vide order dated 1.8.2008 has been deposited with Delhi Legal Services Authority or not and application is totally silent. There is no claim of the defendant that he also visited the Court on 3.11.2008 and, therefore, in my considered view the defendant has failed to disclose existence of any sufficient cause non appearance in the Court on 12.9.08, 27.9.08 and 4.10.2008. The application has been moved only to delay the proceedings and the execution proceedings.

15. In view of the above findings of the trial court coupled with facts that appellant had not been perusing his case diligently and his conduct and approach was so callous, that it amounted to negligence. The only intention of appellant is to delay the proceedings and to certain extent, he has achieved his objective, as he did not appear for his evidence nor did he produce even single witness, before he was proceeded ex-parte. Moreover, appellant did not deposit even the adjournment costs imposed by the trial court. Appellant was most negligent in defending his case and his non action and want of bonafide are clearly imputable. Thus, appellant has not been able to satisfactorily show any sufficient cause for non-appearance.

16. Under these circumstances, I have no reason to disagree with the findings of the trial court that no sufficient cause for non-appearance has been shown by the appellant in the court, on various dates. Application under Order IX Rule 13 of the Code has been filed only just to delay the execution proceedings. The present appeal is without any basis and same is hereby dismissed with costs of Rs.20,000/-. C.M. No. 13496/2009

17. Dismissed.

18. Appellant is directed to deposit the costs with trial court, within a period of one month from today, failing which trial court shall recover the same in accordance with law.

19. Copy of this order be sent to the trial court.