

(1997) 03 DEL CK 0106

In the Delhi High Court

Case No : Civil Revision Appeal No. 554 of 1991

Mansingh Gupta and Co.

APPELLANT

Vs

Ashok Kumar Jain

RESPONDENT

Date of Decision : 01-03-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 35B

Citation : (1997) 70 DLT 575

Hon'ble Judges : S.N. Kapoor, J

Bench : Single Bench

Advocate : B.K. Choudhry, for the Appellant;

Judgement

S.N. Kapoor, J.

(1) This revision petition is directed against an order dated 30th January, 1989 rejecting an application to review closing plaintiff's evidence on the ground of non-payment of costs.

(2) This order has been assailed by the learned Counsel for the petitioner on the ground that on account of the marriage of the nephew of the Counsel for the plaintiff on 6th September, 1989 at Bombay, he sought an adjournment which was granted and the case was adjourned to 6th November, 1989. On 6th November, 1989, the partner of the plaintiff firm Anil Gupta had not turned up by the time the case was called. The case was adjourned to 30th January, 1990 subject to further payment of the costs as last opportunity. On 29th evening, the Counsel for the plaintiff apprehending that he would not be able to attend the case, requested Mr. B.P.S. Tyagi on 29th January, 1990 to come and attend to this case. The plaintiff did not come to the Court costs imposed on the previous dates was not paid. Consequently, the evidence was closed and since the onus of all the issues was on the plaintiff, the suit was dismissed.

(3) On 16th February, 1990, the plaintiff moved an application for review on the grounds that the plaintiff was bed-ridden and that he was the only witness to be

examined. Since the plaintiff was bed-ridden, he could not come; the costs could not be paid. A Medical Certificate was also produced.

(4) The application was rejected on the ground that there was no subsequent discovery of any new or important matter to justify a review.

(5) The contention of the learned Counsel is that there was subsequent discovery about the new and important fact that the plaintiff was bed-ridden at the time of passing of the impugned order of closing evidence and dismissing suit. Had the Court known this fact, it might have extended time to pay the costs as well as to plead evidence. Consequently, rejection of the review was not justified.

(6) The learned Counsel for the petitioner relied upon *Esso. Standard EJ. Co. v. Wearwell Cycle*, 1977 Rlr 497. In para 8 of the judgment, following observations were made on the point:

8."As a rule this Court would not interfere with the discretion of the Trial Court in deciding the suit forthwith under Order XVII, Rule 3, Civil Procedure Code. But in this particular case, the Trial Court seems to have been under a misapprehension that once it made the payment of adjournment costs conditional, it had no discretion to allow more time to the plaintiff for payment of costs. It, Therefore, failed to exercise the discretion which it had in giving the plaintiff some time to pay the adjournment costs under a mistaken view of law. Appeal allowed".

(7) It was also pointed out that Mr. B.P.S. Tyagi, Advocate- requested for adjournment. The presence of Mr. Tyagi is very much mentioned in the order dated 30th January, 1990. Adjournment was also sought stating that the Counsel was busy in High Court. From the impugned order, it is apparent that the last opportunity was given to the plaintiff. Neither the plaintiff appeared nor the costs were paid and the Counsel was said to be busy in High Court.

(8) It is apparent that the plaintiff was bed-ridden on account of a vehicular accident, and the Counsel himself was busy in High Court. The Counsel had taken care to see that proxy Counsel appears and seeks adjournment. The proxy Counsel failed to bring it to the notice of the Court that the plaintiff was sick and confined to bed and in such circumstances, the evidence was closed and the case of the plaintiff was dismissed - Application for review was filed but the learned Trial Court rejected the review on the ground that no new factor was brought to its notice. It is apparent from the order dated 30th January, 1990 that the plaintiff was bed-ridden was not brought to the knowledge of the Court, though the Court should have been informed about it but there was some communication gap.

(9) Confinement of the plaintiff due to vehicular accident was a fact, which could not be brought to the notice of the Court and this would provide sufficient ground to review the impugned order. It may be mentioned that the provisions of Section 25B of CPC are not of such a nature that order could not be reviewed, in

view of Esso. Standard E.I. Co. v. Wearwell Cycle (supra) revisional Court in appropriate cases in order to avoid any miscarriage of justice in situations as is obtained in this case, could entertain revision petition and pass appropriate orders to further substantial justice.

(10) Seeing the above circumstances, I allow the revision petition to ensure substantial justice in between the parties subject to payment of costs of Rs.1500.00 to the opposite party by delivery of banker's cheque or draft within a period of two weeks and in case of refusal to deposit the same in Court and further subject to the condition that the plaintiff/applicant shall inform the opposite party as well as his Counsel by a Regd. letter about the order which is being passed today and further subject to the condition that the plaintiff/applicant shall close his evidence on two dates that may be fixed by the learned Trial Court for recording the evidence of the plaintiff/applicant. And set aside the order dated 1st April, 1991 dismissing application for review and review the order closing evidence.

(11) A copy of this order be sent to the learned Trial Court through learned District Judge for information and to proceed in accordance with law.