

(2021) 04 DEL CK 0217

In the Delhi High Court

Case No : Civil Suit (COMM) No. 17 Of 2018

M/S. Hira Sweets & Confectionary Pvt. Ltd. And Others

APPELLANT

Vs

Hira Confectioners

RESPONDENT

Date of Decision : 27-04-2021

Acts Referred:

Limitation Act, 1963 — Article 123

Code Of Civil Procedure, 1908 — Order 9 Rule 13

Citation : (2021) 04 DEL CK 0217

Hon'ble Judges : Manoj Kumar Ohri, J

Bench : Single Bench

Advocate : Satish Kumar, B.K. Pandey

Final Decision : Dismissed

Judgement

Manoj Kumar Ohri, J

I.A. 9702/2020 (Under Order IX Rule 13 CPC by the Defendant) & I.A. 9703/2020 (Condonation of Delay of 582 days in filing I.A. 9702/2020 by the Defendant)

1. The present applications have been preferred by the defendant through its proprietor - Pooja Sharma seeking setting aside of the ex-parte judgment and decree dated 01.02.2019 as well as for seeking condonation of delay of 582 days in filing the application.

2. Briefly, the present suit was filed for permanent injunction restraining infringement and passing off of trademark, copyright, damages, delivery up etc. In the plaint, it was averred that the plaintiffs' predecessor had started the business of selling sweets in the year 1912 and the trademark/label 'HIRA SWEETS' was conceived and adopted by the plaintiffs' predecessor in the year 1960. It was also averred that the plaintiff No.1 was the registered proprietor of the original artistic work 'HIRA SWEETS' and it became the registered proprietor of the mark and device 'HIRA SWEETS' under Classes 29, 30, 32 and 43 of the

Trade Marks Act, 1999 in 2016. The defendant was served with the summons in suit and after availing various opportunities, filed the written statement however, thereafter, stopped appearing before the Court. Later, on the defendant's continued absence, his right to file the affidavit of admission/denial of documents was closed.

3. On 01.02.2019, while directing that the defendant be proceeded ex-parte, this Court while relying on the decision in Satya Infrastructure Ltd. and Ors. v. Satya Infra & Estates Pvt. Ltd. reported as 2013 SCC OnLine Del 508 and after considering the averments in the plaint as well as in the written statement, came to the conclusion that the defendant had no real prospect of defending the claim. The suit was decreed in favour of the plaintiffs.

4. The defendant filed the present applications on 19.10.2020. It is claimed that the defendant came to know of the ex-parte decree only on 18.07.2019 when it received certified copies of the judgment. It is claimed that after becoming aware of the ex-parte judgment, the defendant approached the plaintiffs and keeping in view their long-standing relations, the plaintiffs assured the defendant of an amicable settlement. It is averred that the settlement talks continued till February, 2020. However, on account of financial hardship, the defendant's shop was closed from March, 2020 onwards.

5. Insofar as its non-appearance before the Court is concerned, it has been averred that the defendant's counsel, who was engaged to pursue the matter, despite assuring of his regular appearance before the Court rather failed to appear resulting into passing of the decree against the defendant. It is averred that the defendant has also filed a complaint against its counsel before the Delhi High Court Bar Association.

6. In support of the applications, the defendant has also placed reliance on the medical documents of the son of the defendant's proprietor, namely, Master Sparsh Sharma. It is stated that Master Sparsh Sharma, aged about 10 years, underwent a heart surgery on 4.07.2018. Reliance is also placed on the medical documents of the mother of the defendant's proprietor namely, Smt. Savita Pandit. It is stated that Smt. Savita Pandit used to have dialysis and expired on 20.04.2019. It is averred that for the said reasons, the defendant could not appear before the Court and also could not file the captioned applications within time.

7. In support of his submissions, learned counsel for the defendant/applicant has placed reliance on the decisions in Rafiq and Another v. Munshilal and Another reported as (1981) 2 SCC 788, Smt Lachi Tewari and Others v. Director of Land Records and Others reported as 1984 Supp SCC 431, M/s N.K. Electronics v. Narinder Kumar reported as 2013 (4) RCR (Civil) 143.

8. The applications are contested by learned counsel for the plaintiffs. He submits that the 'case history' as available on the website of the Delhi High Court shows that the defendant through its proprietor - Pooja Sharma had applied for a

certified copy of the decree on 29.05.2019, which admittedly was received by her on 18.07.2019. On 11.09.2020, the plaintiffs filed an Execution Petition bearing No. 568/2020. He submits that only after notice in the aforesaid execution petition was issued, the defendant has preferred the captioned applications.

9. Learned counsel for the plaintiffs has placed reliance on the decisions in Sudarshan Sareen v. National Small Industries Corporation Ltd. And Anr. reported as 2013 SCC OnLine Del 4412, Indian Sewing Machines Co Pvt Ltd. v. Sansar Machine Ltd. and Another reported as 1994 SCC OnLine Del 573, M. Paul Babuta v. Union of India and Another reported as 1998 SCC OnLine Del 601 & Baldev Raj Arora v. Modex International Securities Ltd. reported as 2009 SCC OnLine Del 3573.

10. I have heard learned counsels for the parties and gone through the averments made in the applications as well as the case laws relied upon by the learned counsels for the parties.

11. Insofar as the scope of an application under Order IX Rule 13 CPC is concerned, the Court has to see whether the summons in the suit were duly served or not and/or whether the defendant was prevented by any "sufficient cause" from appearing when the suit was called for hearing. In the present case, the defendant was duly served with the summons in the suit and had appeared.

12. "Sufficient Cause" is an elastic expression and no hard and fast guidelines are prescribed. The Court, in its discretion, has to consider the "sufficient cause" in the facts and circumstances of every individual case. Although in interpreting the words "sufficient cause", the Court has wide discretion but the same has to be exercised in the particular facts of the case.

13. Article 123 of The Limitation Act prescribes that the application for setting aside an ex-parte decree should be filed within thirty days of passing of the decree.

14. In Sudarshan Sareen (Supra), a Division Bench of this Court while holding that the appellant therein, was wilfully negligent in not appearing and thus rejecting his prayer for setting aside of an ex-parte decree, relied on the following passage in the case of Parimal v. Veena reported as (2011) 3 SCC 545, where the expression "sufficient cause" was interpreted as under:

"13. "Sufficient cause" is an expression which has been used in a large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party

cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide *Ramial v. Rewa Coalfields Ltd.* [AIR 1962 SC 361], *Lonand Grampanchayat v. Ramgiri Gosavi* [AIR 1968 SC 222], *Surinder Singh Sibia v. Vijay Kumar Sood* [(1992) 1 SCC 70] and *Oriental Aroma Chemical Industries Ltd. v. Gujarat Industrial Development Corpn.* [(2010) 5 SCC 459].)

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15. While deciding whether there is sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide *State of Bihar v. Kameshwar Prasad Singh* [(2000) 9 SCC 94], *Madanlal v. Shyamlal* [(2002) 1 SCC 535], *Davinder Pal Sehgal v. Partap Steel Rolling Mills (P) Ltd.* [(2002) 3 SCC 156], *Ram Nath Sao v. Gobardhan Sao* [(2002) 3 SCC 195], *Kaushalya Devi v. Prem Chand* [(2005) 10 SCC 127], *Srei International Finance Ltd.v. Fairgrowth Financial Services Ltd.* [(2005) 13 SCC 95] and *Reena Sadh v. Aniana Enterprises* [(2008) 12 SCC 589].)

16. In order to determine the application under Order 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."

15. Recently, the Supreme Court in *A. Murugesan v. Jamuna Rani* reported as (2019) 20 SCC 803 affirmed its earlier view in *G.P. Srivastava v. R.K. Raizada and Others* reported as (2000) 3 SCC 54, which is reproduced as under:

"7. Under Order 9 Rule 13 CPC an ex-parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex-parte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard-and-fast guidelines can be prescribed. The courts have a wide

discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex-parte and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits."

16. In the present case, although the defendant has blamed her counsel for his non-appearance which resulted in passing of the decree however, a perusal of the judgment dated 01.02.2019 would show that the same was passed after considering the merits of the case.

17. A perusal of the case record would show that the defendant had applied for a certified copy of the decree on 29.05.2019 which admittedly, was received by her on 18.07.2019. The defendant has failed to state that after becoming aware of the passing of the ex-parte decree on 18.07.2019, what steps were taken by it to seek setting aside of the same. It appears that the defendant rather preferred to sit over it. The captioned applications came to be filed on 19.10.2020, only after the plaintiffs filed the execution petition.

18. The Apex Court in decisions relied by learned counsel for the defendant has held that a party should not suffer from the inaction, deliberate omission or misdemeanour of his agent. However, the facts in present case show that after becoming aware of the ex-parte decree on 18.07.2019, the defendant took no steps against its counsel for more than 14½ months i.e., till 06.10.2020 when a complaint was stated to be filed and that too, two weeks prior to the filing of the captioned applications. In the opinion of this Court, the action taken seems to be only an afterthought with the aim of filing the present application.

19. Insofar as the delay of 582 days in filing the application is concerned, the defendant has sought to explain the same by claiming that some settlement talks were going on between the parties. The defendant has also relied upon certain medical documents of the son and mother of the defendant's proprietor.

20. During the course of arguments, learned counsel for the plaintiffs strongly denied the claim of any settlement talks. The defendant failed to put any supporting document in this regard. The defendant's reliance on the medical documents of the son of the defendant's proprietor is of no use as the same pertained to the year 2018 i.e., before passing of the decree. The mother of the defendant's proprietor is also stated to have expired on 20.04.2019. It is noted that the abovementioned events occurred prior to 29.05.2019 and as such, do

not provide any justifiable explanation to the delay of 582 days in filing the application or at least, the delay from 18.07.2019 when the defendant admittedly, became aware of passing of the ex-parte decree.

21. In the opinion of this Court, the defendant has failed to show any "sufficient cause" for its absence in the Court on the material dates. The defendant has also failed to satisfactorily explain the delay of 582 days in filing the captioned application. The explanation given by the defendant is only an eye-wash.

22. Accordingly, this Court is not inclined to accept the explanation provided by the defendant. Consequently, the captioned applications are dismissed.

I.A. 2403/2021 (Directions for Stay by the Defendant)

1. In view of the aforesaid order passed today, there is no need to go into the captioned application.

2. The application is dismissed as infructuous.