

**(2013) 01 P&H CK 0269**  
**In the Punjab And Haryana At Chandigarh**  
**Case No : F.A.O. No. 3139 of 2012 (O and M)**

M/s. N.K. Electronics

APPELLANT

Vs

Narinder Kumar

RESPONDENT

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**Date of Decision :** 25-01-2013

**Acts Referred:**

**Citation :** (2013) 01 P&H CK 0269

**Hon'ble Judges :** A.N. Jindal, J

**Bench :** Single Bench

**Advocate :** Sumeet Mahajan and Mr. Amit Kohar, for the Appellant; M.L. Sarin and Mr. Nitin Sarin, for the Respondent

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## Judgement

A.N. Jindal, J.—In a suit instituted at the instance of Narinder Kumar Proprietor of M/s. N.K. Sales Corporation (herein referred as, "the respondent"), the defendant M/s. N.K. Electronics appellant was proceeded against ex-parte on 10.10.2006 and ex-parte decree was passed on 12.2.2007. According to the appellant he came to know about the ex-parte decree on receipt of the summons in an execution on 24.7.2007 and he moved an application for setting aside ex-parte proceedings and decree on 22.8.2007. This suit was under the Copy Right and Trade Marks Act pending before the Additional District Judge, Ludhiana, therefore, he dismissed the application for setting aside the ex-parte decree on 28.3.2012, against which this appeal has been preferred. In his application for setting aside the ex-parte decree, he had pleaded that he continued attending the case since the very date he was summoned in the case. He filed written statement through his counsel Mr. Jaswant Singh on 16.3.2005 and plaintiff filed replication on 27.4.2005 and attended the proceedings up to 18.7.2006. Since the case was being adjourned unnecessarily from time to time, he was told by his counsel that he would inform him when the case is fixed for substantial date or for evidence. However, on 10.10.2006, neither he nor his counsel appeared, therefore, he was proceeded against ex-parte and ultimately ex-parte decree was passed against him on 12.2.2007. However, he came to know about the ex-parte

decree on 24.7.2007 when he received summons, as such, he having filed the application within one month from the date of knowledge has prayed for setting aside the ex-parte decree.

2. Upon notice the defendant appeared and contested the application. He has stated that the application was hopelessly time barred. The plaintiff was a registered owner of the trade mark N.K. Sales Corporation and the defendant had been deliberately infringing his trade mark. Since the defendant-appellant (herein referred as, "the appellant") had no case, therefore, he intentionally absented himself from the court and ultimately ex-parte decree was passed against him. The application is time barred. After passing of the decree, it was immediately conveyed to the plaintiff in the presence of Dr. Dev Kaushal at his shop and he was requested not to continue to use his trade mark but he did not agree. Summons were sent to him. His absence from the court was intentional. Thus, he prayed for dismissal of the application.

3. From the pleadings of the parties, the trial court framed the following issues.

1. Whether there are just and sufficient grounds to set aside the decree dated 12.2.2007? OPA

2. Whether the application is within time? OPA

3. Relief.

4. Both the parties led evidence. The defendant appeared himself as AW-1 and proved on record copy of the summons Ex. A1 which he received on 24.7.2007 regarding the execution proceedings. On the other hand, the respondent Narinder Kumar while appearing in the witness box as RW-1 produced an affidavit Ex. RW 1/A and proved on record, the receipt regarding his application for registration of the trade mark filed on 27.1.2005 Ex. R1, copy of certificate of registration of the trade mark/trade name of N.K. Sales Corporation Ex. R2 and copy of the legal proceedings Ex. R3 and certificate of registration of his trade mark issued by the Government of India Ex. R4. RW-2 Krishan Chand, Process Server had proved on record summons Ex. RW 2/A/A1, his report Ex. RX/1 made on the summons and report of the Nazir Ex. RX/2.

5. The facts and circumstances emanating from the file appear to be that the suit which was filed on 3.2.2005 moved at snail pace till 10.10.2006. Since no order of injunction, during this period, was passed against the appellant and the application was still pending for arguments along with the application for amendment of the plaint, therefore, the defendant could not be said to be apprehensive of the feeling that he had no case at all and it was a device for him if he absents from the court. The zimni orders reveal that the application for injunction was filed on 17.5.2005 and the case continued pending for arguments on the application for temporary injunction for 32 dates and thereafter an application under Order 6 Rule 17 CPC was filed on 18.7.2006 which also continued to be adjourned up to 10.10.2006 when the defendant was proceeded

against ex-parte. The zimni orders further reveal that on 22.3.2006, 8.4.2006, 13.5.2006 and 14.9.2006, none was present on behalf of the parties but the case was not dismissed in default. However, it was only on 10.10.2006 that the defendant was proceeded against ex-parte on account of none appearance of the defendant or his counsel. Thus, this casual approach of the court to adjourn the case time and again without taking any substantive steps towards the decision on the application or for inviting evidence, accompanied by the assurance of the learned counsel for the appellant-defendant to miss the court for a few hearings, until the case is fixed for substantial hearing i.e. arguments on the application are heard or parties are invited to lead evidence invited the mistake and led the plaintiff not to attend the court on the day he was proceeded against ex-prte. In any case, the case of the appellant is definite that since he was assured by his counsel that he would be informed about the substantial date when he is to come, he stayed back. Thus, this could be said to be a sufficient cause in the given circumstances of the case, for not attending the dates. Consequently, he was proceeded against ex-parte. Thus, this court considers it sufficient ground for setting aside the ex-parte proceedings as well as ex-parte decree.

6. The relations between the party and his agent/advocate are very sacrosanct and of very pious nature. The advocate through his power of attorney promises to pursue the case to the end and he has no right to abstain from the court and also to inform the party in case any adverse or favourable order is passed in the case of his client. While dealing with the duties of the advocate towards his party, the Apex Court in case *The Secretary, Department of Horticulture, Chandigarh and Another Vs. Raghu Raj*, observed as under:-

An advocate has no right to remain absent from the Court when the case of his client comes up for hearing. He is duty bound to attend the case in Court or to make an alternative arrangement. Non-appearance in Court without "sufficient cause" cannot be excused. Such absence is not only unfair to the client of the advocate but also unfair and discourteous to the Court and can never be countenanced. At the same time, however, when a party engages an advocate who is expected to appear at the time of hearing but fails to so appear, normally a party should not suffer on account of default or nonappearance of the advocate.

7. A party, when engages the advocate, presumes that he would all the way be sincere to conduct his case, support his cause to the best of his ability, knowledge and competency. Their relationship has a foundation of mutual trust and confidence. He would represent his case and work under his instructions and he would inform him about the court proceedings from time to time and in case of his non appearance, he would arrange for a substitute. As per Black's Law Dictionary; Advocate is a person who assists, defends, pleads or prosecutes for another. Since the times immemorial, the office of an advocate is placed at a high esteem, treated with honour, dignity and respect. Though presently barring some abrasions, still it has not lost its image. The Advocates commanding seniority, and repute at their face still behold respect and confidence. The courts

expect the lawyers practicing in the courts of law to be courteous knowledgeable and wise in their arguments; appear impressive in their robes; pleasant and cheerful, protective, defensive, clean, truthful and honest in their conduct and respectful, regardful in their body language. They besides being the artisan of Rule of Law, are the media between the courts and the customers of justice. They are supposed to assist the courts fairly and without concealment of facts. They should maintain the dignity of the law as well as the courts. They should maintain the principle of privileged communications between them and their clients. The Apex Court, while highlighting duties of the lawyers in case Rafiq and Another Vs. Munshilal and Another, observed as under:-

.....After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job.....

8. When a party performs his part of contract towards the advocate, then he all the way is innocent of the acts, the advocate has done, and he should not be allowed to suffer for any such act of his counsel for the inaction, deliberate omission or negligence of his agent which in the natural circumstances, the party would not have done or apparently his valuable rights had been put to jeopardy and such negligence was detrimental to the valuable rights of the party. It is also often seen that on account of the fact that the counsel are too busy to attend a particular case, make inadvertent statements by mixing one case with the other, miss the brief, miss to attend the court on account of their health problem or on account of recording wrong dates, as such the courts being oblivious of such problems, the advocates are facing, have been condoning the acts, omissions and such faults for which the party has to suffer, lest the legitimate and meritorious claims go against them being unheard, unattended, undefended, untried and uncontested. This Court also, in case Dinesh Kumar Vs. Chanderkala and another, while scrutinizing the relationship between the advocate and his client and the apathy of the client to suffer on account of the negligence and inaction on the part of the advocate, observed that since the litigant is not to be benefited for the absence of his advocate in defending the case and the litigant himself was not in any way negligent as his advocate was duty bound to attend in his absence and no motive could be attributed to the defendant-appellant that he was to be benefited in any manner by filing late application. Non attendance of the party and non appearance of the counsel on particular date could be treated as sufficient ground for setting aside the ex-parte decree. It was also observed in case Lal Devi and Another Vs. Vaneeta Jain and Others, wherein it was observed as under:-

When the suit was called out before the Court of the learned District Judge, counsel for the parties ought to have been present in Court. If on account of any unforeseen or unavoidable reason it was not possible for the defendant or his counsel to be present in Court, courtesy demanded that a representation ought to have been made before the Court by any other counsel so that the Court was informed that the counsel engaged were busy in the High Court. If such a request was made, we have no doubt that the learned District Judge would have accommodated counsel for the defendant. It is not unusual for the lower Courts to accommodate counsel on whose behalf a representation is made about their absence on account of remaining pre-occupied before the High Court. We have no doubt that the counsel for the defendant were remiss in not showing even the minimum courtesy expected of them.

9. Thus, in the aforesaid circumstances, the Apex Court further observed that in case of such nature, passing of the ex-parte decree is too harsh a consequence to be upheld especially when the defendant was not at fault, having duly instructed his counsel to appear before the District Court. When the counsel is engaged and he duly accepts the power of attorney as signed by the principal and undertakes to appear on behalf of the principal on each and every date of hearing and take all the steps towards culmination of the suit having accepted the conditions of the power of attorney with pleasure. It cannot be expected that they would go absent and if they do so, without any fault on the part of the defendant, the defendant cannot be made to suffer merely because the counsel for the defendant did not take proper care and caution that cannot be treated as cause detrimental to the rights of the plaintiff who had obtained an ex-parte decree. On examination of the zimni orders it transpires that the counsel was guilty of dereliction of duty not to appear in the court after 10.10.2006. As such, in such a case, where the injunction against the trade mark of the defendant-appellant was imposed could lead to disastrous result, substantive material and irreparable loss to his business. Thus, the propriety demands decision of such a case while applying the principle of "audi alteram partem".

10. While examining the case from another aspect, though the defendant was proceeded against ex-parte on 10.10.2006 and adjourned the case for 30.10.2006. However, on 30.10.2006, presence of the proxy counsel of the defendant's counsel was marked which impliedly nullifies the previous order and after 30.10.2006, the case was adjourned to 4.11.2006. On 4.11.2006, no specific order with regard to proceeding against ex-parte against the defendant was passed. In such a situation, I have reservations to say if order dated 10.10.2006 proceeding the defendant against ex-parte was valid.

11. In order to rebut the arguments raised by the learned counsel for the appellant, the learned counsel for the respondent has urged that in the light of the judgment delivered in case Shri Sanjay Vs. Smt. Kamlesh, Since the principal was responsible for negligence of his agent, therefore, the negligence of the agent would be taken as negligence of the principal, therefore, the same cannot

be condoned and is not sufficient for condoning the delay. He has also placed reliance on the judgments delivered in cases Salil Dutta Vs. T.M. and M.C. Private Ltd., and Suresh Kumar Vs. Smt. Daryai and Others, wherein it was observed that if the counsel pleads no instructions, then it is not necessary for the court to issue notice to the respondent. He has further placed reliance on the judgments delivered in cases Ram Narain Singh Vs. Smt. Gurinder Kaur and Another, and Chander Singh and another Vs. Ramkaran and another,

12. Having gone through these judgments, the same are on their own fact situation and are not applicable to the facts of the present case. As such, this court holds that the plea set up by the appellant that on failure of his counsel to inform him about the proceedings and the counsel was negligent in appearing before the court particularly when his agency was never revoked by him, therefore, there are sufficient grounds for setting aside the ex-parte proceedings as well as ex-parte decree.

13. The learned counsel for the appellant has further urged that before the appellant applies for setting aside the ex-parte decree, he should apply for setting aside the ex-parte proceedings which had taken place on 10.10.2006. In the absence of the prayer for setting aside the ex-parte proceedings, the ex-parte decree could not be set aside.

14. I have examined the application dated 22.8.2007 filed by the appellant for setting aside the ex-parte decree. If the application is read as a whole, then the same points towards both the situations i.e. ex-parte proceedings as well as ex-parte decree. He has explained both the stages by saying that he was not informed by his counsel about the ex-parte proceedings and the ex-parte proceedings did not take place on account of his fault. In this regard, it would be relevant to refer para Nos. 7 and 8 of the application which reads as under:-

7. That the absence of the defendant/applicant is neither intentional nor willful. He had acted only as per the instructions of his counsel. The defendant/applicant was not even informed by his counsel about the ex-parte proceedings against him and he remained under the impression that he will be called by his lawyer whenever required. Had he known about the consequences, he would have not stopped attending the case, which he had been attending regularly till January, 2006. The defendant/applicant confided in his counsel as he was told that the case will take a long time i.e. about 3-4 years and he will be called as and when he is required. The defendant/applicant could not comprehend that the suit will be disposed off in such a short time.

8. That the exparte proceedings and exparte decree were passed on account of the fault of the counsel for the defendant/applicant and he had no knowledge either of the exparte proceedings being taken against him on 10.10.2006 nor he had any knowledge of passing of the decree. He came to know only on 16.8.2007 after he received the summons from this Hon"ble Court and thereafter when the enquiries were made.

15. Thus, on reading of the contents of the application as a whole, it transpires that the applicant had challenged the ex-parte proceedings as well as ex-parte decree. It may further be mentioned that it was not a regular suit where a declaration regarding all orders was to be claimed. Further, the order of proceeding ex-parte merges in the decree. When the ex-parte decree is challenged, then automatically the order proceeding exparte would be deemed to have been challenged and there is no specific rule that at the time of challenging the ex-parte decree, the order proceeding exparte has also to be separately challenged.

16. The third plank of the argument raised by Mr. M.L. Sarin, Sr. Advocate is that the application is time barred. The decree was passed on 12.2.2007. The ex-parte proceedings had taken place on 10.10.2006; he had received the summons of execution on 24.7.2007 and had filed the application on 22.8.2007, therefore, if the limitation is counted from 10.10.2006 or 12.2.2007, then the application is time barred.

17. In this regard, it may be observed that nevertheless, the appellant was in the knowledge of the proceedings but it is established on record, by way of evidence, that he never knew if he was proceeded against ex-parte on 10.10.2006. It is established by the appellant that he informed through the summons on 24.7.2007 about the exparte decree passed against him when he was served with the summons in the execution, then he filed this application for setting aside the exparte proceedings and the decree on 22.8.2007 i.e. within 30 days from the date of knowledge. Consequently, it has to be observed that the trial court gravely erred in not calculating the limitation from the date of passing of the ex-parte judgment and decree. The court has also not taken notice of the Punjab Amendment to Order 9 Rule 13 CPC. The Punjab amendment has added sub rule (2) which for ready reference is reproduced as under:-

Rule 13 shall be numbered as rule 13(1) and the following sub-rule (2) shall be added to it namely:-

(2) The provisions of Section 5 of the Indian Limitation Act, 1908 shall apply to applications made under sub-rule (1).

18. The combined reading of Rule 13 read with Section 5 of the Limitation Act, make it abundantly clear that the application for setting aside the ex-parte decree could be filed even after the prescribed period of limitation, if the applicant satisfies the court that he was prevented by the sufficient cause from filing the application within prescribed time. Non appearance of the advocate and his failure to communicate that the defendant has been proceeded against ex-parte and the appellant's lack of knowledge of exparte judgment and decree dated 12.2.2007 having been passed against him till 24.7.2007, could be treated as sufficient cause for condoning the delay and setting aside the ex-parte decree or treating the application to be within limitation. I also do not find any merit in the contention that the appellant was ever told orally about the judgment and

decree having been passed against him. The evidence so led in this regard appear to be not believable. Thus, on the scrutiny of the facts and circumstances prevailing over the entire case, it would be appropriate to observe that the trial court has not touched the core issue and examined the law of the land on the point. Thus, interference in the impugned order becomes inevitable. Resultantly, this appeal is accepted, impugned judgment is set aside, the application under Order 9 Rule 13 CPC is accepted subject to payment of Rs. 10,000/- as costs and the trial court is directed to proceed in accordance with law.