

(2013) 10 BOM CK 0057

In the Bombay High Court

Case No : Notice of Motion (Lodging) No. 3061 of 2012 in Appeal (Lodging) No. 748 of 2012 in Suit No. 3028 of 2007

M/s. Whale Stationery Products Ltd.

APPELLANT

Vs

Kores (India) Limited and Another

RESPONDENT

Date of Decision : 24-10-2013

Acts Referred:

Citation : (2013) 56 PTC 467

Hon'ble Judges : M.S. Sonak, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Bimal Rajshekhar and Ms. Ritcha Sahay, instructed by Mr. Ashwin Shankar, for the Appellant; Rashmin Khandekar, instructed by Mr. Minesh Andharia, for the Respondent

Judgement

M.S. Sonak, J.—In this matter, one of us (D.Y. Chandrachud, J.) had passed an ad-interim order in a notice of motion in Suit No. 3028 of 2007. The learned Counsel for the parties, however, stated that they have no objection to the matter being taken up by this Bench. By this notice of motion, the Applicant seeks condonation of a delay of about 200 days in filing an appeal against an ex-parte judgment and decree dated 19 March 2012 in Suit No. 3028 of 2007.

2. The Applicant had taken out a Notice of Motion before the learned Single Judge under Order 9 Rule 13 of the CPC for setting aside the ex-parte judgment and decree dated 19 March 2012, which was dismissed by an order dated 22 August 2013.

3. There is no bar to maintain an appeal against the ex-parte judgment and decree, despite a motion under Order 9 Rule 13 for setting aside the ex-parte judgment and decree having been dismissed. However, in the present case, the grounds upon which the Applicant applied for setting aside of the ex-parte judgment and decree dated 19 March 2012 and the grounds in support of the application for condonation of delay are one and same. Infact, the affidavits in support of the respect of notices of motion are admittedly, verbatim copies of

one another. The first paragraph of the affidavit in support of the present notice of motion also states that the application is being filed "under Order IX Rule 13 read with Section 151 of CPC for setting aside the ex-parte order dated 19 March 2012".

4. The Applicant has not taken out any proceedings as against the order dated 22 August 2013 by which the Applicant's notice of motion for setting aside the ex-parte order and decree dated 19 March 2012, came to be dismissed. In such circumstances and considering the fact that the cause stated in both the motions was identical, we are required to take into consideration the order dated 22 August 2013 and the observations made therein.

5. In the affidavit supporting the present notice of motion in paragraphs 12 and 13, it is stated as under:

12. On 7 September 2012, Respondent No. 1 filed certain documents in CS (OS) No. 328/2011 before the Hon'ble High Court of Delhi, which included the true copy of the order dated 19 March 2012. Only thereafter, the Appellant learnt of the order dated 19 March 2012 passed by this Hon'ble Court.

13. After the order dated 6.12.2007, Mr. Lalith B. Nair expressed his inability to continue and the Appellant thereafter appointed Mr. Rahul Moghe, 29, Jolly Maker Chamber II, Nariman Point, Mumbai-21 as its Counsel and also deposited an amount of Rs. 20,000/- towards his professional fees. This amount was paid by a cheque bearing No. 796983 dated 12 September 2008 drawn on ICICI Bank favouring Mr. Rahul Moghe. This cheque was cleared on 17 September 2008 from the account of the Appellant. A copy of the letter dated 13 September 2008 written by the Appellant to Mr. Rahul Moghe is annexed herewith as Exhibit-F. Thereafter the learned Counsel assured the Appellant that all necessary action shall be taken to defend the present suit on its behalf. The Appellant had got prepared a detailed written statement from its Counsel at New Delhi and also an application for its deletion from the Memo of Parties and provided the same to the aforesaid Counsel for filing in the Hon'ble Court. The Appellant thereafter contacted its Counsel on several dates and was assured that needful has been done and that the Appellant shall be informed of further developments. However, nothing was heard from the Ld. Counsel. On receipt of a true copy of the order dated 19.3.2012, the Appellant tried to contact its Counsel on his mobile no. 9821033002 repeatedly. However, there was no response.

6. As allegations had been made against Advocate Mr. Moghe, the learned Single Judge directed the Advocate for the Applicant to inform the advocate about the same, pursuant to which Mr. Moghe appeared before the learned Single Judge and filed an affidavit stating that he has neither dealt with nor remembers having any conversation with Mr. Deepak Tiwari, Deponent in the affidavit-in-support of the notice of motion and for the reasons explained in the affidavit, he had not even filed a Vakalatnama on behalf of the Applicant.

7. In the order dated 22 August 2013, the learned Single Judge has observed as

follows:

14. The allegations made by the Deponent Shri Deepak Tiwari against his Advocate Shri Rahul Moghe also cannot be accepted in view of what is set out by Shri Moghe in his affidavit as stated above. As stated by Shri Moghe, he had never dealt with Shri Tiwari and was always in touch only with one Shri Mukesh Gupta of Defendant No. 1. The said Shri Mukesh Gupta has not filed any affidavit refuting what is stated by Advocate Shri Moghe in his affidavit. If a written statement was prepared by the Defendant No. 1 from their Counsel at New Delhi and the same, along with an application seeking deletion of Defendant No. 1 from the memo of parties, was forwarded to Shri Moghe by Defendant No. 1 as alleged, the Defendant No. 1 would surely have produced before this Court a copy of the said draft written statement as well as the application for its deletion from the memo of parties. Again if Defendant No. 1 learnt about the ex-parte order being passed against them, they would have surely rushed to the Advocate Shri Moghe to enquire as to under what circumstances the ex-parte decree was passed in the matter and/or at least would have written a letter to Shri Moghe seeking an explanation as to why he had not filed his appearance in the matter. However, it is clear that Defendant No. 1 being aware that Shri Moghe, as stated in his affidavit, would not be able to file his Vakalatnama in the matter, could not be blamed for the ex-parte decree passed on 19 March, 2012 and have therefore filed an affidavit behind his back making serious and reckless allegations against him and inter alia alleging that they tried to contact him on his mobile phone to which there was no response.

8. The learned Single Judge, in the context of certain other statements in the affidavit has observed that the Deponent Deepak Tiwari has no qualms about making incorrect statements on oath.

9. The Supreme Court, in Bhanu Kumar Jain Vs. Archana Kumar and Another, , has held that when an application under Order 9 Rule 13 of the Code is dismissed, the Defendant can only avail of a remedy there against, viz., to prefer an appeal in terms of Order 43, Rule 1 of the Code. Once such an appeal is dismissed, the Appellant cannot raise the same contention in the first appeal. If it be held that such a contention can be raised both in the first appeal as also in the proceedings arising from an application under Order 9 Rule 13, it may lead to conflict of decisions, which is not contemplated in law. The dichotomy can be resolved by holding that whereas the Defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex-parte hearing by the trial court and/or existence of a sufficient cause for non-appearance of the Defendant before it, it would be open to him to argue in the first appeal filed by him u/s 96(2) of the Code on the merits of the suit so as to enable him to contend that there was no sufficient material on record for a passing decree or the suit was otherwise not maintainable.

10. In the present case, the very filing of the present appeal is almost 200 days beyond the period prescribed by the law of limitation. The cause pleaded in the

affidavit in support of the notice of motion is identical to the cause pleaded in the affidavit supporting the motion to set aside the ex-parte decree. Such cause has been disbelieved by the learned Single Judge while passing the order dated 22 August 2013 dismissing the motion to set aside the ex-parte decree. In the order dated 22 August 2013, the learned Single Judge has observed that the Applicant set up a false case and the Deponent Deepak Tiwari had no qualms about making incorrect statements on oath. The case that the Applicant had engaged Advocate Rahul Moghe to appear in the matter and the said Advocate not only failed to put in his appearance, but upon being contacted on several occasions assured the Applicant that the needful had been done, has been found to be false. There is no separate explanation furnished or cause shown in the affidavit supporting the notice of motion seeking condonation of delay. In such circumstances, it is not possible to accede to the submission of the learned Counsel appearing for the Applicant that sufficient cause has been shown for the purposes of condonation of delay.

11. Learned Counsel for the Applicant, however, submitted that the Plaintiffs have played a fraud in the matter of securing the ex-parte decree dated 19 March, 2012. The fraud, according to the learned Counsel consists in the tacit understanding arrived between the Plaintiff and Original Defendant No. 2 for settlement of disputes between themselves and at the same time seeking damages from the Plaintiff for having imported products from Original Defendant No. 2 by stating that the same constitute breach of Plaintiff's trade mark.

12. Except for a vague statement in paragraph 11 of the affidavit supporting the notice of motion, there are no particulars with regard to any fraud. In any case, such issues, at the highest relate to the merits of the appeal, in the event the appeal were to be entertained. Such vague statements would, in no manner assist the Applicant in making out a sufficient cause for condonation of delay in filing the appeal.

13. Once, it is found that the Applicant has come out with a false case, there is no question of exercising any discretion in the matter of condonation of delay in filing the appeal.

14. The Applicant, having failed to make out any case for condonation of delay, the Notice of Motion is dismissed. However, there shall be no order as to costs. In view of disposal of the notice of motion, the Appeal (L) No. 748 of 2012 will not survive on the file.