

(2010) 11 DEL CK 0136
In the Delhi High Court
Case No : FAO 388 of 2010

Naviar International Pvt. Ltd.

APPELLANT

Vs

Sunita Sareen

RESPONDENT

Date of Decision : 02-11-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Limitation Act, 1963 — Section 5

Citation : (2010) 11 DEL CK 0136

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Anupam Srivastava and Anil Chander, for the Appellant; Nemo, for the Respondent

Final Decision : Dismissed

Judgement

Mool Chand Garg, J. 1. The Appellant is the Defendant in the original proceedings where he was proceeded ex parte and in fact, the proceedings resulted in passing of a judgment and decree against him dated 05.09.2008 whereby the suit of the Respondent was decreed.

2. It is not in dispute that the Appellant had been occupying the suit property as a lessee and was obliged to pay at least a sum of "7 per sq.ft. even as per his own admission towards the lease amount but the said amount was not paid by the Appellant. According to the Respondent, the rate of rent was "10 per sq. ft.

3. The case of the Appellant is that he came to know of the proceedings on 25.02.2009 when old documents were shifted. It is submitted by them that Sh. Praveen Aggarwal, Advocate had returned the papers without informing them about the status of the case. However, they have nowhere stated as to when Sh. Praveen Aggarwal returned the papers. It is further alleged by them that on inspection of the Court file they came to know about the dismissal of the suit and then moved the application for setting aside the ex parte order. It is alleged that non-appearance of the Appellant/Defendant in the suit was due to omission of

their advocate and no negligence can be imputed to them. However, nothing has been brought on record as to what steps have been taken by the Appellant against the counsel. Not even a iota of reference is available on record about the filing of any complaint against counsel in the Bar Council of Delhi.

4. The application under Order 9 Rule 13 CPC was also not filed within limitation as is apparent from the fact that an application u/s 5 of the Limitation Act for condonation of delay was filed along with the application.

5. The Respondent opposed the application being highly time barred and full of fabricated and bogus grounds. It was also pleaded that the Appellant had full knowledge of the status of the suit and its result but they are simply trying to wriggle out of it for one reason or the other. It was also stated that the Appellant had full opportunity to cross-examine the witnesses of the Respondents and to adduce evidence, in case they so wished. But they have not availed of the said opportunity.

6. The learned ADJ while dismissing the application of the Appellant has made the following observations:

4. The Defendant had earlier been proceeded ex parte on 21.05.2007 which order was recalled on 17.08.2007. At the stage of evidence, Id. Regular counsel for the Defendant did not appear on 12.03.2008 and 09.04.2008. Since the witness was not to be available for long time as he was leaving for USA, the matter was posted for 11.04.2008 for cross examination of PW1 on request on behalf of the Defendant. Id. Regular counsel against did not appear on said date. The proxy counsel who had appeared for seeking adjournment was afforded opportunity to conduct cross examination but he did not avail it. The opportunity of Defendant to cross examine PW1 was, therefore, closed and matter was posted for evidence of the Defendant for 04.07.2008. After adjournment Id. Regular counsel for Defendant appeared and was offered to conduct cross examination of the witness who was still present in the Court with his counsel but he claimed not to be prepared.

5. On 04.07.2008 none turned up for the Defendant who was proceeded ex parte and the case was adjourned to 05.09.2008 for arguments. The impugned judgment and decree were passed on that day.

6. On one of the dates authorized officer of Defendant or their perokar was present in the case. Sh. Asheet Taneja, Director of Defendant who had filed affidavit supporting the written statement cum counter claim was apparently aware of Sh. Praveen Aggarwal and Dinkar Kumar having been engaged as advocates by the Defendant through another Director who had executed Vakalatnama dated 05.02.2007 in their favour. While contending that the counsel engaged by the Defendant was solely responsible or that owned to look after the proceedings of the suit, the terms of written contract with the advocate have been totally overlooked. It was read by the client (Defendant) that its duly authorized agent would appear in the Court on all hearing and will uniform the

advocate for appearance when the case is called. It was further agreed that the client will not hold the advocate or his substitute responsible for the result of the case. The assertions in the applications contrary to the written contract with the Counsel cannot be accepted.

7. Even otherwise the directors or other authorized official of the Defendant was expected as a prudent person to know the status of the case by calling him over telephone or being in touch with him in any other manner. Having not taken the least safeguard/precaution, the Defendant cannot take shelter by imputing negligence on their previous counsel. To take benefit of the proposition of law in favour of advocates as officers of the Court, even the client should have conducted itself diligently. It is strange that when the case was being adjourned for 1-11/2 months at a time, the Defendant kept itself oblivious of the developments for more than a year. It is apparent that the Defendant was not interested in progress of the Suit but interested in delaying its disposal one way or the other. For this reason no complaint against the alleged negligent conduct of previous counsel has been lodged by them with the Bar Council.

Both the applications for foregoing reasons are absolutely bereft of merits.

7. I have heard the learned Counsel for the Appellant. In addition to the grounds taken by the learned ADJ in having dismissed the application for setting aside the ex parte order and condoning the delay-in filing the said application, I may also observe that it is not a case where the Appellant is entitled for any indulgence. Even as per the calculation sheet shown to me the Appellant was indebted to the Respondent towards payment of rent at least for a period of 19 months which they have calculated @ `7 per sq. ft. and which comes to `4,35,575/- besides electricity charges. Even if it is to be presumed that they were entitled to adjustment of `1,00,000/- as paid by them towards security which normally is adjusted when somebody vacates the premises and not towards the rent of the premises, they have not paid the aforesaid amount and also claim TDS which becomes payable when the payment is made. This shows that entire attempt by the Appellant is only to buy time and somehow to keep their liability in abeyance. The plea taken by the Appellant that on account of counsel's fault the party should not suffer relying upon a judgment delivered in the case of Rafiq and Another Vs. Munshilal and Another, has also dealt with by the trial Court. I am also of the considered view that such plea that it was the fault of the counsel is nowadays normally taken without taking any action against the Advocate which only goes to show that the blame is sought to be shifted to the Advocate despite their own negligence. In this case, it is apparent that the cross-examination of the witnesses of the Respondent was being deferred from time to time and the opportunity given to the Appellant to lead their evidence was also not availed. For leading the evidence it is not the advocate who is responsible, it is the party who is to be careful and to contact their counsel to know as to what is to be done as the next step in the proceedings.

8. The counsel says that there was a counter claim but that counter claim also

included the issue of refund of the security amount paid besides claiming recovery of amounts spent for improvement of the premises and beautifying the same. Such dues are not to be claimed in the manner in which the Appellants are seeking to claim that also after withholding the rent.

9. I do not find any ground to allow the appeal taking into consideration the overall conduct of the Appellant, even though it has been the case of the Appellant that there were counter claims.

10. The appeal is accordingly dismissed.