
(1998) 03 DEL CK 0055
In the Delhi High Court
Case No : F.A.O. No.35 of 1990

Nirmal Sharma

APPELLANT

Vs

Mr.Jagdish Chander Jaitley

RESPONDENT

Date of Decision : 01-03-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 21

Citation : (1998) 2 AD 900 : (1998) 72 DLT 421 : (1998) 45 DRJ 68 : (1998) 3 RCR(Civil) 483

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Advocate : Mr. M.K. Dua and others Adv, for the Appellant; Mr. L.D. Adlakha, for the Respondent

Judgement

Usha Mehra, J.—Appellant has assailed the order of the Additional District Judge, Delhi, whereby he dismissed the application of the appellant (respondent before the first appellate Court) under Order 41 Rule 21 of CPC (in short the CPC). The learned Additional District Judge, Delhi, refused to rehear the appeal which had been decided ex-parte against this appellant. His application was dismissed primarily on two grounds firstly it was barred by time and secondly this appellant failed to show sufficient cause for his non-appearance.

2. In order to appreciate the challenge the relevant facts which require consideration are that respondent herein filed a suit for declaration against the predecessor in interest of this appellant namely Bhagat Ram as well as against Union of India. After Bhagat Ram's death his legal heirs were substituted. In the suit the respondent herein based his claim on the fact that he had a verified claim of Rs.29,840/- beside compensation of Rs.8,760/-. He was in occupation as one of the four authorised allotted of House No.XV/595, Kait Wali Gali, Bazar Sangtarashan, Paharganj, New Delhi since September,1979. He was subsequently allotted a part of neighbouring house No.XV/582,Kait Wali Gali, Bazar Sangtarashan, Paharganj, Delhi. One Mr.Kali was also authorised allotted in

respect of that house. Both the houses were evacuee properties forming part of the compensation pool. Pursuance to the notice issued to him he expressed his willingness for transfer of the said two properties in his name. He, however, gave preference for house No.XV/595 against his compensation. He did not exercise option with regard to house No.XV/582. The Managing Officer vide order dated 21st February,1958 held him eligible for the transfer of the said house and Mr. Khali for house No.XV/582. Bhagat Ram filed an appeal against the said order. The appeal filed by Bhagat Ram against respondent as well as Kali were dismissed by the Assistant Settlement Commissioner. Bhagat Ram filed revision petition before the Deputy Chief Settlement Commissioner. The order passed by the Managing Officer as well as of the Assistant Settlement Commissioner were set aside ex-parte vide order of Deputy Chief Settlement Commissioner dated 29th October,1958. The respondent herein in the meantime received a letter from the Regional Settlement Commissioner informing him that House No.XV/595 had been transferred in his name and that his compensation stood adjusted towards part price of the said house. He was asked to pay the balance amount. He offered the balance amount but the same was not accepted. When the respondent came to know about the exparte order of the Deputy Chief Settlement Commissioner dated 29th October,1958, he filed an application seeking re-hearing of the revision. The same was dismissed vide ex-parte order dated 13th February,1959. The Deputy Chief Settlement Commissioner ordered the transfer of house in question to Bhagat Ram. The order of the Deputy Chief Settlement Commissioner was challenged but was rejected by the appellate authority on 27th May,1959. He was not informed of the order passed u/s 33 of the DP(C&R) Act (in short the Act). He came to know about the passing of the order u/s 33 of the Act on 17th January,1967 when copy of the letter was produced by Bhagat Ram in High Court in writ proceedings. In his suit this respondent challenged the order of the Deputy Chief Settlement Commissioner and the order of the appellate authority passed u/s 33 of the Act, on the grounds that the same were inconsistent with the provisions of the Act and the rules framed thereunder. His main grievance was that being occupant of the house he was entitled to transfer of the said house. He had already paid the price of the house. Hence the impugned orders were illegal and against the principle of natural justice. He wanted a declaration to the effect that orders dated 13th February,1959 and 27th July,1959 be declared illegal, ultra virus and without jurisdiction. The suit was contested by the predecessor in interest of the present appellant thereby raising preliminary objection about the maintainability of the suit as well as the jurisdiction of the Civil Court coupled with the fact that the suit was barred by time and hit by the principle of resjudicata. The suit was dismissed by the Sub-Judge on two grounds namely the Civil Court had no jurisdiction and the suit was barred by time.

3. Against that order this respondent filed appeal which was listed as RSA No.98/81. Notice of the appeal was received by respondent No.2 in that appeal i.e. Mr. Chaman Lal, son of Bhagat Ram predecessor in interest of the present

appellants. Other legal heirs of Bhagat Ram were impleaded as respondents 3 to 5. Respondent No.1 was Union of India. On 29th January, 1981 as per record of the first appellate Court respondent No.2 i.e. Chaman Lal son of late Shri Bhagat Ram appeared in person. So far as Union of India and other LRs namely Shri Mohan Lal and Smt. Sarla Mudgal, they were proceeded ex-parte. Notice was issued afresh to Smt. Kailash Wati Sharma, respondent No.5, another legal heir of late Bhagat Ram. Matter was adjourned to 3rd March, 1981 on which date Chaman Lal respondent No.2 again appeared in person. Since notice to respondent No.5 had not been served hence the case was adjourned to 3rd April, 1981. Respondent No.5 was served for 3rd April, 1981, but she did not put in appearance hence proceeded ex-parte. On 3rd April, 1981 Chaman Lal respondent No.2 did not appear, therefore, the court proceeded with him ex-parte as well.

4. After hearing arguments of the appellants and the Union of India, the first appellate court allowed the appeal and set aside the Judgment and order of the trial court. First appellate court upheld the jurisdiction of the Civil Court to try the suit. Further that the suit was not barred by time. The first appellate court vide its order dated 13th February, 1959 declared that the order passed by the Deputy Chief Settlement Commissioner Gajender Singh and the order in revision dated 27th July, 1959 passed by Shri S. Prasad, Deputy Secretary to the Government of India were illegal, without jurisdiction, and Therefore, not binding on that appellant/respondent herein. These appellants thereafter moved an application under Order 41 Rule 21 CPC for setting aside ex-parte order and seeking opportunity to address arguments on the appeal. Their application was dismissed by the impugned order being time barred and that no sufficient cause had been shown for non-appearance.

5. The grievance of the appellant is that Chaman Lal had no knowledge of the ex-parte order passed against him in appeal. Chaman Lal during his life had pointed out to the Court that he had engaged a lawyer by the name of Shri D.L. Malhotra who assured him that he would appear. Hence it was not necessary for Chaman Lal to appear in Court in person. Appeal was to be argued by a counsel. Since that counsel did not put in appearance nor informed Chaman Lal about the fate of the appeal, Chaman Lal could not be blamed for that. A litigant should not be made to suffer for the fault of a lawyer. According to him Chaman Lal was not keeping good health. Moreover, due to prolonged sickness he was unable to attend Court on each and every date of hearing. He accordingly engaged Shri D.L. Malhotra, Advocate. The said counsel assured that the presence of Chaman Lal was not required and that he would inform Chaman Lal when to attend the court. With this assurance from the counsel Chaman Lal felt relieved and, Therefore, did not attend the Court. At the same time Mr. Malhotra also did not attend the Court with the result the appeal was proceeded ex-parte for no fault of Chaman Lal. This according to Mr. M.K. Dua, counsel for the appellants, was a sufficient ground for the First Appellate Court to condone the delay in seeking set aside the ex-parte decree and seeking opportunity of being heard.

6. In the normal circumstances the arguments propounded by Mr. M.K. Dua would have been sufficient to accept his prayer. But the facts on record speaks otherwise. It reveals that Mr. Chaman Lal the predecessor in interest of the appellants not only did not appear but intentionally with ulterior motive choose not to appear. To support this view the following facts are sufficient indication. Mr. Chaman Lal did not engage Mr.D.L.Malhotra. He avoided to appear even after having been served with an injunction order restraining him from transferring or selling the property in question. Chaman Lal in spite of receipt of injunction order transferred/ sold the property in question. This act itself speaks volumes about his conduct. This shows he deliberately did not put in appearance. From this inference can be drawn that his non appearance was not innocent but intentional. To arrive at this conclusion reference can also be made to the proceedings of the first appellate Court to show that Chaman Lal predecessor in interest of these appellants intentionally avoided appearance in the Court and that he had not engaged Mr. D.L. Malhotra as his counsel. After service of appeal Mr. Chaman Lal appeared in person. In his presence matter was adjourned to 3rd April, 1981 on which date he did not put in appearance. Thereafter the case was adjourned to 16th April, 1981 and then to 4th June, 1981, 6th August, 1981, 10th November, 1981 and then to 4th March, 1982, 12th May, 1982, 26th August, 1982, 24th November, 1982, 16th February,1983, 12th April, 1983, 8th August, 1983, 17th November,1983, 10th February, 1984. On 10th February,1984 again the matter was adjourned for hearing to 3rd April, 1984 and then to 6th August, 1984. On 6th August, 1984, present respondent filed an application under Order 39 Rules 1 & 2 CPC expressing his apprehensions that Chaman Lal and other respondents i.e. LRs of Bhagat Ram were threatening to dispose/ transfer the property in question. Therefore, they be enjoined from doing so. On this application notice was issued to all the respondents including Chaman Lal for 30th April,1984. The proceedings of 30th April,1984, of the first appellate court show that respondent No.2 i.e. Chaman Lal inspire of being served did not put in appearance. Process to respondents 3 & 5 not received back, Therefore, directions were given that respondents 3 to 5 be served afresh for 11th May,1984. They were served by proclamation appearing in the newspaper "Statesman". Since the respondents inspire of service did not appear, the first appellate court prima facie being satisfied that respondents before him were likely to transfer the property enjoined them including Chaman Lal from parting with possession of the property in question. The said order was passed on 11th May, 1984. The same was duly served on respondent Mr. Chaman Lal, predecessor in interest of the appellants. Even then he did not put in appearance nor contested the said order passed in the appeal.

7. The depiction of above facts show that the appeal was not decided in a day. It, Therefore, cannot be said that Chaman Lal was not aware of what was happening in the appeal. He was served with the application under Order 39 Rules 1 & 2, but choose not to appear. He was again served with the order enjoining him not to part with possession of the property in question. Even then he did not appear

nor contacted his counsel (if had been engaged) to find out what was happening in the appeal. In fact perusal of the record of the first appellate Court show that Mr. D.L. Malhotra was never engaged. No power of attorney of Mr. D.L. Malhotra is on record nor at any stage Mr. Malhotra put in appearance. In the absence of any appearance and in the absence of his power of attorney, it is a clear indicator that the story of having engaged Shri D.L. Malhotra is after thought built up to shift the fault on him. In fact when Mr. Chaman Lal was served with injunction application as a prudent person he would have rushed to his lawyer, if at all engaged to find out what was happening in the appeal and also to inform about the said application and what reply was to be given. Matter does not end here even after receipt of order of injunction he did nothing of this sort. This shows the theory of engaging Mr. D.L. Malhotra was an excuse. No man in his senses would sit tight in spite of injunction order having been passed against him. But no Explanation has been offered as to what steps were taken by Chaman Lal after receipt of application u/s 39 Rules 1 & 2 CPC, and after having been served with injunction order. Chaman Lal as well as these appellants are silent on this aspect of the matter. They, to my mind, have no Explanation to offer. Therefore, the first appellate Court rightly concluded that the non appearance of Shri Chaman Lal was deliberate and intentional. He had not engaged Mr. D.L. Malhotra. From the facts on record I have no reason to disagree with the conclusion arrived at by the First Appellate Court. In fact appellants have failed to substantiate their story that Chaman Lal engaged D.L. Malhotra or entrusted the appeal to him or that it was D.L. Malhotra who had not put in appearance. Record of the Court below does not support this version. It appears that to get a favourable order this excuse had been built up. No affidavit of Shri D.L. Malhotra had been placed on record to support this version. In the absence of having shown good cause for non appearance on 3rd August, 1981 and on all subsequent dates the First Appellate Court was justified in passing the impugned order. It requires no interference.

8. I find no merits in the appeal. Dismissed.