
(2009) 04 DEL CK 0197

In the Delhi High Court

Case No : I.A. No's. 10112 and 10113 of 2006 in C.S. (OS) 748 of 2002

NSIC

APPELLANT

Vs

Nova Vision Electronics P. Ltd.

RESPONDENT

Date of Decision : 08-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 4, Order 9 Rule 13, 151
Limitation Act, 1963 — Section 18

Citation : (2009) 04 DEL CK 0197

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Sanat Kumar, for the Appellant; K.K. Jha, for the Respondent

Judgement

Manmohan Singh, J.—The present suit filed by the plaintiff under Order XXXVII, CPC had been decreed on merits and an ex parte decree for a sum of Rs. 26,88,133.78 with interest @ 16% p.a. from the date of institution of the suit i.e. 16th March, 2002 till realization of the amount has been passed in favour of the plaintiff and against the defendants. The pending applications including application for leave to defend the suit were also disposed of by order dated 28th July, 2006.

2. On 28th August, 2008 an application was filed on behalf of defendants 1 to 3 under Order XXXVII Rule 4 read with Section 151 CPC being I.A.No.10113/06 for setting aside the ex parte decree dated 28th July, 2006 along with an application for stay of the operation of the ex parte decree in which this Court has heard arguments of the parties and reserved the order on 16th March, 2009.

3. The main ground which has been taken in this application is that this matter was listed on 21st April, 2006 and 3rd July, 2006 but no one appeared on behalf of the defendants and the matter was adjourned to 6th July, 2006. Even on that date, no one appeared on behalf of the defendants. The matter was heard ex parte and the court reserved the order on that date.

4. It is contended by the defendants that the defendant No.2 reached the office of his counsel on 13th July, 2006 in connection with the matter titled as NSIC v. Morgen Electronic Pvt. Ltd as the said matter was listed for evidence before the learned Joint Registrar of this Court on 15th July, 2006. The defendant No.2 asked his counsel about the progress of this matter and the counsel checked up the same from his Court clerk as well as the court diary in which it was mentioned that the matter was adjourned to 21st April, 2006 at the front page of the file but the clerk of the counsel had not written this matter in the relevant page of the court diary.

5. Learned Counsel for the defendants under the said circumstances asked his colleague, namely, Mr. K.K. Jha, Advocate to inspect the file of this case and to know the status of the proceedings taken place on 21st April, 2006.

6. It is further stated that Mr. Jha, Advocate enquired from the dealing clerk on 14th July, 2006 as to the next date in the matter and he was informed that the file has not been received from the court from 3rd July, 2006. Then Mr. Jha tried to inspect the court file and moved an application for inspection of the court file on 19th July, 2006 for 20th July, 2006 but the file was not sent by the concerned dealing clerk and the application was returned with the remark that the file has not been received from the court. Another application was moved on 24th July, 2006.

7. The counsel thereafter asked his clerk to check up the position with the Court Master and the Court Master informed Mr. Jha, Advocate that the court file is lying with the court from 3rd July, 2006. It was also informed by the Court Master that dictation has already been given to the Private Secretary by the court and the judgment would be pronounced within 3 to 4 days.

8. The learned Counsel for the defendants was informed by Mr. Jha, Advocate accordingly and the main counsel had waited for pronouncement of the said judgment. The judgment was pronounced in the matter on 28th July, 2006.

9. It is mentioned in the application that Mr. Jha, Advocate tried to inspect the file by moving another application for inspection on 2nd August, 2006 for 3rd August, 2006 but the said application was returned on the ground that the file has been sent to the decree writer.

10. Then further applications were moved on 8th August, 2006, 17th August, 2006 and 18th August, 2006 for inspection of the file and ultimately the counsel pursued the application and contacted the decree writer in this regard and ultimately the file was inspected only on 22nd August, 2006 by counsel for the defendants and it transpired from the file that the court has decreed the suit after granting opportunity from time to time for non appearance of the counsel for the defendants.

11. It is stated in the application that the non appearance for the defendants and their counsel on 21st April, 2006, 3rd July, 2006 and 6th July, 2006 is a result of

their ignorance about these dates and it is a bonafide mistake on the part of the clerk of the counsel for the defendants who could not note down the date on which the matter was listed on 21st April, 2006.

12. It is contended by the counsel for the defendants that the defendants have a very good case on merit and they are entitled for unconditional leave to defend as the plaintiff has filed the present suit on the basis of forged and fabricated documents and the same can be proved by the defendants only when the defendants will be granted an opportunity to lead evidence and cross examination of the plaintiff's witnesses.

13. In the reply to the application, the plaintiff has opposed the prayer of the defendants made in the application on the ground that the application filed by the defendants to set aside the decree does not disclose any special circumstances as envisaged in Rule 4 of Order XXXVII of the Code of Civil Procedure, the principles of which are different than those contained in Order IX Rule 13 CPC in which the applicant can succeed by showing sufficient cause for non appearance of the defendants but in the present case, the defendants have to show the existence of special circumstances. Since the defendants have failed to show the existence of special circumstances the present application cannot be entertained.

14. It is further contended by Mr. Sanat Kumar, Adv. appearing on behalf of the plaintiff that not only the defendants are required to show the special circumstances in the application for setting aside the decree, but the defendants under the law are also required to disclose the substantial defense available to him to defend the suit as the judgment and decree passed by this Court is on merit in which all the grounds raised by the defendants seeking leave to defend have been considered and decided, therefore, the present application is not maintainable for lack of showing special circumstances.

15. I have heard learned Counsel for the parties and I agree with the submission of learned Counsel for the plaintiff that in order to succeed in the present applications, the defendants have to show the existence of special circumstances and only then the present application can be considered.

16. The question under these circumstances in the present case is as to whether the defendants have been able to show the special circumstances to set aside the ex parte decree passed by this Court, where while passing the ex parte decree, the court has considered the grounds raised by the defendants in the application for leave to defend the suit.

17. It appears from the application for leave to defend filed by the defendants, that the following grounds, inter alia, were stated in the application, the same are also referred in the judgment:

(i) the claim of the plaintiff was not within the ambit of the provisions of Order XXXVII CPC.

(ii) that it was not within limitation as alleged guarantee was executed on 7th November, 1986 while the present suit was filed in or about March, 2003.

(iii) that the plaintiff Corporation was in any case free to sell the goods for recovery of its alleged dues.

(iv) it was contended that neither the goods were disposed of by the plaintiff nor the same were delivered to the plaintiff company and instead a false and frivolous claim has been made.

18. Similar grounds are mentioned in the present application that the suit was not filed within limitation as the alleged guarantee was executed on 7th November, 1986 while the present suit was filed in or about March, 2003. Learned Counsel has also referred to Paras 9 and 10 of the plaint. The same reads as under:

9. It is pertinent to mention here that since the defendant No.1 had not been paying the amounts due and outstanding in its account the plaintiff had frozen the said account of defendant No.1 with effect from 1st April 1992. 10. Even though the defendant No.1 made some payments of the defendants but despite of the substantial amount remaining due and outstanding in its account the defendant No.1 vide its letter dated 1st July 1992 acknowledged and accepted its liability towards plaintiff to the tune of Rs. 26,88,133.78. The defendant No.1 made several promises to pay the dues but did not make any payment.

19. Learned Counsel for the defendant has argued that in view of Para 9 of the plaint, the plaintiff was aware that the defendant No.1 had not been paying the amount due and outstanding, therefore, the accounts of the defendants were frozen with effect from 1st April 1992. After the gap of six years, the defendants admittedly accepted the liability by sending the letter dated 1st July, 1998 to the plaintiff. Subsequently by virtue of agreement dated 25th June, 1999 the defendant No.1 again acknowledged and accepted the liability to the tune of Rs. 26,88,133.78. Between this period the claim of the plaintiff becomes barred by limitation and it does not matter if the defendants have accepted the liability of lapsed claim later on. If any acknowledgement is made by the party after the expiry of period, the said acknowledgement has no meaning in the eyes of law and cannot be used as admitted liability against the party. It is further argued that defendants 2 and 3 are not signatory to the said agreement dated 25th June, 1999, therefore, the said acknowledgement is also without any substance.

20. Learned Counsel for the defendants has not disputed the fact that in the ex-parte decree passed on 25th July, 2008 the learned Court in para 18 of the judgment has dealt with the question of delay but the learned Counsel for the defendants has submitted that the point of limitation has not been dealt as per submission mentioned in para 20 of this order.

21. He further submits that the acknowledgement in the year 1998 and 1999 is contrary to Section 18 of the Limitation Act as according to the defendants there

is no acknowledgment or any document in this regard by the defendants between the period 1992 to 30th June, 1998. He contends that the suit could be maintained only if there was an acknowledgement u/s 18 of the Act. He submits that this aspect has not been considered in the judgment passed by the Court in favour of the plaintiff. Therefore, accordingly to him the point of limitation is in favour of the defendants and on this ground itself the defendants are entitled for leave to defend the suit unconditionally.

22. As regards the application seeking setting aside an ex-parte decree, the learned Counsel for the defendants has referred the decisions State Bank of Saurashtra Vs. Ashit Shipping Services (P.) Ltd. and Another, and Goyal MG Gases Ltd. Vs. Premium International Finance Ltd. and Others,

23. After hearing the parties, I am of the opinion that prima facie there is some force in the submission of defendants on the question of limitation which has specifically raised by the defendants but has not been dealt in the judgment, therefore, I am inclined to grant one opportunity to the defendant to make the submission before this Court on merit. I feel that the application made by the defendants comes within the meaning of special circumstances and is thus maintainable.

24. However, since the other issues involved in the matter have been dealt and decided, therefore, the defendant should not address the same issues again except the issue of limitation discussed above. In case the issue of limitation is decided in favour of the defendants, then this Court will decide the application for setting aside the ex-parte decree accordingly. The operation of judgment and decree dated 28th July, 2008 is stayed as prayed in the IA No.10112/2006, and is disposed of accordingly.

25. List on 13th July, 2009 for further hearing.