(2018) 12 DEL CK 0163

In the Delhi High Court

Case No : Regular First Appeal No. 827 Of 2006

Oriental Insurance Company Ltd APPELLANT

Vs

Naveen Goyal RESPONDENT

Date of Decision : 07-12-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 96, Order 9 Rule 7

Citation : (2018) 12 DEL CK 0163

Hon'ble Judges : Valmiki J. Mehta, J

Bench : Single Bench

Advocate : Vishnu Mehra

Final Decision : Partly Allowed

Judgement

Valmiki J. Mehta, J

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/defendant/ insurance company impugning the Judgment of the trial court dated 06.09.2006 by which the trial court has decreed the suit filed by the respondent/plaintiff/insured, and passed a money decree for a sum of Rs. 8,79,184/- alongwith interest. The money decree was claimed by the respondent/plaintiff on account of the insured goods having been lost on account of theft/burglary.

2. The respondent/plaintiff filed the subject suit for recovery of Rs. 8,79,184/-. Out of this amount of Rs. 8,79,184/-, the principal amount was of Rs. 7,17,375/- comprising of the value of stock of Rs. 6,20,245/- and cash stolen of Rs. 97,130/-. To this amount, interest of Rs. 1,61,409/- was added and which resulted in the suit amount of Rs. 8,79,184/-.

3. At the outset, I would like to note that the appellant/defendant was proceeded ex parte in the trial court. As the appellant/defendant was proceeded ex parte, the appellant/defendant has not cross-examined the two witnesses of the respondent/plaintiff and no evidence was led in the trial court by the appellant/

defendant.

4. The facts of the case are that the respondent/plaintiff filed the subject suit for recovery pleading that he had taken from the appellant/defendant/insurance company an insurance policy with respect to his stocks in the premises bearing no. N-5, Bajrag House, Ring Road, South Extension Part I, New Delhi-110049. The burglary took place on 11.07.2003 and FIR No. 274/2003 was lodged on 11.07.2003 with the police station Kotla Mubarakpur. The claim was also lodged with the appellant/defendant for a sum of Rs. 7,17,375/-.

The insurance policy in question was for the period from 03.01.2003 to 02.01.2004 and the burglary took place on 11.07.2003 i.e. within the period of the policy. The police made efforts to catch the thief but the efforts were of no avail, and ultimately an untraceable report was sent by the police on 07.09.2003. The respondent/plaintiff pleaded that the appellant"s/defendant"s surveyor rejected the documents given to him on flimsy grounds which included the following documents:-

"I. Item wise, quantity wise detail of purchases from 1st April 2003 to 10th July 2003,

II. Quantity wise and value wise detail of clothing stock as on 31st March 2003.

III. Provisional Final Account for the year ending 31st March 2003.

IV. The Audit Report for the financial year 2002-2003.

V. Copy of Income Tax return for the assessment year 2002-2003.

VI. Copy of Sales tax return for the financial year 2002-03.

VII. Details of Stock from 10th July 2003 to 13 July 2003.

VIII. Layout of Showroom and Godown and all other documents as required by surveyor."

5. The respondent/plaintiff pleaded that he was asked to receive a letter dated 15.03.2004 from the appellant/defendant wherein it was stated that it was not possible to assess the loss in the absence of stock register and inventory. By the said letter, the appellant/defendant assessed the loss of 15 handsets at rate of Rs. 4918/- and a further loss of Rs.7500/- in cash. The respondent/ plaintiff rejected the offer of the appellant/defendant for a sum of Rs. 81,270/- vide the respondent"s/plaintiff's letter dated 24.03.2004. After serving the legal notice dated 07.05.2004, the subject suit for recovery was filed.

6. Appellant/Defendant contested the suit by filing its written statement. It was pleaded that as per Clause 3 of the General Conditions of the subject insurance policy, an insured is required to maintain all records and books of account and since this requirement is not complied with, the claim was rightly rejected.

7. The following issues were framed in the suit:-

"i) Whether the plaintiff has not approached the Court with clean hands and has suppressed various material facts from this Court as mentioned in the preliminary objections 1 & 2 of the written statement? OPD

ii) Whether the plaintiff is entitled to recovery an amount of Rs. 8,79,184/- from the defendant? OPP

iii) Whether the plaintiff is entitled to interest, if so, at what rate and for what period? OPP

iv) Relief."

8. As already stated above, since the appellant/defendant was ex parte, the two witnesses of the respondent/plaintiff were not cross-examined, and the appellant/defendant has led no evidence. The trial court has by referring to the depositions of the witness of the respondent/plaintiff and the documents proved by them, has decreed the suit.

9. At the outset, it is argued on behalf of the appellant/defendant that the trial court has erred in dismissing the application filed under Order IX Rule 7 CPC vide Order of the trial court dated 06.09.2006. It is argued that the trial court has wrongly held that a lawyer must appear during strike, failing which ex parte proceedings are justified. It is argued that this view of the trial court is erroneous and cannot be sustained as the client should not suffer on account of his advocate not appearing on the date of strike.

10. In my opinion, though the trial court was not justified in rejecting the application, as the counsel for the appellant/defendant failed to appear on 23.02.2006 when there was a strike, however, the issue is not only of non-appearance on 23.02.2006 but the fact of the matter is that after 23.02.2006 the suit was not straightaway decreed but there were as many as five hearings on 30.03.2006, 24.04.2006, 17.05.2006, 01.06.2006 and 17.07.2006. The application under Order IX Rule 7 CPC was filed by the appellant/defendant only later on 20.07.2006. On 30.03.2006, the matter was adjourned to 24.04.2006 when the evidence of the PW1 was recorded on behalf of the respondent/plaintiff. On the next date on 17.05.2006, the summoned witness PW2 from the bank with whom stock was hypothecated was called, and he proved the record with the bank of the stock of the respondent/plaintiff. On 17.05.2006 after closing of evidence by the respondent/plaintiff the matter was listed for final arguments on 01.06.2006 when final arguments were heard and the matter fixed for judgment on 17.07.2006. On 17.07.2006, the judgment was not pronounced and the matter was listed for further arguments on 24.07.2006. Therefore, in my opinion, the contention of the appellant/defendant is misconceived that the ex parte proceedings against the appellant/defendant have to be set aside inasmuch as the appellant/defendant, even though had a reasonable cause for non-appearance on 23.02.2006 when there was a strike, but there is no sufficient cause for non-appearance thereafter till 20.07.2006 when the application under Order IX Rule 7 was filed.

11. In fact in the application filed under Order IX Rule 7 CPC, two grounds are mentioned for setting aside the ex parte proceedings; one being of non-appearance on 23.02.2006 because of a strike; and the second ground being that the chamber of the counsel for the appellant/defendant was shifted from Tis Hazari Courts to Delhi High Court whereby the files were lost and misplaced. I also reject the stand of the appellant/defendant that the appellant"s/ defendant"s counsel could not appear for as many as six dates because the files were being shifted from District Courts to the High Court inasmuch as dates are mentioned besides on the files, on the case diary of the Advocate as well, and therefore the excuse given in para 4 of the application of shifting of chamber cannot be accepted.

12. This Court, therefore, rejects the challenge laid by the appellant/defendant to the order dated 06.09.2006 whereby the ex parte proceedings against the appellant were not set aside.

13. On merits, it is seen that the trial court has referred to various documents filed and proved on behalf of the respondent/plaintiff with respect to the stocks, and therefore, no illegality can be found in decreeing the suit by the trial court by holding that stock did exist in the premises of the respondent/plaintiff and the same was stolen. I may note that there is no dispute that there was a valid policy as on the date of theft being 11.07.2003 and also the fact that there was a theft in the premises of the respondent/plaintiff. The relevant para of the trial court proving the original documents of the respondent/plaintiff reads as under:-

"Issues No.2 & 3: The onus of these issues is on the plaintiff. To prove these issues plaintiff has examined Shri Satya Naraian Goel as PW1. PW1 has reiterated the contents of the plaint. He proved power of attorney as Ex.PW1/1, insurance policies as Mark B (which have not been disputed by the defendant), letter dated 11.7.2003 as Mark B, FIR as Mark ?A", details of stock as Ex.PW1/6, details of stolen goods as Ex.PW1/7, untraced report as Mark C, details of purchases as Ex.PW1/10, details of closing stock as on 31.3.2003 as Ex.PW1/11, Provisional Final Account as Ex.PW1/12, Audit Report as Ex.PW1/13, Income Tax Return as Ex.PW1/14, Sales Tax Return as Ex.PW1/15, details of stock from 10.7.03 to 13.7.03 as Ex.PW1/16, layout of showroom and godown as Ex.PW1/17 and legal notices as Mark G. The testimony of PW1 has remained unrebutted. Thus, plaintiff is entitled to 18% interest from the date of theft till the filing of the suit. From the perusal of evidence on record, I am of the opinion that plaintiff is entitled to recover an amount of Rs.8,79,184/- from the defendant. Hence, these issues are decided in favour of the plaintiff and against the defendant."

14. However, in my opinion, there are two arguments of the counsel for the appellant/defendant which deserve to be accepted. The first argument is that the trial court has erred in granting a decree for a sum of Rs. 97,130/- as this cash is stated to be stolen from the premises of the respondent/plaintiff on the date of theft on 11.07.2003, inasmuch as the subject insurance policy had insured cash

in till only to the extent of Rs. 7500/-. The respondent/plaintiff has himself proved relevant page of the policy as per the complete policy which is proved and exhibited as Ex.PW1/3. Ex.PW1/3 clearly in column no.3 shows that cash which is insured is only of Rs.7500/-. Therefore, the decree with respect to loss of cash granted by the trial court for Rs. 97,130/- is reduced to a sum of Rs. 7,500/-.

15(i). The second argument of the counsel for the appellant/defendant is that the trial court has passed a decree for Rs. 8,79,184/- which includes the claim of the interest as on the date of filing of the suit for the sum of Rs. 1,61,409/- at 18% and this rate of interest is too high a rate of interest. It is also argued that this interest amount be reduced by awarding pre-suit interest only at 6% per annum.

15(ii). I agree with the argument that the rate of interest @ 18% per annum claimed by the respondent/plaintiff for the pre-suit period is very high and therefore it is ordered that pre-suit rate of interest would only be 9% per annum simple, with interest being calculated @ 9% per annum simple on an amount of Rs. 6,20,245/- plus Rs. 7,500/-i.e. Rs. 6,27,745/-. Interest will be payable @ 9% per annum simple from 07.05.2004 when the legal notice has been sent by the respondent/plaintiff to the appellant/defendant till the date of filing of suit and thereafter at the rate of 6% pendente lite and future till payment.

16. In view of the aforesaid discussion, this appeal is partially allowed. The suit of the respondent/plaintiff is decreed for a sum of Rs. 6, 27,745/- with interest @ 9% per annum simple from 07.05.2004 till the date of filing of the suit on 04.11.2004. Pendente lite and future interest will continue at the same rate of 6% as granted by the trial court. The respondent/plaintiff will also be entitled to costs as assessed by the decree of the trial court at Rs. 11,264/-. The parties are left to bear their own costs so far as this appeal is concerned. Decree sheet be prepared. Trial court record be sent back.