

(2015) 04 DEL CK 0229

In the Delhi High Court

Case No : Regular First Appeal (OS) 4 and 5 of 2015

Pal News Media (P) Ltd. and Others

APPELLANT

Vs

Super Cassettes Industries Ltd.

RESPONDENT

Date of Decision : 09-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (2015) 220 DLT 698 : (2015) 150 DRJ 698

Hon'ble Judges : Kailash Gambhir, J;I.S. Mehta, J

Bench : Division Bench

Advocate : J.K. Singh, for the Appellant; K.K. Khetan and Prachi Aggarwal, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Kailash Gambhir, J.—Challenge in the present appeals is to the order dated 11.09.2014 passed by learned Single Judge whereby the learned Single Judge has dismissed the applications preferred by the appellants under Order IX Rule 13 CPC. Since the appeals are filed against the common order, therefore the same are being heard and disposed of by this common order.

2. Mr. J.K. Singh, the learned counsel for the appellants at the very outset seeks modification of the order dated 24.02.2015, limited to the extent that in the said order the Court has not recorded the fact that the statement given by the learned counsel stating that he will confine his arguments to assail the order under Order 9 Rule 13 of the CPC was on instructions from Mohd. Waris, the authorised representative.

3. The modification sought for is innocuous in nature, therefore, the same is allowed and the order dated 24.02.2015 is modified, limited to the extent of incorporating the fact, that the submission made by Mr. J.K. Singh, Advocate, was on the instructions received by him from Mohd. Waris - authorised representative of the appellant Company.

4. Brief facts relevant for deciding the present appeals inter alia are that two separate suits for permanent injunction, restraining infringement of copyrights, damages, rendition of accounts, etc., were preferred by the respondents. Summons of the suit and notice of the injunction applications in both the suits were served on the appellant on 25.07.2012 and the next date fixed in both the suits was 30.7.2012. An advocate by the name of Mr. Umesh Mishra had appeared on behalf of the appellants before the Court in both the suits on 30th July 2012 and both the matters were adjourned at his request, for 21.11.2012. On 21.11.2012, nobody had appeared in both the said matters on behalf of the appellants, nor had the appellants filed their written statements within the prescribed period of limitation. The learned Single Judge accordingly closed the right of the appellants to file their written statement and on the same date, proceeded ex parte against the appellants as nobody had appeared on their behalf on that date. Learned Single Judge in the order dated 21.11.2012 recorded the fact that on 30th July 2012, one Mr. Umesh Mishra had appeared on behalf of the appellants/defendants and the appellants were duly served in both the suits on 30th July 2012. Noticably, Mr. Umesh Mishra who had appeared in the suits on 30th July 2012 did not file his Power of Attorney or any memo of appearance, therefore the appearance of Mr. Umesh Mishra, Advocate on 30th July 2012 was without any authority. Ex-parte evidence in both the suits was recorded on 20.2.2013 and 9.4.2013 and ex parte judgment was passed by the court on 26.7.2013. In the application filed by the appellants under Order IX Rule 13 of the CPC, in both the suits, the common stand taken was that on 30th July 2012, proxy counsel Mr. Umesh Mishra had appeared before the court on behalf of Mr. Mrinal Kumar, Advocate but on the subsequent dates, Mohd. Waris, Advocate could not appear and nor could he file written statement as the counsel - Mr. Mrinal Kumar had to go to his home town because his brother was suffering from cancer.

5. It was also the case of the appellants that they were not aware of the proceedings which had taken place in the Court and it was only on 9.7.2013 when a demand notice dated 6.7.2013 was received from the respondents in the matter C.S. (OS) No. 2185/2012 whereafter, necessary inquiries were made by the appellants about the said matters from their advocate. It was further averred that the Advocate did not respond to the calls of the appellants and when the appellants searched the website of the Delhi High Court therefrom it transpired to the appellants, that they were preceded ex parte on 21.11.2012 and the ex parte judgment was passed against them on 26.07.2013. In support of the application, the appellants also filed supporting affidavit of Mr. Mrinal Kumar, Advocate.

6. The aforesaid applications filed by the appellants were strongly opposed by the respondent/plaintiff. Both the said applications were dismissed by the learned Single Judge by the impugned order dated 11.09.2014.

7. Assailing the legality and correctness of the aforesaid order Mr. J.K. Singh,

counsel for the appellants vehemently submits that the learned Single Judge has not appreciated the fact that the application filed by the appellants was duly supported by the affidavit given by the advocate himself, who was engaged by the appellants to appear in the said matter. Counsel further argued that the learned Single Judge has also not appreciated the fact that the brother of the counsel for the appellants was suffering from cancer due to which he could not cause his appearance before the Court and therefore, the non appearance on behalf of the appellants was neither deliberate nor intentional. Counsel also argued that the learned Single Judge should have given an opportunity to the appellants to contest the suit on merits, instead of dismissing the application by adopting a hyper technical approach.

8. Refuting the contentions of the learned counsel for the appellants, Mr. K.K. Khetan, Advocate representing the respondent submits that the appellant is a well known media company with sufficient man power and therefore they cannot take a plea that they were not aware of about the dates fixed in the Court in their matters. Counsel also argued that the appellants failed to appoint any advocate to represent in both the matters. This is evident from the fact that neither Mr. Umesh Mishra, Advocate filed his Power of Attorney nor any Power of Attorney was filed by Mr. Mrinal Kumar, Advocate. Counsel further argued that in the application filed by the appellants, the appellants have failed to disclose as to when Mr. Mrinal Kumar, Advocate was engaged by them and on which date, he had left Delhi to attend to his brother at his home town or during which period his brother was under treatment for cancer and as to when he returned back to Delhi, in the absence of these details there was no material before the Court, which would bequeath benefits to the appellants. Counsel thus, submits that the application filed by the appellants was most vexatious and frivolous and therefore the same have been rightly dismissed by the learned Single Judge.

9. We have heard the submissions made by learned counsel for the parties and also gone through the impugned order and the material placed on record.

10. These appellants were duly served in both the suits on 25.07.2012 and this fact has not been denied by the appellants. One Mr. Umesh Mishra, Advocate had appeared in both the suits on 30.07.2012 and it is an admitted fact that Mr. Umesh Mishra failed to file his Power of Attorney. The presence of Mr. Mrinal Kumar, Advocate has no where been recorded in the proceedings of both the cases and Power of Attorney of Mr. Mrinal Kumar, Advocate was also never filed by him. It is also a fact admitted on record that the appellants failed to disclose in both the applications as to when they had engaged Mr. Mrinal Kumar, Advocate to represent them in the matters and why Mr. Mrinal Kumar, Advocate had failed to appear on the dates fixed by the learned Single Judge. The appellants have further failed to disclose as to on what date Mr. Mrinal Kumar, Advocate left Delhi to attend to his brother who was stated to be suffering from cancer, and as to when he had returned back from his home town. The appellants have also not disclosed as to why Mr. Mrinal Kumar, Advocate did not take any steps to find out

the status of both the suits after returning back from Bihar. The appellants have also further not disclosed as on what dates they had contacted Mr. Mrinal Kumar, Advocate to find out the status of their cases. The negligence on the part of the appellants is writ large.

It is a settled legal position, that where sufficient cause is not shown by the applicants for seeking setting aside the ex parte order and the applications are based on vague, evasive and false averments, then in such matters, ex parte decree shall not be set aside. In the facts of the present matter, the conduct of the appellants has been grossly negligent and the appellants failed to disclose any sufficient cause for not causing appearance in the matters on the dates fixed before the Court and the main plea taken by the appellants was that their advocate - Mr. Mrinal Kumar, had gone to attend to his brother at Bihar did not inspire any confidence of the Court, due to the lack of proper details and supporting evidence and therefore, we do not find any illegality, perversity or irrationality in the reasoning given by the learned Single Judge in dismissing the applications preferred by the appellants. In this regard reliance can be placed on the judgment Supreme Court in the case of Parimal Vs. Veena @ Bharti, AIR 2011SC 1150 : (2011) 112 CLT 120 : (2011) 2 CTC 329 : (2011) 2 RCR(Civil) 155 : (2011) 2 SCALE 302 : (2011) 3 SCC 545 : (2011) 2 SCR 648 : (2011) AIRSCW 1233 : (2011) 1 Supreme 731 wherein the Court has examined the scope of Order IX Rule 13 of the Code of Civil Procedure, 1908 after examining the various judicial precedents on the provision, the Court held as under:

"7. Order IX, R.13 CPC:

The aforesaid provisions read as under: "Setting aside decree ex-parte against defendant In any case in which a decree is passed ex-parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; xx xx xx Provided further that no Court shall set aside a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

xx xx xx"

(Emphasis added)

8. It is evident from the above that an ex-parte decree against a defendant has to be set aside if the party satisfies the Court that summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant

had notice of the date and sufficient time to appear in the court.

The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.

9. "Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide: Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., AIR 1962 SC 361 : (1962) 2 SCR 762 ; Sarpanch, Lonand Grampanchayat Vs. Ramgiri Gosavi and Another, AIR 1968 SC 222 : (1967) 15 FLR 466 : (1968) LabIC 201 : (1967) 2 LLJ 870 : (1967) 3 SCR 774 ; Surinder Singh Sibia Vs. Vijay Kumar Sood, AIR 1992 SC 1540 : (1991) 4 JT 125 : (1992) 101 PLR 326 : (1991) 2 SCALE 781 : (1992) 1 SCC 70 : (1991) 1 SCR 467 Supp : (1991) 2 UJ 758 ; and Oriental Aroma Chemical Industries Ltd. Vs. Gujarat Industrial Development Corporation and Another, (2010) 2 JT 389 : (2010) 5 SCC 459 : (2010) 2 SCR 1172 : (2010) 3 UJ 1276)

10. In Arjun Singh Vs. Mohindra Kumar and Others, AIR 1964 SC 993 : (1964) 5 SCR 946 , this Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause". (See also: H.H. Brij Indar Singh vs. Lala Kanshi Ram 1917 (19) BOMLR 866 (Privy Council) ; Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others, AIR 1964 SC 1336 : (1964) 3 SCR 495 ; and Mata Din Vs. A. Narayanan, AIR 1970 SC 1953 : (1969) 2 SCC 770 : (1970) 2 SCR 90).

11. While deciding whether there is a sufficient case or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide: State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, AIR 2000 SC 2306 : (2000) 5 JT 389 : (2000) 4 SCALE 417 : (2000) 9 SCC 94 : (2000) SCC(L&S) 845 : (2000) AIRSCW 2389 : (2000) 4 Supreme 197 ; Madanlal Vs. Shyamlal, (2001) 9 AD 524 : AIR 2002 SC

100 : (2001) 2 JT 389 Supp : (2001) 8 SCALE 172 : (2002) 1 SCC 535 : (2001) AIRSCW 4655 : (2001) 8 Supreme 200 ; Davinder Pal Sehgal and Another Vs. Partap Steel Rolling Mills Pvt. Ltd. and Others, AIR 2002 SC 451 : (2001) 10 JT 463 : (2001) 8 SCALE 476 : (2002) 3 SCC 156 : (2002) 1 UJ 148 : (2001) AIRSCW 5065 : (2001) 8 Supreme 636 ; Ram Nath Sao @ Ram Nath Sahu and Others Vs. Gobardhan Sao and Others, (2002) 2 JT 349 : (2002) 2 SCALE 334 : (2002) 3 SCC 195 : (2002) 2 SCR 77 : (2002) AIRSCW 978 : (2002) 2 Supreme 143 ; Kaushalya Devi v. Prem Chand and Anr. (2005) 10 SCC 127; Srei International Finance Ltd., v. Fair growth Financial Services Ltd. and Anr., (2005) 13 SCC 95 ; and Reena Sadh Vs. Anjana Enterprises, AIR 2008 SC 2054 : (2008) 4 JT 565 : (2008) 6 SCALE 95 : (2008) 12 SCC 589 : (2008) AIRSCW 2718 : (2008) 2 Supreme 810).

12. In order to determine the application under Order IX, Rule 13 CPC, the test has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application.

11. The learned Single Judge is also correct in observing that it is evident that the applications filed by the appellants are frivolous and they did not disclose sufficient cause for setting aside the judgment and decree dated 26.07.2013 and this Court does not find any ground to disagree with the aforesaid findings.

12. In view of the aforesaid discussions, we do not find any merit in the present appeals and therefore the same are dismissed.