

(2006) 12 DEL CK 0159

In the Delhi High Court

Case No : First Appeal from Order (OS) No. 96 of 2006

Payal Kapoor

APPELLANT

Vs

K.S. Grewal

RESPONDENT

Date of Decision : 08-12-2006

Acts Referred:

Citation : (2009) 93 DRJ 774 : (2007) 146 PLR 31

Hon'ble Judges : Mukul Mudgal, J; J.P. Singh, J

Bench : Division Bench

Advocate : N.S. Vashisht, for the Appellant; J.P. Gupta, Sohan Lal and Rikky Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—The order of the learned Single Judge dated 23rd March, 2006 which dismissed the application filed by the original defendant Mrs. Payal Kapoor, rejecting the application for framing the issues in the suit arising from the counter claim said to be filed by the defendant.

2. The brief facts of the case as per the plaintiff/respondent are as follows:

a) The plaintiff filed the suit for recovery of Rs.20 lakhs and injunction against the defendant from interfering in the completion of the balance work of the house of the plaintiff at Ludhiana.

b) The plaintiff contended that he is a Non Resident India and Chairman of Indian Companies which are having their offices at Bombay and at New Delhi. He had given an advertisement for completion of his house at Ludhiana, pursuant to which defendant who is the daughter of a friend of the plaintiff approached him for her consultancy firm and represented that she would be able to execute the work. An initial quotation of Rs. 59,850/- was given. On the representation made by the defendant, the work was awarded to her and an advance payment of Rs. 20 lakhs was paid to her, which was acknowledged by her on 16.6.1997, 4.8.1997 and 16.9.1997. The plaintiff contended that he did not expect any foul

play and made further payment of Rs. 7 lakhs on 22.10.1997.

(c) The defendant raised various bills necessitating plaintiff raising queries regarding those bills and the quality of the work done by the defendant. The plaintiff demanded supporting documents for the bills raised by the defendant. The queries raised by the plaintiff were not specifically replied nor the supporting documents were given. The plaintiff, Therefore, appointed Mr. Ramesh C. Ahuja, an Architect to verify, assess and suggest the value of the work done by the defendant. The Architect appointed by the plaintiff also requested the defendant to give the details of the measurement in support of the bills raised by the defendant. Despite reminders it was not done. The plaintiff contended that he even reminded his friend, retired Commodore, J.R. Mehra about it that his daughter is not giving the details of her alleged work and amount spent by her on the construction. Despite all sorts of requests, the details were not rendered by the defendant. It also transpired that the defendant did not have the necessary expertise to execute the work undertaken by her. On the basis of the assessment to execute the work undertaken by her. On the basis of the assessment of the architect appointed by the plaintiff, it transpired that the defendant was paid an extra amount of Rs. 17,23,813/- which the plaintiff demanded along with interest and, Therefore, plaintiff claimed a sum of Rs. 20 lakhs from the defendant and filed the present suit.

(d) The defendant contested the suit and filed the written statement raising various pleas and also contending that since the property is situated at Ludhiana, the Court at Delhi does not have jurisdiction. In the written statement the defendant also made a prayer for recovery of Rs. 10,47,056/- besides dismissal of the suit of the plaintiff.

3. We have noted the fact that the plaint was filed on 5th March, 1999 and the written statement was purportedly filed on 15th September, 2000. On 2nd August 2002, the matter was proceeded ex parte against the appellant/defendant. On 4th May, 2005 an application for setting aside the ex parte order was dismissed in default and on 11th May, 2005, an application for setting aside the ex parte order was again rejected. This order of 11th May, 2005 became final. From 8th February, 2005 onwards, the defendant/appellant had started participating in the proceedings and from 18th November, 2005 the evidence of the plaintiff were recorded and the cross-examination of the plaintiff was done by the appellant. In January, 2006, the present application for framing issues was filed, the dismissal of which has led to the present appeal.

4. Various issues regarding maintainability of the appeal have been raised by the respondent. However, in our view, the appeal can be decided on the following issues alone:

(i) For the purposes of the decision of this suit, it is necessary to extract paragraph 17 of the judgment of the learned Single Judge which reads as follows:

The learned Counsel for the plaintiff, per contra, has contended that on failure of

the defendant to appear on 2.8.2002, she was proceeded ex parte and the plaintiff was directed to file the ex parte evidence and the issues on the basis of defense and the counter claim were not framed. The effect of proceeding ex parte against the defendant was not to consider the pleas and contentions raised by the defendant in her written statement and counter claim and direction was given to the plaintiff to substantiate his pleas and contentions. Since the issues were not framed the plaintiff in his evidence, only has to substantiate and prove the facts stated by him. Since the defendant joined the proceedings later on but her request for setting aside the ex parte proceedings was declined, though she can cross-examine the plaintiff and his witnesses on the facts to be proved by the plaintiff but she can not be allowed to agitate her defense and counter claim nor can put her defense and counter claim to the plaintiff and his witnesses and consequently the issues are not be framed because the defense and counter claim were not considered by the Court on proceedings ex parte against the defendant and what so ever was done by the Court cannot be undone on dismissal of his application for setting aside the ex parte proceeding.

(ii) We need only concern ourselves with the finding of the learned Single Judge that no permission was sought for enlargement of time in filing the Court fee and that no affidavit was signed in respect of averments made in the counter claim and thus in law there was no counter claim on record. In so far as the non-filing of the affidavit is concerned, the learned Counsel for the respondent does not press this plea. However, in so far as the finding of the learned Single Judge that no permission for enlargement of time in filing the Court fee was sought, this finding has not even been challenged in the memo of appeal before us. Thus, the finding whether right or wrong, of the learned Single Judge that no permission was sought for enlargement of time in filing the Court fee, even 1-1/2 years after filing of the written statement/counter claim has not been challenged and thus the written statement could not be taken note of. Accordingly, since there is no written statement on record as found by the learned Single Judge, no issues could be framed and accordingly, no cause for interference arises, and the appeal warrants dismissal on this short ground alone.

5. Even if we are to treat the written statement as being on record the only averment in the counter claim is as follows:

Decree the Counter Claim of Defendant with cost for a sum of Rs. 10,47,056/- (Rupees ten lacs forty seven thousand fifty six only) along with interest @ 18% per annum from the date 1.7.1998 and damages, which is being made separately.

6. There is no other averment in support of this prayer of counter claim and the same appears to have been filed merely as a counter blast to the aforesaid plaint without giving the slightest particulars of such claim. In the light of these facts, even if the appellant's counter claim is to be considered on record, no issue arises merely on averments made in the prayer Clause of counter claim.

7. In fact, we have noticed that the order dated 11th May, 2005 which dismissed

the prayer for setting aside the ex pane order was passed on averments made by the appellant that the counter-claim and written statement were on record. This order was never challenged and Therefore, this issue cannot be raised at this stage. Therefore, taking into account the facts that the litigation appears to have been dragged on necessarily by the appellant on frivolous issues arising from findings not even challenged in this appeal, the appeal is dismissed along with costs of Rs. 5,000/- payable to Delhi High Court Mediation and Conciliation Centre not later than 31st January, 2007.

8. The suit be listed before the Judge in charge, Original Side, for appropriate directions on 8th January, 2007.