
(1993) 11 DEL CK 0011

In the Delhi High Court

Case No : Interim Application Appeal No. 3258, 3259 of 1992 and Suit No. 1440 of 1983

Punjab and Sind Bank

APPELLANT

Vs

Manjit Singh and Another

RESPONDENT

Date of Decision : 12-11-1993

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (1993) 4 AD 753 : (1993) 27 DRJ 612

Hon'ble Judges : Sat Pal, J

Bench : Single Bench

Advocate : A.S. Chandhiok, Amar Gupta and I.C. Kumar, for the Appellant;

Judgement

Sat Pal, J.

(1) is 3 259/92 has been filed on behalf of the defendants under Order 9 Rule 13 read with Section 151 of the CPC (for short called "the Code") for setting aside the ex parte judgment and decree dated 7th August, 1990. Along with this application the defendants have also filed another application bearing is . No-3258/92 u/s 5 of the Limitation Act for condensation of delay in filing the application for setting aside the ex parte judgment and decree. Notice of both the applications was issued to the plaintiff and a reply has also been filed in respect of both the applications and the plaintiff has controverted the submissions made in these applications and it has been stated in the reply that both the applications should be dismissed with compensatory costs.

(2) Since the fate of IA3259/92 depends on the decision in is 3258/92, I would first dispose of is 3258/92.

(3) Mr. Kumar, the learned counsel appearing on behalf of the applicants/defendants submitted that the defendants came to know for the first time on 6/1/1992 about the ex parte judgment and decree dated 7th August, 1990 against them when they received a notice of is No-2157/91. He further

submitted that he was engaged by the defendants on 12/1/1992 and thereafter he appeared before Court on behalf of the defendants on 13/1/1992 and submitted on that date that the defendants were filing an application for setting aside the judgment and decree dated 7th August, 1990. He further submitted that after preparing the case, the applications bearing Nos. 3258 and 3259 of 1992 for setting aside the ex parte decree were finally filed on 2nd April, 1992. He drew my attention to paras 7,8 and 9 of the application bearing No. 3258/92 wherein it has been stated that the present advocate had to inspect the court file many a times and had to go through various orders passed by this Court and by the Deputy Registrar and the law involved and in this process there was a delay of 31 day in filing this application and that the delay should be condoned in view of the facts mentioned in this application.

(4) Learned counsel also submitted that Mr. C.L.Nayyar, advocate, who was engaged by the defendants earlier was allowed to be discharged from appearing on behalf of the defendants by this Court vide order dated 24/1/1990 and after his discharge the said counsel was required to inform the defendants by registered A.D. post that henceforth he would not be appearing on their behalf. In Support of his submissions he drew my attention to the Delhi High Court (Original Side) Rules, Chapter 5 Rules 4 and 5 and Order 3 Rule 4(2) of the Code. He contended that since the earlier counsel failed to inform the defendants after he obtained an order for his discharge from the Court, the ex parte judgment and decree dated 7th August, 1990 were liable to be set aside and the suit should be restored. In support of his contention the learned counsel has placed reliance on the following judgments;-Rafiq and another vs. Munshilal and another, 1981 Sc 1400, Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others, , Smt. Lachi Tewari and Others Vs. Director of Land Records and Others, Savithri Amma Seethamma Vs. Aratha Karthy and Others, , Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , Bank of India vs. M/s.Mehta Brothers and others, Air 1991 Delhi 194 and Kiran Singh and Others Vs. Chaman Paswan and Others, .

(5) The learned counsel for the defendants also submitted that the judgment and decree was liable to be set aside on the ground that while passing the judgment and decree the Court has relied upon the evidence of the witnesses of the plaintiff which was recorded in the earlier proceedings when the defendants were proceeded against ex parte but the order proceeding against the defendants ex parte was set aside subsequently.

(6) Mr. Chandhiok, the learned counsel appearing on behalf of the decree holder submitted that the application (IA No. 1874/89) filed by the earlier counsel Mr. C.L.Nayyar advocate seeking discharge was accompanied by copies of the notices dated 1/1/1989 and 3/2/1989 sent to defendant No. 1 along with postal receipt. He submitted that the notice of this application was also issued by the Court to both defendants and as per orders dated 6th October, 1989, defendant No.2 refused to serve of this notice and was deemed to have been served and

defendant No. 1 though he was served on 3rd November, 1989, failed to appear before the Deputy Registrar as we before the Court despite service of the notice. He submitted that it was in these circumstances that the earlier counsel was permitted to be discharged and both the defend were directed to be proceeded against ex parte. The learned counsel further submit that no Explanation whatsoever has been given by the defendants for their non-appearance after defendant No.2 was deemed to have been served and after the notice was served on defendant No. 1 on 3rd November, 1989 as stated hereinabove. He, Therefore, contended that the application was devoid of merits and should be dismissed with costs. As regards the contention of the learned counsel for the defendants that the judgment in the suit was based on the evidence recorded in the earlier proceedings, the learned counsel p73 submitted that this question being on merits of the case could not be raised in these proceedings. He, however, submitted that this Court vide order dated 6th July, 1990 had permitted the plaintiff bank to refer to and rely upon the evidence recorded in the earlier proceedings and as such this could be relied upon under law. In support of his contention the learned counsel placed reliance on a Full Bench judgment of the Gujarat High Court in Shah Bharatkumar Premchand Vs. Motilal and Bharulal, .

(7) I have given my thoughtful consideration to the submissions made by the learned counsel for the parties and have also perused the records. In para 9 of the application it has been stated that there is a delay of only 31 days and effort has been made to explain the aforesaid delay but from the facts mentioned in the application itself I find that there is a delay of 55 days even if it is reckoned from the date of alleged knowledge of the defendants regarding ex parte judgment and decree passed against them. In para 5 of the application it has been stated that defendant No. 1 came to know on 6/1/1992 that ex parte judgment was passed on 7/8/1990 and admittedly this application has been filed on 2/4/1992. After excluding the period of 30 days which is permitted under the Limitation Act, the period of delay comes to 55 days. Thus, there is no Explanation whatsoever for the delay of the remaining period of 24 days (55 days - 31 days). I, Therefore, do not find sufficient cause for excusing the delay. The application is liable to be dismissed on this ground alone.

(8) Even otherwise the facts of the present casee show that the delay is occasioned on account of culpable negligence on the part of the defendants. It may be pointed out here that the earlier counsel Mr. C.L.Nayyar,advocate,moved an application (IA 1874/89) and in this application it was stated that the applicant had served two notices dated 19/1/1989 and 3/2/1989, since the counsel was not getting proper instructions from the defendants. Copies of the notices and postal receipts and acknowledgement in respect of these notices were also annexed along with the application. Notice of this application was issued to the defendants on 10/3/1989. aside The order dated 6/10/1989 passed by the Deputy Registrar shows that defendant appl No.2 was deemed to have been served as the registered A.D. cover containing the notice was received back with the remarks "refused". So far as defendant No. 1 is concerned, settle he

received the notice in respect of the said application on 3/11/1989 but issued despite service of this notice he failed to appear before the Deputy Registrar on 5/12/1989 and again before the Court on 24/1/1990. It was in these circumstances that the application of the earlier counsel was allowed and he was discharged from the case and the defendants were ordered to be proceeded against *ex parte* vide order dated 24/1/1990. The contention of the learned counsel that the 2. earlier counsel after he was discharged, was required to serve another notice on the defendant is without any substance. In terms of Chapter 5 Rule 5 of Delhi High Court (Original Side) Rules, notice is required to be sent to the party concerned by the counsel 3. only before filing of the application seeking discharge from the case and not on any subsequent occasion.

(9) As stated hereinabove the defendants were duly served in the year 1989 itself in 1874/89 but there is no Explanation in the present application as to why they did not contact their earlier counsel Mr. C.L. Nayyar, advocate during the period 1989 to 1991. There is no sufficient cause for condoning the delay which is condition precedent to condone the delay in terms of law laid down by the Supreme Court in *Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.*, . The application is, Therefore, liable to be dismissed.

(10) The ratio of the judgment in the cases of Rafiq and another and Smt. Lachi Tewari (*supra*) is not applicable to the facts of the present case as in the present case there is no inaction or deliberate omission on the part of the counsel but on the contrary there is culpable negligence on the part of the defendants. Similarly the decision of the Supreme Court in the case of Savitri Amma Seethamma, Grindlays Bank Ltd., Collector, Land Acquisition, Anantnag and judgment of Delhi High Court in Bank of India (*supra*) are of no assistance to the defendants in the present case as the defendants have failed to show sufficient cause for their non-appearance in the case as explained hereinabove. In view of the above discussion I find no merit in this application and the same is dismissed.

(11) As regards the contention of the learned counsel for the defendants that the judgment and decree was liable to be set aside as the evidence recorded in the earlier proceedings had been relied upon, I am of the view that the defendants cannot be permitted to urge this contention in these applications. Even otherwise I find that this Court vide order dated 6th July, 1990 had permitted the plaintiff bank to rely upon the evidence recorded before the setting aside of the decree. In this connection reference may be made to a judgment of the Gujarat High Court in the case of Shah Bharat kumar Premchand (*supra*).

(12) The application bearing is No-3258/92 for condensation of delay having been dismissed, the application bearing is No.3 259/92 for setting aside the *ex parte* judgment and decree dated 7th August, 1990 is also dismissed. The parties are left to bear their own costs.

(13) Before parting with this order I record my appreciation for the lucid

arguments advanced by Mr. I.C. Kumar, advocate appearing on behalf of the applicants and also of Mr. A.S. Chandhiok, advocate who appeared on behalf of the decree holder for his able assistance.