

(2015) 07 DEL CK 0273
In the Delhi High Court
Case No : CS (OS) 835 of 2004

Rahul Vaid

APPELLANT

Vs

Balraj Vaid and Others

RESPONDENT

Date of Decision : 14-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10
Limitation Act, 1963 — Section 5

Citation : (2015) 9 AD 587 : (2015) 222 DLT 32

Hon'ble Judges : Valmiki J. Mehta, J

Bench : Single Bench

Advocate : Pankul Nagpal, for the Appellant; Sunil Aggarwal, Advocates for the Respondent

Judgement

Valmiki J. Mehta, J.

O.A Nos. 94/2014 and 95/2014

[Chamber appeals by legal heirs of defendant no. 1 against the orders dated 20.11.2013 and 23.4.2014 passed by the Joint Registrar refusing to implead the legal heirs of defendant no. 1 and allowing the application of the plaintiff under Order XXII Rule 4(4) CPC being IA No. 1293/2013 for exempting the plaintiff from substituting the legal heirs of defendant no. 1 in place of defendant no. 1 as also to condone the delay under Section 5 of the Limitation Act, 1963 by allowing IA No. 11687/2014]

OA No. 119/2014

[Chamber appeal filed by defendant nos. 9 and 10 against the order dated 21.5.2014 passed by the Joint Registrar disallowing the applications being IA No. 10800/2010 filed under Order IX Rule 7 CPC for setting aside the ex parte proceedings against these defendants and IA No. 10801/2014 filed under Section 5 of the Limitation Act, 1963 for condonation of delay in filing IA No. 10800/2014]

1. Without in any manner being distracted by the many Original Appeals and various applications which have to be decided, in sum and substance, the prayers are for allowing the legal heirs of defendant no. 1 to appear and contest the proceedings by being substituted in place of the deceased defendant no.1 and that the defendant nos. 9 and 10 who are the purchasers of rights from defendant no. 1 are allowed to get set aside the ex parte proceedings against them and thus permitting them to contest the suit on merits.

2. The subject suit is a suit for partition of a property stated by the plaintiff to be joint Hindu family property. The property is the property bearing no. 3/64, Old Rajinder Nagar, New Delhi. Originally, there were four defendants in the suit and subsequently, after allowing of the two amendments, the number of defendants increased to 9 and then to 10, defendant no. 10 being the wife of defendant no. 9 and both these defendants being purchasers of the suit property.

3. The defendant nos. 2(a), 3, 4 and 7 as also defendant nos. 5, 6 and 8 are in fact supporting the plaintiff because they fall in the plaintiff's branch. The effective contesting defendant in the case was defendant no. 1. Defendant no.1 had filed his initial written statement on 7.1.2005 taking the plea that the suit property is not a joint Hindu family property but the said property is exclusively owned by defendant no. 1 as the title deeds of the property are in the name of defendant no. 1.

4. The defendant nos. 9 and 10 who have purchased the rights of defendant no. 1, and therefore, they will be taken up as one group along with defendant no. 1.

5. For disposal of various applications, a few dates are relevant for the purpose of adjudication. These are:-

6. The law with respect to setting aside the ex parte proceedings is well settled since early 1950s when the Supreme Court passed the judgment in the case of Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, AIR 1955 SC 425 : (1955) 2 SCR 1 . As per this judgment, once a person is proceeded ex parte that does not mean that the person is proceeded ex parte for all times, and the said person has a right to appear in all subsequent dates/proceedings, of course though he cannot set the hands of the clock back by getting those things undone which are done when the said defendant had remained ex parte. Therefore, unless he can show good cause, the ex parte defendant must accept all that has happened before and such defendant must be content to proceed from the stage at which he comes in. Also, the endeavour of the court is that ex parte proceedings against the defendant, ordinarily in the interest of justice can be set aside unless the defendant by his deliberate action wants to cause irreparable prejudice to the plaintiff and condonation of delay in setting aside the ex parte proceedings can be allowed if the explanation for the delay is supported by sufficient cause. If the explanation does not smack of malafides or it is not put forth as part of a dilatory strategy the court must show utmost consideration for condoning the delay liberally. (Ref: N. Balakrishnan Vs. M. Krishnamurthy, (1998)

6 AD 465 : AIR 1998 SC 3222 : (1998) 2 CTC 533 : (2008) 228 ELT 162 : (1998) 6 JT 242 : (1999) 121 PLR 462 : (1998) 5 SCALE 105 : (1998) 7 SCC 123 : (1998) 1 SCR 403 Supp : (1998) AIRSCW 3139 : (1998) 7 Supreme 209).

7. Basically, the courts are liberal in allowing the setting aside of ex parte proceedings, including of restoration of suit dismissed in default, because, ordinarily persons should be allowed to have a judgment on merits and not on account of default.

8. With the aforesaid preliminary observations, the aspect to be noted is that the real issue to be decided is of the absence for the period from 8.12.2009 when defendant nos. 1, 9 and 10 were proceeded ex parte; and who are the only contesting defendants; till the date of 16.3.2010 when IA no. 8063/2010 was filed by defendant no. 1 (who was then alive) for setting aside of the ex parte proceedings against him. It may be noted that in the meanwhile between 8.12.2009 and 16.3.2010, an event had happened, being that on 18.2.2010 the plaintiff had led his ex parte evidence.

9. Essentially, therefore, the issue is that whether the negligence of defendant no. 1 and/or his legal heirs for non-appearance from 8.12.2009 to 16.3.2010 is such that the ex parte proceedings be not set aside and the legal heirs of defendant no.1 be not substituted in place of the deceased defendant no.1.

10. In my opinion, a period of just a few months from 8.12.2009 to 16.3.2010 is hardly such a period and which in any manner can be said to be such a long period of many years, that unnecessary prejudice would be caused to the plaintiff by such delay and that non-appearance of defendant nos. 1, 9 & 10 for such period should be punished by not allowing these defendants to contest the suit on merits. Plaintiff can always be compensated by costs for such delay.

11. It needs to be noted at this stage that defendant no.1, and now his legal heirs, have urged substantial defence for contesting the suit, inasmuch as, as already stated above, the defendant no.1's case as per the written statement filed is that the suit property is not a joint Hindu family property but is of the defendant no.1 and the title deeds are in the name of deceased defendant no.1.

12. The defence of defendant nos. 9 and 10 is intrinsically linked to defendant no. 1 inasmuch as these defendants being subsequent purchasers have a right to be added under Order XXII Rule 10 CPC because successor- in-interest of a property can be added as a party to the suit; once and if that successor-in-interest of a party to litigation so chooses. (Ref: Dhurandhar Prasad Singh Vs. Jai Prakash University and Others, AIR 2001 SC 2552 : (2001) 5 JT 578 : (2001) 4 SCALE 495 : (2001) 6 SCC 534 : (2001) 3 SCR 1129 : (2001) 3 SLJ 432 : (2001) AIRSCW 2674 : (2001) 5 Supreme 278).

13. In the facts of the present case and where vital rights to an immovable property for defendant nos. 1, 9 and 10 are involved, the negligence is not such that it cannot be condoned by making payment of costs to the plaintiff

considering that valuable rights in an immovable property is involved and the period of non-appearance and delay is only of around four months.

14. In view of the above, the appeals being OA nos. 94/2014, 95/2014 and 119/2014 along with the connected applications under Section 5 of the Limitation Act being IA nos. 11687/2014 and 14171/2014 are allowed subject to payment of costs of Rs. 10,000/- with respect to each appeal to be paid to the plaintiff by defendant nos. 1, 9 and 10. The legal heirs of defendant no.1 are added as defendants to the suit and ex parte proceedings against them/defendant nos. 1, 9 & 10 are set aside. These legal heirs and defendants no. 9 & 10 will now file their written statements.

15. List the matter before the Joint Registrar on 20.10.2015 for further proceedings and for completion of pleadings as also for filing of documents and their admission/denial.