
(2009) 03 DEL CK 0240
In the Delhi High Court
Case No : F.A.O. (OS) 366 of 2005

Rizzoli/Corriere Della Sera Quotidiani S.P.A.	APPELLANT
Vs	
Devika Chitra	RESPONDENT

Date of Decision : 02-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 39 Rule 3, Order 5 Rule 5,
Order 9 Rule 13, 151
Limitation Act, 1963 — Section 22(2)(g), 5

Citation : (2009) 3 ILR Delhi 433

Hon'ble Judges : Manmohan Singh, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Sudhir C. Aggarwal with Mr. S. Kumar, Mr. Anil Kumar and Mr. Pawan Bakshi, for the Appellant; Arun Mohan, with Mr. D.N. Sawhney, Arvind Bhatt and Mr. Ashok Gurnani, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, J.—The appellant is a foreign company which is incorporated under the laws of Italy. It has suffered ex-parte decree dated 10.7.1996 and supplementary decree dated 6.5.2002 (again ex-parte) in CS (OS) No. 2332/1989 filed against it by the respondents herein. Attempt of the appellant to get the said decrees set aside by filing an application under Order IX rule 13 of the Code of Civil Procedure, 1908 (for short, "CPC") read with Section 151 thereof has been unsuccessful. The learned Single Judge has dismissed that application vide order dated 26.10.2005. This order is the subject-matter of challenge in this appeal. The learned Single Judge, in the impugned order, has come to the conclusion that no sufficient cause is shown by the appellant seeking setting aside the ex-parte decrees. We would like to mention that though in this appeal we are concerned with the validity of the order of the learned Single Judge, i.e. to determine as to whether there is sufficient cause to set aside these decrees, on many other related issues elaborate and lengthy submissions were advanced by the counsel for both the parties. Even at the time of conclusion of

the arguments, counsel for the parties submitted that they would be filing written submissions. Giving of this permission resulted in another round of submissions, thereafter written submissions, reply to written submissions, additional submissions, reply to additional submissions, which the learned counsel for the parties kept on filing even after the judgment was reserved. However, all that need not even be considered, as pointed out at the relevant place. As noted above, ex-parte decree was passed on 10.7.1996 (hereinafter referred to as the "first decree"). Thereafter, supplementary ex-parte decree was passed on 31.5.2002 (hereinafter referred to as the "second decree"). The appellant thereafter filed application under Order IX Rule 13 CPC on 3.11.2003 for setting aside that decree which has been dismissed by the learned Single Judge vide impugned order dated 26.10.2005.

2. Before we deal with the central issue, it would be necessary to take note of certain important dates and developments which took place in the suit proceedings and otherwise as these would have some bearing on the issue involved.

3. The respondent herein (hereinafter referred to as the "plaintiff") filed Suit No. 2332/1989 on 31.8.1989. In this suit, he impleaded four defendants, particulars whereof are as under:-

Defendant No. 1: Rizzoli/Corriere della Sera Produzioni T.V. S.p.a.

Defendant No. 2: Tangram Films

Defendant No. 3: M/s. Gemini Films s.r.l.

Defendant No. 4: Mr. Claudio Biondi

4. Defendant Nos. 1 to 3 are the companies established under the laws of Italy and were carrying business in Italy. Defendant No. 4 was the Managing Director of the defendant No. 3. The plaintiff had filed the suit for specific performance of the agreement dated 2.5.1989 and the letter of confirmation dated 11.5.1989. As per the purported agreement to sell and the terms contained in the confirmation letter, there was an agreement between the plaintiff and the defendants for production of a film titled as "The Mysteries of The Dark Jungle" in which the plaintiff was to be a co-producer. According to the plaintiff, as the defendants went ahead with the shooting of the film without treating the plaintiff as the co-producer, he filed the suit for specific performance, inter alia, claiming the reliefs that the defendants be directed to take the plaintiff as a co-producer in the film and be also restrained from carrying with the production of the film without the participation of the plaintiff.

5. This suit was contested by the defendants, including the defendant No. 1, who filed written statement in July 1990. The plaintiff had also moved an application for interim injunction seeking restraint against the defendants from carrying with the preparation, production or shooting of the said film without participation and/or involvement of the plaintiff. This application came to be decided by the

learned Single Judge vide order dated 24.8.1990.

6. The plaintiff challenged this order by filing the appeal before the Division Bench of this Court, which was decided vide judgment dated 14.12.1990. The Division Bench also refused to grant any interim injunction. The plaintiff preferred SLP to the Supreme Court. This was decided on 18.7.1991 and the judgment is reported as Suresh Jindal Vs. Rizzoli Corriere Della Sera Prodzoini T.V.S.p.a. and others, in the following terms :-

4. We have heard the learned Counsel for the appellant as well as the learned Counsel for the respondents for quite some time. At the outset, we may point out that, according to the respondents, there had been no concluded contract regarding the part to be played by the appellant in the actual production of the film, though the appellant disputes this. It is, however, clear that the appellant did not play any part in the production of the film because, even according to him, he was totally excluded by the respondents from doing so. For obvious reasons, the question of specifically performing this portion of the contract (even assuming, as contended by the appellant, that there was a concluded contract in this respect which could be enforced) can no longer arise. At best the only issue that can be agitated in the suit would be whether the appellant is entitled to damages for having been excluded from being allowed to participate in the production of the film. But, whatever may be the merits of the appellant's claims in the suit, the facts as placed before us have, prima facie, left no doubt in our minds that the appellant did render some services to help the respondents to obtain the permission of the Government of India for shooting the film in India. Whether or not the appellant's claim that, but for his help such permission could not have been obtained, is correct, there is no doubt that he did make a valuable contribution in this respect. The only question before us now is whether the appellant is entitled to any interim relief on the basis of the undoubted part played by him in this regard.

5. The appellant has frankly stated before the High Court as well as before us that he was not interested in pursuing the claim for specific performance or damages if only the respondents would make a public acknowledgment (if not that he was a co-producer) at least that he had played a part in making the film possible. He has assured us that, if this relief is granted to him, he would even be prepared to withdraw the suit itself. This appears to us to be a very reasonable stand. We repeatedly make it known to the learned Counsel for the respondents that we were firmly of the opinion that the least that the respondents could do was to the help given by the appellant. We left them to choose their own words for expressing such acknowledgment. We suggested to them that it would only be just and proper that they should display, for a short time, (say three seconds, as suggested by the appellant) their acknowledgment in the titles of "credits" for the film so that the services rendered by the appellant, whether they were crucial as urged by the appellant or not very substantial as claimed by the respondent, are made known to the public, learned

Counsel for the respondents, however, after taking instructions, reported that the respondents would neither be willing nor able to make any such acknowledgment inasmuch as the production of the film was complete and steps had already been finalised even for its distribution and exhibition.

6. The High Court seems to have taken the view that, even if the appellant had rendered some services as claimed and the respondents refused to acknowledge it, he can be adequately compensated by the award of damages. Of course, it is possible that the court may ultimately be able to assess some damages for this breach if it comes to the conclusion that there has been such breach. However, we think that in a matter of this type the award of damages is not a complete and adequate remedy or relief. As the appellant has made clear, he is not interested so much in the monetary aspect of the deal he claims to have entered into with the respondents. The gain by way of reputation as well as goodwill which the appellant would secure if his services are acknowledged in the title shots of the film is not one which can be adequately expressed in terms of money. By the time the suit is finally decided, any such exhibition of acknowledgment may become totally impossible or infructuous. In that situation, perhaps, there would be no alternative but to assess the damages somehow or other depending upon the findings of the court on the issues in the case. We, however, think, on the prima facie case made out and having regard to the fact that the necessary modifications in the "credit-titles" can be easily made as the film is still in the early stages of its exhibition, that it is just and necessary that the appellant should be granted interim relief at this stage by injuncting the respondents from exhibiting the film except after displaying an acknowledgment of the appellant's services.

(Emphasis supplied)

7. This appeal was, thus, partly allowed in the following manner:-

7....We, therefore, restrict the scope of the interim relief and direct, in the interests of justice, that in case the film is proposed to be, or is, exhibited either on the T.V. or in any other medium in India, it shall not be so exhibited by the respondent or their agents unless it carries, in its title shots, an acknowledgement of the services rendered by the appellant to the producers in some appropriate language. We direct accordingly.

8. Thereafter, the Apex Court also issued certain clarification in the following words:-

8. We would like, however, to make three clarifications. First, we realise that the direction given by us does not fully grant the appellant the relief he deserves. The appellant's desire really is that the part played by him should become known to other foreign producers so that they may indent on his services. A publicity in India alone may not achieve his purpose. However, for the reasons indicated already, we do not wish to further broaden the scope of the interim relief. Second, we are leaving the phraseology of such acknowledgment, in the

event of the respondents' decision to exhibit the film in India, to their good sense. In case the film is exhibited without such acknowledgment as we have directed or in case the appellant is not satisfied with the terms in which the acknowledgment is phrased, it will be open to the appellant to approach the High Court for appropriate relief. Third, we have referred to the appellant's willingness to withdraw the suit itself in case the respondents agree to exhibit an acknowledgment in the terms sought by him. In view of the fact that the respondents have not agreed to the suggestion and that the relief given by us is a limited and restricted one, we should like to make it clear that the grant of the interim relief by this order should not be construed as imposing an obligation on the appellant to withdraw his suit or to not prosecute it further. Nor should it be construed as prejudicing or abridging the appellant's claim to damages or other relief in case, for one reason or another, the film is exhibited in India or elsewhere without such acknowledgment as we have suggested.

(Emphasis supplied)

It is clear from the above that the plaintiff had right to continue with the suit and press for damages. We are making these observations as it was strenuously argued by the learned counsel for the appellant that the plaintiff had given up the relief for damages, which plea is not correct.

9. The suit thereafter proceeded on merits. Upto this stage, the defendants were contesting the suit, which is clear from the fact that not only in the suit proceedings but in appeal before the Division Bench as well in the Supreme Court, the defendant No. 1, appeared and contested those appeals.

10. It so transpired that the defendant No. 1 was merged into RCS Films and T.V.S. p.a. on 28.2.1994 and ceased to exist. This latter company, thereafter, got merged into RCS Editoria S.p.A. on 19.12.1994. This company has changed its name to Rizzoli/Corriere Della Sera Quotidiani S.p.A. by resolution dated 14.4.2003. It is an Italian company based in Milan. The present appellant did not give any instructions to its counsel. Defendant Nos. 2 to 4 were also not giving any instructing to their counsel and, therefore, IA No. 1569/1995 was moved by the counsel for the defendant Nos. 2 to 4 on 10.2.1995 seeking discharge. Though there was no specific application filed for discharge by the counsel for the defendant No. 1, in I.A. No. 1569/1995 order dated 3.4.1995 was passed discharging the counsel from the matter. At the same time, the defendants were proceeded ex-parte. This order reads as under:

I.A. 1569/95

This is an application filed by the counsel for defendants 2 and 4 seeking discharge from the proceedings. The application is accompanied by a registered AD notice and postal receipts showing that the defendants were informed about the date of 10.1.95. The defendants have not cared to appear. Counsel is allowed discharge from this matter.

I.A. 2920/95

None appears for the defendants. Case is directed to proceed ex parte against all the defendants.

The plaintiff is permitted to adduce ex parte evidence by way of affidavits within six weeks. List before the J.R. for marking exhibits on 3.7.95.

List before the court on 29.9.95.

11. Thereafter, the plaintiff led his evidence on the basis of which first ex-parte decree dated 10.7.1996 was passing in the following terms:

- (1) to pay the plaintiff a sum of Rs. 30 lakhs;
- (2) to pay Rs. 3 lakhs for every telecast, screening or viewing of the film through cinema or video theatres or through television, cable or satellite abroad;
- (3) to pay Rs. 5 lakhs for every agreement;
- (4) to pay interest @ 12% per annum from the date of decree; and
- (5) to pay costs of the suit to the plaintiff.

12. The plaintiff thereafter moved IA No. 8759/1998 u/s 152 of the CPC seeking correction of the decree. Apart from other clerical errors which were allowed to be rectified, the plaintiff also wanted quantification of the amount as per his calculations in the decree. This request was, however, rejected by the learned Single Judge vide orders dated 10.11.1998 on the ground that the same was not possible because the decree had to be prepared as per the judgment and not as per any quantifications which may be made as per the judgment. The plaintiff even preferred appeal, being FAO (OS) No. 327/1998, against orders dated 10.11.1998 which was dismissed by the Division Bench vide orders dated 11.12.1998. SLP there against was filed in the Supreme Court which was dismissed as withdrawn.

13. On 8.11.2000, however, the plaintiff filed another IA No. 381/ 2001 praying for passing of "supplementary decree" to the tune of Rs. 10.22 crores. This application was allowed and vide judgment and decree dated 31.5.2002, 2nd decree, i.e. supplementary decree for Rs. 10.22 crores was passed. After this decree was passed, the plaintiff sent notice dated 20.2.2003 to the successor-in-interest of defendant No. 1 in Italy to pay the decretal amount. On receipt of this notice, the appellant, being successor-in-interest, filed application under Order IX Rule 13 CPC on 3.11.2003 for setting aside both the decrees. It is this application which was dismissed by impugned order dated 26.10.2005.

14. Along with the application under Order XXXIX Rule 3 CPC, application u/s 5 of the Limitation Act was also filed. Two more applications were filed, one was under Order XIV Rule 2 CPC stating that the Delhi court had no territorial jurisdiction to try and determine the suit, and the other was u/s 151 CPC for keeping orders dated 5.10.2004 in abeyance during the pendency of the

aforesaid applications.

15. The learned Single Judge has opined that in the application filed by the appellant under Order IX Rule 13 CPC, no reasons for non-appearance and delay are shown and the entire discussion is in the following manner:-

The application does not dispute that defendant No. 1 was earlier represented through a counsel. Learned counsel for defendant No. 1 states that the said counsel failed to appear and sought discharge though no notice was actually served on defendant No. 1. Defendant No. 1 is stated to have merged in a new entity as averred in the application and nothing has been placed on record to show that as to what steps either the original defendant No. 1 or the new entity has taken to defend the suit or instructed the counsel to prosecute the same. The proceedings are in the nature of suit and unless there are instructions from the party, it can hardly be expected that counsel can defend or prosecute such a matter. In case defendant No. 1 had merged into a new entity, it was for the new entity to inform the counsel appearing for defendant No. 1 to take appropriate steps. This was not done. All the burden is now sought to be thrown on the counsel that he sought discharge without notice to the new entity. If the existence of the new entity is not brought to the notice of the counsel, it is not understood how the counsel would come in touch with the new entity. It is for the defendant No. 1 to have taken appropriate steps to defend the suit.

It is not the case of defendant No. 1 that instructions were given to the counsel who failed to act or acted negligently. Nothing has been placed on record to substantiate this plea.

In my considered view, leave aside sufficient cause, no cause whatsoever has been shown to set aside the decree nor is there any ground for condonation of delay.

16. In sum and substance, according to the learned Single Judge, when the defendant No. 1 had merged with the appellant, it was the duty of the defendant No. 1/appellant to inform about this to its counsel. Otherwise, counsel was not expected to appear without any instructions and he being unaware of the aforesaid merger could not have contacted the new entity. Therefore, fault was that of the defendant No. 1/appellant and the discharge sought by the counsel for the defendant No. 1, even without notice, was appropriate.

17. Challenging this order, Mr. Sudhir C. Aggarwal, learned senior counsel appearing for the appellant/defendant No. 1, made the following submissions:-

(a) Counsel for the defendant No. 1 just stopped appearing, which could not have been done without writing letter to the defendant No. 1 and seeking proper discharge. He referred to the provisions of Rule 5 of Chapter V of the Delhi High Court Rules in this behalf, which read as under:

5. Notice of discharge to a client - An Advocate in a suit or matter desiring to obtain an order for his discharge, shall first give notice of his intended application

for discharge to his client and fact of such notice having been served shall be stated in the application.

Provided that an Advocate may be discharged by consent of the Advocate and the party by a letter addressed to the Registrar and signed by the Advocate and the party.

On this basis, argument was that it was the lapse on the part of the Advocate because of which defendant No. 1, or for that matter, its successor (appellant herein) should not be allowed to suffer.

(b) Till the merger in all proceedings, defendant No. 1 had appeared not only in the suit proceedings but also in appeal before the Division Bench and hotly contested the case/ appeal of the plaintiff. This would show that the defendant No. 1 was vigilant throughout and it was not a case where defendant No. 1/ appellant was negligent or did not want to contest the suit.

(c) No summons of application filed by the plaintiff seeking supplementary decree were served upon the appellant. Service was effected by publication in English newspapers having circulation in Rome, which was not sufficient, the appellant is based in Milan.

(d) As the defendant No. 1 had merged with new entity, namely, the appellant herein, it was necessary for the plaintiff to bring the appellant on record as the defendant No. 1 had ceased to exist. Since it was not done, the suit stood abated.

(e) No 2nd decree could be passed in law as there is nothing like "supplementary decree". After passing the 1st decree in the suit, the Court had become functus officio and could not proceed to pass "supplementary decree".

(f) Merits of the defendant No. 1's contention had not even been gone into by the learned Single Judge, though it was a necessary exercise required to be undertaken by the trial court even in ex-parte proceedings, as held in *M.K. Prasad Vs. P. Arumogam*, .

(g) The Court lacked the necessary jurisdiction as per the principle of law laid down in the judgment in *Partap Singh Vs. Bank of America*, .

18. Mr. Arun Mohan, learned senior counsel appearing for the respondent, on the other submitted that the learned trial court was right in holding that no sufficient cause was shown in the application preferred by the plaintiff and it was a necessary requirement for seeking setting aside of the ex-parte decree and, therefore, the application was rightly dismissed. At the outset, he referred to the judgment of the Supreme Court in *Sunil Poddar and Others Vs. Union Bank of India*, , where this principle is highlighted in the following terms:-

11. It was also submitted that the appellants were not informed about the transfer of case from the civil court to DRT and no summonses were served upon them. According to the appellants, they had changed their address and new address was available with the Bank. In spite of that, with mala fide intention

and oblique motive, summonses were sought to be served upon the appellants at an old address but the appellants were not served because of change of address. Summonses were then published in a Hindi newspaper which had no "wide circulation". That action was also taken with a view to deprive the appellants from knowing about the proceedings before DRT so that they may not be able to appear and defend themselves and the Bank would be able to obtain ex parte order. The appellants had led the evidence in support of their say that they were not in Mumbai at the relevant time and they were not subscribers of Hindi newspaper Nav Bharat Times. They had produced necessary particulars and yet DRT failed to consider the said evidence in its proper perspective and dismissed the application observing that the appellants must be deemed to be aware of the proceedings.

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15. Having heard the learned Counsel for the parties, in our opinion, the appellants have not made out any ground on the basis of which the order passed by the DRT, confirmed by the DRAT and by the High Court can be set aside. From the record, it is clearly established that the suit was instituted by the plaintiff-Bank as early as in August, 1993. The appellants who were defendant Nos, 7 to 9 were aware of the proceedings before the Civil Court. They appeared before the Court, engaged an advocate and filed a written statement. They raised preliminary objections as also objections on merits. They filed applications requesting the Court to raise certain issues and try them as preliminary issues. It was, therefore, obligatory on their part to appear before the DRT, Jabalpur when the matter was transferred under the Act. The appellants, however, failed to do so. We are not impressed by the argument of the learned Counsel for the appellants that they were not aware of the proceedings before the DRT and summonses could not be said to have been duly served. As is clear, summonses were issued earlier and on the same address, summonses were sought to be served again after the case was transferred to DRT, There is substance in the submission of the learned Counsel for the respondent-Bank that the appellants had avoided service of summons as they wanted to delay the proceedings. We are also inclined to uphold the argument of learned Counsel for the Bank that in view of the fact that the appellants were appearing before the Civil Court, it was not necessary for the Bank to get summonses published in a newspaper after the matter was transferred in accordance with law to the DRT, Jabalpur. But even that step was taken by the respondent-Bank. In "Navbharat Times", a Hindi newspaper having wide circulation in Bombay and Raipur, summonses were published. It cannot be argued successfully that the appellants were not the subscribers of the said newspaper and were not reading "Navbharat Times" Hindi Edition. But even otherwise, such contention is wholly irrelevant. As to bills said to have been produced from the newspaper agent, to us, both the Tribunals were right in observing that such a bill can be obtained at any time and no implicit reliance can be placed on that evidence. It is immaterial whether appellants were subscribers of the said newspaper and whether they were reading it. Once a

summons is published in a newspaper having wide circulation in the locality, it does not lie in the mouth of the person sought to be served that he was not aware of such publication as he was not reading the said newspaper. That ground also, therefore, does not impress us and was rightly rejected by the Tribunals.

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23. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim, of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiffs claim, he cannot put forward a ground of non service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code. Since the said provision applies to Debt Recovery Tribunals and Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before the DRT, they had no sufficient time to appear and answer the claim of the plaintiff-bank and on that ground, ex parte order deserves to be set aside.

24. In our opinion, the Tribunals were also right in commenting on the conduct of the appellants/defendants that they were appearing before Civil Court through an advocate, had filed written statement as also applications requesting the Court to treat and try certain issues as preliminary issues. All those facts were material facts. It was, therefore, incumbent upon the appellants to disclose such facts in an application u/s 22(2)(g) of the Act when they requested the DRT to set aside ex parte order passed against them. The appellants deliberately and intentionally concealed those facts. There was no whisper in the said application indicating that before the Civil Court they were present and were also represented by an advocate. An impression was sought to be created by the defendants/appellants as if for the first time they came to know in December, 2000 that an ex parte order had been passed against them and immediately thereafter they had approached the DRT. The Debt Recovery Tribunal, Jabalpur, therefore, in our opinion was right in dismissing the said application.

(Emphasis supplied)

19. He also submitted that in the application filed by the appellant under Order IX Rule 13 CPC, while describing the appellant as the successor company of defendant No. 1, this fact was suppressed that defendant No. 1 and its successor companies, including the appellant, were also companies of the same group and, therefore, merger was not with an outsider company. What was sought to be

highlighted was that not only this fact was suppressed that the merger was within the same group, the appellant had gone to the extent of taking false plea that it did not know of the pendency of the suit in this Court. It was also not disclosed that the defendant No. 1 was wholly owned subsidiary of the appellant. He also submitted that no case was set up that earlier counsel acted in a negligent manner or has ditched the defendant No. 1/appellant. Even as per the appellant's own showing, he was appearing in all these proceedings. However, at the crucial stage of evidence, the counsel could not proceed without instructions of the defendant No. 1/appellant and since he stopped receiving any instructions, he had no option but to withdrawn from the case.

20. Mr. Arun Mohan also pointed out that on an application for supplementary decree, notice was sent twice to the defendant No. 1/ appellant, but as it could not be served by ordinary process, publication was ordered, which was the only course of action available. The defendant. No. 1/ appellant, therefore, would be deemed to have been served and supplementary decree was properly passed as nobody appeared in spite of deemed service. He, thus, argued that there was absence of valid ground, important facts were concealed and even false averments were made in the application filed under Order IX Rule 13 CPC which was, thus, rightly rejected. He also submitted that no doubt the defendant No. 1 contested the suit and appeals where the question of interim injunction was involved. However, the moment the threat of interim injunction was over, the defendant No. 1/ appellant perceived as if the matter was. over insofar as the appellant is concerned and did not bother to contest it further, which was entirely is own take. Perhaps the appellant thought that it is free to release its movie without any shackles and unconcerned or oblivious about the consequences of the suit, it did not give any regard to these proceedings and showing defiance, stopped appearing.

21. We have considered the submissions of both the counsel with reference to the record.

It is not in dispute that even when the appellant is a foreign entity, it duly appeared in the suit filed by the plaintiff in this Court and contested the same in all earnestness and diligence which was required, at the initial stages. That is even accepted by the learned counsel for the plaintiff. Not only written statement to the plaint was filed, reply to application for injunction was also filed. Application for injunction was defended and hotly argued before the learned Single Judge, thereafter before the Division Bench and then in the Supreme Court. There was proper and effective representation by the defendant No. 1/ appellant. It is also clear that the contest was so vehement on the part of the defendant No. 1 that even when the plaintiff was ready to give up the claim for damages and only wanted some credits to him acknowledging his services in the title shots of the film, even that was not acceptable to the defendant No. 1. What we intend to convey is that the defendant No. 1 had participated in the proceedings and defended the prayers made by the plaintiff seeking interim relief

with all vehemence and stoutness.

22. No doubt, after the conclusion of the proceedings in the Supreme Court, which arose out of an application of the plaintiff for interim relief, the defendant No. 1 stopped appearing. According to the plaintiffs counsel, the defendant No. 1 stopped bothering about these proceedings thereafter, which may or may not be true. As against it, the explanation given by the appellant is certainly possible, when judged in the background of weighty circumstances disclosed by it. Many developments took place in rapid succession insofar as the defendant No. 1 is concerned, viz. merger of the defendant No. 1 with RCS Films and T.V.S.p.a. on 28.2.1994 and merger of the latter company with RCS Editoria S.p.a. on 19.12.1994. This company also changed its name to what the present appellant is. Furthermore, office of the defendant No. 1 in Rome was closed down as the present appellant is based in Milan. Under these circumstances, in the process of these mergers etc., may be in the same group, possibility of losing track of the present suit cannot be ruled out, particularly when this suit was pending in a foreign country, where the defendant No. 1/appellant has otherwise no activity or presence. Counsel in Delhi, who was representing the defendant No. 1, also had no knowledge of these developments and, therefore, he did not know that the appellant is the successor of the defendant No. 1, which was not operating from the address available with the counsel, but was based in Milan.

23. There is yet another very significant aspect of the matter which is to be borne in mind while deciding the application under Order IX Rule 13 of the CPC. Ex-parte decree which was passed in favour of the plaintiff was to the tune of Rs. 30 lacs. Of course, at the same time, decree also mentioned the defendants to pay Rs. 3 lacs for every telecast etc. and Rs.5 lacs for every agreement. Still attempt to quantify the same into decree by means of application u/s 152 CPC had failed till the Supreme Court. It is only when supplementary decree is passed that the import is fully realized. However, in the application for supplementary decree, the defendants were not served by ordinary process. There is a service only by publication and the appellant has much to say about the nature of such a service, as noted above. Without going into the aspect as to whether it was a proper service or not, what is emphasized is that as against the main decree of Rs. 30 lacs, the supplementary decree, which is again ex-parte, has been passed to the tune of Rs. 10.22 crores. With interest the amount has bloated to more than Rs. 25 crores. At the same time, in the matter of application for supplementary decree, when main suit was over and fresh summons were to be served upon the defendants, the fact situation was entirely different from that existed in Sunil Poddar & Co. (supra) and that judgment would not apply here.

24. The moot question which arises in these circumstances is as to whether it would not be reasonable and proper to give an opportunity to the appellant to contest such a suit by giving it a chance when the two decrees passed earlier are ex-parte and the appellant has given plausible explanation for non-appearance.

25. May be, the appellant was not as vigilant as it ought to have been, but when

we take the overall circumstances into consideration, we find that its conduct is not that of an irresponsible litigant. The following observations of the Supreme Court in M.K. Prasad (supra) would clearly be applicable to the fact situation in which this case is placed:-

10. In the instant case, the appellant tried to explain the delay in filing the application for setting aside the ex parte decree as is evident from his application filed u/s 5 of the Limitation Act accompanied by his own affidavit. Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. He should have been more vigilant but his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the ex parte decree, the court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the court in this case can be compensated by awarding appropriate and exemplary costs. In the interests of justice and under the peculiar circumstances of the case, we set aside the order impugned and condone the delay in filing the application for setting aside ex parte decree. To avoid further delay, we have examined the merits of the main application and feel that sufficient grounds exist for setting aside the ex parte decree as well.

Thus, we are of the opinion that too strict or narrow view, while considering the applications of the appellant for setting aside the ex-parte decrees and for condonation of delay in filing the application for setting aside the ex-parte decrees, should not have been taken by the learned Single Judge. The appellant came to know of the ex-parte decrees only when it received notice from the plaintiff. Thereafter, it moved this Court and filed these applications. Therefore, we feel that the appellant has shown sufficient cause for condonation of delay and setting aside the ex-parte decrees.

26. At the same time, in order to balance the equities and also to suitably compensate the plaintiff who has been litigating the matter for all these years with passion, sincerity and due diligence involving costs as well, we are of the opinion that order for setting aside the ex-parte decree should not be without conditions. More so, when the appellant/defendant No. 1 is responsible for creation of the situation, wittingly or unwittingly. It is trite law that while setting aside the ex-parte decree, the Court is competent to impose any conditions which are reasonable and advance the course of justice.

27. Before setting out these conditions, we may observe that detailed arguments were advanced on various aspects, including as to whether there was a proper service upon the defendant No. 1/appellant of summons of the plaintiff's application seeking supplementary decree; whether decree could be passed against the defendant No. 1 which had been merged with the appellant and,

therefore, had ceased to exist; whether the court was competent to pass the supplementary decree at all or not; whether there was lack of jurisdiction, etc. However, we have not dealt with those submissions including plethora of case law cited by the counsel for the parties on these aspects as according to us the central issue with which we are concerned in these proceedings is as to whether in the facts and circumstances of this case, setting aside of ex-parte decree is warranted or not. We have, thus, limited our discussion to this aspect alone. Other issues can always be thrashed out in the main suit. In the facts and circumstances of the present case and on taking a holistic view of the matter, we are of the opinion that ends of justice would be subserved by giving the following directions:-

(a) ex-parte decree dated 10.7.1996 and supplementary decree dated 31.5.2002 are set aside, subject to the following conditions:-

(i) the appellant shall deposit a sum of Rs. 30 lacs (amount of the original decree) in this Court within four weeks from today and the plaintiff shall be entitled to withdraw this amount, subject to furnishing of security to the satisfaction of the Registrar of this Court; and

(ii) the appellant shall also pay to the plaintiff costs of Rs. 2 lacs.

(b) having regard to the fact that suit is of the year 1989 and pleadings are complete, the trial court shall make an endeavour to finish the trial and decide the suit as expeditiously as possible and preferably within one year;

(c) since defendant No. 1 has merged with the appellant, the appellant shall be allowed to be substituted in place of the defendant No. 1. We order accordingly and without any formal application, permit the plaintiff to file amended plaint within two weeks; and

(d) parties shall appear before the learned Single Judge on 6th April 2009, when issues would be framed and the learned Single Judge would also be at liberty to fix time bound schedule for recording of evidence/trial.

The appeal stands allowed in the aforesaid terms.