

(1996) 01 DEL CK 0025
In the Delhi High Court
Case No : F.A.O. (OS) No. 158 of 1994

Sardar Jaswant Singh

APPELLANT

Vs

M/s. Daya Industries and another

RESPONDENT

Date of Decision : 05-01-1996

Acts Referred:

Citation : (1996) 01 DEL CK 0025

Hon'ble Judges : M. Jagannadha Rao, J;A.D. Singh, J

Bench : Division Bench

Advocate : Mr. Man Mohan Singh, for the Appellant; Mr. R.K. Aggarwal, for the Respondent

Judgement

M. Jagannadha Rao, C.J.—This appeal is filed by the respondent Sardar Jaswant Singh in Civil original petition No. 3/1981 filed by the 1st respondent (M/s. Daya Industries) u/s 51A of the Designs Act, 1911, against the orders of the learned Single Judge dated 18.4.1994 dismissing is 1188/91 filed by the appellant under Order 9 Rule 13 CPC to set aside the order dated 13.11.1991.

2. The facts of the case are as follows : M/s. Daya Industries (1st respondent) and another filed application u/s 51A of the Design Act, 1911, seeking cancellation of the registration of the design of the appellant dated 16.5.1988. The above section permits any person aggrieved by orders of registration passed by the Controller of Patents and Designs Calcutta, to approach the High Court for cancellation of registration granted by controller provided the applicant before the High Court pleads and proves certain facts. The 1st respondent and another contended in their application filed u/s 51A in this court in 1989 that they have been carrying on the business of manufacturing and selling Heat Convector's besides other equipments for several years and that on 4.1.1989, they had come to know about the insertion of a Design Caution Notice in "Sandhya Times", that the appellant had obtained registration in respect of heat convector's under No. 158951 under the Designs Act, 1911 from the office of the Controller of Patents and Designs, Calcutta. The 1st respondent contended that the appellant had

obtained such registration fraudulently and that the design had, infact, been previously published in India and West Germany by M/s. Borun Electric Canada Ltd. and that the design was in use long before May, 1988 in India. The 1st respondent also claimed that the appellants' design was neither new nor an original one at the time of registration. These, were, in fact, the conditions required to be pleaded in the High Court u/s 51A of the Designs Act, 1911 if the petitioner therein is seeking cancellation of the registration of the design obtained by the non-applicant.

3. The appellant put in his appearance on 9.3.1989 through Shri D. P. Sharma, his counsel before the Deputy Registrar, High Court, accepted notice and sought 4 weeks" time to file reply. The matter was adjourned to 16.5.1989. Nobody appeared for appellant on 16.5.1989, further time was granted up to 11.9.1989 none appeared for appellant and the Deputy Registrar placed the matter before court on 4.10.1989. On 4.10.1989 no replay was filed. Only on 17.12.1989, reply was filed. On 30.1.1990, issues were framed. Thereafter on 16.4.1990, 23.5.1990 none was present for appellant. On 18.7.1990, adjournment was sought by his counsel, who appeared on 16.11.1990 and on 14.12.1990 none appeared for appellant. On 4.3.1991, counsel for both sides appeared and they were suggesting compromise talks. 1st Respondent give an undertaking not to take action for piracy against the appellant. The matter was adjourned to 15.3.1991. On 15.3.1991, 25.5.1991, 24.10.1991, 12.11.1991, none was present for the appellant.

4. Ultimately on 13.11.1991, the learned Trial Judge heard the matter and decided the case on merits and allowed the petition filed u/s 51A by 1st respondent after registration of the appellant's design stood cancelled.

5. Thereafter, the appellant Sardar Jaswant Singh filed is 11887/91 under Order 9 Rule 13 CPC and the matter came up before another learned Judge sitting on the original side. After referring to the above list of adjournments given in the matter, the learned Judge dismissed the is on 18.4.1994 under the impugned order stating that both the appellant and his counsel were negligent in defending the petition. This appeal is filed against the said order.

6. In this appeal, it is contended that the learned Single Judge committed a serious error in observing that no counter was filed by the appellant in the Section 51A petition filed by the 1st respondent in this court. It is also contended that the learned Judge who allowed the Section 51A application ought not to have disposed of the matter on merits but should have simply proceeded ex parte. It is stated that the appellant suffered from eye disease (cataract) and was being admitted at AIIMS hospital since 11.1.1990 and could not contact his advocate and that the counsel for the 1st respondent (applicant in Section 51A petition) did not inform the appellant about filing of affidavit by way of evidence. Otherwise, appellant would have filed affidavit by way of evidence. It was also contended that there were compromise talks as recorded in court's order dated 4.3.1991.

7. Two questions arise in this context. Firstly whether the court could have passed an order on merits on 13.11.1991 even though the appellant (who was respondent in the petition) had filed his counter and issues were framed on 30.1.1990. The second point is whether, even if the order dated 13.11.1991 was on merits, it could be challenged by the appellant on the ground that there was sufficient cause for the appellant to explain his absence on various dates and seek a fresh disposal on merits.

8. So, far as the first question is concerned, it is necessary to refer to Order 17 Rule 2 and Order 17 Rule 3 CPC.

9. "R. 2. Procedure if parties fail to appear on day fixed.

10. Where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit."

11. "R. 3. Court may proceed notwithstanding either party fails to produce evidence, etc.

12. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed"

13. The State of Objects and Reasons (1976) regarding Order 17 Rule 3 and Order 17 Rule 2 are respectively as follows :

"Clause 71 - Sub-clause (iii) - 2 Rule 3 provides that a court may proceed with a case notwithstanding the failure of either party to produce evidence. There are different opinions regarding the scope of this rule. The amendment is intended to define the scope of Rule 3 so as to make it clear that action can be taken by the court when the parties are present as well as when they are absent. "S.O.R. (Gaz. of Ind. 8-4-1974, Pt. II, Section 2, Ext. p. 319)."

"Sub-clause (ii) - Rule 2 provides for the procedure to be adopted where parties fail to appear on a day fixed. At present three courses are open to the court namely :

(a) "to act under Order 9, though it is not bound to do so;

(b) To grant further adjournment; or

(c) to make "such other order as it deems fit. The words "such other order" have been differently interpreted by different High Courts. In view of the obscurity of the present position, a new Explanation is being added to the rule to make the position clear by empowering the court to proceed with a case even in absence of a party where evidence or a substantial portion of the evidence of such party has already been recorded." - S.O.R. (Gaz. of Ind., 8-4-1974, Pt. II, Section 2, Ext.,

p. 318)"

14. It will be seen that when such situations arise, the court after the 1976 amending Act, had to apply Order 17 Rule 3 initially. If the party to a suit (or petition such as the appellant in this case) whom time had been granted failed to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time had been allowed, the court might, notwithstanding the default, proceed to decide the suit forthwith, if both parties were present. In the present case, the appellant was absent on 23.5.1991 when the matter was posted for arguments and the court need not have to and should not have passed an order on merits. The court ought to have, in view of Order 17 Rule 3(b) proceeded under Order 17 Rule 2 because the appellant, the defaulting party, had been absent on 23.5.1991 when arguments were heard and on 13.11.1991 when judgment allowing the Section 51A petition was passed. (In fact, appellant was also absent on 27.5.1991, 23.10.1991, 24.10.1991, 12.11.1991). The court ought to have opted to follow Order 17 Rule 2. Under Order 17 Rule 2 the court should have, in the absence of the appellant, proceeded under Order 9 Rule 13 to pass an ex parte order or the court could have passed such other order as it thought fit. Under the Explanation to Order 17 Rule 2, it was only in cases where the party who had already adduced his evidence or a substantial part thereof was absent or the adjourned day that the court in its discretion could decide the suit on merits, even in cases falling under Order 17 Rule 3(b).

15. The above position is made clear by the Supreme Court in Prakash Chander Manchanda and Another Vs. Janki Manchanda, . In that case, the plaintiff's evidence was over and the defendant's evidence was to begin but repeatedly, the case was adjourned but defendant did not appear nor produce his witnesses. The court listed the matter for arguments and judgment pronounced decreeing the suit. Then, the defendant filed application under Order 9 Rule 13 CPC. That was dismissed on the ground that the suit was disposed of on merits and hence is under Order 9 Rule, 13 was not maintainable. The High Court dismissed the appeal. On defendants' further appeal, the Supreme Court held that the court could use Order 17 Rule 2(b), resort to the Order 17 Rule 2, that Explanation to Order 17 Rule 2 was not applicable and that the court ought not to have proceeded on merits but should have proceeded under Order 9 and that the order could, even if it was on merits, be set aside by an application filed under Order 9 Rule 13. The Supreme Court held that the court committed an error in proceeding to dispose of the suit on merits. The matter was remitted to see if there was sufficient cause. In that context, it was observed :

"It is clear that in cases where a party is absent only course is as mentioned in Order 17(3)(b) to proceed under Rule 2. It is Therefore clear that in absence of the defendant, the court had no option but to proceed under Rule 2. Similarly the language of Rule 2 as now stands also clearly lays down that if any one of the parties fails to appear in the court has to proceed to dispose of the suit in one of

the modes directed under Order 9. The Explanation to Rule 2 gives a discretion to the court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is Therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined up to that date the court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9, Civil P.C. It is, Therefore, clear that after this amendment in Order 17 Rules 2 and 3, Civil P.C. there remains no doubt and Therefore, there is no possibility of any controversy. In this view of the matter, it is clear that when in the present case on 30-10-1985 when the case was, called nobody was present for the defendant. It is also clear that till that date the plaintiff's evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is, Therefore, clear that up to the date i.e. 30-10-1985 when the trial court closed the case of defendant there was no evidence on record on behalf of the defendant. In this view of the matter Therefore, the Explanation to Order 17 Rule 2 was not applicable at all. Apparently when the defendant was absent Order 17 Rule 2 only permitted the court to proceed to dispose of the matter in anyone of the modes provided under Order 9.

7. It is also clear that Order 17 Rule 3 as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of defendant was closed nobody appeared for the defendant. In this view of the matter it could not be disputed that the court when proceeded to dispose of the suit on merits had committed an error. Unfortunately even on the review application, the learned trial court went on in the controversy about Order 17 Rules 2 and 3, which existed before the amendment and rejected the review application and on appeal the High Court also unfortunately dismissed the appeal in liming by one word."

16. We Therefore hold that the court ought not have proceeded to dispose of the suit on merits on 13.11.1991. But this finding cannot help the appellant. The case before us is not one where the is filed under Order 9 Rule 13 was dismissed as not maintainable. The learned Judge who disposed of Order 9 Rule 13 application held that the appellant and his counsel were both negligent and there was no sufficient cause to set aside the order dated 13.11.1991.

17. The question then is whether, treating the order dated 13.11.1991 as an ex parte order and treating the is filed under Order 9 Rule 13 as maintainable, whether there was sufficient cause ? On this aspect, the appellant must surely fail because of the continued absence of the appellant as also of his counsel and in their not producing the affidavit evidence. The cataract in the eye so far as the appellant was concerned was in January, 1990 and was no excuse for absence throughout after that for 1 year 11 months. The alleged talks of compromise were in March, 1991, and even thereafter, there was default for eight months.

The dates we had set out show nothing short of negligence. Even assuming that the appellant's counsel appeared on 18.7.1990 or on 4.3.1991, and the earlier absence was to be disregarded, the absence after 18.7.1990 or 4.3.1991 has not been explained. We have given the list of the various dates when the appellant and his counsel were absent. We are in entire agreement with the learned Single Judge that the appellant has not made out any case for condoning his or his counsel's indifference to the case.

18. For the aforesaid reasons, the appeal is dismissed.