

(2008) 08 DEL CK 0087
In the Delhi High Court
Case No : CM (M) 1676 of 2007

Sh. Rajesh Kumar Aggarwal

APPELLANT

Vs

Sh. Pavneet Singh

RESPONDENT

Date of Decision : 27-08-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 17, Order 41 Rule 7, Order 5 Rule 20(1A), Order 9 Rule 13, Order 9 Rule 3

Citation : (2008) 153 DLT 121

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Ravi Gupta and Ankit Jain, for the Appellant; S.S. Bahl and T.K. Chawla, for the Respondent

Judgement

Shiv Narayan Dhingra, J.—By this petition, the petitioner has challenged an order of learned ADJ dated 25th September, 2007 allowing an appeal against order dated 23rd February, 2007 of the learned Civil Judge

2. The brief facts relevant for disposing of this petition are that an ex parte decree was passed by the learned Civil Judge in respect of possession of property No. F-40/47, Model Town, Delhi on 6th March, 1990. While execution of this decree was pending, an application was filed on 25th January, 1994 under Order 9 Rule 13 CPC by one Sukhbir Singh, Advocate claiming to be General Power of Attorney of Satnam Kaur, JD. This application was dismissed by the learned Civil Judge vide his order dated 20th March, 2004 Against this order, the Attorney preferred an appeal and along with the appeal an application under Order 18 Rule 17 CPC was filed to produce certain additional documents. The application under Order 18 Rule 17 CPC was allowed by learned ADJ vide his order dated 2nd December, 2004 permitting exhibiting of General Power of Attorney, Medical Certificates, summons, newspaper, plaint, application, etc., subject to costs of Rs. 10,000/-. The learned ADJ remanded the matter back for deciding the matter afresh after allowing the applicant's witness, Sukhbir Singh, to exhibit the

aforesaid documents, subject to objections.

3. After the matter was remanded back further statement of Sukhbir Singh, Advocate was recorded and the Trial Court again dismissed the application under Order 9 Rule 13 CPC vide its order dated 23.2.2007. During this time, Satnam Kaur had died. An appeal against order of Civil Judge was preferred by Praveen Singh, LR of Satnam Kaur. This appeal has been allowed by the impugned order.

4. Advocate, Mr. Sukhbir Singh who moved application under Order 9 Rule 13 CPC on 24.1.1994 for setting aside the ex parte decree, claimed to be the brother-in-law of Satnam Kaur. He appeared in the Court as a witness in support of this application. In his testimony, he stated that on 24th January, 1994 he received a telephonic call from an unknown person informing him about a matter going on in the Court against Satnam Kaur for possession of the shop. The anonymous caller also told him the name of the Court. The Trial Court has asked him to reveal the name of the caller but he refused to reveal the name of the caller and told that he was a well-wisher of him. He did not say that he was not aware of his name. He further deposed "Satnam Kaur told me that she is hearing about the case for first time and is not in the knowledge of any suit like this. She further instructed me, on engaging me as her counsel, to move an application under Order 9 Rule 13 CPC. She further told me she has never been served with summons of any such case from the Court regarding my shop at Model Town. No notice of any kind from any counsel has even been received by her. Satnam Kaur never used to receive any documents or paper from any one without informing me or without getting my permission and always used to be in my knowledge."

5. It is evident that the entire testimony of this witness is hearsay and is not admissible in evidence. Satnam Kaur was very much alive at that time when he gave the testimony and the testimony of this witness in respect of knowledge of Satnam Kaur was inadmissible. He claimed to be Attorney and Advocate, both of Satnam Kaur but did not file his Power of Attorney in Court. It is only when the Civil Judge dismissed the application under Order 9 Rule 13 CPC inter alia on the ground that Power of Attorney of Satnam Kaur filed in the case was neither proved nor it was a valid Power of Attorney and only a photo copy of General Power of Attorney was produced on record that the Advocate filed an application under Order 18 Rule 17 CPC before the Appellate Court to bring Power of Attorney on record. The Power of Attorney placed on record by this witness is dated 3rd March, 1999.

6. Order 18 Rule 17 CPC is not applicable during pendency of an appeal. It is not understood how the learned ADJ entertained an application under Order 18 Rule 17 CPC when there is specific provision under Order 41 Rule 7 CPC for production of additional evidence during appeal.

7. A perusal of Power of Attorney shows that the Power of Attorney is prospective and does not ratify any of the acts of the Advocate done in past. In 1994 when this Advocate moved this application under Order 9 Rule 3 CPC claiming to be

General Attorney of Satnam Kaur, he had no authority to move the application.

8. The learned Civil Judge while reconsidering the matter after being remanded back, made this observation in his order that the Power of Attorney was of 1999 and the application was filed on 25th January, 1994. Learned ADJ in his appellate order not only overlooked this material aspect of the case, but did not even mention a word about this aspect as to how an application under Order 9 Rule 13 CPC made by an Advocate without authority was maintainable and how hearsay evidence was admissible under law and how a stranger could prove or exhibit documents.

9. The learned Counsel for the respondent pleaded that the only deposition to be made in the Court was how JD gained knowledge of the decree and since this knowledge was gained through AW-1, Power of Attorney, the JD was not a necessary witness and only Attorney was the necessary witness.

10. Order 9 Rule 13 CPC reads as under:

13. Setting aside decree ex parte against defendants.- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.]

[Explanation.- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree.]

11. A perusal of this order shows that it is the defendant who can apply to the Court for setting aside an order. No doubt, the defendant can act through his agent. In order to act through his agent, a valid Power of Attorney has to be executed by the defendant. The Power of Attorney is allegedly executed in 1999 while the application is made before the Court in 1994. The other aspect of Order 9 Rule 13 CPC is that the defendant has to satisfy that summons were not duly served or he was prevented for sufficient cause for appearing. Thus, it is the knowledge of the defendant which is material. It is only defendant who can

depose in the Court whether he was sufficiently served or not and whether he had knowledge of the suit pending in the Court or not or he was prevented from appearing in the Court for sufficient cause. If he was not served, when did he gain knowledge of the suit/decreed. An Attorney cannot depose on behalf of the defendant/JD and tell the Court that JD was not sufficiently served and JD was prevented by a sufficient cause from appearing. These are the facts in the specific knowledge of the JD and only JD is competent to depose these aspects. An advocate who may be relative of the JD cannot depose about the personal knowledge of the JD that whether she received summons or not and whether she was duly served or not or whether she was prevented for sufficient cause from appearing.

12. When this witness appeared in the Court, it was specifically put to him that Power of Attorney had not been executed in his favour by Satnam Kaur. It was also suggested that Satnam Kaur was in Delhi. It was admitted by the witness that Satnam Kaur was in Delhi at the time of his deposition but he took a stand that Satnam Kaur was not physically fit. No medical certificate of Satnam Kaur was produced by him at the time of his deposition. It is only later on when permission to file documents under Order 18 Rule 17 CPC was given by Appellate Court that he produced Power of Attorney and medical certificates. The medical certificates filed in Court are of 16th April, 1997. There was no medical certificate of 2002 when this witness appeared in the Court. The witness himself proved the Power of Attorney and the medical certificates issued by the Doctor. He is neither the executor of document nor a witness mentioned in the document. When the genuineness of the Power of Attorney was denied, it was obligatory on the JD to prove this document by appearing in the Court or by getting herself examined on Commission since she was in Delhi, even if she was bed ridden. She did not examine herself and did not appear in Court.

13. It is settled law that when best evidence is withheld, the Court has to draw an adverse inference against the person withholding the evidence. However, the learned ADJ gave no consideration to any of the aspects that in this case no document was proved. The testimony of the only witness was hearsay evidence. The credibility of the witness itself was highly doubtful. The witness could not have proved the medical certificates and Power of Attorney, etc. A document has to be proved by primary evidence and the primary evidence is the executor of the document. Where executor of the document is available and can be examined, it is only he who should be summoned to the Court to prove the documents.

14. The learned first Appellate Court had observed "the address of the defendant where the service was effected was in a colony which had been demolished. In view of this, any publication having been carried out become insignificant." This observation of the learned Appellate Court is contrary to the provisions of CPC. Order 5 Rule 20(1A) reads as under:

Where the Court acting under Sub-rule (1) orders service by an advertisement in

a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

15. Service by publication is effected only when either the defendant has left the given address or no other address of the defendant was known to the plaintiff or the defendant was evading service and efforts to serve him through ordinary mode had failed. Where a defendant was living in a colony which has been demolished, the plaintiff has no other means to serve such a defendant except by publication. The publication is the only effective mode in such a case and the observation of the Appellate Court below that service by publication become insignificant is contrary to legal provisions.

16. In the present case, the shop which is subject matter of the suit was stated to be lying closed after death of husband of Satnam Kaur for number of years. The plaintiff/petitioner furnished the residential address of the respondent, i.e., wife of the deceased and categorically stated that shop was lying closed. It is not disputed that the address furnished by the plaintiff was correct address at that time and she was living at that address. Service was effected on that address through publication and Civil Court passed a decree. Thereafter, when execution of this decree was to be carried out, bailiff went to the shop, the shop was still lying closed. Only the neighbour shopkeepers did not allow the bailiff to break open the lock and take possession on 9th June, 1992. The bailiff had also visited shop prior to that on 8th April, 1992 and found the shop to be closed. The reports of bailiff coupled with the statement of the plaintiff show that the shop was lying closed and there was no other mode of service of the defendant. The plaintiff in the meantime, asked for police help. When the application of the plaintiff of police aid was pending, AW-1 made this application on 25th January, 1994 claiming to be a relative and attorney of JD for setting aside the ex parte decree. JD did not turn up in the Court either to prove relationship or her attorney. Except self-serving statement of the Advocate, claiming to be a relative of JD, there is no other evidence on record. On the basis of a self-serving statement of an Advocate, whose evidence is only hearsay and who even did not disclose the name of so-called well wisher, who informed him, an ex parte decree cannot be set aside.

17. I consider that the learned Civil Judge rightly dismissed the application of the JD under Order 9 Rule 13 CPC on the ground that testimony of AW-1 was not admissible under law. The Power of Attorney was not proved and the best evidence was withheld and AW-1 had no authority to move application on behalf of the JD. The petition is allowed. The order of the learned ADJ dated 25.9.2007 is set aside and the order of the learned Civil Judge dated 23.2.2007 is restored.

18. The petitioner/decreed holder is entitled to costs throughout. The costs have to be realistic. Considering the legal fees being charged these days costs are quantified as Rs. 60,000/-.