
(2007) 09 DEL CK 0195

In the Delhi High Court

Case No : IA No's. 2143 and 13308 of 2006 in CS (OS) No. 1056 of 1998

Sh. Sanjay Kumar and Another

APPELLANT

Vs

Smt. Sita Rani Khanna and Others

RESPONDENT

Date of Decision : 18-09-2007

Acts Referred:

Limitation Act, 1963 — Section 5

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 9, 151

Citation : (2007) 6 ILR Delhi 115

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Vijay Choudhary, for the Appellant; P.K. Rawal and Ajay Bahl, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.

IA Nos. 2143/2006 & 13308/2006

1. The applications of the plaintiffs are for setting aside the order dated 28th April, 2005 dismissing the suit for non prosecution under Order 9 Rule 9 read with Section 151 of CPC and for condensation of delay u/s 5 of the Limitation Act in filing the application under Order 9 Rule 9 read with Section 151 of the Code of Civil Procedure.

2. The plaintiffs have filed the above noted suit for specific performance of agreement to sell executed between the parties in respect of agricultural land admeasuring 164 bighas, 13 bids was situated in revenue estate of village Quadipur, Delhi. The agreement contemplated sale of land at the rate of 4.5 lakhs per acre which rate was enhanced to Rs. 5.25 lakhs per acre.

3. The plaintiffs paid a total sum of Rs. 37 lakhs to the defendants out of which Rs. 17 lakhs was paid at the time of agreement and Rs. 20 lakhs was paid later on, receipts of which amounts have been admitted by the defendants.

4. According to the plaintiffs after filing of the suit, the pleadings were completed and on 3.9.2002 issues were framed. Thereafter, plaintiffs filed their evidence on affidavit on 14.2.2003. The contention of the plaintiffs is that they had been pursuing their case diligently and had been approaching and contacting their counsel Sh. Deepak Khosla, Advocate at his chamber No. 422, Civil Wing, Tis Hazari Court, Delhi.

5. The plaintiffs/applicant have contended that they had been approaching Sh. Deepak Khosla, Advocate regularly but they were falsely told by the said counsel that he had been regularly attending the case of the plaintiffs though later on it transpired that the matter was listed before the Joint Registrar on 19th March, 2004, 31st March, 2004, 29th April, 2004 and 21st March, 2005, however, their counsel did not appear before the Joint Registrar. The suit was finally dismissed for non-prosecution and for non appearance of counsel for the plaintiffs on 28th April, 2005.

6. The plaintiffs contended that they had met their counsel Sh. Deepak Khosla, Advocate on number of occasions personally and they were always told that the case is being looked after and only on 7th February, 2006 when the counsel told the plaintiffs that an application is to be filed for hearing the case when the plaintiffs got suspicious and engaged the services of another advocate on the same date who enquired about the case and then communicated to the plaintiffs that the suit had already been dismissed by the Court for non-prosecution on 28th April, 2005.

7. The plaintiffs/applicant categorically contended that their counsel had misguided them. In these circumstances the plaintiffs have contended that their non appearance and non-prosecution was neither deliberate nor intentional but on account of non appearance of their counsel who had failed to discharge his responsibility and duty honestly and diligently. On the same grounds the application has been filed u/s 5 of the Limitation Act seeking condensation of delay in filing the application for setting aside the order dated 28th April, 2005 dismissing the suit of the plaintiff for non appearance though on that date also no one had appeared on behalf of the plaintiffs.

8. The applications are contested by the defendants contending inter-alia that the application is barred in law as it was filed 30 days after the dismissal of the suit for non-prosecution on 28th April, 2005. The application is also opposed on the ground that a conditional stay was granted to the petitioner on 25th May, 1998 and the plaintiff failed to comply with the terms of the order dated 25th May, 1998 whereby he had undertaken to file the Court fees before the next date of hearing which was 15th September, 1998. According to the defendants the plaintiff failed to pay Court fees by 15th September, 1998 and, Therefore, the order dated 25th May, 1998 granting interim order to the plaintiffs have been vacated. The defendants stated that since the order was vacated they have also executed a registered sale deed in favor of purchaser which fact is within the knowledge of the plaintiffs/applicant. The defendants/non-applicant has referred

to the hearing on different dates prior to dismissal of the suit to contend that there is no sufficient cause for setting aside the order of dismissal dated 28th April, 2005.

9. The learned Counsel for the plaintiff/applicant has relied on Karnataka Handloom Development Corporation Ltd. Vs. Sh. B.S. Chopra, , Gloria Chemicals Vs. R.K. Cables and Others, , Sunder Kukreja and Others Vs. Mohan Lal Kukreja and Others, , Rafiq and Another Vs. Munshilal and Another, , Rafiq and Anr. v. Munshilal and Anr. to show that on account of the lapses on the part of the counsel who had been misleading the plaintiffs/applicants, they should not be allowed to suffer in as much as the plaintiffs have paid Rs. 37 lakhs already and even if the allegation of the defendants are accepted the defendants were liable to execute the conveyance in respect of proportionate area of the land as the agreement was for Rs. 5,25,000/- per acre and in case the suit is not restored the defendants will appropriate an amount of Rs. 37 lakhs which they are not entitled to in the facts and circumstances. The learned Counsel for the defendant, Mr. Rawal has relied on Syed Mujibur Rahman Vs. Abdul Azeez, , Syed Mujibur Rahman v. Abdul Azeez; 2007 VI AD (Del) 126, Inder Industries v. Gemco Electrical Industries; 2003 IV AD (Del) 299 , Badri Bhagat Jhandewalan Temple v. Delhi Development Authority and Salil Dutta Vs. T.M. and M.C. Private Ltd., , Salil Dutta v. T.M and M.C. Private Limited to contend that improper advice of advocate cannot as a rule be accepted as a sufficient cause and on account of the negligence on the part of the counsel for the plaintiff, it cannot be inferred that sufficient cause is made out for condensation of delay in filing the application and for setting aside the order of dismissal dated 28th April, 2005.

10. I have heard the learned Counsel for the parties in detail and have perused the applications and replies and the record of the case. Issues were framed in the suit on 3rd September, 2002 and it was directed that the examination in chief of witnesses be filed on affidavits and only those witnesses were to be summoned who were required for cross examination by other parties. It was also ordered that the official witnesses will be summoned for examination in accordance with law. plaintiff was directed to file his evidence on affidavit in regard to examination in chief within eight weeks and the matter was adjourned to 25th November, 2002. On 25th November, 2002 further time was sought by the counsel for the plaintiff to file the affidavit of examination in chief and the matter was adjourned for the cross examination for 20th May, 2003.

11. On 14th February, 2003 the affidavit of examination in chief of the plaintiff had been filed and the cross examination could not be conducted on 20th May, 2003 as the presiding officer was on leave on that date and the matter was adjourned to 28th July, 2003. On 28th July, 2003 an adjournment was sought as the witnesses whose examination in chief on affidavit was filed were not present and, Therefore, the matter was re-notified for 19th March, 2004. On 19th March, 2004 the cross examination could not be recorded as the counsel for the plaintiff, Mr. Deepak Khosla was busy in the election of the bar and the matter was

adjourned to 31st August, 2004. On 31st August, 2004 the witnesses could not be cross examined as the counsel for the defendants contended that he had not been supplied with the copy of the affidavit filed by the plaintiff towards examination in chief. Consequently, it is apparent that the counsel for the defendants knew that an affidavit of evidence has already been filed on behalf of the plaintiff. On the next date 29th November, 2004 as the witness was not present and the copy of the affidavit had not been supplied the plaintiffs were burdened with a cost of Rs. 1000/- to be deposited with Delhi High Court Legal Services Committee and the matter was adjourned to 21st March, 2005. On 21st March, 2005 as the cost in terms of order dated 29th November, 2004 had not been paid at the request of counsel for the defendants, the matter was placed before the Court and also because no one was present on behalf of plaintiffs on 21st March, 2005. Therefore, the matter was put before the Court for 28th April, 2005 and the suit was accordingly dismissed for non-prosecution though no one was present for the plaintiff on 21st March, 2005 and 28th April, 2005.

12. The plaintiffs/applicant have categorically contended that they had been contacting their counsel regularly and they were assured that the matter is being looked after. As to why counsel did not appear on 19th March, 2004, 31st August, 2004, 29th November, 2004 and 21st March, 2005 is not known to them. The plaintiffs/applicants have contended that when they met their counsel on 7th February, 2006 and they were told by their counsel that he had to file another application for hearing of the case when they became suspicious and asked another counsel to inspect the file who intimated the plaintiffs/applicants that the case had already been dismissed on 28th April, 2005.

13. In these circumstances on account of lapses on the part of the counsel for the plaintiffs whether it can be inferred that there is sufficient cause for non-appearance of plaintiffs and for not taking steps as the suit has been dismissed for non prosecution also.

14. From the averments made in the application which is supported by the affidavit, the inevitable inference is that the plaintiffs had been contacting their counsel and they had been assured that the matter is being looked after and attended. If counsel had been representing to the plaintiffs that the matter is being looked after I find no reason for the plaintiffs to doubt the representations made by their counsel as the affidavit of evidence had been filed and on the next date the Joint Registrar was on leave. It was only on 7th February, 2006 when they were asked to file another application that the plaintiffs became suspicious about their counsel leading to engaging another counsel who inspected the record and it transpired that the counsel, Mr. Deepak Khosla had not been attending the case and the case had already been dismissed on 28th April, 2005.

15. The Supreme Court had held that a party who has selected his advocate, briefed him and paid his fee can remain confident that his lawyer will look after his interest and such an innocent party who has done everything in his power and expected of him to look after his case, should not be made to suffer for

inaction, deliberate omission or misdemeanor of his counsel. The Apex Court in Rafiq and another (Supra) Rafiq and Another Vs. Munshilal and Another, had held as under:

3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe, we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned Advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs 200 should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K. Sanghi.

16. In a case where no steps were taken for restoration for over six months and the proceedings had been pending for more than three years it was held that on

account of negligence of the counsel, the defendant should not be completely barred and another chance was given for setting aside the ex-parte proceedings subject to payment of the cost in Karnataka Handloom Development Corporation Ltd. (Supra) by a Single Judge of this Court. The Apex Court in N. Bala Krishnan v. M. Krishnamurthy 1988 VI AD (SC) 465 had held that the rules of limitation are not meant to destroy the right of parties and are to be used to see that the parties do not resort to dilatory tactics and the object of providing a legal remedy is to repair the damage caused by reason of legal injury. In this matter the observation was made by the Supreme Court while dealing with the application for condensation of delay u/s 5 of the Limitation Act. The Apex Court had held that the length of delay is not that much material rather acceptability of the Explanation for delay is the only criterion, as sometimes delay of the shortest range may be incondensable due to want of acceptable Explanation whereas in certain other cases delay of very long range can be condoned as the Explanation thereof is satisfactory. Another Single Judge of this Court in Sunder Kukreja (Supra) had held that a party cannot be allowed to suffer for laches and lapses on the part of the lawyers. In this case the suit of the plaintiff was dismissed for default and an application for restoration of the suit was filed under Order 9 Rule 9 of the CPC with a supporting affidavit of the counsel. In these circumstances it was held that there was sufficient reason for condensation of delay and the order of dismissal of the suit was set aside.

17. In Gloria Chemicals (Supra) it was held that even if the counsel is found to be negligent the plaintiff should not be allowed to suffer because of the innocence of the agent both in the facts and circumstances. In para 15 it was held that word "sufficient cause" should receive liberal construction so as to advance substantial justice when no negligence or inaction or want of bonafide is imputable to a party. The Apex Court in Salil Dutta (Supra) which is relied by the defendant had held that improper advice of advocate as a rule cannot be accepted as a sufficient cause and it depends on particular facts and circumstances of the case. In this case the suit was posted for final hearing seven years after institution and the defendant had alleged that he did not appear on final hearing on account of advice of advocate. Since the defendant firm was a limited company having its registered office in the same city managed by educated businessman, it was held that the defendants conduct and Explanation was not acceptable and the Court also held that the defendant was adopting delaying tactics and in the circumstances the application of the defendant under Order 9 Rule 13 was not allowed and dismissed. In contradistinction the case of the plaintiff is distinguishable in as much as after the issues were framed the examination in chief of the plaintiff was filed and thereafter the matter was adjourned from time to time and the plaintiffs have contended that they had been contacting their counsel who had been assuring them that the matter was being looked after and, Therefore, it cannot be held that there was a doubt in those facts and circumstances for the plaintiffs to disbelieve their counsel. According to the plaintiffs they realized something

suspicious only in February, 2006 when counsel asked them about filing of another application for hearing of the case when they got the file inspected through another counsel when it transpired that the earlier counsel had not appeared on various dates and the suit had been dismissed on 28th April, 2005. The other judgment relied on by the defendant is Badri Bhagat Jhandewalan Temple (Supra) which was also regarding the application under Order 9 Rule 13 whereby the defendant had sought setting aside of the ex-parte judgment passed against him. In this matter the defendant was proceeded ex-parte on 8th August, 1988 in a suit for injunction seeking restraint against the defendant applicant not to interfere with the possession, management and control of the plaintiff. The Court had considered the fact that the plaintiff had been in possession for more than 12 years and the applicant/defendant had woken up after more than 50 years and had started digging the grave. In the peculiar facts and circumstances it was held that even the witnesses had not been produced by the applicant and, Therefore, the Court had held that the applicant Delhi Development Authority cannot justify its rights by placing the entire blame on their advocate for ex-parte proceedings, judgment and decree. It was also held that although mistake of counsel in certain circumstances could be taken into account yet the negligence of advocate was not sufficient to allow the application. The Single Judge, however, held that words "sufficient cause" for non appearance should, however, be given liberal construction so as to advance substantial justice when no negligence or inaction or want of bonafide is imputable to a party.

18. In Inder Industries (Supra) another Single Judge had not allowed an application under Order 9 Rule 13 as the applicant had failed to produce any evidence and alleged that on account of financial crisis he could not approach his advocate as was recovering from losses suffered by him during torrential rains. The present case of the plaintiffs/applicant are apparently distinguishable in as much as the plea of the plaintiffs is that they had been approaching their counsel and had filed his examination in chief on affidavit and thereafter it was represented to them that their case is being looked after. In the circumstances it is not that the plaintiffs had not approached their counsel but it was the inaction on the part of the counsel and counsel misleading the plaintiffs which resulted into dismissal of the suit and for delay in filing the application for condensation of delay.

19. Learned Counsel for the defendant, Mr. Rawal has also placed reliance on Syed Mujibur Rahman (Supra) where the applicant was seeking setting aside of order of dismissal on the ground that he was attending the office of the counsel regularly and the negligence was on the part of the counsel, which was disapproved on account of the fact that the applicant/plaintiff was not even living in India as he was working in Gulf countries and living abroad during pendency of the proceedings and, Therefore, it was inferred that he was not attending and meeting his counsel. The facts of the case relied on by the learned Counsel for the defendant are completely distinguishable. The Single Judge of Karnataka

High Court had also held that notwithstanding the negligence or misdemeanor of the advocate where the Court finds that the client was not innocent litigant then as an absolute rule it cannot be held that such a party can disown its advocate and seek relief as no such absolute immunity is either permissible under the law nor has been recognized. It was held that whether on account of the negligence on the part of the counsel sufficient cause is made out or not, will depend on the facts and circumstances of each case.

20. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. The ratio of any decision must be understood in the background of the facts of that case. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. In *Ambalal Manibhai Patel Vs. State of Gujarat*, the Supreme Court had observed:

The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.

Similarly in *Bhavnagar University v. Palitana Sugar Mills Pvt. Ltd.* (2003) 2 SC 111, the Supreme Court had observed:

It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

21. What emerges from the judgments cited by the parties is that whether on account of the negligence on the part of the counsel sufficient cause is made out or not, will depend on the facts and circumstances of each case. A party who has selected his advocate, briefed him and paid his fee can remain confident that his lawyer will look after his interest and such an innocent party who has done everything in his power and expected of him to look after his case, should not be made to suffer for inaction, deliberate omission or misdemeanor of his counsel and a party cannot be allowed to suffer for laches and lapses on the part of the lawyers. The rules of limitation are not meant to destroy the right of parties and are to be used to see that the parties do not resort to dilatory tactics and the object of providing a legal remedy is to repair the damage caused by reason of legal injury. Therefore the length of delay is not that much material rather acceptability of the Explanation for delay is the only criterion, as sometimes

delay of the shortest range may be inconsiderable due to want of acceptable Explanation whereas in certain other cases delay of very long range can be condoned as the Explanation thereof is satisfactory. It has also been held that words "sufficient cause" for non appearance should be given liberal construction so as to advance substantial justice when no negligence or inaction or want of bonafide is imputable to a party.

22. In the present case as already discussed hereinabove the plaintiffs after framing of issues filed their evidence on affidavit when the matter was listed for the cross examination of the plaintiffs, however, the Joint Registrar was on leave on 20th May, 2003 and Therefore the cross examination could not be recorded. The plaintiffs have contended that they had been meeting their counsel who had been assuring them that the matter is being attended and looked after and, Therefore, it cannot be inferred that the plaintiff had reasons to disbelieve their counsel and did not do something which they ought to have done in the facts and circumstances. Since the evidence on affidavit had also been filed, normally the suit should not have been dismissed for non-prosecution but it was dismissed at the instance of the defendant who contended that the orders have not been complied with. The plaintiffs got suspicious about the representation made by counsel that another application is to be filed on 7th February, 2006 and, Therefore, they promptly engaged another lawyer and it transpired that the suit had already been dismissed on 28th April, 2005. In the facts and in these circumstances if one has to give liberal construction to "sufficient cause", the inevitable inference is that plaintiffs have been able to show that there is sufficient cause for non appearance and for delay in not filing the application within 30 days of dismissal of the suit on 28th April, 2005. The non prosecution of the case also resulted on account of non appearance of counsel for the plaintiffs. The plaintiffs had filed their examination in chief on affidavit and thereafter they had to appear for cross examination and on one occasion, the Joint Registrar was on leave and on another date the counsel for the plaintiffs was busy in bar elections. In these circumstances, it was reasonable for the plaintiffs to assume that their counsel will intimate them whenever they will have to appear in the Court. If the counsel has not appeared and not given the copy of the affidavit of examination of the plaintiffs to the defendants, it will be on account of the counsel non appearance. In the totality of circumstances and considering that liberal meaning has to be given to the "sufficient cause", I am of the view that the plaintiffs have been able to make out sufficient cause in the facts and circumstances.

23. The learned Counsel for the defendant has opposed the application for restoration also on the ground that the plaintiff did not comply with one of the directions on which interim injunction was granted. Perusal of the order granting interim injunction and subsequent orders it is apparent that since plaintiff did not comply with one of the conditions to pay the remaining amount of the Court fees the injunction order granted on 25th May, 1998 stood vacated on 15th September, 1998 but that will not negate the sufficiency of cause for not

appearing on 28th April, 2005 and sufficient reason for condensation of delay. The application of the plaintiff for setting aside the order of dismissal also cannot be disallowed on the alleged ground that the defendants have already sold the suit property. The defendants have contended in their reply that they executed a registered lease deed in favor of purchaser, however, without specifying the particulars of the sale deed and the lands which have been sold by the defendants. The plaintiff has filed the suit for specific performance of the lands detailed in the plaint at the rate of Rs. 5,25,000/- per acre. The learned Counsel for the plaintiffs has also drawn my attention to para 9 of the agreement to sell dated 27th July, 1994 stipulating that if plaintiffs do not perform their part of the contract within the stipulated period even then the sale deed in respect of the land for Rs. 37 lakhs paid by plaintiffs to the defendants had to be executed.

24. In the circumstances the plaintiffs have been able to make out sufficient cause for condensation of delay in filing the application for setting aside the order dated 28th April, 2005 and has also been able to show sufficient reason for non appearance of plaintiffs and for non prosecution. Consequently, the delay in filing the application under Order 9 Rule 9 being is No. 13308/2006 is allowed and delay in filing the application under Order 9 Rule 9 is condoned and the order dated 28th April, 2005 dismissing the suit of the plaintiff is set aside. The suit is restored to its original number subject to a cost of Rs. 20,000/- payable by plaintiffs to the defendants. Costs be paid within four weeks.