
(2009) 10 DEL CK 0351

In the Delhi High Court

Case No : I.A. No. 13060 of 2006 in C.S. (OS) No. 1412 of 1995

Sh. Sudhir Kohli

APPELLANT

Vs

Smt. Satish Kohli and Others

RESPONDENT

Date of Decision : 08-10-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 6

Citation : (2009) 10 DEL CK 0351

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Vishwa Bhushan Arya, for the Appellant; S.K. Verma, for Defendants Nos. 1 to 4, for the Respondent

Judgement

Manmohan Singh, J.—The present application has been filed by Mr. S.K. Verma for his admission as attorney of defendant Nos. 1, 2, 3 and 4, for deposing on behalf of defendant Nos. 2, 3 and 4 and for setting aside the ex parte status of defendant Nos. 2 and 3.

2. Brief facts are that the present suit was filed by the plaintiff for partition and his 1/5th share in property bearing No. 9, Gandhi Square, Malka Ganj, Delhi - 110007 (hereinafter referred to as the "suit premises"). The plaintiff is the son of late Sh. O.P. Kohli, who was the erstwhile owner of the suit premises, and who on passing away bequeathed all his properties, movable and immovable, to his wife defendant No. 1 vide Will dated 9 April, 1980. Defendant No. 2 is the late brother of the plaintiff and defendant Nos. 3 and 4 are the sisters of the plaintiff. The entire case of the plaintiff was that the suit premises were sold in his absence and therefore, he never got his 1/5th share of the same. The facts stated by the plaintiff have been disputed vehemently by the defendant No. 1.

3. In the present application under consideration, it has been contended that on 6 November, 2006, defendant No. 3 was present though defendant No. 4 could not appear as she was with defendant No. 2, who was very unwell.

4. In his reply, the plaintiff has contended that the ex parte proceedings against the defendant Nos. 2 and 3 should not be set aside as they have been given many chances and refused to avail of the same. Despite repeated adjournments and costs, defendant Nos. 1 and 4 did not file their affidavits in evidence and were given a last opportunity to do so on 7 September, 2006. On 6 November, 2006, evidence of defendant No. 1 was taken on record and defendant No. 4 executed a power of attorney in favour of her brother in law, husband of defendant No. 3. Counsel for the defendants stated that the evidence of defendant No. 4 be allowed to be recorded through her attorney. It appears that defendant No. 2 appeared once in 1995, filed his reply in 1999 and then never appeared. Defendant No. 3 received summons but never appeared.

5. I have gone through the contentions of both parties as well as the record of the case. By order dated 29 August, 2000 this Court proceeded ex parte against defendant Nos. 3, 5 and 6. On 6 September, 1999 and also on 7 February, 2001 it was recorded by the court that the written statement of defendant No. 2 would not be taken on record. Vide order dated 19 February, 2001 this Court has passed the order that though costs along with written statement were filed by defendant No. 3, the same had been done way beyond the time granted and therefore, the same was not permitted. The present application was filed on 17 November, 2006.

6. During the pendency of the present application, defendant No. 2 expired and an application was filed by the plaintiff to implead the LR's of defendant No. 2. By the Joint Registrar's order dated 24 August, 2007 the LR's of defendant No. 2 being his wife, daughter and son namely Smt. Raj Rani Kohli, Ms. Sunaina Kohli and Mr. Rajat Kohli respectively were taken on record. Therefore, in view of the present situation the issue is only whether defendant No. 3's ex parte status is to be set aside or not.

7. As far as the legal position on the present application for setting aside of the ex parte status of the relevant defendants, the same has been set out comprehensively in *Finolex Cables Ltd. Vs. Finolux Auto Private Limited*, wherein it has been observed as follows:

10. The legal position which is not in dispute and which can be extracted from the conjoint reading of the Supreme Court Judgment in the case of *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, and Division Bench judgment of this Court in *Lotus International Vs. Chaturbujadas Karnani Textiles (P) Ltd.*, is this:

(a) if the defendant does not appear on the date of hearing CS (OS) No. 99/2004 Page 7 of 8 fixed by the court, the court has power to proceed ex parte against him;

(b) when the defendant joins and participates in the proceedings at a stage when the plaintiff is yet to examine his witnesses, the defendant shall have right to cross examine the plaintiff's witnesses, provided such cross examination has not

already been foreclosed. In that event, the court has also the power to permit the defendant to adduce evidence on his side. It really depends as to at what stage the defendant was set ex parte under Order IX Rule 6 CPC and at what stage he has chosen to seek permission to participate in the proceedings;

(c) the defendant can appear later and move application for setting aside the ex parte order by showing sufficient cause for non appearance on the date the defendant was proceeded ex parte. If sufficient cause is shown, the court can set aside the ex parte order and in that case it shall restart the proceedings from the stage when the defendant was proceeded ex parte on the premise that no proceedings were held at all on the date when the defendant was proceeded ex-parte and/or on subsequent dates; and

(d) even if the defendant is not able to show good cause, he has right to participate in the proceedings from the stage when he started appearing. However, in that event he has no right to set back the clock and, therefore, if any advantage accrued to the plaintiff on the dates when the defendant had not appeared, that advantage would continue to accrue in favour of the plaintiff.

8. Since the LR's of deceased defendant No. 2 have already been taken on record, as regards Mr. S.K. Verma's appearance as GPA holder is concerned, he may appear and represent their case on behalf of the LR's of the deceased defendant and of the other defendants in accordance with law.

9. However, the ex parte proceedings of defendant No. 3 cannot be set aside as no valid reasons or sufficient cause for non-appearance has been shown. However, this Court is of the view that considering the circumstances of the present case, as the present case is a partition suit, in the interest of justice, defendant No. 3 is allowed to participate in the proceedings at the present stage of the proceedings itself.

Accordingly, I.A. No. 13060/2006 is disposed of.

List before court on 12 January, 2010.