

(2009) 08 DEL CK 0118

In the Delhi High Court

Case No : F.A.O. No's. 356-59 of 2006

Sh. Sukhinder Singh, Sh. Madhav Inder Singh, Sh. Manav
Inder Singh and Sh. Simar Inder Singh

APPELLANT

Vs

Sh. Gurbux Singh and Others

RESPONDENT

Date of Decision : 26-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 11 Rule 8, Order 11 Rule 9, Order 22 Rule 3, Order 22 Rule 9

Citation : (2009) 162 DLT 433 : (2010) 7 RCR(Civil) 1177

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Rajiv Sawhney and Vineet Jhanji, for the Appellant; Amit S. Chadha Kunal Sinha, for R-1 and Abhijat, for R-4, for the Respondent

Final Decision : Allowed

Judgement

V.B. Gupta, J.—Present appeal has been filed against order dated 3rd July, 2006 passed by Additional District Judge, Delhi, dismissing the appellants application under Order IX Rule 9 of CPC (for short as ?Code?).

2. Appellants filed a suit in this Court bearing (old number 487/75) on its original side jurisdiction in year 1975. Vide order dated 17th January, 1985, that suit was clubbed with another (Suit No. 235/66).

3. (Suit No. 487/75) was treated as main suit. Common evidence was recorded in these two suits, after they were clubbed together. After conclusion of trial, both matters came at the stage of final arguments in year 1994.

4. Due to the change of pecuniary jurisdiction in year 2003, (Suit No. 487/75) was transferred to District Courts, whereas, (Suit No. 235/66) remained in this Court.

5. In (Suit No. 487/75), Additional District Judge, ordered for issuance of court notice to the appellant and his counsel, but despite service of court notice, no

one turned up from the side of appellant and accordingly, this suit was dismissed in default on 8th March, 2004.

6. On 9th March, 2004, an application under Order IX Rule 9 of the Code, was filed. That application was contested by defendants.

7. In between, Mukhinder singh (plaintiff No. 1 in the suit), before trial court, died. An application under Order 22 Rule 3 of the Code was filed for substitution of his LRs.

8. Meanwhile, one Preet Mohinder Singh intervened and moved an application for becoming a party in the suit. Due to these reasons, restoration application could not be disposed off.

9. When continuously for four dates, no one appeared from the side of the appellants, then restoration application under Order IX Rule 9 of the Code, was also dismissed in default and for want of prosecution, on 1st March, 2006.

10. Thereafter, another application for setting aside order dated 1st March, 2006, was filed on 29th March, 2006.

11. Vide impugned order, both these applications were dismissed.

12. No reply to the applications was filed on behalf of respondents. However, oral arguments have been advanced by learned Counsel for both the parties.

13. It is contended by learned Counsel for appellants that the suit had been pending for the last about thirty years and the appellant/plaintiff have been diligent throughout these years in pursuing the matter. In fact, appellants had no notice or knowledge of the court dates. Moreover, lawyers being on strike, appellants were therefore not being represented by their advocate.

14. It is also contended that the entire evidence in the matter had already been recorded and the suit was to be finally argued, when the same was dismissed in default for the first time, due to negligence of counsel for the appellants.

15. It is further contended that the suit was transferred due to change in pecuniary jurisdiction on 19th November, 2003 and same was listed again on 14th January, 2004, when presiding officer was on leave. Thereafter, it was listed on 8th March, 2004, when, due to non appearance of counsel as well as appellants, it was dismissed for non-prosecution. Application for restoration was filed on very next date.

16. Another contention made by learned Counsel for appellants is that, when suit was received upon transfer on 19th November, 2003, no court notice was issued to plaintiff Nos. 2 to 5 (the appellants). Notice was issued only to plaintiff No. 1, who at that time was in the hospital and thereafter, died on 20th May, 2004. Therefore, neither plaintiff No. 1 nor other appellants/plaintiffs were aware of the said dates.

17. The present case has been dismissed only due to fault of advocate of the

appellants and not due to negligence of appellants. Appellants had been diligent in pursuing their case for last thirty years and suit has been dismissed only due to the lack of communication and negligence on the part of counsel for appellants.

18. On the other hand, it has been contended by learned Counsel for respondents, that after dismissal of the suit, appellants filed an application for restoration and that application for restoration was also dismissed. This itself goes on to show, as to how negligent appellants in this case are, in pursuing the matter.

19. Appellants have put entire blame on their counsel Sh. Girdhar Govind, but again they have engaged that very counsel in these proceedings. Moreover, contradictory pleas have been taken by appellants in the application.

20. It is further contended that no ground is made out for restoration of the suit as well as application. In support of its contentions, learned Counsel for respondents, cited the following judgments;

(i) Ramey Vs. M.C.D., , in which it was held;

In light of the above and in the facts and circumstances of the present case, we are not persuaded to exercise our power of condonation of delay in favour of the appellant. We are not inclined to condone the delay of 1203 days in filing the present appeal as the appellant has failed to furnish any satisfactory explanation in his application warranting condonation of delay.

(ii) In Sh. Jasbir Sobti and Others Vs. Sh. Surender Singh, , this Court held;

The question that arises for consideration is as to whether another opportunity is to be given to the plaintiffs under the cloak of 'in the interest of justice'. Answer to this would lie in replying to the related question, namely, whether interest of justice demands that case is to be decided on merits even when there are lapses galore on the part of the plaintiffs in not prosecuting the case diligently thereby delaying the process endlessly. We are afraid, in the name of justice no such licence can be given to the plaintiffs. No doubt, if there is a minor procedural lapse, that can be condoned and the main purpose of the court is to see that such cases are decided on merits. However, that would not mean that the plaintiffs or the defendants are allowed to drag on the proceedings unnecessarily by taking adjournments continuously.

(iii) In Binod Engineering & Mechanical Works v. Union of India 160 (2009) DLT 719 In this case, appellant filed an application under Order IX Rule 13 of the Code for setting aside ex-parte decree and also sought condonation of delay. This Court held;

Reasons given by applicant in application under Order 9 Rule 13, CPC are false on face of it. Even if one partner was unwell, other partners could have acted for firm.

21. As per record, Nathu Ram Friends Colony Cooperative House Building Society

Ltd., filed a civil suit against Late Sirdar Sohan Singh, (Suit No. 235/1966), for declaration and perpetual injunction.

22. On death of Sirdar Sohan Singh on 16th January, 1974, right in the suit property devolved upon surviving coparcenars i.e. appellants in the instant case, who also filed a (Suit No. 478/1975), for possession and mense profits against respondents. Both these suits, one filed by the society and other by appellants, were clubbed together, vide order dated 17th January, 1985.

23. Common evidence was recorded in these suits and after conclusion of trial, both matters came at the stage of final arguments, in the year 1994.

24. Due to change of pecuniary jurisdiction in year 2003, (Suit No. 487/1975) was transferred to District Court, whereas, (Suit No. 235/1966) remained in this Court.

25. On 26th September, 2003, in (Suit No. 487/1975), following order was passed;

Present: None

Suit No. 487/1975

This is a case where the value of the suit for purpose of pecuniary jurisdiction is less than Rs. 20.00 lakhs. In view of the order passed by the Hon"ble Chief Justice the present matter is transferred to the Hon"ble Distt. Judge, Tis Hazari Court, Delhi for assignment to a court of competent jurisdiction. Parties and/or their counsels to appear before Hon"ble distt. Judge Delhi on 19.11.2003.

(the date 2.12.2003 is cancelled)

Sd/-

N.P. Kaushik, J.R.

26. Thereafter, (Suit No. 487/1975) was assigned to the court of Shri Parveen Kumar, Additional District Judge on 19th November 2003. On that date following order was passed;

19.11.2003

Present: None for plaintiff

Defendant No. 1 in person

Suit received on transfer from High Court. It be checked and registered.

Issue Court Notice to the plaintiff/counsel for 14.1.2004.

Sd/-

ADJ

27. On 14th January, 2004, presiding officer was on leave and thus the matter

was listed on 8th March, 2004. On that date, following order was passed;

8.3.2004

Present: None for plaintiff Defendant No. 1 in person with Counsel Sh. M.L. Lonial, Ms. Urmila Lamba Counsel for Applicant Counsel for applicant has moved an application under Order 1 Rule 10 CPC for making applicant as one of the Defendant in this case. Case has been called several times since morning. It is 12.35 PM now. Counsel for the plaintiff has been duly served with Court notice for today. As none is preset on behalf of the plaintiff since morning the suit of the plaintiff is dismissed in default. File be consigned to Record Room.

Sd/-

Praveen Kumar

ADJ, Delhi

28. Appellants thereafter filed an application under Order XI Rule 9 of the Code for restoration of the suit dismissed on 8th March, 2004, which was contested by the respondents.

29. In the meanwhile, Mukhinder Singh (plaintiff No. 1) died and application under Order 22 Rule 3 and 9 of the Code was moved for the substitution of his Legal representatives. When continuously for four dates, no one appeared from side of appellants, restoration application was dismissed by the trial court which passed the following order;

1.3.2006

10.15 AM Present: Sh. Gurbux Singh Defendant No. 1 None for plaintiff Sh. Rohit Verma, Counsel for Applicant Mohinder Singh Despite case called number of times. No-one appeared for plaintiff/Applicant. An application under Order 9 Rule 9 CPC is pending for restoration of suit dismissed in default on 8.3.2004.

On last 3 dates, no one appeared for plaintiff which shows that plaintiff/Applicant is not interested to present his application under Order 9 Rule 9 CPC. Hence this application is dismissed in default and for want of prosecution.

Counsel for Applicant pressed from his application under Order 1 Rule 10 CPC and argued that it should be proceeded further but when plaintiff are not interested in revival of their suit and applicant has not become party till date so no ground exists to extension application under Order 1 Rule 10 CPC. Applicant if has any right or interest in subject matter can take his independent action as per law. File be consigned to record room.

Sd/-

A.K. Sarpal, ADJ

30. Appellants, thereafter filed application on 29th March 2006, under Order XI Rule 9 read with Section 151 of the Code, for recalling and setting aside of order dated 1st March, 2006. This application was disposed off by impugned order. The trial court held;

In the present case, plaintiffs have failed to show their own bonafide act and action as well as sufficient cause. Otherwise in my view the present suit cannot proceed further when the main suit with which this suit was consolidated had already been dismissed. Moreover certain false facts alleged in the application under Order 9 Rule 9 CPC as discussed above in order to mislead the court are sufficient to decline the relief claimed so I find no ground to restore the suit. Both applications of the plaintiffs are hereby dismissed. File be consigned to record room.

31. The facts that appellants and their counsel have been negligent or not, has to reckoned from the facts stated by the appellants, in their applications filed on 8th March, 2004 and 29th March, 2006 respectively and as per the settled law.

32. Order XI Rule 9 of the Code, reads as under;

Rule 9. Decree against plaintiff by defaults bars fresh suit (1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

33. The order of dismissal may be set aside if sufficient cause for non-appearance is shown to the satisfaction of the court. The words 'sufficient cause' have got to be construed with regard to facts and circumstances of each case.

34. Supreme Court in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , while interpreting the meaning of the words 'sufficient cause' held;

The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice-that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court.

35. In the instant case, in application for recalling of order dated 1st March, 2006, it is stated by appellants that nothing was heard from their counsel Shri

Girdhar Govind for almost 2-3 months, after reopening of the courts in January. On enquiry, the counsel informed that since the lawyers were on strike, none had appeared on behalf of appellant.

36. According to Grounds of Appeal and as per contentions of learned Counsel for appellants, entire blame has been put upon their counsel, Mr. Girdhar Govind, who was conducting the case in trial court. It is the case of the appellants that, there was negligence on the part of their counsel, as he neither appeared nor informed them that they were required to go and appear when lawyers were on strike.

37. This Court in Lalit Kumar Bhargava, (now deceased) Vs. Shri Devender Kumar Bhargava, it was held;

In this case, the negligence of the counsel is evident from failure to take miscellaneous steps such as filing of process fee and non-appearance resulting in dismissal of the suit. The fact the applicant has not taken legal action against the counsel engaged by his deceased father, by itself cannot non suit him in these facts and circumstances. Once on the above broad parameters, it is held that the plaintiff/applicant has sufficiently explained the delay and sought condonation on grounds, which appear tenable, the court would not decline relief on the ground that the initial application had been submitted or signed by the counsel, whose vakalatnama was not on record. The present application could be taken as one of ratifying the making of the earlier application or be itself treated as an application for restoration of the suit also. The defendant can be compensated by costs for the delay caused. It may be noted that the matter had even been adjourned earlier to enable a settlement between the parties, who are close relations, which unfortunately did not come through.

38. Thus, due to negligence of the counsel, parties cannot be deprived of their legal rights.

39. There is no dispute about various decisions cited by learned Counsel for respondents but same are not applicable to the facts of present case, as they relate to condonation of delay.

40. One fact which need to be highlighted is that present suit was dismissed in default at the stage of final arguments.

41. Supreme Court in International Airports Authority of India Vs. M.L. Dalmia and Co. Ltd., on similar facts, took the view;

Having perused the contents of the application for restoration supported by affidavit, we find that the appellant did try to explain the absence on 10.7.2001 but the explanation so offered did not appeal as plausible to the High Court, specially in view of the earlier conduct of the appellant which weighed heavily with the High Court resulting in denial of indulgence being shown to the appellant. Looking at the stakes involved and keeping in view the weighty consideration that so far as practicable, a litigant ought not to be denied a

hearing on merits, we are inclined, in the facts and circumstances of this case, to allow the appellant one more opportunity of hearing in the appeal on merits by restoring the same on the file of the High Court, but subject to terms.

42. As the present case was at the stage of final arguments, thus, it is expedient that the matter be decided on merits, rather it go in default, in as much as substantial rights of the parties are involved. So, in the interest of justice and for just decision, it shall be appropriate to restore the suit of the appellants and let the trial court decide the same on merits.

43. Since matter is pending in the court for many decades and as respondent is an aged person, it would be in fitness of things that respondent should be compensated with suitable costs, for the delay caused by appellants.

44. Keeping in view the facts and circumstances of the case, as the case was dismissed at stage of final arguments, it is a sufficient cause for restoration of the suit.

45. The present appeal is thus allowed subject to payment of costs of Rs. 50,000/- (Rupees Fifty Thousand). Out of Rs. 50,000/-, sum of Rs. 25,000/- be paid to respondent, while balance amount of Rs. 25,000/- be deposited with Registrar General of this Court.

46. Costs be paid/deposited within two weeks. In case, appellant fails to pay/deposit the costs, within two weeks, then present appeal shall stand dismissed.

47. Trial Court is directed to dispose of the matter within a period of two months, on receipt of record. It shall take up the same for hearing, after lunch for atleast two hours, on alternate working days. Both parties should not be given more than two weeks each to conclude their arguments, failing which they may file their written arguments.

48. Subject to these terms, present appeal stands disposed of.

49. Trial court record be sent forthwith.

50. Parties are directed to appear before the Trial Court on 14th September, 2009.