
(2004) 03 DEL CK 0026
In the Delhi High Court
Case No : FAO (OS) 327 of 2003

Sham Kapoor

APPELLANT

Vs

Suraj Prakas Kapoor and Others

RESPONDENT

Date of Decision : 05-03-2004

Acts Referred:

Citation : AIR 2004 Delhi 302 : (2004) 110 DLT 332 : (2004) 73 DRJ 542

Hon'ble Judges : B.N. Chaturvedi, J;B.A. Khan, J

Bench : Division Bench

Advocate : P.V. Kapur and Malvika Rajkotia, for the Appellant; Maninder Singh for R-1, Atul Batra and C. Shiveta Kitchoo for R-2, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Chaturvedi, J.—Instant appeal arises out of an order dated 29.8.2003 passed by learned Single Judge dismissing an application u/s 148 read with Section 151 CPC seeking enlargement of time for filing written statement, made on behalf of appellant-defendant No.6.

2. Subhash Kapoor, respondent No.9 (plaintiff), filed a suit for partition, possession and mesne profits in respect of properties detailed in the plaint, on 2nd of May, 1997 impleading the appellant and eight others, being brothers and sisters, as defendants. Appellant, apart from other defendants, was served with summons of the suit for 23rd of October, 1997. The appellant-defendant caused appearance, through his counsel, on 28th of February, 1998 when four weeks' time was granted to him to file his written statement. No written statement was, however, filed by him within that time-frame and instead an application, being IA. No. 7538/98, under Order VII Rule 11 CPC, was filed on his behalf seeking rejection of plaint. This application was, however, respected on 5th of October, 1998 with liberty to the appellant-defendant to take up the plea raised in the application in his written statement. The appellant-defendant inspired of grant of time on numerous occasions to file his written statement, failed to file the same. Lastly, on 6th of February, 2003, further time was granted to the appellant-

defendant to file his written statement within ten days with the condition that on his failure to do so, his right to file the written statement would stand close. The appellant-defendant again failed to file his written statement within the time so granted. It was only on 27th of May, 2003 that he sought to file his written statement with an application, being IA.No. 8910/03 under Sections 148 and 151 CPC, seeking extension of time to file the same. Reason for enlargement of time to file his written statement, as disclosed in the application, was that the appellant-defendant has been suffering from a number of ailments and is, thus, unable to act on his own and needs constant help from others. It is added that on account of this handicap, after demise of his previous counsel, Shri Ravi Kher, Advocate, he could not find a suitable replacement to his personal satisfaction, which resulted in failing to file his written statement within the time granted by the learned Single Judge. He, accordingly, sought extension of time beyond ten days, as granted on 6th of February, 2003, and prayed for admitting his written statement, filed with the application, on record.

3. The learned Single Judge, noticing that the appellant-defendant had failed to file his written statement over a period of more than six years in spite of numerous opportunities granted for the purpose, declined extension of time and, consequently, disallowed the appellant's prayer for taking his written statement on record.

4. Thrust of argument on behalf of appellant-defendant was that since his written statement has already been filed with the application seeking extension of time, admitting the same on record is not likely to cause any further delay in progress of the trial of the suit while rejection of his prayer would result in procedural law gaining precedence over substantial justice. In support of this plea learned counsel appearing for appellant sought to place his reliance on a decision of the Supreme Court in Ramesh Chand and another Vs. Punjab National Bank and others, , wherein in spite of the conduct of the defendant being held far from satisfactory, one final opportunity was granted for filing written statement on condition of defendant depositing in Court an amount of Rs.2 lakhs within time specified for the purpose. Learned counsel for appellant-defendant submitted that the written statement, in the present case, could be taken on record on such terms as the court deemed proper in the given circumstances.

5. The argument, in opposition, advanced on behalf of respondent-plaintiff was that the appellant-defendant tried his utmost in various ways to delay the disposal of the suit. Stating that the appellant-defendant being in possession of Kirti Nagar property to the exclusion of others was making gains by utilising the same for commercial purpose and to serve his interest in that regard he has already been able to hamper the progress of the suit to a great extent. It was further contended that the learned Single Judge having exercised his discretion reasonably and in a judicial manner while disallowing the extension of time and declining the written statement being taken on record, no interference with the impugned order would be legally justified.

To supplement his contention, decisions of the Supreme Court in *Wander Ltd. and Another Vs. Antox India P. Ltd.*, ; *Shri Chandrakant Shukla Vs. Maharaja Martand Singh*, ; *Shanti Prasad Gupta Vs . Deputy Director of Consolidation, Camp at Meerut and Others* ; and *Dr. J.J. Merchant and Others Vs. Shrinath Chaturvedi*, , were cited from the side of respondent-plaintiff.

6. The appeal is considered to be an extension of the suit and in terms of Section 107(2) of the Code of Civil Procedure, the appellate court has the same powers as are conferred by the Code on the courts of original jurisdiction in respect of suits instituted before them.[see *Vasant Ganesh Damle Vs. Shrikant Trimbak Datar and Another*,]. But, at the same time, settled position of law is that it is only if the discretion is not exercised in the spirit of the statute or fairly or according to rules, reasons and justice, that the order passed by the trial court can be reversed in appeal.(see *Mysore State Road Transport Corporation Vs. Mirja Khasim Ali Beg and Another*,). In *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph*, ; and *Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi*, , dealing with the scope of discretion of the court u/s 34 of the Indian Arbitration Act, 1940, to stay the proceedings in a suit, the Supreme Court laid down that if the discretion has been exercised by the trial court reasonably and in a judicial manner, the fact that the appellate court could have taken a different view may not justify interference with the trial court's exercise of discretion.

7. In the present case, there is no denying the fact that in spite of more than enough opportunities granted to the appellant-defendant to enable him to file his written statement, he kept on postponing filing of his written statement on one pretext or the other. Indulgence shown to him by the learned Single Judge from time to time was stretched by the appellant-defendant to an extent of misusing the liberty granted to him in that regard. Even the condition that failure to file his written statement within ten days in terms of order dated 6.2.2003, would automatically lead to closure of his right to file the written statement, did not add to urgency and the appellant-defendant took his own time in approaching the learned Single Judge with an IA. No. 890/03 seeking enlargement of time to file his written statement.

8. Reference to the Supreme Court decision in *Ramesh Chand*(supra) cannot help the cause of the appellant-defendant, where conduct of the defendant being far from satisfactory, a final opportunity to file the written statement, on deposit of Rs. 2 lakhs in court within specified time, was granted in the facts and circumstances of that particular case. Another decision of the Supreme Court in *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, , referred to on behalf of appellant-defendant, deals with the High Court's power under Article 226 and extent to which discretion under Article 226 in the face of Section 105 of the Representation of the People Act(1951) could be exercised. It was held therein that the High Courts' powers under Article 226 are purely discretionary and though no limits can be placed upon that discretion, it must be exercised

along with recognised lines and not arbitrarily, and one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of cases unless substantial injustice had ensued or is likely to ensue. This was a case based on a distinct legal proposition and different set of facts, which cannot be used in aid of plea for allowing the appeal by setting aside the impugned order. Moreover, the grounds set out in the application and additional affidavit do not appear to justify extension of time and admission of the written statement filed with the application on record.

9. We, thus, find no merit and dismiss the appeal.