
(2013) 11 DEL CK 0033

In the Delhi High Court

Case No : FAO (OS) 482 of 2011 and CM No. 18432 of 2011

Sudarshan Sareen

APPELLANT

Vs

National Small Industries Corporation Ltd. and Another

RESPONDENT

Date of Decision : 01-11-2013

Acts Referred:

Citation : (2014) 3 AD 561 : (2014) 206 DLT 534

Hon'ble Judges : Vibhu Bakhru, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Sangram Patnaik and Mr. Deepak Kumar, for the Appellant; Sanat Kumar, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J.—The present appeal has been filed by the appellant (arrayed as defendant No. 2 in the suit) impugning the order dated 8.8.2011 passed by a learned Single Judge of this Court in CS(OS) No. 1982/1999 (hereinafter referred to as the "impugned order"). By the impugned order, the learned Single Judge has dismissed the application being I.A. No. 14129/2009 filed by the appellant under Order 9 Rule 13 of CPC for setting aside of an ex-parte decree dated 21.2.2006. The application being I.A. No. 14130/2009 filed u/s 5 of Limitation Act, 1963 for condoning the delay in preferring the said application has also been rejected by the impugned order. The suit filed by Respondent No. 1 against the appellant (defendant No. 2) and respondent No. 2 (defendant no. 1) being CS(OS) No. 1982/1999 was decreed on 21.2.2006. The controversy in the present appeal revolves around the question whether the ex-parte decree is liable to be set aside inasmuch as, it is contended that the plaintiff is a shareholder of defendant No. 1 and being in control of defendant No. 1 did not take any steps to contest the suit and consequently defendant No. 2 who was not in any manner personally liable for the debts of defendant No. 1 has suffered the decree.

2. Briefly stated the facts are that respondent No. 2 is a company incorporated

under the companies Act. Respondent No. 1 sanctioned a credit limit of Rs. 15,00,000/- for financing the bills drawn on respondent No. 2 by various suppliers for the supplies made to respondent No. 2. Respondent No. 1 had discounted various bills drawn on respondent No. 2 and made payments to various suppliers on behalf of respondent No. 2. Respondent No. 2 defaulted in repayment of the said loan. The appellant, who was a director of the respondent No. 2 at the material time is stated to have sent a letter dated 31.5.1996 whereby he undertook to pay to respondent No. 1 the outstanding dues of respondent No. 2 amounting to Rs. 17,09,779/- along with interest.

3. Admittedly, the appellant and respondent No. 2 failed to pay the outstanding dues. Consequently, respondent No. 1 filed a suit for recovery of dues amounting to Rs. 36,76,949.05. In the said suit, both appellant and respondent No. 2 were served with summons. Respondent No. 2 had initially appeared through Counsel and filed a written statement, however, he failed to appear in the proceedings thereafter and was proceeded ex-parte on 10.8.2005. The appellant did not enter appearance in the suit despite service of the summon and was proceeded ex parte on 6.9.2000. Respondent No. 1 led the ex parte evidence and on 21.2.2006, the suit was decreed in favour of the respondent No. 1. A decree for an amount of Rs. 36,76,949.05/- along with pendente lite and future interest was passed against the appellant and respondent No. 2.

4. The appellant has asserted that he became aware of the ex parte decree for the first time on 25.9.2009 when the summons in the execution proceedings being EP No. 371/2009 were served on him. The appellant thereafter, on 22.10.2009, filed an application (I.A. No. 14129/2009) under Order 9 Rule 13 of CPC for setting aside the ex parte decree dated 21.2.2006 along with an application (IA No. 14130/2009) for condonation of delay in filing the said application.

5. It was contended by the appellant in the said application that the appellant cannot be made personally liable for the loan which was sanctioned, taken and utilized by respondent No. 2. It was also contended that the undertaking to pay the amounts due from respondent No. 2 was given by the appellant in his official capacity as a director of respondent No. 2 and, thus, the same could not be construed as his personal guarantee. It was further asserted that the appellant was the Managing Director of the respondent No. 2 at the relevant time, however, he had since resigned and his resignation was duly accepted by respondent No. 2 vide its letter dated 4.2.1997. As per the records of the Registrar of Companies, the appellant ceased to be a director of respondent No. 2 with effect 6.9.1997.

6. It is contended on behalf of the appellant that respondent No. 2 is a public company and the appellant was associated with the said company as a director. It is further contended that respondent No. 1 is a substantial shareholder of respondent No. 2 company and if the corporate veil is lifted it would be found that respondent No. 2 is controlled by respondent No. 1 and as such, the decree

obtained by respondent No. 1 is a collusive decree. With regard to the service of summons in the suit, it was admitted that the appellant received the summons, however, it was contended that the same were handed over to respondent No. 2 on the alleged assurances that the appellant would be duly represented by respondent No. 1.

7. We have heard the learned Counsel for the parties.

8. The contention that since the respondent No. 1 is a shareholder of respondent No. 2, the decree passed at the instance of respondent No. 1 is a collusive decree does not appear to be sustainable. While, it is correct that the respondent No. 1 holds approximately 10% of the entire issued and paid up share capital of respondent No. 2 company, it is equally true that the appellant and his family members also own substantial shares of the respondent No. 2 company.

9. For considering the controversy whether the ex parte decree is liable to be set aside, Rule 13 of Order IX of CPC is relevant and is reproduced 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.

10. A plain reading of the provisions of Order 9 Rule 13 of the CPC indicates that an ex parte decree can be set aside when a defendant satisfies the Court that the summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. As per second proviso of Order 9 Rule 13 of CPC, the Court is proscribed from setting aside the ex parte decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date of hearing and sufficient time to appear in Court.

11. The Supreme Court has in the case of Parimal Vs. Veena @ Bharti, held that the Second Proviso of Order 9 Rule 13 of CPC is mandatory and has interpreted the expression "sufficient cause" as under:

13. "Sufficient cause" is an expression which has been used in a large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously. [Vide Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., ; Sarpanch, Lonand Grampanchayat Vs. Ramgiri Gosavi and Another, Surinder Singh Sibia Vs. Vijay Kumar Sood, and Oriental Aroma Chemical Industries Ltd. Vs. Gujarat Industrial Development Corporation and Another,

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15. While deciding whether there is sufficient cause or not, the Court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the Court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, Madanlal Vs. Shyamlal, ; Davinder Pal Sehgal and Another Vs. Partap Steel Rolling Mills Pvt. Ltd. and Others, ; Ram Nath Sao @ Ram Nath Sahu and Others Vs. Gobardhan Sao and Others, Kaushalya Devi v. Prem Chand, (2005) 10 SCC 127; Srei International Finance Ltd. v. Fairgrowth Financial Services Ltd., (2005) 13 SCC 95 and Reena Sadh Vs. Anjana Enterprises,

16. In order to determine the application under Order 9 Rule 13, CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the Court with a reasonable defence. Sufficient cause is a question of fact and the Court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application.

12. In the case of G.P. Srivastava Vs. Shri R.K. Raizada and Others, , the Supreme Court held as under:

7. Under Order 9 Rule 13, CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for nonappearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex parte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The Courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The "sufficient cause" for nonappearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.

13. Following the aforesaid decisions, we do not feel that the appellant has been able to show sufficient cause for not appearing in the proceeding. In the present case, the appellant has admitted the service of summons. Admittedly, the appellant was aware of the pendency of the suit and had sufficient time to appear and answer the claim of respondent No. 1. The only reason given by appellant for not appearing in Court is the alleged assurance given by respondent No. 2 that the appellant would be duly represented in the matter. We find that this reason cannot by any stretch constitute a sufficient cause for non-appearance of the appellant. Admittedly, despite being aware of the proceedings, the appellant neither took any pains to ensure that he was represented before the Court nor did he take any efforts to even apprise himself as to the outcome of the proceedings. The appellant has been wilfully negligent and thus, the recourse under Order 9 Rule 13 of CPC is not available to the appellant. The learned Single judge has considered the question whether the application of the appellant fell within the scope of Order 9 Rule 13 of the CPC and held as under:

10. It is, thus, clear that the second proviso to Order 9 Rule 13 is mandatory in nature. A party approaching the Court for setting aside ex parte decree has to disclose "sufficient cause" by which he was prevented from appearing in the Court. "Sufficient cause" would mean that (i) the party had not acted in a negligent manner (ii) he had acted bonafidely but could not appear in Court due to the facts and circumstances beyond his control (iii) he had been acting

diligently in pursuing the legal remedy available to him. Whether a party has succeeded in disclosing "sufficient cause" depends on facts and circumstances of each case and no straitjacket formula of universal application can be adopted. In this case, applicant was well aware about the pendency of suit right from August/September, 2000 and had ample opportunity to participate in the proceedings while the suit remained pending about for six years. Since applicant was aware of the pendency, even the application for setting aside the ex parte order is barred by time by about three and a half years for which no plausible explanation is there. However, without going into the question of delay, application under Order 9 Rule 13, CPC is being disposed of on merits. All throughout applicant did not bother to find out as to what was happening in the suit. His this conduct itself clearly shows lack of bona fide on his part and shows that he was grossly negligent in pursuing the matter. In my view, he has failed to disclose "sufficient cause" by which he was prevented from appearing in Court from 2000 to 2006 when ultimately decree was passed.

We are unable to accept that the appellant was prevented by any sufficient cause from appearing when the suit was called on for hearing. We concur with the decision of the learned Single Judge and find the present appeal devoid of any merit. We, accordingly, dismiss the present appeal and the application with no order as to costs.