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(2014) 09 DEL CK 0273

In the Delhi High Court

Case No : CS (OS) Nos. 1891 and 2185/ 2012

Super Cassettes Industries Ltd. APPELLANT

Vs

Pal News Media Pvt. Ltd. RESPONDENT

Date of Decision : 11-09-2014

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 9 Rule 13, 151
Copyright Act, 1957 — Section 52A

Citation : (2015) 62 PTC 554

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Prachi Aggarwal and K.K. Khetan, Advocate for the Appellant; Niraj Jha, Advocate for the Respondent

Final Decision : Dismissed

Judgement

G.P. Mittal, J.

I.A. No. 20056/ 2013 (O. IX Rule 13 CPC) in CS (OS) No. 1891/2012

I.A. No. 13876/ 2013 (O. IX Rule 13 CPC) in CS (OS) No. 2185/ 2012

1. These applications under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure, 1908 (CPC) have been filed by the applicant/ judgment debtor (JD) for setting aside of the ex-parte judgments and decrees dated 26.07.2013 and 07.05.2013 respectively.

2. A suit bearing CS (OS) No. 1891/ 2012 for permanent injunction, restraining infringement of copyright, damages, rendition of accounts etc. was filed by the Plaintiff against the Defendant. An application under Order XXXIX Rules 1 and 2 CPC was also filed. By an order dated 06.07.2012, an ex-parte injunction was granted against the Defendant. The relevant part of the order dated 06.07.2012 passed is extracted hereunder:-

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".....After having given my thoughtful consideration to the arguments advanced by the learned counsel for the plaintiff, I am of the considered view that the plaintiff has made out a prima facie case for the grant of ex-parte ad interim injunction in their favour. The balance of convenience also lies in favour of the plaintiff and if an ex-parte interim injunction is not granted, irreparable loss and injury would be caused to the plaintiff.

Accordingly to the defendant, its principal officers, servants, agents and representatives are hereby restrained from recording, distributing, broadcasting, public performance/ communication to the public or in any other way exploiting the cinematography films, sound recordings and/ or literary works (lyrics) and musical works (musical composition) or other work or part thereof, owned by the plaintiff including all works whereon the plaintiff has shown its copyright u/s 52A of the Copyright Act or doing any other act that would lead to infringement of the plaintiffs copyright till the next date....."

3. The summons of the suit and notice of the injunction application was served upon the Defendant on 25.07.2012. One Advocate by the name of Umesh Misra appeared on behalf of the Defendant on 30.07.2012 but there is no vakalatnama on record filed by him. The matter was adjourned for 21.11.2012 on which date none appeared on behalf of the Defendant. Right of the Defendant to file written statement was closed as the Defendant had failed to file the written statement within the prescribed period of limitation of 30 days or even within the extended period of 90 days. The matter was listed for ex-parte evidence. Ex-parte evidence was recorded on 20.02.2013 and 09.04.2013 and ex-parte judgment was passed by the Court on 26.07.2013.

4. The case set up by the applicant/ JD is that after the Defendant was served with the summons of the suit and notice of the injunction application, a proxy counsel on behalf of the counsel for the applicant/JD entered appearance on 30.07.2012 but the matter was not taken up and adjourned to 21.11.2012. Thereafter, the applicant/ JD''s counsel Mrinal Kumar, Advocate could not appear and neither could the written statement be filed on time as the said counsel of the Defendant had to go to his hometown because his brother was suffering from cancer. On 21.11.2012, the Defendant was proceeded ex-parte.

5. It is the case of the applicant/ JD that it was not aware of the proceedings which were taking place in the Court and it was only on 09.07.2013 that a demand notice dated 06.07.2013 was received by the applicant/ JD in the matter CS (OS) No. 2185/ 2012, when the applicant/ JD inquired about the instant case from its advocate.

6. According to the applicant/ JD, the advocate did not respond and the applicant then searched the website of the Delhi High Court and it transpired that the applicant was ordered to be proceeded ex-parte on 21.11.2012 and that an ex-parte judgment and decree was passed against him on 26.07.2013. Affidavit of Mrinal Kumar, Advocate has also been filed in support of the application.

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7. The application is opposed by the non-applicant (decree holder). It is urged that the Defendant was merely adopting dilatory tactics. It is stated that the conduct of the applicant is evident from the fact that the written statement was not filed by it and that this application has been filed so that the applicant/ JD may avoid the payment of damages of Rs. 21 lacs as awarded by the Court.

8. The applicant/ JD can succeed in the application for setting aside the ex-parte decree only if he shows that there is sufficient cause for the same.

9. It is borne out from the record that the Defendant is a large company. Mohd. Waris, who has signed the application on behalf of the Defendant has himself stated in the application that when he searched the website of the Delhi High Court after 09.07.2013, he came to know about passing of the order dated 21.11.2012, proceeding the applicant/ JD ex-parte and the order dated 26.07.2013 whereby ex- parte judgment and decree was passed against the applicant/ JD.

10. First of all, I shall refer to the Affidavit of Mrinal Kumar, Advocate filed in support of the application. It may be mentioned that this Affidavit is not on record and the learned counsel for the applicant/ JD has not even bothered to find out whether the Affidavit has come on record or not. A copy of the same has been obtained from the counsel for the applicant/ JD during hearing of this application which is now taken on record. The Affidavit is completely bereft of any detail. The Affidavit runs into just two paragraphs which are extracted hereunder:-

"2. That I depose that the defendant approached me in respect of the present case for filing of written statement after receiving the summon issued by this Court, but unfortunately as I had to go back to my home town due to the reason that my deceased cousin brother was seriously ill, as he was suffering from cancer, I asked the defendant to engage another counsel for the respective matter.

3. That I depose that I came back to Delhi alongwith my deceased brother for his treatment and that during the treatment at Delhi, I had to take him to the hospital for treatment and had to look after his all basic and medical needs as no one in the family was so close and efficient to look after him..."

11. Mrinal Kumar, Advocate, who is alleged to have been engaged by the applicant/ JD thus, states that he had to proceed to his hometown because his cousin was suffering from cancer and was seriously ill. He had to take his cousin for treatment to the hospital. It is further stated that said Mrinal Kumar, Advocate had asked the Defendant to engage another counsel in the respective matters.

12. However, the Affidavit is completely silent as to when the said counsel had gone to his hometown or when had he asked the applicant/ JD to engage another counsel. Obviously, this must happened immediately after 30.07.2012. Further,

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the application under Order IX Rule 13 CPC is completely silent that the Affidavit given by the counsel is false or that no such information (to engage another counsel) had been given by the counsel to the applicant/ JD. The application simply states that the applicant/ JD came to know of the order only when he searched the website of Delhi High Court and found the order.

13. Even if it is assumed that the Affidavit filed by Mrinal Kumar, Advocate is false, though the same has not been stated by the applicant/ JD, there is no Vakalatnama in his favour available on record. It is evident that the applicant acted negligently and carelessly.

14. As stated earlier, the applicant/ JD was served with the summons in the month of July, 2012. He ought to have enquired from his counsel immediately after 30.07.2012 (which was the next date of hearing, on which some proxy counsel appeared) as to the progress of the case. Even thereafter, the applicant/ JD was expected to consult his counsel to know if anything was required to be done by the applicant. A prudent litigant is expected to follow his counsel and make enquiries from him after each date of hearing. A litigant is not expected to be complacent by merely engaging a counsel. In this case, the counsel Mrinal Kumar was not even engaged and there is no vakalatnama in his favour on record. It is evident that the applicant acted negligently and carelessly. Even if the said counsel did not give the information, still the applicant/ JD was aware that he can open the court''s website and know about the progress of its case which the applicant did after passing of more than a year. All the more, the applicant/ JD knew that he had not even signed the written statement and therefore, his written statement could not have been filed.

15. Similarly, none appeared on behalf of the Defendant on the 1st two dates in CS (OS) No. 2185/ 2012. Thus, on 16.01.2013, though one Vinod Kumar, Advocate appeared as proxy counsel on behalf of alleged Mrinal Kumar, Advocate, yet because of non-filing of the written statement, the Defendant was proceeded ex-parte and the ex- parte judgment and decree against it was passed on 07.05.2013 after recording ex-parte evidence on 27.02.2013 and 26.04.2013.

16. The Defendant in its application under O. IX Rule 13 in this case also has taken the same ground that Mrinal Kumar, Advocate had gone to attend his brother and hence, written statement could not be filed. Two different dates of appearance by proxy counsel i.e. in July, 2012 and January, 2013 on behalf of Mrinal Kumar, Advocate demolish the applicant''s case because the Court can accept either the version that counsel Mrinal Kumar had gone to his home town in July/ August,2012 or that he had gone there in January, 2013. It is not the applicant''s case that the counsel remained with his brother from July/August, 2012 to January, 2013.

17. Therefore, the said reason in either case does not appear to be believable. It is evident that the applications under Order IX Rule 13 CPC are frivolous. They do not disclose sufficient cause for setting aside the ex-parte judgments and

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decrees dated 26.07.2013 and 07.05.2013 respectively. The same are accordingly dismissed.

I.A. No. 20057/ 2013 (delay) in CS (OS) No. 1891/ 2012

I.A. No. 13877/ 2013 (delay) in CS (OS) No. 2185/ 2012

Since the applications under Order IX Rule 13 CPC are bereft of any merit and I have discussed in detail as to how there was no good cause for non-appearance and for setting aside ex parte judgment, the application for condonation of delay have been moved on similar grounds'' I do not find sufficient cause for condonation of delay.

The applications are dismissed.

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