
(2011) 04 DEL CK 0054
In the Delhi High Court
Case No : FAO No. 187 of 2007

Union of India (UOI) and Others

APPELLANT

Vs

Narula Udyog Pvt. Ltd.

RESPONDENT

Date of Decision : 07-04-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 13(1), Order 9 Rule 2, 80

Limitation Act, 1908 — Section 5

Citation : (2011) 179 DLT 499 : (2011) 6 RCR(Civil) 383

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Preeti Dalal, Tanu Goswami, Jayashree Shukla and Maneesha Dhir, for the Appellant; Sumit Bansal, Ateev Mathur and Vaibhav Arora, for the Respondent

Final Decision : Allowed

Judgement

Mool Chand Garg, J.—The basic issue involved in this case is as to whether the Additional District Judge was justified in having dismissed the application filed by the Appellants under Order 9 Rule 13 CPC for setting aside the expert decree dated 13.09.1996 passed against them despite having condoned the delay in filing of the said application vide order dated 11.11.1995 primarily by accepting the case of the Appellants that they had no knowledge about the transfer of civil suit which was originally filed by the Respondent against the Appellants in this Court to the District Court.

2. To appreciate the controversy between the parties it would be appropriate to take note of the order passed by the Additional District Judge dated 11.11.1995, whereby the Additional District Judge condoned the delay of about 8 years in filing the application under Order 9 Rule 13 Code of Civil Procedure. The reasons given by the Additional District Judge are as follows:

5. The Ld. Counsel for the Defendants/J Ds has argued that there was no

knowledge of passing the judgment/decreed against the Defendants since the Defendants were solely dependent upon their counsel and even no notice was issued to the Defendants after transfer of the case from the Hon. High Court of Delhi to the District Courts, Delhi. The Defendants have also filed copies of the letters and reminders written to the Government counsel on page No. 1 to 26 in support of their application. Ld. Counsel for the Defendants in support of his arguments has relied upon the judgment as reported in Special Tehsildar, Land Acquisition, Kerala Vs. K.V. Ayisumma, it was held by the Hon. Supreme Court that "it is now settled law that when the delay was occasioned at the behest of the Government, it would be very difficult to explain the day to day delay. The transaction of the business of the Government being done leisurely by officers who had no or evince no personal interest at different levels. No one takes personal responsibility in processing the matters expeditiously. As a fact at several stages, they take their own time to reach a decision. Even in spite of pointing at the delay, they do not take expeditious action for ultimate decision in filing the appeal. This case is one of such instances. It is true that Section 5 of the Limitation Act envisages explanation of the delay to the satisfaction of the court and in matters of Limitation Act made no distinction between the state and the citizen. Nonetheless adoption of strict standard of proof leads to grave miscarriage of public justice, it would result in public mischief by skillful management of delay in the process of filing the appeal. The approach of the Court would be pragmatic but not pedantic. Under those circumstance, the subordinate Judge had rightly adopted correct approach and had condoned the delay without insisting upon explaining every day's delay in filing the review application in the light of the law laid down by this Court. The High Court was not right in setting aside the order. Delay was rightly condoned". In Bank of India v. M/s Mehta Brothers and Ors. AIR 1991 DELHI 194 In this case, ex parte decree was passed. Application was filed for setting aside ex parte decree stating reason that Defendant entrusted the case to a firm of solicitors-default of appearance once committed by lawyer continued on all subsequent dates - however Defendant, remaining under belief that its case was being conducted all along by its lawyers- Defendant, moment it was informed of passing of ex parte decree, taking immediate steps. It was held by the Hon"ble High Court of Delhi that so far as Defendant was concerned, there was sufficient cause for setting aside ex parte decree and condoning delay in filing application for setting aside decree". In Devendra Swamy v. Karnataka State Road Transport Corpn AIR 2002 SC 2545, In this case, the lawyer engaged by the Respondent - Corporation was holding the papers and did not inform the corporation of the decision in the writ appeal. The corporation, having felt convinced of the default on the part of the lawyer, removed him from the panel of the corporation and engaged another counsel through whom the writ appeal was made out. It was held by the Hon"ble Supreme Court that there was sufficient cause for condoning the delay in filing the writ appeal. Whereas Id. Counsel for the Plaintiff has argued that it was negligence and mistake of the Defendants and not the counsel. Court notice is not a matter of right. The law, for condonation of delay u/s 5 of the Limitation

Act is that each and every day has to be explained. The Ld. Counsels for the Plaintiff in support of his arguments, has relied upon the judgments reported in Delhi St. Ind. Dev. Corp v. Ashish Anand 2000 RLR (Note) 73, M. Paul Babuta v. Union of India and Anr. 75 (1998) DLT 634, Daya Industries and Others Vs. Jaswant Singh, , and Indian Sewing Machines Co. Pvt. Ltd. v. Sansar Machine Ltd. and Anr. 1994 DRJ (31) 383

6. As per the order sheets that after the transfer of the case from the Hon. High Court the orders for issuance of the court notice were passed on several dates but the notice was not served upon the Defendants. Therefore, the Defendants have alleged to have given sufficient ground for condonation of delay in the application u/s 5 of the Limitation Act for filing the application Under Order 9 R 13 r/w/s 151 Code of Civil Procedure. In this context a reliance can be had upon the judgment reported in Ravinder Jain v. Natraj Albums Industries (Pvt. Ltd.) 1996 (39) DRJ (DB) it was held by the Hon"ble High Court of Delhi that "while dealing with an application u/s 5 of the Limitation Act, a liberal and not pedantic approach has to be adopted. A practical view of the events has to be taken. A litigant fighting his case with diligence would not ordinarily allow the litigation to be lost by deliberately defaulting in taking steps requisite for keeping the litigation alive so is secure adjudication of the lis on merits. IN Standard Pharmaceuticals Ltd. Vs. Gyan Chand Jain and Another, , it was held by the Hon"ble High Court of Delhi that "seeing the judgment of the Supreme Court in Commercial Tax Officer and others Vs. Emkay Investments Pvt. Ltd., where the Hon"ble Supreme Court condoned a delay of nearly 18 years and the desirability to allow the parties to contest on merits it would have been appropriate for the Ld. Appellant court to allow the application for in such matter too technical a view should not be taken.

7. In view of the above facts and circumstances I am of the considered opinion that that the delay was not intentional but due to the reasons stated above which are genuine and bonafide if Defendants are not given an opportunity to contest the application Under Order 9 R 13 r/w/s 151 CPC it may prejudice to the rights of the Defendants. The case of the Defendants for condonation of delay u/s 5 of the Limitation Act is covered under the judgments cited by the Ld. Counsel for the Defendants and also the judgments reported in Revinder Jainj and Standard Pharmaceuticals Ltd (supra). Thus, the negligence of the counsel may be enough to constitute the sufficient cause and delay deserves to be condoned. Accordingly, the present application is allowed. Hence, the delay in filing of this application Under Order 9 R 13 r/w/s 151 CPC is condoned.

Now to come up for arguments on the application Under Order 9 R 13 r/w/s 151 CPC for 7.12.2005.

3. However, despite the aforementioned observations of the Additional District Judge while condoning the delay in filing the application under Order 9 Rule 13 Code of Civil Procedure, another Additional District Judge has dismissed the application under Order 9 Rule 13 CPC even though the plea taken by the

Appellants was similar as taken in the application for condonation of delay i.e. that on 11.05.1993 counsel for the Appellant did not appear before this Court and the matter was transferred to the District Court and, as such, the Appellants had no knowledge about the transfer of this matter to District Court; counsel also did not intimate the transfer of the suit to this Court; the notice for 21.12.1995 which was received by the Appellant was not accompanied with the copy of the case as required under Order v. Rule 2 CPC and even the notice did not bear the case number of the suit and thus, the Appellant could not appear before the Court on 21.12.1995. It was also pleaded that the court notice issued to Sh. R.K. Mehra, counsel for Appellant, for 21.12.1995 was not a valid service to the Appellants as the counsel had already resigned from the case on 13.12.1989. It was also pleaded that the court directly fixed the matter for ex parte evidence without proceeding the Appellants as ex parte and that the Appellants had never received any notice u/s 80 CPC and even no exemption application was moved by the Respondent under Order 80(2) Code of Civil Procedure.

4. The Additional District Judge made a distinction between the reasons in having condoned the delay and service of notices under Order 9 Rule 13 Code of Civil Procedure. It has been observed by the Additional District Judge that,

Admittedly in this case, the court notice has been duly received by the concerned clerk of the Defendant No. 2 & 3. The clerk of the Defendant No. 2 while receiving the court notice made an endorsement for sending copies. However, the clerk for Dr. Ram Manohar Lohia Hospital, New Delhi, Defendant No. 3, has received the Court notice sent for 08.04.94 making an endorsement that MLC No. etc. be supplied. The name of the case is clearly mentioned on this Court notice. The written statement was filed on behalf of the Defendant No. 1, i.e. Union of India and affidavit in support of written statement was filed by Dr. J.P. Singh, Medical Supdt. of Dr. Ram Manohar Lohia Hospital, New Delhi. The present application is also moved on behalf of the Defendant No. 1 which is accompanied by affidavit of Additional Medical Supdt. of Dr. Ram Manohar Lohia Hospital, New Delhi. Thus, the court notice has been duly served upon the Defendant No. 2 as well as the Defendant No. 3, Practically, it is Defendant No. 3 who has contested the suit by filing the written statement. In these circumstances, it cannot be stated that Office of the Medical Supdt. of Dr. Ram Manohar Lohia Hospital, New Delhi was not aware of the pendency of the suit. On receiving the court notice by concerned clerk, the same must have been placed before the concerned Medical Supdt. And for that reasons, no material is brought forward to show that the concerned clerk has not brought the court notice in the knowledge of the Medical Supdt. If the concerned clerk has not done so, it is not explained as to what action has been taken against him for non-placing of the court notice before the Medical Supdt. No government employee or public authority can be allowed to take the process of the court so lightly. These facts shows that the Defendant No. 3 who is the main contesting party had knowledge of the pendency of this matter when the impugned order and judgment was passed.

5. Relying upon the judgment of this Court in 2004 4 AD (Delhi) 545 and 2003 4 AD (Delhi) 299, the Additional District has dismissed the application under Order 9 Rule 13 CPC by opining that the Appellant failed to show sufficient cause for non-appearance at the time of hearing when they were proceeded ex parte.

6. Before going further, I may also observe that pursuant to the directions given by this Court, 75% of the decretal amount has already been deposited by the Appellants in the shape of an FDR with the Registrar General of this Court and the said amount is now `10 lakhs whereas the suit filed by the Respondent against the Appellants was only for recovery of `4,52,441.32 with interest @15% p.a.

7. It is the case of the Appellants that the suit if allowed to be contested is certainly likely to fail. They also submit that the record of the case will show that after the transfer of the suit from the Court to District Court on 11.05.1993 they were not served with the notices by the District Judge and thus, there were no reason for their non-appearance and the cause shown by them in their opinion was sufficient cause. They also submit that the law with regard to interpreting sufficient cause requires liberal approach and the Additional District Judge while passing the order dated 11.11.1995 while condoning the delay in filing the application under Order 9 Rule 13 CPC after 8 years has granted indulgence to the Appellant by appreciating case of the Appellants in the right perspective. While doing so, the Additional District Judge has also appreciated the stand of the Appellant that they had no notice of the transfer of their case from this Court to District Court.

8. It is submitted that while their application u/s 5 of the Limitation Act on the grounds mentioned by them that they were not served with the notice of transfer of suit has been allowed, the second Additional District Judge, who has dealt with the application under Order 9 Rule 13 CPC has just taken a somersault and has taken a different view that the Appellants were served with the notice of the case after the transfer of the case which is contrary to record inasmuch as directions have been given to the Respondents by the Additional District Judge being satisfied that the service was not effected to serve notice even by affixation. However, those orders have not been complied with by the Respondents. The Respondents have also not served any notice regarding the transfer of the suit on the Appellant through registered post. Moreover, when the record clerk received the court notice sent for 8.4.1994, he made the endorsement "MLC No. to be supplied". Same is the position when service of notice is stated to have been made on Medical Superintendent of RML Hospital. Despite endorsements made by them on the notice to supply a copy of the paper book, no such request was acceded to by the Respondents for the simple reason that they wanted to have an ex parte decree.

9. It is also submitted that the Appellant is a Government Office, where no one is personally responsible for anything because it is the institution which works together. When notice was issued a request was made to supply a copy of the

paper book and thus, the Respondent was duty bound to supply a copy of the paper book to the Appellant. It is also an endorsement made by the Appellant when notice was sent to the office of the second Appellant, which was also not complied with. It is thus submitted that in the present case considering the fact that the Respondents were well aware that the Appellants were not served with the notice and in any case had no knowledge about the proceedings for the reasons stated above, the Appellants are entitled to be allowed to contest the proceedings on merit. More so, it is submitted that if ex parte proceedings are allowed to stand, public money will go to the pockets of Respondent even though they are not entitled to receive it. It is a fit case where the application under Order 9 Rule 13 CPC should have been allowed and thus, this Court should allow the appeal filed by the Appellants.

10. Briefly stating, the facts; suit bearing No. 653/1986 was filed by the Respondent against the Appellant in this Court for recovery of `4,52,441.32 with interest @15% p.a.. The said suit was contested by the Appellants and they have also filed their written submissions opposing the claim of the Respondent. The said suit was transferred to the District Court on the ground of pecuniary jurisdiction vide order dated 11.05.1993. It is thereafter Appellants have not appeared for the reasons stated by them in their application under Order 9 Rule 13 Code of Civil Procedure.

11. After recording ex parte evidence, the Additional District Judge vide order dated 13.09.1996 passed an ex parte decree of `3,60,802.47 with the cost of the suit and pendente lite and future interest @15% p.a. from the date of filing of the suit till realization.

12. The decree holder/Respondent initiated execution proceedings against the Appellant in the year 2004 i.e. after 8 years of passing of the ex parte decree. Appellant received court notice in the execution proceedings and the counsel was engaged to defend the interest of the Appellants in the execution proceedings and to represent them before the Court on 10.12.2004. It was during these proceedings, counsel for the Appellant came to know about the passing of ex parte decree on 13.09.1986 when they appeared in Court on 10.12.2004. Immediately thereafter, the Appellant filed an application under Order 9 Rule 13 CPC along with an application u/s 5 of the Limitation Act for condoning the delay of 8 years. As already stated above, the delay in filing the application was allowed by the Court vide order dated 11.11.1995 by holding that on transfer of the case court notice was issued, however the same was not served upon the Appellants. The relevant portion of the order already stands quoted above.

13. The application filed by the Appellants under Order 9 Rule 13 CPC was dismissed by taking a contrary view that the notices after the transfer of case were served upon the Appellants but they themselves decided not to appear before the court and thus, there is no infirmity in the ex parte decree passed against them.

14. It has been submitted on behalf of the Appellant that the ground on which the delay in filing an application under Order 9 Rule 13 CPC after 8 years has been condoned holds good even in respect of the application under Order 9 Rule 13 CPC inasmuch as

(i) The court notices though issued on various dates were not served upon the Appellants.

(ii) The reasons given by the Additional District Judge that despite service the Appellants had decided not to appear is contrary to the reasoning given in the order dated 11.11.1995 and is also contrary to record.

(iii) It is a matter of record that in terms of the order dated 29.11.2006 it was held that the clerk of the Appellants received the court notice sent for 08.04.1994 making an endorsement that MLC No. etc. be supplied. The said contention has even been acknowledged by the Additional District judge vide subsequent orders dated 24.08.1994 and 10.04.1995. However, fresh notices directed to be issued in terms of subsequent orders were never complied with by the Respondents.

(iv) The Additional District Judge has ignored the factum of change of counsel in the matter and has also ignored the factum of non-appearance in the matter and also the factum of not informing about the transfer of the case to the Department despite sending various reminders.

(v) In view of the orders passed by the Additional District Judge directing service of summons by pasting having not been complied with, the service of the Appellant cannot be deemed to have been accepted as having served upon them without complied with the provisions of Order v. Rule 20 Code of Civil Procedure.

(vi) Even service on Defendant No. 2 for 21.12.1995 in the suit cannot be said to be effective service as the Defendant No. 2 was Director General of Health Services and was the non-contesting Defendant therein. In fact, the said Defendant had prayed for deletion of its name from the array of parties. There was no report of service of the notice upon the Appellants on 21.12.1995 and therefore, the court forthwith adjourned the matter to 05.02.1996 for ex parte evidence. Service reports filed by the process server reveal that no notice for 21.12.1995 was ever received by the Appellants and the report bears no seal/ stamp for the same. It is submitted that once an order was passed by the Additional District Judge for service of the Appellant for 21.12.1995, in the absence of any notice served upon the Appellant for that date, the question of adjourning the matter to 05.02.1996 for ex parte evidence does not arise.

(vii) Notices which have been accepted to be served were not accompanied with the copy of the case despite endorsement for supply of copy.

15. It is submitted that the Appellant is Union of India. They should not be penalized for the satisfaction of money decree which involves public money just because there is negligence on the part of a clerk. Reliance has been placed on

the judgment of the Apex Court in the case of Union of India (UOI) Vs. Tecco Trichy Engineers and Contractors, , wherein the Apex Court has been pleased to hold,

we cannot be oblivious of the fact of the impersonal approach in the Government Departments and organizations like Railways. In the very nature of the working of the Government Departments a decision is not taken unless the papers have reached the person concerned and then an approval, if required of the competent authority or official above has been obtained

16. It is submitted that in view of the aforesaid judgment, the service of summons upon the clerk of the Appellant and that too when the summons did not bear the name and number of the case does not tantamount to complete service as per the provisions of the Code of Civil Procedure, in view of the transfer of the case to a different court (in this case it was from the High Court to District Court).

17. On the other hand, learned Counsel for the Respondent submits that not only court notice was served upon the Appellant through its clerk but also service was effected on the Director General, Health for 6.4.1994. Both of these notices remarked that copy of the paper book be supplied.

18. Again notices were sent to the Appellant for 21.12.1995, notice was served on RML Hospital on 16.12.1995, notice on Director General, Health was served on 16.12.1995 while notice on Secretary, Ministry of Health and Family Welfare was served for 16.12.1995, despite that the Appellants did not appear on 21.12.1995 and therefore, the matter was proceeded for ex parte evidence. It is submitted that consideration for allowing an application for condonation of delay is different than to allow an application under Order 9 Rule 13 CPC where an applicant has to show that there was sufficient cause for his non-appearance. There was sufficient proof available on record to show that service of the court notice on the Appellant was there. It is thus submitted that the order of the Additional District Judge does not suffer from any infirmity.

19. At this juncture, it would also be relevant to take note of Order 9 Rule 13 Code of Civil Procedure:

13. Setting aside decree ex parte against Defendant

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:

1[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 Plaintiff's claim]

2[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 that ex parte decree.]

HIGH COURT AMENDMENTS

xxx xxx xxx

Delhi.- Same as that of Punjab.

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Punjab-Rule 13 shall be numbered as Rule 13(1) and the following Sub-rule (2) shall be added to it, namely:

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications made under Sub-rule (1).

20. A perusal of the aforesaid provision shows that either when the summons was not duly served or where, the parties prevented from sufficient cause from appearing when the suit called for hearing are sufficient cause for granting indulgence to the applicant.

21. A few facts on which there is no dispute and which are relevant for the purpose of deciding the application of the Appellant under Order 9 Rule 13 CPC and which have not been considered by the Additional District Judge while disposing of the application and dismissing the same are:

(i) The suit in question was filed before this Court.

(ii) The suit was transferred to the District court on account of pecuniary jurisdiction.

(iii) The Appellants despite having contested the suit and filed written statement did not appear in the District Court for the reason as they state was having no knowledge about the transfer of the suit.

(iv) There seems to be no reason as to why the Appellants would like to suffer an ex parte decree.

(v) The clerk to whom the service of notice is stated to have been effected after the transfer of the suit by the order of the District Judge for 08.04.1994 and also to the Medical Superintendent, RML Hospital does not show that the acceptance of service was unconditional inasmuch as, on both occasions a request has been

made for supply of the copy.

(vi) The execution has been filed after 8 years of the ex parte decree. Immediately thereafter, the Appellants have moved an application u/s 5 of the Limitation Act as also under Order 9 Rule 13 Code of Civil Procedure. The condonation of delay has been allowed but the application under Order 9 Rule 13 CPC has been dismissed. The order allowing application for condonation of delay takes note of the contention of the Appellant that they were not served with the notice of transfer.

(vii) There are orders of the Additional District Judge dated 24.08.1994 and 10.04.1995 for service of notice by pasting but no steps have been taken by the Respondent in this regard.

(viii) Respondents have been duly secured by the Appellants by depositing 75% of the decretal amount on which interest is also accruing.

22. Considering all these aspects, the applicant being the Government of India, where the file moves from desk to desk and it is not one person who is in fact responsible for taking decision, the sufficient cause must be viewed liberally. It is well settled that the rule of procedure are handmade of justice and they are not for doing injustice but to do justice between the parties. Moreover, the Respondent can always be compensated with costs for delay which has been caused in deciding the matter. It is a matter of record that in the present case 75% of the decretal amount has been deposited by the Appellant which is accruing interest also, thereby making available at least double the amount. Moreover, in such circumstances, dismissing the appeal may lead to undesirable result of "enriching the Respondent" and would certainly prejudice the Appellant who have defence to make in having file the written statement and who were never served with the notice u/s 80 Code of Civil Procedure.

23. It is well settled that in case of a Government Department the factor of impersonal machinery assumes considerable proportions inasmuch as, the awareness works at the back of the mind of the people that no one in charge of the matter is directly hit or hurt by the impugned order which is to be the subject matter of revision or appeal and also the peculiar bureaucratic methodology. In such circumstances, the words "sufficient cause" should get a liberal construction so as to advance substantial justice when there is no want of bona fide imputable to the Appellant.

24. Taking all these into consideration, I am of the considered view that it would be in the interest of justice to allow the appeal filed by the Appellant and allow the application under Order 9 Rule 13 Code of Civil Procedure, of course, with a heavy costs of Rs. 50,000/- upon the Appellant and with the further direction that the amount already deposited by the Appellant with accrued interest will not be released to the Appellants but would be kept in tact for securing the decree in case the Appellant are not able to obtain a favourable order from the Additional District Judge after contesting the suit of merits. of course, considering the time

which has elapsed, directions are also given to the Additional District judge who will try this case to take up the matter on day to day basis and dispose of the suit within a period of one year from the date of the appearance of the parties. The costs shall be paid by the Appellants on the next date of hearing.

25. Parties to appear before the Court concerned/successor of the Court concerned on 25.04.2011.

26. With these directions, the appeal is allowed. Trial court record be sent back forthwith along with a copy of this order.