

IN THE HIGH COURT OF DELHI AT NEW DELHI

FAO No.477/2003

Shailendra Nigam Appellant.
! through: Mr.Rakesh Tiku, Adv.

VERSUS

\$ Smt.Santosh Batta & Ors. Respondents
^ through: Nemo.

% **DATE OF DECISION:** 22-02-2008

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y
2. To be referred to the Reporter or not? Y
3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J. (Oral)**

1. Appellant is aggrieved by the impugned order dated 21.5.2003 dismissing his application under Order 9 Rule 13 CPC on account of stated inordinate delay in filing the application.

2. Appellant was impleaded as respondent No.1 in a claim petition filed by respondent No.1 herein in which she stated that as driver of the offending vehicle, vehicle belonging

to respondent No.2 herein, appellant had caused injuries to her person. The petition which was filed before a Motor Accident Claim Tribunal was taken cognizance of and a notice was issued. Appellant was served. He engaged one Manoj Verma as his counsel. Unfortunately for the appellant the counsel did not appear in court after initial appearance and even did not file the written statement which appellant claimed was prepared and signed by him. The other co-respondent in the claim petition also did not appear resulting in an ex-parte award dated 21.12.1999 being passed.

3. When put into execution, for the reason insurance company was not impleaded as a respondent by the claimant, appellant learnt about the award and also learnt that his counsel had belied his trust. Appellant thereafter moved an application under Order 9 Rule 13 CPC. In the application appellant pointed out, with reference to the testimony of the witness of the claimant and the testimony of the claimant herself, that admittedly, the claimant was a pillion rider on a motor cycle being driven by her son whose age would be less than 16 years on the date of the accident. Apart from pointing out to the court the inherent weakness in the case of the claimant, for purposes of setting aside of the ex-parte award, it was pointed out that the counsel had belied the trust of the

appellant who being a member of the Civil Services had to join the place where the Central Government or the State Government posted him and for said reason could not personally appear at the hearing.

4. Learned Judge has held against the appellant holding that limitation would run not from the date of knowledge of the award but from the date of award for the reason appellant was admittedly served when claim petition was filed in the Court.

5. Shri Rakesh Tiku, learned counsel for the appellant urges that the view taken by the learned Trial Judge is not sound in law. Counsel states that in the application under Order 9 Rule 13 CPC reason why it was filed much beyond prescribed period of limitation reckoned from the date of the ex-parte award was set out and the same constituted sufficient cause for delay to be condoned in filing the application. Counsel further urges that failure to adopt extra vigilance by a litigant is not a ground to non-suit a meritorious claim and that in such situation exemplary costs can be awarded to the opposite party for the inconvenience cause.

6. In the decision reported as (2000) 3 SCC 54 G.P.Srivastava Vs. R.K.Raizada it was held that the words 'was prevented by any sufficient cause from appearing' under Order

IX Rule 13 must be construed liberally and if there is no mala fide intention of a party not to appear, ex-parte orders should be set aside.

7. In the decision reported as 2001 6 SCC 176 M.K.Prasad Vs. Parumugum it was held that failure to adopt extra vigil is no ground to oust a party from a litigation and inconvenience to the opposite party could be recompensed with exemplary costs.

8. I note that where there is delay in filing the application under Order IX Rule 13 CPC and no application is filed under Section 5 of the Limitation Act, if delay in filing the application is self contained in the application itself, for reasons stated therein delay in filing the application can be condoned.

9. In the instant case, it has to be noted that the claimant chose not to oppose the application filed by the appellant and after being served did not bother to appear before the Tribunal. It has additionally to be noted that the appellant claimed to have engaged a lawyer, Manoj Verma, who appeared before the Tribunal on 20.5.1993, a fact recorded in the order by the Tribunal. It has also to be noted that the appellant is member of the Civil Services assigned to Himachal Pradesh Cadre and is on a transferable job. The

appellant alleges that his counsel belied his trust. There is no reason to disbelieve the appellant.

10. In my opinion sufficient grounds existed to allow appellant's application under Order IX Rule 13 CPC.

11. Before concluding I may note that even in the instant appeal the claimant chose not to appear. She had to be served by publication. The operation of the impugned award has been stayed. Unexplainably, the claimant has chosen to take no steps to oppose the instant appeal.

12. The conduct of the claimant has left this Court guessing for the reason the stated owner of the vehicle impleaded as respondent No.2 who was also ex-parte and who actually does not own the vehicle is also missing. The appellant has got the particulars of the owner of the vehicle and has disclosed the same in the instant appeal. The claimant could have reached out to the insurance company through the real owner had she appeared in this Court.

13. Be that as it may, the appeal is allowed.

14. Impugned order dated 21.5.2003 is set aside. Appellant's application under Order IX Rule 13 CPC is allowed. Ex-parte award dated 21.12.1999 is set aside.

15. I refrain from imposing any costs for the reason the claimant has chosen not to either oppose appellant's

application before the learned Judge, MACT nor before this Court.

February 22, 2008
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(PRADEEP NANDRAJOG)
JUDGE