

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(OS) No.420/2006**

% **Date of Decision: 18.03.2009**

Bhavika Builders Pvt. Ltd. Plaintiff

Through Mr.Saurabh Banerjee, Advocate

Versus

Sh. Vinod Kumar Chawla Defendant

Through Mr.Raman Kapur, Advocate

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

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|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

IAs No.7889/2008 and 7529/2008

These are the applications by the plaintiff/applicant under Order IX Rule 9 read with Section 151 of Code of Civil Procedure for setting aside the order of dismissal in default and for non-prosecution dated 9th April, 2008 and for condonation of delay in filing the application for setting aside the dismissal order.

The plaintiff has filed the above noted suit for mandatory and permanent injunction contending inter alia that the defendant is the owner of the residential plot bearing No.55, Block-A1, admeasuring 667 square yards in Safdarjung Development Scheme known as Safdarjung

Enclave, New Delhi, and a memorandum of understanding dated 17th April, 2003 was arrived at between the parties pursuant to which plaintiff had paid a sum of Rs.12.00 lakh. The plaintiff had to re-develop/re-construct the property and besides incurring the cost and expenses for redevelopment/reconstruction, the plaintiff had to pay a sum of Rs.1,32,00,000/- as non-refundable interest free security deposit. The plaintiff paid only a sum of Rs.12,00,000/- and did not deposit the other sum as had been agreed, however, plaintiffs contended that the rest of the amount was payable later on as had been agreed under memorandum of understanding.

The plaintiff contended that the defendant did not honor his part of memorandum of understanding and, therefore, plaintiff filed the present suit for mandatory injunction seeking direction to defendant to fulfil his part of obligation as per terms of memorandum of understanding dated 17th April, 2003 and to handover peaceful and vacant possession of the respective portions to the plaintiff. The plaintiff valued the suit for the purposes of Court fees and jurisdiction at Rs.21,00,000/- and paid the court fees thereon.

After the defendant was served and the written statement was filed on behalf of defendant, by order dated 21st July, 2006 the plaintiff Company was directed to file the documents and the matter was re-notified for 22nd September, 2006.

Despite the time given on 21st July, 2006, the documents were not filed by the plaintiffs. On 22nd September, 2006, the plaintiff was again granted six weeks time to file the original documents.

The documents were not filed by the plaintiff even within the six weeks granted, i.e., by 8th November, 2006. The documents were not filed even before the next date of hearing, i.e., 7th December, 2006 on which date, subject to a cost of Rs.2,000/- plaintiff was granted final opportunity to file the original documents within four weeks, i.e., by 7th January, 2007.

The original documents were again not filed by the plaintiff by 7th January, 2007 rather documents were not filed till the next date of hearing which was 19th February, 2007. On 19th February, 2007 also the previous cost of Rs.2,000/- was not paid nor the documents were filed and, therefore, the matter was placed before the Court by the learned Joint Registrar. The matter came up before Court on 4th April, 2007, however, till that date also the plaintiff did not file the documents nor paid the previous cost.

The Court by order dated 4th April, 2007, subject to a further cost of Rs.1,500/- to be paid within two weeks along with previous cost, granted four weeks time more to the plaintiff to file the documents.

The plaintiff had to pay the cost of Rs.3,500/- within two weeks, i.e., by 18th April, 2007 and had to file the original documents by 4th May, 2007. However, again neither the documents were filed nor the previous costs were paid.

The matter again came up for hearing on 9th July, 2007 and till that date also neither the documents were filed nor the cost was paid. On 9th July, 2007 no one even appeared before the Joint Registrar. The matter was adjourned to 1st November, 2007, however, no one again appeared on behalf of the plaintiff before the Joint Registrar nor documents were filed nor were costs imposed on different dates paid. Consequently the Joint Registrar directed that the matter to be placed before the Court on 29th February, 2008.

From 21st July, 2006 till 29th February, 2008, the plaintiff did not file the documents nor paid the cost imposed on the plaintiff. On 29th February again no one appeared on behalf of plaintiff. The Court instead of dismissing the suit on account of non-appearance of the plaintiff and for non compliance of orders granted another opportunity and re-notified the matter for 9th April, 2008.

Even on 9th April, 2008, no one appeared on behalf of plaintiff nor the documents were filed since 21st July, 2006 nor were the costs imposed paid. Therefore, on 9th April, 2008 the suit of the plaintiff was dismissed in default of appearance of plaintiff and his counsel and for non-prosecution.

The application for setting aside the order of dismissal in default of appearance of plaintiff and his counsel and for non-prosecution was not filed within 30 days as contemplated under law and the application was filed on 30th May, 2008. No application for condonation of delay in filing the application under Order IX Rule 9 of the Code of Civil CS(OS) No.420/2006

Procedure for setting aside the order dated 9th April, 2008 was filed along with the application under Order IX Rule 9 of the Code of Civil Procedure. The application for condonation of delay was later on filed on 4th July, 2008.

The applicant/plaintiff has contended that as the plaintiff company was going through a lean/bad phase and suffering losses in its business and its Director, Mr.D.P. Wig, who was looking after the case was not in actual physical possession of the relevant documents, he instructed the counsel to seek further time for compliance thereof. It is further asserted that the time which was granted to the plaintiff, subject to cost was communicated to Mr.D.P. Wig, however, with great difficulty he was able to collect the relevant documents from Mr.Praveen Arora and handed them over to his employee, Mr.Shri Kumar, who was looking after the instant suit and instructed him to hand them over to the counsel for the plaintiff.

It is contended that Shri D.P. Wig kept assuring the counsel of complying with the directions in due course but he never complied with the same and stopped giving instructions to the counsel. The applicant has contended that the counsel, therefore, stopped appearing and the case was dismissed-in-default and for non-prosecution on 9th April, 2008.

It is further contended that on 26th May, 2008, Mr. D. P. Wig contacted the counsel to enquire about the status of the instant case and was surprised that no one from his office, particularly Mr.Shri

Kumar, had handed over the relevant original documents to the counsel. It is asserted that thereafter Mr.D.P.Wig contacted the counsel and handed over the original documents and it was on account of this confusion that there was an inadvertent, non-deliberate, unintentional non-compliance of the directions of this Court. In the circumstances, it is contended that the plaintiff has all the intentions to proceed with the suit and seeks an opportunity to make amends for unintentional non-compliance of the orders of this Court. It is also asserted that in case the order of dismissal of the suit for non-appearance of plaintiff and his counsel and for non-prosecution is not set aside, it shall cause huge losses and damage to the plaintiff. The application is supported by the affidavit of Shri Dharam Pal Wig.

Perusal of the plaint reveals that the plaint has been signed, verified and instituted by the Director, Shri Dharam Pal Wig. Though it is alleged in the application that Mr.Wig was not in actual physical possession of the relevant document, however, it has not been disclosed as to in whose possession the original documents were and when efforts were made by Shri D.P. Wig to collect the original documents. The directions to file the documents were given by the court to the plaintiff, for the first time, on 21st July, 2006. Nothing has been shown or pleaded as to what efforts were made between 21st July, 2006 and 9th April, 2008 to get the documents and from which of the persons. Along with the plaint, photocopies of certificate of incorporation; resolution dated 18th February, 2006; perpetual lease dated 27th February, 1997;

memorandum of understanding dated 17th April, 2003; receipt dated 17th April, 2003; photocopy of postal order dated 17th April, 2003; copy of letter dated 10th October, 2005 and 9th February, 2005 were filed. Mr.Wig is the Director of the company and it cannot be believed in absence of any averment by him that the certificate of incorporation and the resolution of the Board of Directors of the plaintiff company were not with him. The plaintiff has filed a list of documents dated 4th July, 2008, however, it is apparent that those documents were not filed on 4th July, 2008. The other documents which have been filed by the plaintiff also could not be in the custody of such other persons from whom the documents could not be collected by the Director of the plaintiff company since 21st July, 2006. The court had imposed the cost for non-compliance of its order of 7th December, 2006 and on 4th April, 2007. No reason has been disclosed in the application as to why the costs could not be paid on behalf of plaintiff, rather no averment has been made that the amount of costs was paid to Mr.Shri Kumar or to the counsel to be paid in the Court.

The plaintiff has made a vague allegation that the documents had to be collected from Mr.Praveen Arora and handed over to employee, Shri Kumar, however, when the documents were collected and when the documents were handed over to Shri Kumar has not been disclosed. It has not been disclosed that as to how or why the original documents were with Mr.Praveen Arora or what post the said Praveen Arora holds in the Plaintiff company. Nothing has been pleaded to show as to what

steps were taken by the plaintiff to collect the documents from Shri Praveen Arora from 21st July, 2006. Though it is alleged that Mr.Shri Kumar is the employee of the plaintiff company and the documents were handed over to him to be handed over to counsel, however, no affidavit of Mr.Shri Kumar has been filed to show as to when the documents were handed over to him.

The averments made by the plaintiff are vague. No documents have been filed in support of the allegations made in the applications. In the circumstances, the plaintiff has failed to make a sufficient cause for the non-prosecution of the case. Learned counsel for the plaintiff has also contended that Shri D.P.Wig was communicated the orders of the Court imposing cost and directing the plaintiff to file the original documents, however, Mr.D.P. Wig did not respond to the intimations sent to the plaintiff and did not give any instructions. Even if the instructions were not given by the plaintiff to the counsel, he could not discontinue to appear in the case, unless he had been discharged by the Court on behalf of plaintiff.

In the circumstances, there is no sufficient cause for non-appearance of plaintiff and his counsel on 9th April, 2008 when the suit was dismissed in default for non-appearance of plaintiff and his counsel and for non-prosecution and on earlier dates when no one had appeared on behalf of the plaintiff.

It is also alleged on behalf of plaintiff that the plaintiff company was going through a lean/bad phase, however, nothing has been

produced to show that the company was going through a bad or lean period. In any case, if the company was going through lean/bad phase, that does not give a sufficient reason to the plaintiff company not to comply with the orders of the Court. If the company was going through a lean/bad phase and the cost could not be paid, the plaintiff company should have filed an appropriate application seeking review of order imposing costs or for waiving of the cost which was not done.

Though the application for setting aside the order dated 9th April, 2008 dismissing the suit of the plaintiff for non-appearance of plaintiff and his counsel for non-prosecution was filed on 30th April, 2009 beyond the period of 30 days as contemplated under law, however, no application for condonation of delay was filed. The application being IA No.7899/2008 for condonation of delay was filed on 4th July, 2008. No cogent reason has been given for not filing the application for condonation of delay along with the application for setting aside the order of dismissal in default dated 9th April, 2008. The application for condonation of delay, in the facts and circumstances, does not disclose sufficient reason for condonation of delay in filing the application for setting aside the order of dismissal of the suit. In the circumstances, there is no sufficient reason so as to entail condonation of delay in filing the application for setting aside the dismissal order in default of appearance and for non prosecution.

In the circumstances, the applications are without any merit; there is no sufficient cause for condoning the delay and also no

sufficient cause for non-appearance of plaintiff and his counsel for not prosecuting the suit by not filing the documents from 21st July, 2006 till 9th April, 2008 when the suit was dismissed in default for non-appearance of plaintiff and his counsel and for non-prosecution.

The applications are, therefore, without merit and are dismissed.

March 18, 2009

'K/Dev'

ANIL KUMAR, J.