

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

% *Judgment pronounced on: January 02, 2014*

+ **CM(M) 350/2012 & CM No.5306/2012**

SANDEEP KUMAR MANGLA Petitioner
Through Mr.Mr.Satinder S. Gulati, Adv.

versus

GEETA BAJAJ Respondent
Through Mr.Jagdish Dhawan, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By way of the present petition under Article 227 of the Constitution of India, the petitioner has assailed order dated 20th October, 2010 whereby an application filed by the petitioner seeking to set aside ex-parte proceedings under Order 9 Rule 7 read with Section 151 CPC was dismissed and also an order dated 26th November, 2011 whereby the application filed by the petitioner under Order 47 read with Section 114 and 151 CPC seeking review of the said order was also dismissed by the learned Trial Court.

2. Brief facts for the purpose of adjudication of the present petition are that the respondent had filed a suit for declaration and permanent injunction against the petitioner and the defence of the petitioner was struck off on 25th January, 2008 due to non-appearance in the matter.

3. The petitioner filed an application under Order 9 Rule 7 CPC for setting aside the said ex-parte order and stated therein that there were two other litigations pending between the parties before the same court and that

his counsel in those two matters had advised him that his appearance is not necessary in the said suits and so he need not appear every day. Accordingly, acting on the said advise the petitioner was not appear and that on one of such dates, the suit for declaration and permanent injunction was filed of which his counsel accepted the summons in the court itself on behalf of the petitioner. However, the counsel never informed the petitioner of the said suit. It was contended in the application that since he was never aware of the existence of the suit, he never appeared, consequently his defence was struck off and it was only on 22nd July, 2008 that his counsel informed him about the said suit and that he had already been proceeded ex-parte.

4. The respondent opposed the said application on the grounds that the same was time-barred and that no condonation of delay was prayed therein. It was stated that in the other two pending matters between the parties, the petitioner had been regularly appearing.

5. The learned Trial Court noticed that admittedly the service of summons in the said suit was accepted by the counsel for the petitioner only since the order sheet dated 22nd November, 2005 clearly stated that the service was accepted by him. However, on perusal of the record it was found that the respondent did appear before the court on 14th November, 2007 before his defence was struck off. Dismissing the said application, the learned Trial Court observed that the petitioner had made a false submission before the court regarding his appearance and that by his application he sought to amend his laches which resulted in the case being proceeded ex-parte.

6. Thereafter the petitioner filed an application under Order 47 read with Section 114 and 151 CPC against the said order stating that there was a

typographical error in the order sheet dated 14th November, 2007 in as much as the respondent's attendance had been marked as petitioner's as Sh. Ajay Yadav's (proxy counsel) attendance had been marked for the respondent alongwith the petitioner and that it should have been with the respondent. It was stated that the petitioner never appeared before the court.

7. The respondent opposed the said application stating that no ground for review was specifically mentioned therein and that the application had been filed after the expiry of limitation period without explaining the reason for delay caused and without filing of application for condonation of delay.

8. The learned Trial Court noticed that Mr. Jagdish Dhawan who was pursuing the case on behalf of the respondent throughout had appeared on behalf of the respondent on 14th November, 2007 also. On that date Mr. Ajay Yadav had also appeared. Though the petitioner submitted that the attendance of the respondent was wrongly marked as petitioner, the order-sheet clearly stated that Mr. Ajay Yadav (who was appearing on behalf of the petitioner) had appeared with the petitioner. It was observed that there was no ground for questioning the court record when the presence of the counsel for the respondent had been marked separately. It was also observed that the said application was filed beyond the limitation period without explaining the delay caused.

9. With these observation the learned Trial Court dismissed the said application of the petitioner vide the impugned order and aggrieved thereof the petitioner filed the present petition.

10. The main contention of the petitioner is that the petitioner was not served with the suit summon therefore the limitation for filing an application for setting aside the ex parte order will begin from the date he got the

knowledge. As and when he got the knowledge of the ex parte proceedings from his counsel Mr. C.L. Dhawan who informed him that he was proceeded ex parte by order dated 25th January, 2008 and his defence was struck off. Thereafter he filed an application under Order 9 Rule 7 CPC on 20th July, 2008 within the limitation. However, the same was dismissed on 23rd November, 2010. Thereafter, review was filed which was also dismissed by order dated 26th November, 2011 which is now impugned by the petitioner.

11. It is admitted position that the respondent filed a suit No.640/2005 on 9th November, 2005 seeking declaration and permanent injunction before Senior Civil Judge, Delhi against the petitioner.

12. When the said suit was listed for issuance of summons second time on 22nd November, 2005 two other proceeding pending were between the same parties i.e. Suit No.643 of 2005 Sandeep Kumar Mangla vs. Geet Bajaj and Case No.M-40/6 Sandeep Kumar vs. Geeta Bajaj and both the said proceedings were being contested on behalf of the petitioner, by Sh. C.L. Dhawan, Advocate.

13. The following order was passed on that date in the suit in question:

“Pr. Sh. Jagdish Dhawan, Cl. For plff. Sh. C.L. Dhawan cl. For deff. Copy of plaint and docs supplied to cl for deff. Service excepted by cl for def. who is plff’s counsel in connected case No.643/05.”

The petitioner’s counsel’s presence was recorded in the order.

14. On 20th December, 2005, the matter was again adjourned for written submission/issues for 1st February, 2006. The said order was also passed in the presence of counsel for the petitioner.

15. Thereafter the matter was listed from time to time alongwith other connected matters.

16. On 14th November, 2007 in the presence of petitioner and his counsel the following order was passed :

“Counsel for the defendant has filed photocopies of order sheets and the same are taken on record. Counsel for the plaintiff submits that defendant has been directed to file his written statement on 20.12.2005, however, no written statement has been filed as yet. Counsel for the defendant submits that there were talks of compromise going on between the parties which is denied by the counsel for the plaintiff. Defendant is directed to file his written statement within a month and supply advance copy of the written statement to the counsel for the plaintiff two weeks before the next date of hearing. Replication, if any, be filed. To come up for framing of issues and further proceedings on 25/1/2008.”

17. Neither the written statement filed by the petitioner nor petitioner present when the matter was listed on 25th January, 2008 the following orders were passed :

“Present : Shri Jagdish Dhawan, counsel for the plaintiff

None on behalf of defendant

Counsel for the plaintiff has pointed out that on the last date of hearing inadvertently this court had mentioned in the first line, ‘counsel for defendant has filed the copies of orders sheets which are taken on record’, whereas, the copies were filed by him. Counsel for the plaintiff further submits that despite clear directions, defendant has neither filed his written statement nor supplied the advance copy of the written statement and so his defence is liable to be struck off. As despite clear directions, defendant has failed to file written statement, so his right to file written statement is closed and his defence is struck off. Moreover, no one has appeared on behalf of defendant today so he is proceeded ex parte. To come up for ex parte evidence on 26/5/2008.”

18. Review against the said order was also dismissed on 26th November, 2011 and review court held that the plea of the petitioner that he was

unaware of the proceedings was found to be false with certain clarification about the making of attendance in the order sheets which were clarified in second last para of the order. The same is extracted as under :

“The court is in agreement with the counsel for plaintiff. For clarification, reference to order-sheet dt. 24.04.2007 is relevant. The attendance marked in this order-sheet is reproduced as under :

“Present : Counsel for plaintiff
Sh. Ajay Yadav, proxy counsel for
defendant

In this order-sheet, attendance of Sh. Ajay Yadav has been marked as proxy counsel for defendant. Mr. Jagdish Dhawan who is pursuing the case on behalf of plaintiff till date appeared on behalf of plaintiff on 14.11.2007. On that date, Mr. Ajay Yadav had also appeared. Counsel for defendant submits that the attendance of the plaintiff was wrongly marked as defendant. However, order-sheet clearly stated that Mr. Ajay Yadav (who was appearing on behalf of defendant) had appeared with the defendant. There is no ground for questioning the court record when the presence of the counsel for plaintiff had been marked separately. In these circumstances, the court does not find any ground for review of order dt. 20.11.2010.”

19. From the above, it is clear that the petitioner was aware about the suit filed by the respondent since December, 2005. He was given time to file the written statement which was not filed by him in time. Even after expiry of about two years one more opportunity was granted by order dated 14th November, 2007 to file written statement but the same was not filed. When the matter was listed on 25th January, 2008, no one appeared on behalf of the petitioner even no written statement was filed.

20. In his application under Order 9 Rule 7 CPC, it is evident that the petitioner having made the incorrect grounds that he was not aware about

the suit as well as the ex parte proceedings and it was only in July, 2008 his counsel informed him about ex parte proceedings. It is pertinent to mention that the same counsel who appeared in 2005 in the matter in hand is also in other litigations on behalf of same client with the respondent.

The application filed by the petitioner thus contains false and frivolous grounds known to the petitioner who has apparently no respect to truth. Thus, he does not deserve any indulgence from this court.

21. The present petition under Article 227 otherwise has no force after dismissal of his review petition. The said order hence needs no interference.

22. The present petition and pending application are dismissed.

(MANMOHAN SINGH)
JUDGE

JANUARY 02, 2014