

\$~22

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

+ **FAO 383/2014 & CM No. 3721/2015 (Stay)**

AMITAV CHAUDHURI

..... Appellant

Through: Mr Abhijat, Mr Neeraj Kumar & Mr
Harsh Vardhan, Advs.

versus

**NATIONAL RESEARCH DEVELOPMENT
CORPORATION**

..... Respondent

Through: Mr Joydeep Sarma & Mr Raghav
Kapoor, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

04.08.2015

%

1. This appeal is directed against the order dated 09.09.2014, passed by the trial court, on an application filed under Order 9 Rule 13 of the Code of Civil Procedure, 1908 (in short the CPC). The said application was accompanied by an application under Section 5 of the Limitation Act, 1963 (in short the Limitation Act). The trial court dismissed the appellant's application under Order 9 Rule 13 of the CPC on the ground of inordinate delay of 607 days and, broadly, for the reason that it did not believe the stand taken in the application that the appellant had engaged a counsel in the matter, who had been tasked with the duty to defend his case.

2. Briefly, the aforementioned applications thus, came to be filed by the appellant/ defendant in the background of the following facts:

2.1 The respondent/ plaintiff herein had filed a suit for recovery for a sum of Rs. 5 lacs which was provided to the appellant herein, who was

arrayed as defendant no.1 in the suit. The appellant/ defendant no.1 is a partner in a firm by the name of M/s Advance Surface Technology. The said entity was impleaded as defendant no.2 in the suit.

2.2 The respondent/ plaintiff had advanced the said financial assistance, in the sum of Rs. 5 lacs, as indicated above, for development of “Dip Coating Machine” for coating sol-gel on ophthalmic lenses etc. The terms and conditions under which the said sum was advanced to the appellant were crystallized in a document dated 31.03.2008. The time for completion of the project was initially set at 31.03.2009, which, it appears, was extended.

2.3 According to the respondent/ plaintiff the appellant was unable to comply with the terms and conditions for which the grant was made to him and upon refund being sought by the respondent/ plaintiff, the same was declined.

3. It is in this background that the suit came to be filed. It appears that summons in the suit were issued and the appellant, pursuant to receipt of the summons, appeared in court, in person, on 14.09.2011. On that date, admittedly, the appellant was not accompanied by any advocate, and that, he in affirmation of his presence in court, signed in the margin of the order sheet generated on that date.

3.1 It is also not disputed before me that, as per the order sheet so generated, the appellant was given time to file a written statement in the matter.

3.2 It is, however, the case of the appellant, both before the trial court and in this court, that he had engaged a counsel by the name of Mr. Uday Vir Singh Tanwar to defend him in the suit filed by the respondent/

plaintiff. The appellant submits that for this purpose a Vakalatnama was also executed in favour of Mr. Uday Vir Singh Tanwar.

3.3 Apparently, the appellant was in touch with his lawyer Mr. Uday Vir Singh Tanwar, who assured him that he would take care of the matter. Unfortunately the counsel for the appellant, Mr. Uday Vir Singh Tanwar, passed away on 02.03.2013.

3.4 The appellant avers that he became aware, for the first time, as regards the suit having been decreed, only in December, 2013.

3.5 Pertinently, in the interregnum, an *ex parte* judgement and decree had come to be passed on 24.05.2012.

3.6 It is, thereafter, that the appellant filed the applications, referred to above. I am informed that application under Order 9 Rule 13 of the CPC, accompanied by an application under Section 5 of the Limitation Act, were filed on 20.02.2014. This fact is not disputed by the counsel for the respondent/ plaintiff.

4. It is in this background that the impugned order dated 09.09.2014 came to be passed whereby, the said applications were dismissed.

5. Mr Abhijat, who appears for the appellant, submits that the appellant, who is a scientist, was rather naive in leaving the affairs pertaining to his defence entirely in the hands of his advocate Mr. Uday Vir Singh Tanwar. Learned counsel submits that being unaware of the court procedures, the appellant placed faith in his advocate that he would fully and truly take care of his interest. Mr. Abhijat, in sum, submitted that at least, one chance be given to the appellant, by the court, to defend his case on merits.

6. On the other hand, learned counsel for the respondent/ plaintiff submitted that there was nothing on record to show that the court staff

posted at the trial court had indicated to the appellant, on the day he put in his appearance (i.e. 14.09.2011), that they would, thereafter, once again issue him a notice of hearing. This submission, according to the learned counsel, was made up. Furthermore, the learned counsel also stressed the fact that the factum of engagement of Mr. Uday Vir Singh Tanwar as appellant's advocate was in doubt. In all, it was the submission of the learned counsel for the respondent / plaintiff that the stand taken by the appellant seemed incredulous and, therefore, the trial court order ought not to be disturbed.

7. Having heard the learned counsels for the parties, what has clearly emerged, is that, the appellant did appear before the trial court on 14.09.2011. It is also not in dispute, as indicated above, that he had appended his signatures on the order sheet generated on that date. Thereafter, it appears, the appellant did not take any robust interest in the presentation of his defence to the suit. The reason for such, apparent, laxity would have emerged, if Mr. Uday Vir Singh Tanwar, was alive. However, the appellant's misfortune stands compounded by the fact that Mr. Uday Vir Singh Tanwar has expired in the meanwhile. The learned counsel, I am told, died on 02.03.2013.

7.1 It is, however, no-one's case before me, that between 02.03.2013 and December, 2013, appellant had either the knowledge or the ways and means of acquiring the knowledge with regard to the fact that an *ex parte* judgement and decree had been passed against him on 24.05.2012. Therefore, the appellant's stand that he became aware of the *ex parte* judgement only in December, 2013; a claim which is backed by an affidavit, would have to be believed. The appellant appears to have taken

steps thereafter, though not with alacrity, but within a reasonable time frame.

7.2 It is trite to state that for an applicant (in this case the appellant) to succeed in an application filed under Order 9 Rule 13 of the CPC, for setting aside an *ex parte* decree, he would have to satisfy the court that his case falls in either one of the two categories. First category being: where an applicant claims that summons were not duly served upon him. The second category pertains to a case where an applicant seeks to demonstrate before the court that he had “sufficient cause” for not appearing on the date when the suit was called out for hearing.

7.3 It is quite obvious that if the case falls in the first category, it would naturally be a sufficient cause for non-appearance before the court on the date when the suit is called out. In the instant case, though the appellant was duly served, so his case would not fall in the first category. The appellant has, in fact, pleaded “sufficient cause” for non-appearance, in point of time, when the suit was called out for hearing.

7.4 It goes without saying that ordinarily courts have taken a liberal view on applications filed under Order 9 Rule 13, as an endeavour is made to render a decision on merits. Therefore, an application under Order 9 Rule 13 is ordinarily allowed unless there is delay in moving such an application which is deliberate, intentional or malafide.

7.5 The narration of facts set out hereinabove, would show that the delay in this case was neither deliberate nor intentional or even malafide. A large part of the delay occasioned on account of the lawyer, engaged by the appellant, not following the case. It is not to say that whenever delay is occasioned on account of acts of omission or commission of the lawyer,

that it would be condoned, in routine, by the court. What is required to be assessed though, is the entire gamut of facts and circumstances which obtained in a case which would include the conduct of the lawyer. [See *State of Haryana vs Chandra Mani & Ors (1996) 3 SCC 132*].

7.6 In this particular case the lawyer, as noted above, has passed away. Much of what has been stated by the appellant has come on record by way of averments made in the application under Order 9 Rule 13 of the CPC, which is supported by an affidavit. My sense is that, there is a ring of truth in what the appellant has stated in the application filed under Order 9 Rule 13 of the CPC as also the accompanying application preferred under Section 5 of the Limitation Act. Thus, in my opinion, the appellant has established sufficient cause for non-appearance.

8. Thus, having regard to the overall circumstances, I am persuaded to set aside the order dated 09.09.2014 subject to imposition of costs for the laxity shown by the appellant which has, if nothing else, resulted in respondent/ plaintiff incurring costs in the matter and having to wait for culmination of its action. Accordingly, impugned order dated 09.09.2014, and the *ex parte* judgement and decree dated 24.05.2012, are set aside. The appellant will, however, pay a sum of Rs. 7500/- to the respondent/ plaintiff within a period of two weeks from today towards costs.

9. In view of the above the parties and their counsels shall appear before the trial court on 28.08.2015. The appellant will carry his written statement to the court and file the same with the trial court, on the date set out above. The trial court will, on that date, set down in the time table for conclusion of proceedings and while doing so shall bear in mind the fact that a delay of four (4) years has already occurred in the matter. The trial

court will ensure that the suit is disposed of within a period of one year from today.

10. The appeal is, accordingly, disposed of.

11. Dasti.

RAJIV SHAKDHER, J

AUGUST 04, 2015

kk