

\$~4

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

%

Date of Decision : February 23, 2016

+

FAO(OS) 536/2015

KISHAN LAL

..... Appellant

Represented by: Mr. Bahar U. Barqi, Adv.

versus

VEENA KUMARI

..... Respondent

Represented by: Ms. Renu Verma, Adv. with
Mr. D. S. Vohra, Adv.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (ORAL)

1. Yet another instance of extreme supine negligence by a learned member of the Bar, bordering on professional misconduct, in respect of which conduct we find that the Bar Council of Delhi has taken cognizance of a complaint made by the appellant.

2. Veena Kumari, the plaintiff of the suit and the respondent in the appeal, is the wife of one Ramesh Kumar who is the brother of the appellant : Kishan Lal, impleaded as the defendant in the suit. As per Veena Kumari, the property bearing Municipal No. 48, Block-D, Prashant Vihar, ad-measuring 80.78 square meters was owned by her father-in-law : late Sh. Bal

Kishan. As per her, Bal Kishan had executed a will on December 26, 1991 bequeathing the property in favour of her husband Ramesh Kumar, and therefore on the death of Bal Kishan on June 23, 1996, her husband became the owner of the property. On the strength of the will, her husband sold the property to her and thus she became the owner of the property. As per her, late Shri Bal Kishan had permitted the appellant, being his son, to live on the first floor of the property as a licensee. We understand the pleading to mean that the possession was permissive without any consideration to be paid by the son to the father. Pleading further that after her father-in-law died, in view of the will dated December 26, 1991, her husband sold the property to her she pleaded that she revoked the permission granted by her father-in-law and called upon the appellant to vacate the premises in his possession and since he did not do so she was constrained to file the suit seeking possession and damages for unauthorized use and occupation.

3. Admitting the suit on December 23, 2009, summons were directed to be served upon Kishan Lal returnable for February 19, 2010, on which date the learned Judge being on leave, the Court Master adjourned the suit to May 12, 2010.

4. In the interregnum, on March 12, 2010 a written statement was filed by the appellant along with reply to an application filed by Veena Kumari praying for interim orders. Documents on which the appellant relied were also filed. An application was also filed praying for delay in filing the written statement to be condoned. All were filed under a common index.

5. The Registry raised an objection concerning some documents which were in vernacular, requiring the same to be translated. Proper court fee being not affixed upon the vakalatnama filed, as also the interim application

filed praying that delay in filing the written statement be condoned was another objection raised. The affidavit required to be filed in support of the written statement, being not attested by an Oath Commissioner was also an objection raised. Therefore, the written statement was not placed in the suit file. It continued to lie in the filing counter requiring the learned counsel engaged by the appellant to take back the same and re-file it after removing the objections.

6. The counsel Pankaj Malik, was thus to ensure that the written statement, reply to interim application as also the application praying for delay to be condoned in filing written statement were taken back from the Registry of this Court and re-filed after removing the objections.

7. As regards the appellant, having entrusted the brief to the counsel, the appellant would be entitled to the benefit of showing due diligence in taking such steps which a litigant needs to take when served with summons in a suit.

8. On May 12, 2010 one Mr.Ketan Malhotra appeared for the appellant and was informed by the learned Single Judge that the written statement was not on record and thus steps should be taken to ensure that the written statement was brought on record. Hearing was deferred to August 30, 2010 before the learned Joint Registrar, on which date once again Mr.Ketan Malhotra appeared. The learned Joint Registrar informed the counsel that the written statement was yet to be brought on the record. Learned Joint Registrar noted that the replication had been filed and was placed in the judicial file. Hearing was deferred for parties to admit/deny respective documents filed and relied upon. The next date fixed was for November 26, 2010, on which date, once again Mr.Ketan Malhotra appeared for the

appellant and was informed once again that the written statement was not brought on record nor were the documents filed by the appellant. Imposing cost in sum of ₹5,000/- the suit was listed for February 02, 2011 for parties to conduct admission/denial of the documents by the other party as also for the appellant to ensure that the written statement was brought on record after objections were removed.

9. On February 02, 2011 neither was written statement brought on the record after removing the objections nor did the counsel appear before the learned Joint Registrar. The learned Joint Registrar placed the matter before Court on May 20, 2011, on which date once again nobody appeared for the appellant. The appellant was proceeded against ex-parte. It was noted by the learned Judge that despite cost imposed the written statement filed in the Registry which was returned with objections was not re-filed after curing the defects. The plaintiff was directed to lead ex-parte evidence. Matter was placed before the learned Joint Registrar for recording of evidence on August 23, 2011. On said date the learned Joint Registrar recorded plaintiff's ex-parte evidence and listed the suit before the Court for November 02, 2011, on which date the ex-parte decree was passed against the appellant.

10. The decree being put into execution, the appellant filed IA 16571/2012 invoking Order 9 Rule 13 of the Code of Civil Procedure. The said application was accompanied by IA 16572/2012, invoking Section 5 of the Limitation Act, 1963. The two applications were listed before the learned Joint Registrar on September 07, 2012 and notice was issued to the plaintiff returnable for February 05, 2013. The matter lingered on after the decree holder i.e. plaintiff was served. Reply was filed to the two

applications.

11. On August 04, 2015 both applications were dismissed by the learned Single Judge.

12. History written in the order-sheets from the date when the suit was filed till when ex-parte decree was passed has been noted by the learned Single Judge to highlight that the appellant was served; the appellant's claim to have filed a written statement, but taking no steps to ensure that the objections listed by the Registry were cured and the written statement was brought on record. The learned Single Judge has highlighted that till when the counsel for the appellant disappeared on February 02, 2011, enough opportunities were given by the Court to cure the defects in the written statement filed. The learned Single Judge further noted that on April 27, 2012, Mr.Pankaj Malik, Advocate and his associate Mr.Pramod Kumar Oberoi had inspected the suit file. The learned Single Judge further noted that thereafter on June 02, 2012, August 28, 2012 and October 10, 2012 one Mr.A.Tewari, Advocate had also inspected the suit file. The learned Single Judge noted that the vakalatnama executed in favour of Mr.A.Tewari had been filed on October 18, 2012. The learned Single Judge has noted that thereafter the applications were filed in the Registry on August 21, 2012. The learned Single Judge has noted that the admission in paragraph 17 of the application of the fact that the appellant learnt about the ex-parte decree when counsel inspected the suit file on April 27, 2012 would require the appellant to explain why the applications were filed after 11 months thereof. Finding no explanation the two applications have been dismissed by the learned Single Judge.

13. Learned counsel for the respondent relies upon a decision of the

Supreme Court reported as (2015) 1 SCC 680 H.Dohil Constructions Co. (P) Ltd. Vs. Nahar Exports Ltd., wherein delay in re-filing the appeals of 1727 days, liberally condoned by a Division Bench of this Court, was held not to be condonable.

14. Learned counsel for the respondent would therefore urge that as in the case before the Supreme Court where the counsel was negligent in not removing the objections by the Registry and re-filed the appeals after 1727 days, similar was the position here albeit with the time span being lesser.

15. The decision relied upon by the learned counsel for the respondent would evince that the Supreme Court found negligence by the party in addition to the negligence by the counsel on account of the fact that requisite court fees had not been paid in the memorandum of appeals and this was to the knowledge of the client, requiring the client to pay court fee and get removed the objections from the Registry. The defect in the filing, was of the kind which was to the knowledge of the client. The observations of the Supreme Court in relation to the maxim *vigilantibus non dormientibus jura subveniunt* i.e. law assists those who are vigilant and not those who sleep over their rights, have to be understood with reference to the facts of the said case.

16. From the facts noted by us hereinabove it is evident that the appellant did what was required to be done by a litigant. Served with the summons in the suit the appellant contacted the counsel, paid the fee, which we presume was paid. Got drafted the written statement, signed and verified the same. Vakalatnama in favour of the counsel was executed. Documents relied upon were handed over. The counsel thereafter was negligent.

17. Law treats negligence by an agent distinctly vis-a-vis negligence by a

party. Negligence by the agent, if adversely affects the principal, is condoned more liberally.

18. Though bitter, but the truth is, a perception in the minds of the citizens of this Country that the Court proceedings linger on for decades the litigants would be justified in going into a slumber awaiting instructions from their lawyer to contact the lawyer for further instructions.

19. The nature of the claim as also the defence is a factor to be kept in mind when rights of parties are adversely affected due to lapses by their counsel. The written statement brings out the ancestral nature of the property, which would raise a serious challenge to the very right of late Shri Bal Kishan to have executed the will in favour of his son. The fact that without a probate, on the strength of the will the sale-deed had been executed by Bal Kishan in favour of one son also has to be taken into note.

20. Knowledge attributed to the appellant by the learned Single Judge when suit file was inspected by Mr.Pankaj Malik, Advocate on April 27, 2012 overlooks the fact that the same counsel was the negligent counsel, and we have no evidence that Mr.Pankaj Malik met the appellant and informed that the suit had been decreed against him ex-parte.

21. After-all, human nature is to hide ones mistakes as also negligence. Thus, knowledge to the appellant of the ex-parte decree with reference to the inspection of the suit file carried out by Mr.Pankaj Malik is a wrong finding returned by the learned Single Judge.

22. The facts of the instant case bring out a tale of miseries for the appellant and he being let down by his counsel.

23. The totality of the facts noted hereinabove warrant discretion to be exercised in favour of the appellant for the reason the appellant has

explained sufficient cause for setting aside of the ex-parte decree as also sufficient cause to condone the delay in filing the application seeking setting aside of the ex-parte decree.

24. The plaintiff needs to be recompensed. Here lies the dilemma for the Court. It is the negligent party which has to recompense the one to whom injury is caused. The negligent party is the counsel. The facts of this case bring out the urgent need to start imposing personal cost on lawyers for being negligent in not acting properly for their clients and not taking ministerial steps to ensure, as in the instant case, that the written statement filed is cured of the defective filing. We hope that the occasion never arises when a Court would be compelled to impose personal cost on a learned member of the Bar. Why should the appellant bear the burden of the cost to recompense the plaintiff the loss occasioned due to delay in disposal of the suit, which would be the direct result of the ex-parte decree being set aside. At this stage, learned counsel for the appellant states that the appellant would recompense the plaintiff ₹25,000/- for the inconvenience caused.

25. We dispose of the appeal setting aside the impugned order dated August 02, 2015. IA Nos. 16571/2012 and 16572/2012 are allowed. Delay in seeking setting aside of the ex-parte decree dated November 02, 2011 is condoned. For the reasons explained and finding the same to be sufficient cause, we set aside the ex-parte decree dated November 02, 2011.

26. We note that the written statement which was filed by the defendant along with the documents has been filed by the learned counsel for the defendant under cover of IA No.1914/2015. We also dispose of said application, in which prayer made to the learned Single Judge is to take the additional documents on record. The additional documents were simply

three : the index containing the written statement along with list of documents (with documents enclosed), and reply to the application seeking interim injunction as also the application praying for the delay in filing the written statement to be condoned. We find that the objections raised by the Registry were not to the written statement but to the documents with reference to some of them in vernacular and translated copies thereof not being filed. The objection was also to the vakalatnama as also the application filed by the appellant seeking delay to be condoned in filing the written statement. The two were not stamped properly. There is also an objection to the affidavit in support of the written statement not being duly attested.

27. To untie the knot, we condone the delay in filing the written statement permitting the appellant to take curative action by filing a fresh affidavit required as per law in support of written statement duly sworn before an Oath Commissioner. The documents filed along with the written statement under cover of index dated March 12, 2010 are taken on record with a direction that either exemption be sought from filing English translation of the documents in vernacular or to have the documents translated and filed the translated version thereof. Needful shall be done by the appellant within six weeks from today.

28. CS(OS) 2527/2009 shall be listed for directions before the learned Single Judge on March 08, 2016.

29. We note that the value of the suit for the purpose of jurisdiction is ₹22 lacs. The suit would require to be transferred to the District Court. The suit property in respect of which possession, damages/mesne profits are claimed is situated at Prashant Vihar. The suit file would be transferred to such

District Court within whose territorial jurisdiction the suit property is situated.

30. The appeal is disposed of.

CM No.20751/2015

Dismissed as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

FEBRUARY 23, 2016
km