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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 10th October, 2019

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CM (M) 628/2019 & CM APPL. 18997/2019

ITIHAD MOTORS PVT LTD.

..... Petitioner

Through: Mr. R. K. Saini and Ms. Bhavana
Jain, Advocates. (M: 9350255162)

versus

PARAS DASS JAIN CHARITABLE TRUST

..... Respondent

Through: Mr. Siddharth Aggarwal, Advocates.
(M: 9871588350)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition has been filed seeking setting aside of the impugned order dated 23rd January, 2019 and consequential setting aside of the judgment/order dated 3rd October, 2013 by which the suit for possession filed by the Respondent/Plaintiff (*hereinafter*, “*Plaintiff*”) was decreed.

2. The brief background is that the Plaintiff, which is a charitable trust, filed a suit for possession, *mesne* profits and damages against the Petitioner/Defendant (*hereinafter*, “*Defendant*”) in respect of the plot of land situated in Khasra No.429/61, Village Azadpur, Delhi (now forming part of Kewal Park Extension, behind Power House, Azadpur, Delhi) (*hereinafter*, “*suit property*”). The suit was instituted on 14th November, 2002. Issues were framed in the suit on 16th October, 2003. The Plaintiff concluded its evidence on 16th May, 2012. Opportunity was given to the Defendant to cross-examine the Plaintiff’s witness, which opportunity was not availed as the Defendant did not appear on 24th August, 2012 and 7th February, 2013.

3. On 7th February, 2013, the Court proceeded *ex-parte* and listed the matter for *ex-parte* Plaintiff's evidence.
4. The decree was, thereafter, passed on 3rd October, 2013. The operative portion of the judgment/decreed is set out herein below:

“17. In view of the aforesaid discussion, the plaintiff is held entitled to the relief of recovery of possession of the suit property i.e. plot of land shown in red in the site plan Ex.PW1/2 situated in Khasra No.429/61, Village Azadpur, Delhi-33, now forming part of Kewal Park Extension, behind Power House, Azadpur, Delhi. The plaintiff has not specifically sought the relief of mandatory injunction therefore no direction can be given to the defendant to remove the structures, which plaintiff would have liberty to do but at its own expense. The defendant may remove its belongings/articles from the suit property within 30 days from today. Plaintiff is also held entitled to relief of recovery of mesne profits/damages however at the rate of Rs.400/- per month from 01.07.2002 till the date of handing over of vacant possession of the suit property along with simple interest @ 8% per annum thereon. The relief of arrears of rent claimed by the plaintiff does not survive since the rent for the period claimed already stands deposited in the court of Ld. ARC which plaintiff is at liberty to withdraw as per law, if not so done already. Since damages have also been assessed @ Rs.400/- per month therefore the amount deposited by defendant till 31.01.2003 (and starting from 01.07.2002) before the court of Ld. ARC shall be adjusted towards mesne profits/damages however for the period starting 01.07.2002 defendant is liable to pay simple interest @ 8% per annum till date of handing over vacant possession. The suit of the plaintiff is thus accordingly decreed. Site plan Ex.PW1/2 to form part of decree. Parties to bear their own costs.

18. Decree sheet be prepared accordingly. Decree to be executable on payment of deficient court fees on the pendentelite mesne profits awarded.”

5. The Defendant thereafter moved an application under Order IX Rule 13 CPC primarily taking the ground that it had an employee, namely, Mr. Narender Upreti, who had been handed over the responsibility of doing the *pairvi* of the case. However, Mr. Upreti did not conscientiously follow up the matter and till December, 2014 the Defendant was not aware that the suit has been decided. Thus, the application under Order IX Rule 13 CPC came to be filed in January, 2015. The said application was decided by the Trial Court vide order dated 18th January, 2018. The findings of the Trial Court were that neither had Mr. Upreti ever appeared before the Court, nor was he the authorised representative of the Defendant. Further, the Trial Court came to the conclusion that on several occasions, the Managing Director and other Directors of the Defendant were present in Court. Thus, they had complete knowledge of the suit. The Defendant having had knowledge of the suit, the Trial Court found that there was no justification for non-appearance in the matter and for not filing the application under Order IX Rule 13 CPC in time. The Trial Court concluded in paragraph 7 that the application is bereft of merit and finally, also dismissed the application on merits.

6. This order of the Trial Court, dated 18th January, 2018, was challenged by way of appeal. In the appeal, on 23rd January, 2019, the Appellate Court confirmed the order passed by the Trial Court. The findings of the Appellate Court are that no fault could have been found with the order of the Trial Court. The Appellate Court found that the counsel for the Defendant had continuously been appearing in the matter and had suddenly stopped appearing. Thus, his client also had knowledge of the case and

could not have blamed the counsel. The present petition also challenges the said order.

7. The submission of Mr. R. K. Saini, Id. counsel appearing for the Defendant is that the Plaintiff had itself delayed its evidence from 2002 till 2012, when the affidavit of PW-1 was tendered for the first time. He submits that for defaults only on two dates, the Defendant has been punished in a disproportionate manner. The endeavour of the Court should be to decide the matter on merits and not merely on technical and procedural issues. He submits that his client has been occupying the suit property for more than 40 years and the suit was, in fact, followed-up by his client with utmost diligence. The default of the counsel was not even within the knowledge of the Defendant, who should, therefore, not be made to suffer on account of non-appearance of the counsel. He submits that the Plaintiff's delay in leading the evidence has been countenanced by the Trial Court, however, the Defendant has been penalised extremely heavily. The order sheets show that the Defendant has not delayed the matter in any manner.

8. On the other hand, Id. counsel for the Plaintiff submits that his first and foremost objection is that the application under Order IX Rule 13 CPC is not accompanied by any application for condonation of delay. He relies on Article 123 of the Limitation Act, 1963, which prescribes a limitation period of thirty days from the date of the ex-parte decree or in cases where summons/notice was not issued, the date when the applicant had knowledge of the ex-parte decree. He submits that this was not a case where the Defendant was not served with the summons and hence there is deemed knowledge of the date of decree *qua* the Defendant. Thus, in the present case, since the Defendant always had knowledge of the proceedings, the

limitation period should be calculated from the date of the decree. As the application under Order IX Rule 13 CPC was not even accompanied with an application for condonation of delay, it could not have been entertained. He further submits that the Trial Court has arrived at the categorical conclusion that the entire story in respect of Mr. Upreti is merely an excuse which the Defendant sought to rely upon in order to cover up the delay in filing the application.

9. Ld. counsel relies upon two authorities i.e., *M/s. Bhagwan Dass Bros. v. Ghulam Ahmed Dar and Ors.*, AIR 1992 Delhi 22 and *Dr. Jagdish Prasad v. Satya Narain Singh & Ors.*, AIR 1982 Patna 37 to support his argument that if the application for condonation of delay is not filed, the application under Order IX Rule 13 CPC is not liable to be entertained.

10. He further relies upon the judgment of the Delhi High Court in *Gloria Chemicals v. R. K. Cables and Ors.*, AIR (1988) Delhi 213 to submit that even if it is presumed that the counsel was in default, the application under Order IX Rule 13 CPC is silent as to what action the Defendant took against its earlier counsel. Thus, the same is not a ground to set aside the decree.

11. This Court has heard the submissions of the counsels for both parties and has perused the order sheets. A perusal of the proceedings before the Trial Court clearly shows that the suit was instituted in 2002 and PW-1's evidence was recorded in 2012. The order dated 16th May, 2012 records that PW-1 has tendered his evidence and the counsel for the Defendant seeks time to go through the file. On 24th August, 2012, none was present on behalf of the Defendant and costs of Rs.1,000/- were imposed by the Court upon the Defendant. Again, on 7th February, 2013, the Court awaited the counsel for the Defendant and called the matter in three rounds. Even on the

third call, when none appeared for the Defendant, the Court proceeded against the Defendant *ex-parte*. Thereafter, the final judgment has been delivered by the Trial Court only on 3rd October, 2013. Admittedly, the application under Order IX Rule 13 CPC was filed only on 16th January, 2015 i.e., two years after the *ex-parte* decree was pronounced. In the application, there is no reason given whatsoever to explain the delay between 2013 to 2015. The application is completely cryptic and does not explain what the Defendant did to establish due diligence between 2013 to 2015. No facts have been pleaded to justify non-appearance. The only explanation given is that the Defendant acquired knowledge of the order passed by the Court only in December, 2014, when its so called employee informed the Defendant about the disposal of the suit.

12. Mr. Saini, Id. counsel, fairly concedes that there was no application for condonation of delay filed alongside the application under Order IX Rule 13 CPC. The counsel appearing for the Plaintiff is right in his submission that in the present case, knowledge of the decree would not be taken from the date of the decree as this was a case where the Defendant was served and had appeared before the Trial Court. This was not a case where summons was not served upon the Defendant and the decree came to be passed *ex-parte*. Thus, without an application for condonation of delay, the application under Order IX Rule 13 CPC could not be entertained by the Trial Court. This is clear from a perusal of ***Bhagwan Dass (supra)***, the relevant portion of which reads as under:

“22. The application under O. 9, R. 13, C.P.C. has been filed 37 days after 27-7-90 when the I.A. 2278/89, being objections to the award were dismissed. As noticed above, no application for condonation of delay

has been filed. Mr. Issar submitted that the application was within time because the fact of the dismissal of the objections on 27-7-90 was learnt only on 31-8-90 and within three days thereafter the application under O.9 R.13, C.P.C. was filed. He submitted that the period of limitation would run from the date of knowledge and referred to Art.123 of the Limitation Act, 1963 in support of this contention. Under this Article, the period of limitation prescribed is 30 days for setting aside the ex parte decree from the date of the decree or where the summons/notice were not duly served then from the date of the knowledge of the decree. Even if it is assumed that the decree in question is an ex parte decree, the period of 30 days started running from the date of decree. This is not a case which can be covered from the date of the knowledge of the decree because it is not the case of the applicant that the decree was passed without service of summons/notice. Unfortunately this article does not help the applicant and the application is late by seven days. Mr. Issar was not able to show me any other provision or authority under which the application could be said to be in time. As noticed above no application under S.5 of the Act has been filed. Therefore, I am constrained to dismiss the application under O.9, R.13, C.P.C., as being barred by time.

23. In view of the fact that I have held that the application is barred by time, there is no need to consider the arguments of Mr. Kanwal Narain that the application does not show any sufficient cause and, therefore, deserves to be dismissed on merits. It is also not necessary to go into the question that the decree is an appealable decree in view of S. 39(1)(vi) as contended by Mr. Kanwal Narain. Even if the decree was appealable the application under O. 9, R. 13; if otherwise maintainable or within time; would not have been rejected merely because the decree was appealable.”

In paragraph 7 of the impugned order dated 23rd January, 2019, The Trial Court notices that the application is barred by limitation. However, it goes on to consider the reasons given by the Defendant even on merits.

13. Jurisdiction under Article 227 of the Constitution of India is limited to seeing that the Trial Court or the Appellate Court is not erroneous in law. A perusal of both the impugned orders shows that the application has been considered in accordance with law and on merits. Having not found any justification for the delay, the Trial Court has dismissed the application. The judgments in *M/s. Bhagwan Dass (supra)* and *Dr. Jagdish Prasad (supra)* are clear that without an application for condonation of delay, the application under Order IX Rule 13 CPC is not liable to be entertained.

14. Even otherwise, the present suit was instituted in 2002, the decree for possession has been passed after almost 11 years and the application for setting aside the *ex-parte* decree has been pending since 2015. The present is not a case where the Court finds it equitable to set aside the decree, which has been passed after the lapse of such a long period. The Defendant has not given any reasons for non-appearance and defaults. There is no ground for entertaining the application under Order IX Rule 13 CPC. The application has been rightly rejected by the Trial Court. The present petition is, thus, liable to be dismissed and is ordered accordingly. All pending applications are also disposed of. There shall be no orders as to costs.

PRATHIBA M. SINGH
JUDGE

OCTOBER 10, 2019/dk