

(1995) 07 DEL CK 0092

Delhi High Court

Case No: Interim Application No"s. 574 of 1994 and 3640 of 1995 and Suit No. 24 of 1992

Jayanti Prashad Gupta

APPELLANT

Vs

Deep Chand and Others

RESPONDENT

Date of Decision: July 1, 1995

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- General Clauses Act, 1897 - Section 27
- Limitation Act, 1963 - Article 123

Citation: (1995) 59 DLT 737 : (1995) 35 DRJ 85

Hon'ble Judges: N.G. Nandi, J

Bench: Single Bench

Advocate: S.S. Vats, Ramesh Chandra and Anand Yadav, for the Appellant;

Judgement

N.G. Nandi, J.

(1) By I.A. No. 574/94 under Order 9 Rule 13 Cpc, the applicants (original defendants No.1 to 6) pray for setting aside the ex parte decree dated 26.5.1993 passed in favor of the opponent (original plaintiff). By I.A. No. 3640/95 u/s 5 of Limitation Act, these applicants also pray for condensation of delay caused in filing is No. 574/94 if the court comes to the conclusion that I.A. 574/94 is barred by time.

(2) The opponent (original plaintiff) filed Suit No. 24/92 against these applicants and two other defendants for recovery of certain amount and permanent injunction; that the said suit came to be decreed ex parte on 26.5.1993 against these applicants and that as far as these applicants are concerned, the summons of the suit, attempted to be served by Registered Ad Post, returned with the endorsement "Refused" whereas the summons by ordinary process, as per the endorsement on the summons, were accepted by the brothers of the defendants, except one of the defendants.

(3) One of the contentions by Mr. Ramesh Chandra, counsel for the applicants, is that defendants No. 1 to 6 are not duly served with the summons of the suit since service to the brother of defendants is no service in eye of law; that service of summons had to be personally to the defendants or to any adult member of the defendants' family and the brother of defendants is not a member of defendants' family. It is further submitted that if the defendants are served with summons then there is no reason for the defendants not to appear before the court and contest the suit when he had contested the proceedings u/s 20 of the Arbitration Act.

(4) Order V Rule 12 CPC provides that where it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case, service on such agent shall be sufficient. In the instant case, the person on whom the summons are served by ordinary process, is not the agent of the defendants, even according to the opponent nor the persons on whom summons are served can be said to be the family members of the defendants and so the service by ordinary process can not be regarded as due service of summons to the defendants as contemplated under the law.

(5) It may be appreciated that in the instant case, the summons are also said to have been served by registered post in addition to the personal service. In the instant case, admittedly, the postal covers containing summons of the suit have been returned with the endorsement "Refused".

(6) One of the argument of L.A. Shri Ramesh Chandra is that each of the envelope sent by registered post, looking to its weight, cannot be said to contain copy of the plaint as required under Rule 2 Order 5 CPC and Therefore, the refusal by the defendant would be justified. It is further contended that the applicants had no opportunity to rebut the presumption with regard to the service of summons by post. On these two grounds, applicants challenge the service of summons by registered post. The envelopes, referred to by the applicants are to be found on record. I have perused the envelopes. All these envelopes are sealed and closed and each having postal stamps of Rs.14.00 affixed. All these envelopes, 14 in number, although the applicants were defendants No. 1 to 6, contain the endorsement "Refused". Now without opening the envelopes, it would not be possible to know whether envelopes contain the copy of the plaint or not and by its weight, it can not be presumed that the envelopes must not be containing copy of the plaint. Even assuming that the envelopes do not contain copy of the plaint in that case under proviso to Rule 13 Order 9 Cpc, it can be regarded at the most an irregularity in the service of summons and for that, the defendants can not be said to be justified in refusing the postal article tendered to them, namely, the envelopes on record, for the purpose of service of summons in the suit to the defendants. Under the circumstances, it can not be presumed that the envelopes did not contain copy of the plaint and Therefore, the defendant was justified in refusing the service of these postal articles by postal authority. The very endorsement "Refused" imply tender of

article for service by the postman concerned and thereafter the refusal to accept the same by the addressee then only the endorsement of "Refused" would appear on the postal article.

(7) It is pertinent to note that it is not the say of the applicants that the postal envelopes suggesting the endorsement "Refused" do not contain the correct name of each of the applicants and their usual place of residence. In the case of [Jagdish Singh Vs. Natthu Singh](#), , considering the provisions contained in Section 27 of the General Clauses Act, it has been observed that the notices must be presumed to have been served, as contemplated by Section 27 of the General Clauses Act". Under the circumstances, I am not inclined to accept the contention of the applicants that the summons in the suit were not duly served on the defendants by registered post and as contemplated u/s 27 of General Clauses Act, the summons in the suit are presumed to have been duly served on the defendants.

(8) The limitation prescribed for the purpose of setting aside an ex parte decree is 30 days from the date of the decree in cases where the summons are duly served and in cases where the summons or notice was not duly served, then the period of limitation would be 30 days from the date of the knowledge of the decree. In the instant case, since the defendants are shown to have been duly served with the summons in the suit, the period of limitation under Article 123 of the Limitation Act for the purpose of setting aside ex parte decree would be 30 days from the date of the decree. The application under Order 9 Rule 13 CPC i.e. is 574/94 has been filed on 17.1.1994. The ex parte decree in S.No.24/92 has been passed on 26.5.93 so the said application is per se barred by limitation, as provided under Article 123 of the Limitation Act.

(9) As far as is 36740/95 under Sec.5 of Limitation Act for condensation of delay in filing is 574/94 is concerned, it has been filed on 25.4.95. As far as sufficient cause u/s 5 of Limitation Act is concerned, the say of the applicants is that application under Order 9 Rule 13 is within limitation as summons of the suit were not duly served on the defendants, which contention has been found to be not acceptable for the reasons contained in the preceding paragraphs. Another ground for condensation of delay is that defendants had sufficient cause under Order 9 Rule 13 for not appearing in court when the case was taken up for hearing, inasmuch as, the applicants were kept in dark and misled by the opponent (plaintiff) and had no knowledge about the continuation of the proceedings of S.No.24/92 and also of exparte decree. It is also stated that the grounds stated for setting aside exparte decree in is 574/94 be treated as part of is u/s 5 Limitation Act. In other words, grounds for setting aside ex parte decree is also the sufficient cause for the purpose of Section 5 Limitation Act. In is 574/94 it is the say of applicants that after the dismissal of Suit No. 2976/89 u/s 20 of the Arbitration Act on 17.8.92, plaintiff approached the defendants and a compromise was worked out between the plaintiff and defendants and it was agreed that plaintiff would bring a purchaser or

land is sold through the plaintiff at a minimum of price agreed between the plaintiff and the defendants then the defendants will pay back the amount received by them under agreement dated 14.12.88 from the plaintiff in proportion to the respective share in the land and that the defendants were assured that plaintiff will not proceed with the case, as the matter was compromised and will not pursue the suit filed by him in this court; that believing the assurance given by the plaintiff, the defendant did not appear in the said suit. Otherwise, there was no reason for the defendants not to appear in the suit when they had earlier also contested the proceedings u/s 20 of Arbitration Act. Thus, according to defendants, it was because of the assurance by the plaintiff that they will not proceed further with the suit because of the compromise arrived at, the defendants did not appear in the suit and the plaintiff misleading and misguiding the defendants, obtained an ex parte decree in the suit and that is how the plaintiff played a fraud on the defendants as also on the court. This contention having been pressed into service by applicants for the purpose of Order 9 Rule 13 CPC as also for the purpose of Section 5 of Limitation Act, I would consider the same for both.

(10) It may be appreciated that according to the applicants, after the dismissal of S.No.2976/89 on 17.8.92, the plaintiff approached the defendants and compromise was worked out between the parties. The order dated 17.8.92 in S.No.2976/89, certified copy whereof has been produced, suggest that the said proceedings were u/s 20 of Arbitration Act for appointment of arbitrator; that in response to the notice, the respondents appeared before the court and objected to the petition contending that matter can not be referred to arbitration; that after the petition u/s 20 was filed, petitioner had also filed a regular civil suit in civil court for recovery of amount alleged to have been paid by him to the respondents; that in view of this development, the petition u/s 20 was found to becoming infructuous and the same accordingly was dismissed; that the said order was passed in presence of counsel for the parties who are also the parties in the present proceeding.

(11) The aforesaid order clearly suggests that the fact of plaintiff having filed civil suit in civil court for recovery of amount alleged to have been paid to him by the respondent. Thus, the plaintiff having filed the suit was sufficiently made known on 17.8.92 to the respondents who were also the parties to the suit, as clearly revealed from this order.

(12) In the suit, by Order dated 27.4.1992, the defendants were ordered to be proceeded against ex parte, as though they were duly served, yet none present on their behalf. The ex parte decree came to be passed on 26.5.93. By order dated 17.8.92 in S.No.2976/89, defendants had sufficient knowledge about the plaintiff having filed regular suit and pending before the civil court. When the civil suit filed by plaintiff was pending on 17.8.92 then what could be the reason for the plaintiff after the order dated 27.4.1992 to proceed ex parte against the defendants, to approach the defendant, as averred in paragraph 9 of is No. 574/94. It is not

probable that when plaintiff has filed the suit for recovery of the amount, allegedly paid to the defendants, he would approach the defendants for compromise and would try to bring a purchaser or that the land is sold. Now, if the plaintiff can find a purchaser for defendants' land and for which he had paid earnest money to the defendants, then why could plaintiff himself not purchase this land instead of finding some other purchaser or that the land is sold through the plaintiff. This story does not sound probable. Moreover, when the plaintiff had filed petition u/s 20 of Arbitration Act and during the pendency of that proceeding, the plaintiff also filed a suit for recovery of the amount paid as earnest money to the defendants, it was all the more necessary for the defendants to be vigilant especially when according to the defendants, the amount of earnest money paid by the plaintiff stood forfeited. It need hardly be said that a party to a lis has to be vigilant and careful and either party to the proceeding is not supposed to either lead or guide the other party. In other words, a party to a litigation would ordinarily misguide or mislead the other side. In order to set aside an order, on the ground of fraud, the fraud must have been practiced on the court and not on the party to the pending proceeding because the party to the proceeding is likely to be defrauded by the other side. Thus, the so called compromise arrived at with the plaintiff, as averred in para 9 of the petition, appears to be improbable and an excuse looking to the facts and circumstances stated above and the ground that the defendants were misled or misguided by the plaintiff and thereby prevented from appearing before the court, can not be accepted for the reasons, aforesaid.

(13) In my opinion, in fact, no sufficient ground has been made out for condoning the delay u/s 5 of the Limitation Act, inasmuch as the applicants have not been able to show the cause contemplated under the law to be sufficient cause for the purpose of condoning the delay in filing is under Order 9 Rule 13 CPC. As far as merits of application under Order 9 Rule 13 CPC are concerned, the applicants have not been able to show sufficient cause as envisaged under the law for the purpose of granting relief under Order 9 Rule 13 CPC.

(14) Thus, it follows from the above that the application u/s 5 of the Limitation Act does not suggest sufficient cause for the purpose of condoning the delay, as contemplated under the law. Even assuming that the delay caused in filing is under Order 9 Rule 13 CPC deserves to be condoned, even then the applicants (defendants) would not be entitled to have ex parte decree passed in the suit, set aside since on merits, Applicants (defendants) have not been able to make out any sufficient cause for the grant of relief under Order 9 Rule 13 CPC.

(15) In the result, I.A. 3640/95 and I.A. 574/94 are dismissed with costs.