

(2009) 07 DEL CK 0455

Delhi High Court

Case No: IA No"s. 9995 and 9996 of 2008 in CS (OS) 815A of 1998

Binod Engineering and
Mechanical Works

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision: July 6, 2009

Acts Referred:

- Arbitration Act, 1940 - Section 30
- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13, 139, 151
- Limitation Act, 1963 - Section 5

Citation: (2009) 161 DLT 76 : (2009) 156 PLR 21 : (2010) 8 RCR(Civil) 1809 : (2010) 7 RCR(Civil) 1944

Hon'ble Judges: S.N. Dhingra, J

Bench: Single Bench

Advocate: Chetan Sharma and D. Moitra, for the Appellant; J.M. Kalra, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Shiv Narayan Dhingra, J.

IA No. 9995 & 9996 of 2008

1. This application u/s 5 of the Limitation Act, 1963 read with Section 151 of the Code of Civil Procedure, 1908 has been made by the applicant/Judgment Debtor for condonation of delay in moving the application being IA No. 9996 of 2008 under Order 9 Rule 13 of CPC for setting aside the ex parte decree/judgment dated 15th March 2004.

2. The arbitration award dated 25th March 1998 was filed in the Court by the Arbitrator and notice of the award was sent to the applicant. The applicant filed

objections against the award u/s 30 of the Arbitration Act, 1940. However, the objections were dismissed by this Court for non prosecution as well as in default on 15th March 2004 and the award was made a rule of the Court on 15th March 2004 and the decree sheet was ordered to be prepared. The applicant made an application under Order 9 Rule 13 CPC on 14.08.2008 for setting aside order dated 15th March 2004 and also made an application for condonation of delay of 1550 days.

3. The applicant has made this application u/s 5 of Limitation Act stating therein that the applicant firm became non-functional sometime in the year 1998 due to differences and disputes between the partners, although all the partners were closely related as family members. The partners made allegations of mismanagement and misappropriation of funds against each other with the result that the operation of the firm became static and the firm had to be closed down from 1998 onwards. The office of the firm virtually closed down as there was no officer to take decision on legal/ business matters. There was no person to take care of the important notices and the papers served on the applicant. This suit was also one of such documents which remained unattended due to lack of proper instructions being given by the office of the applicant and hence no steps were taken in these proceedings by the advocate representing the applicant. The advocate for the applicant appeared in the Court up to 21st January 2004, as revealed from the record. There was failure of appearance thereafter which resulted into passing of the impugned judgment and decree dated 15th March 2004.

4. It is submitted by the applicant that Mr. Satish Kumar Jhunjhunwala, one of the partners of firm, had become physically unwell and was being affected by recurring ailments, so he could not attend the office of the firm nor he could participate in the business. He was, therefore, compelled to keep himself away from the affairs of the firm and it became difficult for him to take any initiative and to participate in the business of the applicant upto end of 2006. The health condition of Mr. Satish Kumar Jhunjhunwala improved and he slowly started participating in the business of the applicant. There was negligence on his part but it was due to physical infirmities and the award became decree of the court. Mr. Satish Kumar Jhunjhunwala came to know of the execution proceeding from Execution Case No. 119 of 2008 which was transferred to High Court of Calcutta under the orders of this Court in the end of July/1st week of August 2008 and a copy of execution proceedings was served upon him. On inquiries he came to know about the case and then instructed the counsel to make this application. It is submitted by applicant that the applicant had a good case on merits to get the decree dated 15th March 2004 set aside and it was due to closure and non operation of the firm and physical inability of Mr. Satish Kumar Jhunjhunwala to give instructions that an ex parte decree was passed in absence of the applicant. It is also submitted that the law firm engaged by the applicant did not inform the applicant about the decree having been passed and the applicant being in Kolkata could not pursue the case properly due to communication gap. It is

prayed that the reason for making the application under Order 9 Rule 13 with a delay of 1550 days have been sufficiently explained by the applicant and, therefore, the delay in filing the application under Order 9 Rule 13 should be condoned.

5. In reply, the non-applicant/decreed holder stated that the application does not disclose a cause for condonation of delay. The applicant did not even disclose a particular date when the applicant came to know about the dismissal of objections. The plea taken by the applicant that he came to know about the order only at the end of July/1st week of August, when a copy of execution petition was served on him is contrary to record. The respondent /decreed holder had written letter dated 3rd June 2006 to the applicant and sent it by registered post informing about the order of the Court and the amount to be recovered from the applicant. A notice of execution petition No. 231/2006 was served upon the applicant and the counsel for applicant put appearance on 12th January 2007, 6th February 2007 and on 17th April 2007, when this Court transferred the execution proceedings to Calcutta Court u/s 139 of CPC. Thus, the plea that the applicant came to know of the order in July/August 2008 was contrary to record and a false plea. The non applicant /decreed holder also denied the other averments made by the applicant regarding the firm having become non-functional from 1998 onwards due to differences and disputes between the partners. It is submitted that the notice /summons from the Calcutta High Court and from this Court were served upon the applicant only at the office address of the applicant and the applicant put appearance in this Court as well as in Calcutta High Court showing that the firm was very much functional and was taking care of all its affairs. The plea about the physical unwellness of Mr. Satish Kumar Jhunjunwala was also denied. The applicant had filed medical record of Mr. Satish Kumar Jhunjunwala along with this application and the counsel for the decreed holder took this Court through the medical record showing that Mr. Satish Kumar Jhunjunwala was not suffering from any serious disease or ailment so as to be incapable of working. The counsel for the non application also drew attention to the fact that Mr. Satish Kumar Jhunjunwala was a member of board of directors of M/s Victory Iron Works Limited. A copy of the notice of annual general meeting of this company and directors' report and other documents were placed on record showing that Mr. Satish Kumar Jhunjunwala was very much active in the company.

6. A perusal of objections u/s 30 of the Arbitration Act, 1940 filed by the applicant would show that the objections were accompanied by an affidavit of Mr. Akhilesh Kumar Jha, the manager of the applicant's firm. The affidavit was filed on 10th May 1999. In case the firm had been non functional from 1998 onwards as is contended and no officer of the firm was taking care of the affairs of the firm, these objections and affidavit accompanying objections would not have been in the Court. The very fact that the objections were filed in the Court on 10th May 1999 accompanied by the affidavit of one of the officers of the firm belies the entire stand taken by the applicant in the application for condonation of delay and shows that the plea taken by the applicant was absolutely a false plea. It is not the case of the applicant that

the applicant firm got dissolved on account of disputes inter se partners, or the disputes of the firm were taken to any court for settlement or any arbitrator was appointed. No record of the firm has been placed on record showing that the firm had stopped transacting business after 1998. The reasons given by the applicant in the application for condonation of delay are thus false on the face of it.

7. The medical record of Mr. Satish Kumar Jhunjhunwala also shows that he was very much hale and hearty. The fact that he was working as director in another company has not been denied. This also shows that the plea of ill health was a false plea. Even otherwise, according to applicant, the firm had following partners:

1. Shri Sant Kumar Jhunjhunwala
2. Shri Satish Kumar Jhunjhunwala
3. Shri Sajjan Kumar Jhunjhunwala
4. Shri Saroj Kumar Jhunjhunwala
5. Shri Ashish Kumar Jhunjhunwala
6. Smt. Usha Devi Jhunjhunwala

Even if one partner was unwell, the other partners could have acted for the firm. It is not the case of the applicant that Mr. Satish Kumar Jhunjhunwala was the only working partner and all other partners were sleeping partners. No partnership deed has been placed on record.

8. In view of the foregoing facts, I find no merits in the application u/s 5 of the Limitation Act for condonation of delay of 1550 days. The application is hereby dismissed. Accordingly, the application under Order 9 Rule 13 CPC also stands dismissed.