

(2009) 08 DEL CK 0407

Delhi High Court

Case No: I.A. No"s. 1556 and 10416 of 2009 in C.S. OS No. 1446 of 2004

Win Medicare Pvt. Ltd.

APPELLANT

Vs

K. Pharmaceuticals

RESPONDENT

Date of Decision: Aug. 31, 2009

Acts Referred:

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

Hon'ble Judges: Manmohan Singh, J

Bench: Single Bench

Advocate: Pravin Anand and Divya Vijen, for the Appellant; Neelam Nagpal, for the Respondent

Final Decision: Dismissed

Judgement

Manmohan Singh, J.

By this order I propose to dispose of I.A. No. 1556/2009 under Order IX Rule 13 read with Section 151 CPC for setting aside the ex parte judgment and decree dated 9th November, 2005 and I.A. No. 10416/09 u/s 151 CPC seeking condonation of delay in moving the application under Order IX Rule 13 read with Section 151 CPC.

2. The brief facts of the case are that the plaintiff filed a suit for permanent injunction restraining infringement of copyright, passing off, rendition of accounts of profits, delivery up etc. against the defendant M/s. K. Pharma Works, Jind-126102. The said suit was for the first time listed before court on 16th December, 2005 when the summons in the main suit and notices in the application were issued to the defendant returnable on 17th February, 2006. On the next date of hearing, Mr. Manoj Sharma, appeared on behalf of the defendant and sought time to file written statement and reply to the injunction application. The next date of hearing in the matter was fixed for 25th March, 2006. On 25th March, 2006 another opportunity was granted to the defendant to file the written statement and reply subject to

payment of costs of Rs. 10,000/-and the next date of hearing in the matter was fixed for 4th May, 2006.

3. On 4th May, 2006 no one appeared on behalf of the defendant and the defendant was proceeded ex parte. The plaintiff was directed to produce the ex parte evidence before the Joint Registrar on 23rd May, 2006. After producing the evidence before the Joint Registrar, the matter was listed before court on 9th November, 2006 and the suit was decreed in terms of Paras 19(a) and (c) of the plaint. The plaintiff has given up the other prayers 19(b) and (e) of the plaint. The court also granted the damages to the tune of Rs. 5,05,000/- in order to grant the relief as prayed in Para 19(f) of the plaint.

4. In the application filed by the defendant under Order IX Rule 13 CPC, it is contended that the defendant came to know about the disposal of the suit on 14th December, 2008 when the legal notice sent by the plaintiff's Counsel was received by the defendant's staff. The defendant thereafter contacted his Counsel but could not get any satisfactory reply. The defendant then filed a complaint before the Delhi Bar Council against his counsel. It is stated that there was no fault on the part of the defendant who had engaged Counsel and has also signed the written statement but for the reasons best known to the Counsel, he did not appear before the court nor informed the defendant about the matter and in fact the defendant was misled by the counsel. On merit, the defendant has also denied any infringement of copyright and passing of his goods as that of the plaintiff.

5. It is also contended that the defendant's business is on a very small scale, therefore, the damages granted by this court is too high. The defendant is a small firm and will not be able to pay the damages to the tune of Rs. 5,05,000/-.

6. In the present case, the Counsel for the defendant two times appeared before the court. One Mr. Manoj Sharma appeared before the court for the first time on 14th February, 2005 and another Counsel Mr. Vivek Malik appeared on 23rd March, 2005. The third Counsel Mr. Rohit Kishore also appeared on behalf of the defendant on 23rd May, 2005 after passing of the ex parte order before the Joint Registrar but the defendant have shown no interest in the matter except that the written statement was filed by one Counsel Mr. Rohit Kishore, Advocate on 23rd March, 2005. There is no representation by the defendant thereafter.

7. In another I.A. No. 10416/09 u/s 5 of the Limitation Act, 1963 almost same reasons have been assigned and the statements made in the application under Order IX Rule 13 CPC have been referred.

8. The learned Counsel for the defendant has argued that it is not the fault of the defendant as he has given the instructions to the Counsel to appear in the matter from time to time but he has misled the defendant. It is submitted by the Counsel that a complaint against the Counsel is also pending before the Bar Council of Delhi.

9. Learned Counsel for the defendant has referred various judgments in support of its contention which are given as under:

- (i) [N. Balakrishnan Vs. M. Krishnamurthy,](#)
- ii) [B.D. Jadhavar Vs. K.D. Bhagwan and Others,](#) .
- iii) Kamta Prasad v. Smt. Jaggiya AIR 1999 All. 184.
- iv) Malkiat Singh and Anr v. Joginder Singh and Ors. AIR 1998 SC 258.
- v) [Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi and Others,](#) .
- vi) Collector Land Acquisition, Anantnag and Anr v. Mst. Katiji and Ors. 1987 (4) SCC 365.
- vii) Nahar Enterprises v. Hyderabad Allwyn Lts. and Anr. Appeal (Civil) 714 of 2007.

10. On the other hand, the learned Counsel for the plaintiff opposed the applications filed by the defendant and has referred to Paras 6 and 7 of the judgment reported in Mahabir Singh v. Subhash and Ors. in Civil Appeal No. 4881/07 arising out of SLP (c) No. 9325/05.

11. Learned Counsel for the defendant however has agreed during the course of hearing to deposit the partial decretal amount before this court if the application of the defendant under Order IX Rule 13 is allowed and the defendant may be permitted to contest the matter on merit. Learned Counsel for the defendant further agreed that as far as the decree for permanent injunction for infringement of copyright and passing off is concerned, the defendant at this stage have no objection if the said interim order granted by the court may continue during the final disposal of the suit which may be decided on merit.

12. After careful consideration of the matter, I am of the view that since the defendant is agreed to deposit a partial decretal amount as well as to suffer an injunction pending the final disposal of the suit, there is no need to go into the merit of these applications and the decisions referred by the learned Counsel for the parties. Keeping in mind the interest of justice, equity and fair play, this Court is of the view that the defendant may be given an opportunity to contest the matter on merit. Hence, the decree passed by this court is set aside subject to the following conditions:

- (a) The defendant shall deposit a sum of Rs. 2,52,500/- i.e. 50% of the decretal amount within four weeks from today with the Registrar General of this court by way of bank draft in his name who shall keep the said amount in FDR initially for a period of one year.
- (b) Till the final disposal of the suit, the defendant, their officers, servants, or agents are restrained from manufacturing, selling, packaging of Povidone Iodine solution IP under the label being a colourable imitation or a substantial reproduction of the

plaintiff's get up, layout and colour combination that comprises of (i) a white background with dark blue lettering printed on it; and (ii) a sky blue stripe followed by a navy blue stripe on which the trademark Standardised is printed in bold.

13. In failure to comply the above said conditions mentioned in para 11 of this judgment within the time granted, the applications of the defendant I.A. No. 1556/08 and I.A. No. 10416/0 would be treated as dismissed and the judgment and decree passed by this Court on 9th November, 2005 shall be restored without any further orders. It is ordered accordingly.

C.S. [OS] No. 1446/2004

List this matter before the Court on 6th November, 2009.