(2000) 01 DEL CK 0080

Delhi High Court

Case No: IAs. 7872/98 and 1494/89 and 931/90 in Suit No. 614/86

Lalit Kumar Bhargava, (now deceased)		APPELLANT
	Vs	
Shri Devender Kumar Bhargava		RESPONDENT

Date of Decision: Jan. 24, 2000

Citation: (2000) 2 AD 219 : (2000) 2 CivCC 472 : (2000) 83 DLT 567 : (2000) 52 DRJ 486 : (2000) 124 PLR 77 : (2000) 3 RCR(Civil) 17

Hon'ble Judges: Manmohan Sarin, J

Bench: Single Bench

Advocate: Mr. G.L. Sanghi and Mr. Pramod Sehgal, for the Appellant; Mr. V.P. Chaudhary and Mr. N. Chaudhary, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Manmohan Sarin, J.
By this order, I would be disposing of the applications bearing IA. No. 7872/87 & IA. 1494/89 both under Order IX, Rule 9 CPC moved by the plaintiff for restoration of the suit dismissed in default and for non-prosecution. is No. 931/90 is the application u/s 5 of the Limitation Act for condensation of the delay in moving the above applications.

2. Mr. Lalit Kumar Bhargava, the plaintiff now deceased had instituted this suit seeking declaration that the deed of dissolution of partnership dated 9.4.1984, between the parties was invalid and the same had been obtained by the defendant fraudulently and by misrepresentation. Further as a consequence thereof a decree of dissolution of the partnership firm and rendition of accounts was sought in the suit. The plaintiff and the defendant were brothers.

3. The application is No. 1494/89 in fact seeks the restoration of an earlier application is No. 7872/87, which was dismissed in default and for non-prosecution. The applications have been vehemently opposed by the counsel for the defendant

as being highly belated, barred by limitations and not maintainable. Counsel urges that these reflect gross negligence and inexcusable conduct in the prosecution of the suit by the plaintiff.

4. It would be pertinent to briefly notice the facts leading to the filing of the present applications. As noted, the suit was instituted by Mr.Lalit Kumar Bhargava on 19.3.1986. As process fee was not filed and counsel did not appear on two dates the suit was dismissed for non-prosecution on 4.11.1986. An application IA. 7131/86 under Order IX, Rule 9 CPC was allowed and the suit was restored.

5. There were defaults again on behalf of the plaintiff and his counsel and the suit was again dismissed for non-prosecution on 6.10.1987. IA. 7872/87 under Order IX, Rule 9 CPC was then moved by the plaintiff on the ground that the counsel had to go out of India and had requested a junior counsel to attend. Further that the junior counsel was informed that the plaintiff on account of illness would not be able to appear. This application had been signed by the junior counsel and supported by the affidavit of the clerk of the counsel. This application was dismissed in default and for non-prosecution on 14.9.1988. In between during the period October 1987 to September 1988, IA. No. 4111/88 under Order XXXIX, Rules 1 and 2 and IA. No. 4869/88 under Order 40, Rule 1 CPC were also moved by the counsel for the plaintiff Mr. Vijay Gupta. An order of status-quo was also passed in IA. No. 4111/88 on 20.7.1988. These applications (IAs. 4111/88 & 4869/88) were supported by the affidavits of the plaintiff.

6. The plaintiff, it is stated, who was suffering from a prolonged illness died on 22.9.1988. His son the present applicant Mr. Ish Kumar Bhargava, who was in U.S.A. returned to India and appears in court for attending the hearing of applications bearing is Nos. 4111/88 & 4869/88, which were refortified .The applicant engages another advocate and moves an application for substitution as a legal representative on 20.12.1988 being is No. 2/89, of which notice was issued returnable in April, 1989. The applicant claims that he got the file inspected on 23.1.1989 and only then learnt about the dismissal of the suit for non-prosecution on 6.10.1987 as well as of the application made for restoration on 14.9.1988. It is the applicants case, that the concerned advocate never informed the applicant or his late father about the dismissal of the suit. In these circumstances; the applicant moved the present application is No. 1494/89 for recalling the order of dismissal of is No. 7872/87 dated 14.9.1989.

7. In the background of the aforesaid factual matrix, learned senior counsel for the plaintiff/applicant urged before me that this was a case of negligence of the counsel, for which the applicant should not be made to suffer. The submission is that in a civil matter normally the counsel takes care of day-to-day today hearings and the counsel for the plaintiff was totally remiss in that. Counsel for the plaintiff failed to appear as a result of which the suit was earlier dismissed on 9.10.1986, which he got restored by moving an application. It is claimed that the applicant''s late father i.e.

the plaintiff was not informed of the dismissal of the suit for non-prosecution. The application IA. No. 7872/87 for restoration was signed by the junior counsel and supported by the affidavit of the clerk. The application itself mentions that the plaintiff had suffered a heart-attack and was confined to bed. In support of the submission that the late plaintiff was not aware of the dismissal of the suit, learned counsel submits that IA. 4111/88 (under Order XXXIX, Rules 1 & 2 CPC) as well as IA. 4869/88 (under Order XXXX, Rule 1 CPC), which are supported with the affidavit of the plaintiff proceed on the basis of suit being pending the dismissal of the suit or application is No. 7872/87 on 14.9.1989 was disclosed.

8. The applicant came to India immediately on the death of his father on 22.9.1988 from U.S.A. and took immediate steps for attending the matter and appeared in court on 6.10.1988. The applicant also took steps to engage a counsel for moving the application for substitution on 12.1.1989. At that stage, the plaintiff was not aware of the dismissal of the suit or the application for restoration. It was only when the file was got inspected on 23.1.1989, the applicant became aware of the same and moved the present application. On objection being taken by the defendant on the maintainability of the above application for restoration and IA. 1494/89 as being barred by limitation, the application IA. 931/90 u/s 5 of Limitation Act was moved. In brief, the submission of the applicant is that the applicant and his late father should not be made to suffer on account of negligence of the counsel or his omissions in not disclosing the factum of dismissal of the suit for non-prosecution as well as of the application for restoration. Further that the late father of the plaintiff was ailing and in fact died within 8 days of the dismissal of the application for restoration and could not have been expected to have actively pursued the litigation himself. The applicant, who was abroad immediately took steps for substitution and on learning of the dismissal of the suit and the restoration application moved the present applications. Further that in the interest of substantial justice and keeping in mind the extenuating and peculiar circumstances of this case, the applications deserve to be allowed to enable the disposal of the suit on merits.

9. Learned senior counsel for the defendant Mr. Chaudhary appearing on behalf of the defendants has vehemently opposed these applications. He submits that as revealed from the order-sheet the plaintiff and his counsel were grossly negligent. He submits that there is no valid application in the eyes of law. IA. 7872/87, of which restoration is sought is neither signed nor filed by an authorised person. It is signed by a proxy counsel. It is not supported by the affidavits of either the counsel engaged in case or the plaintiff. The suit has been dismissed twice for non-prosecution and as also the application for restoration was dismissed. The litigant himself is expected to be vigilant and pursue the case. The applications are opposed as being barred by limitation and not maintainable. It is stated that serious allegations are sought to be made against the counsel in respect of facts, which were in the knowledge of the plaintiff, who is deed. He urged that it could not be presumed that the plaintiff was ignorant of the dismissal of the suit. On the own

showing of the applicant the file was inspected on 23.1.1989, yet the application for restoration i.e. IA. 1494/89 was filed on 20.2.1989, that is beyond time and was barred by limitation. The condensation had also been sought belatedly in 1990. There was no Explanation as to why the application for condensation of delay was not moved for one year. Learned counsel for the plaintiff submitted that the plaintiff in the interregnum had moved two applications and filed affidavits and it could not be believed or presumed that he was not aware of the factual position.

10. The legal position as regards the approach to be adopted on the question of restoration of suits for trial on merits has been set out by the Apex Court in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , wherein the Apex Court observed that a liberal approach ought to be adopted in interpreting "sufficient cause" for the purposes of Limitation Act to enable substantial Justice being done by disposal on merits. The Court laid down the following principles:-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day''s delay must be explained" does not mean that a pedantic approach should be made. Why not every hour''s delay, every second''s delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

11. Considering the peculiar facts of this case and submissions made by the counsel for the parties as well as the legal principles noted above, I am of the view that despite there being negligence on the part of the deceased plaintiff and the present applicant and their counsel, the applications deserve to be allowed on considerations of doing substantial justice and disposal of the matter on merit. I find merit in the submission of the learned counsel for the plaintiff/applicant that the late plaintiff was possibly not aware of the dismissal of the suit. The averments in the applications seeking stay and appointment of the receiver lend support to this.

plaintiff after sickness expired on 22.9.1988 and thereafter his son, the present applicant, who was abroad, took steps within reasonable time for substitution and on learning of the dismissal of the suit for restoration of the application. While it is true that a litigant himself has a corresponding duty to be diligent in prosecuting his suit and cannot shift the burden or lay the blame totally on the doors of the counsel. At the same time a litigant should also not be made to suffer for the negligence of the counsel. In this case, the negligence of the counsel is evident from failure to take miscellaneous steps such as filing of process fee and nonappearance resulting in dismissal of the suit. The fact the applicant has not taken legal action against the counsel engaged by his deceased father, by itself cannot non suit him in these facts and circumstances. Once on the above broad parameters, it is held that the plaintiff/applicant has sufficiently explained the delay and sought condensation on grounds, which appear tenable, the court would not decline relief on the ground that the initial application had been submitted or signed by the counsel, whose vakalatnama was not on record. The present application could be taken as one of ratifying the making of the earlier application or be itself treated as an application for restoration of the suit also. The defendant can be compensated by costs for the delay caused. It may be noted that the matter had even been adjourned earlier to enable a settlement between the parties, who are close relations, which unfortunately did not come through.

12. In view of the foregoing discussion, IAs. 1494/89, 7872/87 and 931/90 are allowed subject to costs of Rs. 6000/- out of which Rs. 3000/- be paid to the Delhi Legal Services Authority.