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Tata Steel Processing and Distribution Ltd. Vs. Ideb Projects Pvt. Ltd.

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Court : Kolkata

Decided On : May-19-2017

Judge : I. P. Mukerji

Appellant : Tata Steel Processing and Distribution Ltd.

Respondent : Ideb Projects Pvt. Ltd.

Judgement :

IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction (Original Side) G.A. No.2317 of 2015 C.S. No.29 of 2013 Tata Steel Processing & Distribution Ltd. Vs. IDEB Projects Pvt. Ltd. For the Plaintiffs/ Respondents:- Mr. M.K. Ghosh...Sr. Advocate Mr. S.K. Dutta Mr. Retabrata Mitra Mr. Atish Ghosh ....Advocates For the Respondents:- Mr. R.S. Mantha...Sr. Advocate Mr. M. Rajeswara Rao Mr. Ranjan Bachwat...Sr. Advocate Mr. Debnath Ghosh Mr. R. Ginodia Ms. Pubali Sinha Chowdhury ...Advocates Judgement on:- 19th May, 2017 I.P. Mukerji,J.

This is an application under Order IX Rule 13 of the Code of Civil Procedure. It is for setting aside the exparte decree dated 3rd December, 2014 passed by this court in the above suit. By this decree the defendant was directed to pay Rs. 14,61,60,384 with interest @ 12% simple interest per annum from January, 2010 till payment, to the plaintiff. The writ of summons was duly served on the defendant. This is certified by the Deputy Sheriff in a certificate dated 16th July, 2014. The parties also admit service of the summons sometime in September

2013. This application of the defendant is signed and verified by a Harkirat Singh Bedi. He says in this application that he is a director of the defendant. The company is entangled in litigation in Delhi, Bangalore and Kolkata. He is constantly moving across the country and abroad. He believes in shooting e-mails to his lawyer, asking them to take care of his litigation. At least that is what he did in this case. After receiving the summons, on 4th December, 2013 he sent an e-mail to M/s R. Ginodia & Co. Advocates, attaching with it the plaint and writ of summons. He thought that he had done his bit and the said firm through their assistant Manoj Tiwari, Advocate would do the rest. On 11th December, 2013 he enquired of that firm whether they would represent the defendant. Neither the firm said yes nor No.They say that it was never possible for them to appear without a vakalatnama together with an affidavit of competency (see paras 3d and e of the affidavit of Manoj Tiwari for R. Ginodia and Co.), which was never sent to them. In the e-mail of 11th December, 2013 Bedi also said that he had paid the firm Rs. 1,50,000/-. He thought that by making that payment the suit would be taken care of by them, despite the firm continually insisting that unless the vakalatnama was executed in their favour and an affidavit of competency executed and filed in court they would have no authority under the Original Side Rules to represent the defendant. In fact it was submitted on behalf of the firm that the defendant was involved in diverse litigation arising out of Section 138 of the Negotiable Instruments Act, 1881 in Kolkata. In that connection a few months before December, 2011, Bedi had paid Rs. 1,50,000/- to the firm as ad- hoc payment. Considering the volume of litigation this amount was very low. It was ridiculous on the part of Bedi to think that the amount would also cover the expenses of the suit. The fact remains that Bedi never came to Calcutta for the purposes of this suit. Neither did he send anybody. No vakalatnama or affidavit of competency was executed in favour of R. Ginodia and Co., or anybody else. On 14th November, 2014 the Deputy Registrar Court and Judicial handed over a certificate to the advocate on record for the plaintiff that till 13th November, 2014 the defendant had not entered any appearance. It goes without saying that no written statement was filed. The plaintiff took the opportunity to mention the matter before the court, and get it listed as an undefended suit on 3rd December, 2014. The decree was passed on that day. No matter how vociferous Mr. Mantha, senior Advocate

appearing for the defendant might contend that M/s R. Ginodia & Co. were contractually bound to defend the case of the defendant, they could not proceed one inch without a vakalatnama in their favour. They did not even have the right to pray for adjournment in court. The defendant did not find it expedient to ask the said firm to send them the draft papers, for execution of the vakalatnama and the affidavit of competency, and thereafter execute them and send them to Kolkata. It is equally astonishing to read in their application that it was only in the first week of July, 2015, while surfing the internet for information regarding their other matters that the defendant came to know that on 3rd December, 2014 the decree had been passed by them. Even after allegedly coming to know of the decree, Bedi very complacently sent an e-mail to Mr. Tiwari request to please advise now what can be done to salvage the situation.. In Parimal v. Veena alias Bharti reported in (2011) 3 SCC545the Supreme Court remarked that whether there was sufficient cause which prevented the defendant from appearing in court had to be ascertained, from what was necessary for the party to do. The act of a party had to be bona fide and diligent. The defendant had to show whether he honestly and sincerely tried to attend the hearing. Sufficient cause was always a question of fact. The most important part of the ratio of this case is that the court had to exercise its discretion judiciously in varied and special circumstances.. In a later decision reported in Basawaraj and Others v. Special Land Acquisition Officer reported in (2013) 14 SCC81the Supreme Court affirmed the same principles. Ultimately sufficient cause is to be gauged from an assessment of the conduct of the party. Due diligence, lack of negligence, presence of bona fides, honesty and sincerity in pursuing the litigation are certainly factors to be taken into account. Unfortunately, in my opinion, Mr. Bedi for the defendant did not possess any of these attributes. He thought that sending e-mails and making telephone calls to his lawyer would take care of his defence. He did not execute any vakalatnama or affidavit of competency, let alone, entering an appearance filing a written statement, discovering and producing documents and contesting the litigation. He thought that Rs. 1,50,000/deposited by him in some other litigation was sufficient advance for this particular litigation. There are other factors also to be taken into account to determine whether there was sufficient cause. A very pragmatic approach was taken by the Supreme Court in deciding whether there was

sufficient cause in Collector, Land Acquisition, Anantnag and another, v. Mst. Katiji and others reported in AIR 1987 SC1353 It said:

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.

. It should be remembered that the defendant does not gain anything by suffering an ex-parte decree. In fact, he has everything to lose if he does not defend a suit. Of course, the exception to this broad statement is that when the defendant knows that he has no defence whatsoever to the claim of the plaintiff and would only lose money trying to defend an action filed against him by the plaintiff, he is justified in staying away from the court, to save legal expenses. In this case what appears from the pleadings is that the defendant has some defence to the claim of the plaintiff. Secondly, if it is assumed that the defendant had some defence to the claim of the plaintiff, what could be its advantage in allowing the suit to be decreed

ex-parte?. The suit was instituted in or about September 2013 and within a space of about 15 months a decree was passed against the defendant on 3rd December, 2014. This was certainly not advantageous to the defendant. The defendant would have been better off by entering an appearance, filing a written statement and delaying the suit as long as possible. Even if it is assumed that the average time taken in this court to decree a suit is five years, the defendant could not have expected a decree to have been passed against them before 2018 if he defended the suit properly. Now, the question is the detriment to be suffered by the plaintiff if the suit is restored?. The plaintiff took all the pains to get a certificate from the Sheriff that the summons had been served and a certificate from the department that the defendant had not even entered an appearance. They got the suit listed as an undefended suit, engaged counsel, requested their witness to attend court, gave evidence and obtained a decree in their favour on 3rd December, 2014. This effort entailed sufficient expenditure. Then after more than six months they were faced with an application to set aside the decree. They had to defend this application by filing an affidavit-in-opposition and engaging learned Counsel. This also involved significant expenditure. The fact remains that the plaintiff got the decree in about fifteen months. Justice is search for the truth. Our system of administration of justice is adversarial. Only in the presence of two contesting parties can the real truth be revealed. It is always necessary in the interest of justice to have a full trial before reaching a decision than reaching it ex-parte. I had invited an affidavit from M/s R. Ginodia & Co. a firm of advocates I do not for a moment think that they were guilty of any inaction or negligence. The defendant had not even executed a Vakalatnama in their favour. Without a Vakalatnama no action could have been taken by them. The defendants director Bedi was almost reckless when he thought that without a vakalatnama without any written instruction, engagement of any counsel the suit could be defended in this Court only on the basis of e-mails sent by him. He wrongly believed that the said firm had entered into a contractual relationship with the defendant to defend the case. Being a veteran litigant, Bedi should have realised that the said firm never assured him or the defendant No.1 of defending their case. They could not in the absence of a vakalatnama, written instruction etc. It was also adventurous on his part to think that the sum of Rs. 1,50,000 deposited by the defendant No.1 on account of

some other cases would be utilised by the said firm as advance for this suit. But nevertheless, M/s R.Ginodia & Co. should have specifically written to the defendant No.1 that they were not defending the suit. Having acted for the defendant No.1 in other cases they should have warned the defendant No.1 and Bedi that if adequate steps were not taken by them there was a risk of an ex-parte decree being passed. The decree that the defendant has suffered is a huge sum of Rs. 14 crores together with interest. Considering all the circumstances, I am inclined to give the defendant a chance to defend the suit. The ex-parte decree dated 3rd December, 2014 is set aside, on the condition that the defendant shall pay a sum of Rs. 2 lakhs to the plaintiffs on record as costs incurred for obtaining the exparte decree and defending the Order IX Rule 13 application. Such costs have to be paid by 12th June, 2017 failing which the plaintiff may apply to this court for vacation of this order. The defendant will engage an advocate to enter appearance in the suit for them by 15th June, 2017. The defendant will file their written statement by 7th July, 2017. The department will not accept any vakalatnama or written statement on behalf of the defendant unless they produce the plaintiffs Advocates receipt regarding payment of costs. Cross discovery by 28th July, 2017. Inspection forthwith. List the suit for trial subject to the convenience of the bench, on 2nd August, 2017. This application to set aside the ex-parte decree dated 3rd December, 2014 is allowed to the above extent. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities. (I.P. MUKERJI, J.)

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