

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 3rd June, 2011

M. A. 53 of 2010

in

Petition No. 282 of 2007

(E. A. No. 02 of 2010)

IndusInd Media & Communication Ltd. ... Orig. Petitioner

Versus

Mrs. Alzira Keki Variava ... Orig. Respondent
Prop. Ultra Channels

BEFORE

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON

HON'BLE MR. G.D. GAIHA, MEMBR

ORDER

G.D. GAIHA, MEMBR

This application purported to be under Order IX Rule 13 of the Code of Civil Procedure has been filed for setting aside an ex-parte decree passed by this Tribunal on 13.01.2007.

2. The Applicant herein, who was respondent in the original petition, has prayed for the following reliefs:-

- a) That the judgment and order ex parte passed by this Hon'ble Authority on 13.01.2010 in the petition No. 282(c) of 2007 be set aside and the respondent be given

an opportunity to file its reply and be heard in the matter.

- b) The review petition/application be allowed with costs.
- c) Pending the hearing and final disposal of this review petition application of the respondent the order under review be stayed and not executed and no future proceedings be taken out by the petitioner.
- d) Ad interim an interim orders as per prayer (c)
- e) Cost of review be provided for
- f) Any other and further orders looking into the nature and circumstances of the case.

3. A person against whom an ex-parte decree is passed may avail any one of the following four remedies namely:-

- a) Prefer an appeal against the ex parte decree passed;
- b) File an application under Order IX Rule 13 of CPC, 1908
- c) To file an application for review of the order
- d) To file an independent suit, if the decree has been obtained by the Decree Holder by committing fraud

Each of the remedies available is independent of the other.

Ordinarily more than one remedy cannot be availed.

4. Along with the said application, no application for condonation of delay had been filed although the same was barred by the limitation. When the same was pointed out by this Tribunal on 07.04.2010, an application for condonation was filed.

In the mean time an Execution Application was filed by the Original Petitioner to which an objection was also filed by the Applicant.

5. By an order dated 18th May 2010, further proceedings of the Execution Application were directed to be stayed.

By an Order of the said date, the delay in filing the application under Order IX R 13 of CPC, 1908 was also condoned.

6. The applicant in support of the said application examined one Mrs. Alzira Variava; whereas the decree holder examined one Shri. Vinayak R. Mohite.

7. Mrs. Variava in the verification portion of the Application stated:

“I, Mrs. Alzira Variava, wife of Mr. Keki Variava age 60 years, Prop. Of the Respondent Firm M/s. Ultra Channel resident of 610, Ground Floor, J.J. Road, Parsi Colony, Dada, Bombay-400014 do hereby verify that the contents of paras 1 to 7 are true to my personal knowledge and believed to be true on legal advice and that I have not suppressed any material facts, therefore I say that all annexure/exhibits are the copies of the respective original.”

8. The verification of the contents of the application neither conforms to the provisions of the Rules framed by this Tribunal, nor the provisions of Order VI Rule 14 of the CPC, 1908. We may, however, ignore the same as in and an application like the present one, needless technicalities may not be insisted.

9. The Applicant in her evidence, inter alia, stated as under:

“13. I did not engage any lawyer prior to Mr. Rath.

14. When I received some papers from this Tribunal which was given to me by my neighbor, I approached my new MSO and enquired what was the issue. The new MSO assured that

if there was any problem relating to change of MSO, they would take care of it because I have paid all the bill upto date.

15. I did not give any signed Vakaltnama to new MSO. The new MSO did not tell me anything about this case and said they would let me know whenever they would come to know about this.

16. Attention of the Witness as drawn to page 122 containing order dated 13.01.2010.

17. I received this order along with the covering letter around end of January, 2010.

18. Thereafter I approached the new MSO and questioned them about this order and they said that they did not know anything about the order. I also asked to return my bills statement and all other papers. I then approached Mr. Vinay A. Rathi, Advocate, who in turn filed the restoration Application in M. A. No. 23 of 2010.”

10. In her cross examination she also denied to have received the copy of subscription agreement. She denied to have received any notice in October or November 2007. She accepted that the courier receipt dated 09.10.2007 shows her address as stated therein i.e, 610, Ground Floor, Zama Jamshed Road Parsi Colony, Dadar, Mumbai-14, which is her residential address. In fact that is the only address has been mentioned on her letterhead used by her in the notice addressed to the original petitioner dated 23.12.2006 (Exhibit- B). The Applicant moreover, in verification of her application also has furnished the same address.

She also stated that she is the proprietor of the firm M/s. Ultra Channels. She accepted that receipt bears the same residential address.

11. She in her evidence furthermore stated as under:-

“15. Witness volunteers that due to medical condition of her husband she has to be constantly at her residence and that is why she has given her residential address. As nobody would be available in the office address, therefore I have given my residential address.

16. It is true to suggest that all the postal/courier communications are being received at my residential address by me.”

12. We may notice that Mr. Tejveer Singh Bhatia is a practicing advocate of this Tribunal. The learned counsel had appeared in this matter in 2007 and 2008 although, no vakalatnama was filed.

13. We may notice that on or about 12.10.2007 not only the notice was directed to be issued to the respondent but also directed to be served dasti. An affidavit of service has been filed. Only on 20.02.2008 Mr. Bhatia sought permission of this Tribunal to withdraw his appearance from the case.

14. The relevant contention of the applicant reads as under:

“The Petitioner though received initial communication from the Hon’ble Authority but not as a due service, could not appoint any authorized person or come in person to defend the case.”

15. The word sufficient cause in O IX R 13 of Code of Civil Procedure, 1908, is, however, of wide import.

The rule does not prescribe for any guidelines. The courts have wide discretion in determining the question as to whether sufficient cause has been made out or not.

It is also well settled that there is no material difference between good cause and sufficient cause.

Admittedly, she migrated to WWIL in January 2007.

16. She in her application stated as under:-

“The MSO, WWIL assured the respondent that WWIL will take care of the above petitioner and collected all papers from the respondent and assured the respondent of full help to represent the respondent. But said WWIL did not took any authorization from the respondent nor informed of any status or progress of the case, till the respondent received the impugned order dated 13.01.2010. The respondent was in total dark and kept on new MSO, WWIL to do needful. Therefore, did not appear in person or appointed any authorized person to represent respondent before the Hon’ble authority in this, which is a genuine reason to remain absent and same should and is prayed to be accepted by this Tribunal to this.”

17. The provisions of the Code of Civil Procedure, 1908, stricto sensu are not applicable in the proceedings before this Tribunal.

18. In her evidence, Applicant categorically admitted that she was handed over certain papers from her neighbor, whereafter only she approached WWIL. She, thus, must be presumed to have received the notice duly served by this Tribunal.

19. The envelope sent to the petitioner which had come back with the postal acknowledgment card with an endorsement being “the respondent had refused to accept” was opened, while M. Mohite was examined before this Tribunal.

20. It is however the specific case of the applicant that she had approached WWIL.

21. Mr. Bhatia, however, did not file any vakalatnama. He sought for the permission to withdraw from this case, as noticed heretofore.

There is nothing on record to show that the Mr. Bhatia had informed the applicant thereabout.

22. We are not oblivious of the fact that another notice was issued on 12. 10. 2007. It was directed to be served also dasti. An affidavit of service had also been filed. We are also not oblivious of the fact that despite the matter having been posted for ex-parte hearing, a notice through speed post was sent on or about 28.02.2009 and another notice on 20.04.2009. However, the said notices were served upon the applicant. They appeared to have been served on some other person.

23. Although it is difficult to accept that the applicant had no knowledge whatsoever about pendency of the petition but keeping in view the peculiar facts and circumstances of the case, we are of the opinion that interest of the justice would be subserved if this tribunal while setting aside the decree impose reasonable terms. The reasonable terms in a case of this nature for the purpose

of invoking O IX R 13 of CPC and/or the principles analogous thereto would be met, if the applicant is directed to deposit Rs. 2 lakh out of the decretal amount.

Recently, in **Parimal v. Veena, (2011) 3 SCC 545**, the Supreme Court of India, has also held as under:

“12. It is evident from the above that an ex-parte decree against a defendant has to be set aside if the party satisfies the court that summons had not been duly served or he was permitted by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court. The legislature in its wisdom, made the second proviso mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.”

In **Tea Auction Ltd. v. Grace Hill Tea Industry, (2006) 12 SCC 104**, the Supreme Court of India held as under:

“10. We may at once notice that whereas Order 9 Rule 7 postulates setting aside of orders passed by the court upon such terms of costs or otherwise; Order 9 Rule 13, inter alia, postulates “payment into court”.

It was observed:-

“15. Order 9 Rule 13 CPC did not undergo any amendment in the year 1976. The High Courts, for a long time, had been interpreting the said provision as conferring power upon the

courts to issue certain directions which need not be confined to costs or otherwise. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when the decree was passed, but also on other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to put the defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith. But, it would not be correct to hold that no error has been committed by the Division Bench in holding that the learned Single Judge did not possess such power. The learned Single Judge exercised his discretionary jurisdiction keeping in view that the matter had been disposed of in fact finally at the interim stage at the back of the defendant and it was in that view of the matter a chance was given to it to defend the suit, but, then the learned Single Judge was not correct to direct securing of the entire sum of Rs 37 lakhs in the form of bank guarantee or deposit the sum in cash. The condition imposed should have been reasonable. What would be reasonable terms would depend upon the facts and circumstances of each case.”

In International Finance Ltd. v. Fairgrowth Financial Services Ltd.,(2005) 13 SCC 95, it was held:-

“2. Having heard the learned counsel for the parties, we are satisfied that the approach adopted by the Special Court in rejecting the application for setting aside the ex parte decree moved by the appellant has been too rigid. It is well settled that, ordinarily, a litigant should not be denied a hearing on merits unless something akin to gross negligence or misconduct on his part in contesting the proceedings is made out. Admittedly, in the present case, the appellant is a company having its corporate office at Kolkata. According to it, it had instructed its solicitors at Kolkata who, in their turn, had instructed the solicitors in Bombay to appear and plead for the appellant. It is pointed out that, initially, there was an appearance by the Bombay solicitors but, later on, there was a default in the appearance and sometime before the matters were taken up for hearing by the Special Court, one of the members of the firm of solicitors for the appellant at Kolkata, who was looking after the appellant’s cases, had suffered a serious accident and remained immobilised for a period of about nine months. In such circumstances, we agree with the learned Senior Counsel for the appellant that a liberal view ought to have been taken by the Special Court and the ex parte decree should have been set aside. We place on record the plea vehemently raised by the learned Senior Counsel for the appellant that it is the same claim which forms part of two proceedings and there has been in effect a double decree for the same amount passed against the appellant and if only the appellant would have been given an opportunity of defending itself, it would have demonstrated that the payments made by the appellant have more than satisfied the respondents’ claim. We note the pleas, but we are not expressing any opinion thereon.”

3. In the totality of the facts and circumstances of the two cases, we are satisfied that the appellant deserves to be allowed an opportunity of hearing and contesting the two cases on merits.

4. The appeals are allowed as per the conditions expressed hereunder. The impugned order dated 17-9-2003 rejecting the application for setting aside the ex parte decree dated 9-7-2003 is set aside. The ex parte decree dated 3-7-2003 is also set aside.

5. Both the cases shall stand restored to the file of the Special Court. The appellant is allowed the liberty of filing written statements in both the cases and contesting on merits but subject to the condition that the appellant shall within a period of four weeks from today deposit an amount of Rs 14,53,327.23p. with the Special Court which amount shall be retained in deposit by the Special Court. The Court may invest the amount in an interest-bearing account with any scheduled bank. The amount shall be available to be disbursed subject to final decision in the cases by the Special Court. Failing compliance with the abovesaid direction, the decrees passed by the Special Court shall stand, and these appeals shall be deemed to have been dismissed.”

24. Ordinarily this Tribunal would not in view of its finding that summons were served upon the Judgment Debtor would not have allowed the said application for setting aside the ex-parte decree. However, possibility of the petitioner being misled by the MSO cannot be ruled out. According to the applicant, her husband had been ill.

25. In a situation of this nature probably interest of justice shall be served if the applicant be directed to deposit of a sum of Rs. 2 lakhs towards the decretal amount subject to ultimate result of the main petition.

Keeping in view the peculiar facts and circumstances of the case a liberal view may be taken.

This application is allowed subject to the aforementioned conditions.

However, in the facts and circumstances there shall be no order as to costs. The applicant must comply with this order within six weeks. The applicant may file her reply within the aforementioned period, Rejoinder thereto if any, may be filed within two weeks thereafter.

Let the matter appear on 3rd August, 2011 for framing of the issues.

....., J
(S.B. SINHA)
CHAIRPERSON

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(G.D. GAIHA)
MEMBER