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IN THE HIGH COURT OF DELHI

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FAO.No.211/2005

Sh. Dinesh Chandra Mahendra
Prop. M/s. Globe Enterprises Appellant
through: Mr. Mohinder Madan, Advocate with
Mr. Deepak Tyagi, Advocate

VERSUS

Sh. Adarsh Priya Srivastava Respondent
through: Mr. Rajesh Yadav, Advocate

DATE OF DECISION

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19.03.2008

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

1. Whether reporters of local papers may be allowed to see the judgment? Y
2. To be referred to the Reporter or not? Y
3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**(Oral)

1. Heard learned counsel for the parties.
2. Vide impugned order dated 4.6.2005, appellant's application under Order 9 Rule 13 CPC has been dismissed on account of the same being barred by limitation and benefit of Section 5 of the Limitation Act being denied.
3. The appellants had sought recall of an ex-parte decree dated 3.8.2002 alleging that the appellant got

knowledge of the decree only on 26.9.2004 when in an arbitration proceedings relating to another firm of the appellant, namely Swati Exports, reference was made to the instant decree.

4. It was stated in the application that the appellant was not served with summons in the suit.

5. Respondent's response was that not only was the appellant served with the summons in the suit by registered post AD and that AD card was on the file of the court but additionally it was stated that the appellant had sought appointment of an Arbitrator vide Arbitration Petition No.16/2002 pertaining to a jural relationship between the appellant's firm Swati Exports and the respondent. That said Arbitration Petition was filed in the Lucknow Bench of the Allahabad High Court in which a counter affidavit was filed by the respondent wherein reference was made to the suit and the ex-parte decree dated 3.8.2002. Pertaining to the said Arbitration Petition, in para 2 of the preliminary objections, in the reply to appellant's application under Order 9 Rule 13 CPC, it was inter alia pleaded as under:-

“That the application of the Defendant under Order 9 Rule 13 CPC is barred by limitation. The limitation to set aside an Exparte Decree as per Article 123 of the Limitation Act is 30 days. In the instant case, the Judgment and decree was

passed on 03.08.2002 and the present application bears the date 25.10.2004. There is a delay of more than two years. The application has been filed by the Defendant with the allegation that the Defendant came to know of the Judgment and Decree on 26.09.2004, when the Plaintiff herein filed reply to the claim of the Defendant in an Arbitration proceeding. It is stated that the alleged date of the knowledge of the Defendant about the Judgment and Decree is a blatant lie. The Defendant was only duly served with the summons of the suit by registered AD Post, but he now erroneously claims that the signatures on the AD card have been manipulated by the Plaintiff. Be that as it may, the Plaintiff had filed an application for taking his counter affidavit on record on 15.12.2003, in the matter of Arbitration Proceeding No.16/02, before the Hon'ble High Court of Judicature "Dinesh Chandra Mahendra Vs. Adarsh Priya Srivastava", at Allahabad Lucknow Bench, Lucknow. In that counter affidavit of 15.12.2003, the Plaintiff had duly mentioned about having filed the present suit and having obtained the Judgment and Decree dated 03.08.02 in suit No.214/02 in the matter of "Adarsh Priya Srivastava Vs. Globe Industries", through its proprietor Sh. Dinesh Chandra Mahendra. The said affidavit was taken on record by the Hon'ble High Court of Judicature of Allahabad on the same day and the Hon'ble High Court passed an order dated 15.12.2003, wherein it has been mentioned that counter affidavit filed in the Court be kept on record. Copy of the counter affidavit was duly supplied to the counsel for the Defendant. The order dated 15.12.2003 was passed by the Hon'ble High Court in the presence of counsel for both the parties. Assuming for the sake of arguments, but not admitting that the Defendant was not served with the summons of the suit, still he came to know of the present suit and the Judgment and Decree dated 03.08.02, atleast on 15.12.2003, when it was mentioned by the Plaintiff in his counter

affidavit. The application is wholly barred by limitation and is liable to be dismissed with exemplary costs."

6. Holding that the appellant had knowledge about the instant suit and the decree when counter affidavit was filed before the Lucknow Bench of the Allahabad High Court on 15.12.2003 learned Trial Court held that at least on said date i.e. 15.12.2003 appellant would be having knowledge of the decree and that since the application under Order 9 Rule 13 CPC was filed on 25.10.2004, delay post December, 2003 remained unexplained.

7. It is urged in the instant appeal that the counter affidavit which was filed before the learned Judge of the Lucknow High Court was taken on record on 15.12.2003, as recorded in the order dated 15.12.2003, and hence the appellant did not have knowledge of the contents of the counter affidavit as the appellant had no occasion to respond thereto.

8. At the first blush argument of the learned counsel for the appellant appears to be attractive but a re-look and specially at the pleadings of the appellant in rejoinder to the reply filed by the respondent to appellant's application under Order 9 Rule 13 CPC requires much to be explained as far as the appellant is concerned.

9. Responding to the preliminary objection No.2 in the reply filed by the respondent to appellant's application under Order 9 Rule 13 CPC, the respondent submitted as under :-

“2. The contents of the para under reply are wrong and denied. It is denied that the application of the defendant under order 9 Rule 13 CPC is barred by limitation. Rest of the contents of the para under reply are a matter of record. It is however wrong and denied that the date of knowledge is wrongly given by the defendant. It is further wrong and denied that the defendant had been duly served in the above noted suit or the signatures on the AD card have not been manipulated. The proceedings before the Hon'ble High Court at Lucknow, are a matter of record. It is however wrong and denied that the defendant had acquired the knowledge about the present decree, through the counter affidavit. It is submitted that the matter had been disposed off on 15.12.2003 itself, when the application for taking on record the counter affidavit had been filed on behalf of the plaintiff and the same did not come to the knowledge of the defendant, at all. It is wrong and denied that the defendant had come to know about the proceedings on 15.12.2003, as alleged.”

10. Faced with the situation of their being no specific denial to the categorical plea taken in the reply that the counter affidavit was supplied to the appellant's counsel, it is to be noted that in the rejoinder there is no denial of the fact that the counsel received the counter affidavit.

11. However learned counsel for the appellant urges that an affidavit of the clerk of the counsel concerned has been

filed to the effect that counter affidavit was not received by the counsel.

12. It is trite that what you prove is controlled by what you plead. It becomes important to have a 360° vision while pleading. In the absence of any pleading by the appellant that the copy of the counter affidavit filed before the Lucknow Bench of the Allahabad High Court was not supplied to his counsel, I am afraid no evidence pertaining thereto can be looked into by this court.

13. Be that as it may order dated 15.12.2003 passed by the learned Single Judge of the Lucknow Bench of the Allahabad High Court, in the very first line records:-

"Counter affidavit filed in the court today be kept on record."

14. When questioned as to when appellant got knowledge of the order dated 15.12.2003, the counsel responds, probably within a week or 10 days. When questioned as to what did the appellant do when he read in the order dated 15.12.2003 that a counter affidavit has been filed in court today and why did he not seek a copy from the counsel concerned, learned counsel for the appellant concedes that the appellant remained negligent in not requiring his counsel to transmit to him the counter affidavit filed in the Lucknow Bench of the Allahabad High Court.

15. Under the circumstances, I find no infirmity in the view taken by the learned Judge that the evidence probablises prior knowledge with the appellant of the decree through the medium of the counter affidavit filed by the respondent in Arbitration Petition No.16/2002.

16. Needless to state, sitting in the first appeal, pertaining to findings of fact, if the view taken by the learned Trial Judge on the given evidence is a probable view this Court would not be justified in substituting the view merely because another view is possible.

17. The appeal is dismissed.

18. No costs.

March 19, 2008
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PRADEEP NANDRAJOG, J.