

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **RFA No. 150/2009 & CM No.5989/2009**

Date of decision : 07.10.2009

IN THE MATTER OF :

M/S MRIDUL ENTERPRISES & ORS. Appellants
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Through Mr.Girish Kumar Mishra and
Mr.Rajesh Pandit, Advocates

versus

\$ NISHA JAGTIANI Respondent
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Through Mr.Vishal Garg, Advocate

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* **HON'BLE MS.JUSTICE HIMA KOHLI**

1. Whether Reporters of Local papers may be allowed to see the Judgment? No.
2. To be referred to the Reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

HIMA KOHLI, J. (ORAL)

1. The present appeal arises out a judgment and decree dated 13.3.2009 passed by the learned Additional District Judge in a summary suit for recovery of Rs.19,88,560/- filed by the respondent,(plaintiff in the Court

below) against the appellants (defendants in the court below) under Order XXXVII of the Code of Civil Procedure.

2. The undisputed facts of the case are that the appellants/defendants, on receipt of summons in the suit instituted by the respondent, entered appearance and filed an application for leave to defend, which was decided vide order dated 19.1.2009 (wrongly typed as 19.1.2008 in Annexure A-8). By the aforesaid order, the learned Additional District Judge, after considering the defence taken by the appellants/defendants, granted them conditional leave to defend the suit upon their depositing a sum of Rs.12 lacs in the Court within a period of 45 days from the date of the said order.

3. It is the case of the appellants/defendants that the certified copy of the aforesaid order dated 19.1.2009 was obtained by them on 11.2.2009. Immediately thereafter, the appellants/defendants filed an application in the suit proceedings stating *inter alia* that they proposed to file an appeal against the order dated 19.1.2009 and in case the appeal was not entertained, they would deposit the amount of Rs. 12 lacs in the Court. The said application was rejected by the learned Additional District Judge vide order dated 9.3.2009 and the suit was ordered to be taken up on 13.3.2009.

4. Counsel for the appellants/defendants states that immediately thereafter, on 18.3.2009, they filed an appeal in this Court against the order

dated 19.1.2009, registered as FAO No.94/2009. As the said appeal was not maintainable, on the very first date, i.e. on 18.3.2009, the appellants/defendants sought to withdraw the same with liberty to file a Civil Miscellaneous(Main) Petition against the order dated 19.1.2009. The liberty as sought was granted to the appellants/defendants in terms of the order dated 18.3.2009 passed in FAO No.94/2009.

5. It is stated that on the same date, the appellants/defendants filed a Civil Miscellaneous(Main) Petition, registered as CM(M) No.227/2009, which was listed in Court on 20.3.2009. However, in the meantime, the impugned judgment and decree dated 13.3.2009 came to be passed by the Trial Court. By the said judgment, the suit was decreed in favour of the respondent/plaintiff while observing that the appellants/defendants had failed to comply with the conditional order dated 19.1.2009. As a result, on 20.3.2009, counsel for the appellants/defendants made a statement in the Civil Miscellaneous(Main) proceedings to the effect that a decree had already been passed by the Trial Court. He therefore sought the permission to withdraw the petition with liberty to prefer an appeal. Vide order dated 20.3.2009, leave as prayed for was granted and the petition was dismissed as withdrawn.

6. Thereafter, the appellants/defendants preferred the present appeal on 21.4.2009. On 29.4.2009, the Trial Court record was summoned

for 13.5.2009. On 13.5.2009, notice was issued to the respondent/plaintiff for 22.9.2009 and in the meantime, the operation of the impugned judgment was stayed, subject to the appellants/defendants depositing the decretal amount along with interest within a period of six weeks. The said order has not been complied with till date.

7. Counsel for the appellants/defendants states that the appellants/defendants are ready and willing to deposit the amount of Rs.12 lacs in the Trial Court within two weeks. He states that the said offer was made even on the last date of hearing, i.e., on 22.9.2009, when time was sought by the counsel for the respondent/plaintiff to obtain instructions from his client for today. Advocate appearing for the respondent/plaintiff sought a pass over on the first call on the ground that the counsel was held up before another Bench. Matter was passed over at his request and taken up in the post lunch session. Even now, counsel for the respondent/plaintiff states that he has not been able to obtain any instructions from his client or his colleague.

8. Looking at the facts and circumstances of the present case, maintaining the impugned judgment would amount to depriving the appellants/defendants of their valuable right to present their defence and contest the suit of the respondent/plaintiff on merits. There is no denying the fact that passing of the decree has resulted in condemning the appellants/defendants unheard. The very fact that, vide order dated

19.1.2009, the learned Additional District Judge had deemed it appropriate to grant conditional leave to defend to the appellants/defendants, upon payment of Rs.12 lacs within 45 days from the date of passing of the said order goes to show that the Trial Court was also convinced that the appellants/defendants had made out a *prime facie* case on merits for being entitled to grant of conditional leave to defend the suit.

9. The appellants/defendants cannot be faulted for exercising their legal right of challenging the validity of the order dated 19.1.2009, granting them conditional leave to defend the suit. However, the subsequent events conspired in such a manner as to render their appeal infructuous in view of the fact that the impugned judgment and decree came to be passed before their Civil Miscellaneous(Main) Petition could come up for hearing.

10. Now that the appellants/defendants have expressed their readiness and willingness to deposit the sum of Rs.12 lacs, in terms of the order dated 19.1.2009, it would only be just, fair and equitable that they be not deprived of their right to contest the suit of the respondent/plaintiff on merits. However, the respondent/plaintiff is also entitled to be compensated for the delay caused by the appellants/defendants in respect of the summary suit instituted by her. Hence, while enlarging the time for depositing the aforesaid amount, it is deemed appropriate to subject the appellants/defendants to costs for delaying the payment, as ordered by the

Trial Court on 19.1.2009 and also by this Court in the present proceedings, on 13.5.2009 and for delaying the suit proceedings instituted by the respondent/plaintiff.

11. Accordingly, the appeal and the pending application are disposed of, with directions to the appellants/defendants to deposit the sum of Rs.12 lacs in the Trial Court within two weeks from today, along with costs of Rs.20,000/- payable to the respondent/plaintiff through counsel. Subject to the above condition, the impugned judgment and decree is set aside. The parties are directed to appear before the Trial Court on 22.10.2009, for further proceedings.

12. The Registry is directed to remit the summoned records to the Trial Court forthwith.

HIMA KOHLI,J

OCTOBER 07, 2009
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