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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 26.03.2012

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FAO(OS) 126/2012

HAJI MALIK GHULAM AHMED SHAH & ANR. Appellants

Vs

JUGAL KISHORE

..... Respondent

Advocates who appeared in this case:

For the Appellants: Mr Mukul Gupta, Sr. Advocate with Mr Anchit Sharma, Advocate.

For the Respondents: Nemo

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

FAO(OS) No. 126/2012 & CM No. 5382/2012 (Stay)

1. This is an appeal directed against the judgment and order of the learned Single Judge dated 23.02.2012 passed in IA No. 9548/2011. By virtue of this application the appellants, who are the original defendants in the suit filed by the respondent/plaintiff, sought setting aside of the ex-parte judgment and decree dated 12.10.2009 under the provisions of Order 9 Rule 13 read with Section 151 of the Code of Civil Procedure, 1908 (in short the Code).

2. In order to fully appreciate the assertions made before us in support of the appeal, some broad facts are required to be noticed. For this purpose we

called the suit record.

2. The respondent/plaintiff had filed a suit for recovery claiming a sum of Rs 44,69,897.92/- alongwith pendente lite and future interest at the rate of 18% per annum, in addition to cost.

2.2 The allegations in the plaint are broadly to the effect that, the respondent/plaintiff alongwith his associates, was dealing in sale of fruits under the name and style of “Delhi Pulwama Shopian Fruit Company”. The said entity operated from C-19, New Subzi Mandi, Azadpur, Delhi during the period 01.04.2000 to 31.03.2002.

2.3 The respondent/plaintiff entered into a transaction with the appellants/defendants in lieu of payment of commission for procurement of apples for sale at Delhi. It was the case of the respondent/plaintiff that his associates walked out of the deal struck with the appellants / defendants, and consequently, he was left to bear both the benefit as well as the downside of the aforementioned transaction. In the course of the aforesaid transaction, monies were advanced by the respondent/plaintiff for procuring apples through the aegis of the appellants / defendants.

2.4 It was the case of the respondent/plaintiff that a sum of Rs.21,47,897.92 was advanced on 22.06.2002, in the presence of one Sh. Mohd. Abdullah Naikoo. It is also the case of the respondent/plaintiff that the appellant /defendants had charged a guarantee fee of 1% against the amount advanced. The respondent/plaintiff averred that not only the commission but also the money advanced was retained by the appellants/defendants. On the respondent/plaintiff insisting on return of money, he was able to recover a sum of Rs.3,000/- only, on 31.05.2005, in the presence of one Major Vikas. As regards the balance sum assurances were given, even while acknwoedging the fact that said sum was due and payable to him.

2.5 It appears that the appellant no.2 /defendant no.2 also lodged a criminal complaint against the respondent/plaintiff and also got one Sh. Bashir Ahmed Malik to file a complaint; both of which were dismissed on 03.03.2008. It is for these reasons that a suit for recovery alongwith interest was instituted.

2.6 The suit was listed before the Joint Registrar of this court, for the first time, on 16.07.2008, when it was registered and summons were issued to the defendants through ordinary process, registered AD and approved courier. The summons were made returnable on 03.10.2008.

2.7 On 03.10.2008, the Joint Registrar, recorded that as per office report, service had not been effected on the appellants / defendants through registered AD, while the report of the service by way of ordinary process was awaited. The Joint Registrar thus proceeded to issue, once again, summons to the appellants/defendants by ordinary process, registered AD and approved courier. In addition, personal service (dasti process) was also ordered, if so demanded. The matter was posted for further proceedings on 18.12.2008.

2.8 On 18.12.2008, the Joint Registrar recorded that the appellants/defendants had refused to accept process through registered AD. Consequently, a direction was issued to list the matter before court, on 23.01.2009.

2.9 On 23.01.2009, the court passed the following order :-

“Service report in this matter is awaited. Let fresh summons in the main suit be issued to the defendant on filing of process fee and registered AD cover within one week before the Joint Registrar in 25th March, 2009. The summons be also served through courier and dasti in addition to ordinary post.”

3. The suit thereafter was listed on 12.03.2009, in court, on an

application dated 07.03.2009 bearing filing no. 43189 being moved under section 151 of the Code, when the court noted the request of the counsel for the respondent/plaintiff to file an English translation of the process server's report; the report being in Urdu. The suit consequently got listed on the date already fixed, i.e., 25.03.2009.

3.1 Since, the affidavit filed by the respondent/plaintiff qua the English translation of the process server's report was not on record, the suit was renotified for further proceedings on 06.04.2009; at the hearing held on 25.03.2009.

3.2 Importantly, on 06.04.2009 when the court examined the English translation of the process server's report, it came to the conclusion that the appellants/defendants had refused to accept service of summons sent by registered AD. Consequently, the court directed that the appellants/defendants be proceeded exparte. By the very same order, directions were issued qua the respondent/plaintiff to file their evidence by way of affidavit. The suit was listed before the Joint Registrar on 20.05.2009, to enable him to put exhibit marks on the documents. The suit was listed for final disposal before court on 15.07.2009.

3.3 Thereafter, several adjournments were sought by the respondent/plaintiff between 20.05.2009 and 09.07.2009 to file his affidavit of evidence. Finally, on 14.07.2009, the respondent/ plaintiff tendered his evidence by way of affidavit, before the Joint Registrar. The respondent/ plaintiff's evidence was closed; the suit was placed before the court on the date already notified i.e., 15.07.2009. On 15.07.2009, the court directed the matter to be placed for final disposal in the category of 'short cause'. Finally, after hearing arguments, judgment was reserved on 23.09.2009.

3.4 Since, the appellants/defendants, as noticed above, had already been proceeded exparte on 06.04.2009, an exparte judgment and decree was

passed by the learned Single Judge on 12.10.2009.

3.5 The appellants /defendants thereafter moved an application, as indicated above, for setting aside the exparte judgment and decree. The said application was filed under the provisions of Order 9 Rule 13 read with section 151 of the Code, as noticed hereinabove by us.

SUBMISSIONS

4. In the background of the aforesaid facts, it was argued before us by Mr. Mukul Gupta, senior advocate on instructions of Mr. Anchit Sharma Advocate that the Joint Register having directed issuance of fresh summons, the court could not have taken into account the office report which indicated refusal of service of summons issued on 16.07.2008 and the process server's report of 06.12.2008 qua summons issued on 03.10.2008, wherein there is a reference to the fact that the copy of the plaint alongwith the notice was evidently handed over to the family members of the appellants/defendants. In order to buttress his submission, Mr. Gupta drew our attention to orders dated 03.10.2008 passed by the Joint Registrar and 23.01.2009 passed by the learned Single, Judge whereby directions were issued for issuance of fresh summons.

4.1 It was next contended by Mr. Gupta that the service was not effected in accordance with the Rules prescribed in regard to service which required the presence of the "numberdar" at the time of effecting service. It may be noted at this stage that while this submission was made there was no reference to any specific provision of the Rules in that regard.

4.2 The learned counsel further submitted that the process server's reports of 06.12.2008 would show that appellant no.1/defendant no.1 was away for medical treatment, while appellant no.2/defendant no.2 had left for work. Therefore, the reports seem suspect for the reason that they merely stated, that the summons alongwith the plaint were handed over to a family

members without indicating the name of the family member. It was the learned counsels' contention that it was precisely the reason why on 23.01.2009, the learned Single Judge had directed issuance of fresh summons in the suit.

4.3 Mr. Gupta submitted that the appellants /defendants became aware of the proceedings only upon receiving a notice on 22.11.2010 for appearance in connection with an execution petition on 25.11.2010 from District Court at Kulgam, Kashmir. It is submitted that on enquiries being made at the office of the Principal District Judge, the appellants/defendants became aware of the fact that an exparte judgment and decree dated 12.10.2009 had been passed against them. Mr. Gupta sought to place reliance on the medical record to support, appellant no.1/defendant no.1's position that he was actually unwell and was therefore, not available at his house. The sum and substance of Mr. Gupta's arguments was that no service had been effected on the appellants/defendants and therefore, the exparte decree ought to be recalled.

REASONS

5. We have considered the submissions of the learned counsel for the appellants/defendants and perused the record. On perusal of the record, we are unable to persuade ourselves to interfere with the impugned judgment and order of the learned Single Judge for the following reasons.

5.1 As noticed above, the suit was registered and summons were issued on 16.07.2008. The returnable date before the Joint Registrar was 03.10.2008, when it was noticed that service report through ordinary process was still awaited and that it would be considered as and when received. Consequently, fresh summons were issued and the next returnable date before the Joint Registrar was 18.12.2008.

5.2 At the proceedings held before the Joint Registrar on 18.12.2008, the

Joint Registrar recorded based on the endorsement on the registered AD covers, that the appellants/defendants had refused the service. Thus, as a matter of fact, service was deemed to have been effected. Since the Joint Registrar, however, did not have the power to proceed *ex parte* against the appellants/defendants, he directed that the suit be placed before court on 23.01.2009.

5.3 It appears that on 23.01.2009, the learned Single Judge overlooked the previous order of the Joint Registrar dated 18.12.2008 and directed issuance of fresh summons. It may, however, be noted that in the said order, the learned Single Judge observed: “service report in this matter is awaited”.

5.4 In the meanwhile, the respondent/plaintiff filed an application in court, which came to be listed on 12.03.2009, to seek liberty to file an English translation of the process server’s report. It is obvious that in the meanwhile the two service reports of even date i.e., 06.12.2008 had been placed on the suit record. At the next date of hearing i.e., 25.03.2009, the matter had to be adjourned as the English translation of the process server’s report was not on record. This deficiency was fulfilled at the hearing held on 06.04.2009, when the learned Single Judge on perusing the English translation of the process server’s report came to the conclusion that the appellants/defendants had refused service of summons sent via registered AD post. Consequently, the learned Single Judge issued a direction that the appellants/defendants be proceeded *ex parte*.

6. In these circumstances, we have no doubt in our minds that the appellants/defendants were avoiding service and hence, had refused to accept notice sent through registered AD, i.e., recorded delivery. This fact is doubly substantiated by the reports of the process server dated 06.12.2008, in which it is noted that while appellant no.1/defendant no.1 was away for medical treatment the other appellant no.2/defendant no.2 had left for work.

6.1 The fact remains that despite not being available, the service according to the reports filed by the process server, was effected on the family members of the appellants/defendants. The argument of Mr. Gupta that no details of the family members on whom the service had been effected, having been mentioned – the service in the eyes of law was non-est, is untenable in view of the fact that the appellant no.1 /defendant no.1 himself seeks to place reliance on the medical records to establish why he was unavailable. This fact could not have been conjured by the process server. This singular fact according to us establishes, the veracity of the process server's report and the dishonesty of the stand taken by the appellants/defendants. The purpose of service is, notice of proceedings. If this fact is disputed the onus would be on one, who disputes service being effected in accordance with law. The reason cited in the process server's report itself suggests that it had to be a person of legal age.

6.2 Mr. Gupta's other contention that the service was not effected in accordance with the Rules prescribed in that regard by the J&K High Court is bereft of any material particulars. Though, in this regard, we must note Mr. Gupta had, by way of oral submissions, indicated the deficiency was with regard to the absence of the numberdar at the time of service. We find from the record that even this submission is incorrect as the process server in his report quite clearly adverts to the fact that he effected the service in the company of the choukidar and the numberdar. We may also notice that the provisions of Order 5 Rule 15 of the Code permit service being effected on an adult member of the family in the absence of any agent empowered to accept service on behalf of the noticee. Furthermore, provisions of Sub-Rule (5) of Rule 9 of Order 5, quite clearly provide that in case service was refused, it shall be deemed to have been effected.

6.3 It is quite obvious that these facts were brought to the notice of the

learned Single Judge on 06.04.2009 when he directed that the appellants/defendants be proceeded ex parte. Since the only case set up by the appellants/defendants, was that they were not served, which is found to be palpably false, in our view, learned Single Judge quite rightly rejected the application of the appellants/defendants under Order 9 Rule 13 of the Code.

7. Before we part, we may only notice that the appellants/defendants have relied upon the judgment of the Supreme Court in the case of ***G.P. Srivastava Vs. R.K. Raizada, (2000) 3 SCC 54***. The judgment is clearly distinguishable as it refers to non appearance on the date fixed, when the aggrieved party was proceeded ex parte, on the ground that there was sufficient cause for absence on the date fixed. In the instant case, as noticed above by us, the case set up by the appellants/defendants is lack of service, which is the other limb of Order 9 Rule 13 of the code.

8. For the aforementioned reasons, we find no merit in the appeal. The appeal and the application are accordingly dismissed.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

MARCH 26, 2012
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