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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) 1238/2007

% **Order delivered on: 21.10.2011**

RAJ KUMAR MAHESHWAI Plaintiff
Through Mr. Subrat Birla, Advocate

versus

JYOTI GUPTA & ORS. Defendant
Through Defendant No.1 in person

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

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

G.S.SISTANI, J. (ORAL)

I.A. No. 6328/2009 (u/o 9 Rule 13 CPC for setting aside Ex. Parte decree)

1. This is an application filed by the defendant no.1 under Order 9 Rule 13 read with Section 151 of the Code of Civil Procedure seeking setting aside of the judgment and decree dated 11th March, 2008 and the order by which she was proceeded ex parte.
2. It is submitted by defendant No.1 that she is being represented by a lawyer appointed by the Delhi High Court Legal Society, who was present at the first call while the counsel for the plaintiff was not present. At the second call, the counsel for defendant No.1 is not

present. Counsel for the plaintiff has submitted that the application is being adjourned from time to time as the counsel for defendant no.1 has been seeking adjournments to delay the matter. Defendant No.1 is present in person. The defendant No.1 submits that she was prevented by sufficient cause for not appearing in this Court and for not filing the written statement, as she was in judicial custody. She has drawn the attention of the Court to the order dated 20th December, 2007 passed on an application filed by the plaintiff seeking to serve summons on her through Superintendent, Tihar Jail No.6. In the said application filed by the plaintiff it was stated that the defendant No.1 is lodged in the Jail pursuant to FIR No. 755 dated 30th December, 2004 under Sections 406/409/420 and 422 IPC PS Model Town. The aforesaid application was allowed. On 11th January, 2008, the defendant No. 1 was present in court in custody and was granted time to file written statement within four weeks. As no written statement was filed and on account of non-appearance, the defendant no.1 was proceeded ex parte. No written statement was filed by defendant Nos. 2 and 3 and they were also proceeded ex parte and subsequently on 25th July, 2008, an ex parte decree was passed.

3. Defendant No.1 submits that she is a widow and she lost her husband very early in life when her only son was studying in 5th Class. It is submitted by her that she was made to sign a cheque to guarantee a transaction which was entered into between plaintiff

and defendant Nos. 2 and 3, against whom no action has been initiated, but taking into consideration that she is a soft target, defenceless and a widow looking after her old aged and infirm mother-in-law along with her minor son, she was arrested and sent to imprisonment. It is submitted that during the relevant period, she remained in judicial custody which prevented her from engaging a counsel and filing written statement. It is further submitted that even delay in filing the present application is on account of the fact that she was unable to engage services of any counsel and even otherwise, she was extremely pre-occupied, mentally disturbed and harassed and was taking all steps to obtain bail, to enable her to look after her family. She does not dispute the fact that she has been making number of applications for bail during this period. It is submitted by her that on account of lack of legal facilities and proper legal advice, she should not be made to suffer twice for an offence which she never committed and to make payment of an amount of which she was never received. She submits that no prejudice will be caused to the plaintiff if the matter is disposed of on merits and on the contrary she will suffer irreparable loss and injury in case the ex parte decree is not set aside. She further submits that the grounds raises in the present application under order 9 Rule 13 may also be read for condonation of delay under Section 5 of the Limitation Act as the ground of delay are identical for non-appearing in the Court and not filing the

written statement.

4. The application is vehemently opposed by the learned counsel for the plaintiff who submits that the defendant No.1 has cheated his client. It is further submitted that defendant no.1 has been actively pursuing her remedies even while she was in judicial custody. He has drawn the attention of the Court to various applications filed by her when she was in judicial custody for securing her bail. He further submits that being in judicial custody cannot be treated as sufficient ground for not appearing in Court. He relied upon ***Collector of Balasore vs. Ashutosh Roy, AIR 1963 Orissa 102 (V 50 C 37)***, particularly, paras 3, 4 and 5.
5. I have heard the defendant No.1 who appears in person and the counsel for the plaintiff and also carefully perused the application under Order 9 Rule 13 CPC. It is contended by defendant no.1, who appears in person, that she was prevented by sufficient cause for not appearing in court and also not filing the written statement, on account of the fact that she was in judicial custody. While considering the application under Order 9 Rule 7 CPC the court must be satisfied that the applicant was prevented from appearing in court on the date fixed for good cause. The court must also consider as to whether the applicant has been able to make out exceptional and special circumstances for non-appearance and non-filing of the written statement. In the present case the ground urged before this court is that the applicant was in judicial custody

during the relevant period. The factum of the defendant No.1 being in judicial custody during the relevant period is not disputed by the learned counsel for the plaintiff. What has been argued by him is during the period from June, 2004 up to 6th July, 2009 when the defendant no.1 was in jail, she had made various applications for being released on bail including on 6th February, 2006, 27th April, 2006, 11th May, 2006, 20th September, 2007, 25th December, 2007, 22nd February, 2008, 7th April, 2008, 17th July, 2008, 21st January, 2009, 28th March, 2009 and 24th May, 2009, which would show that she had the benefit of legal advice and filing of these applications is also not in dispute. The short question that arises for consideration is whether being in jail is to be treated as sufficient cause/ good cause for non-appearance and for not filing the written statement, as per the provisions of Order 9 Rule 13. The case of **Collector of Balasore (Supra)** relied upon by learned counsel for the plaintiff was a case where the accused was present in Court at the time when the decree was passed and he did not file any application either for setting aside the decree or the appeal. What has been held in the case of **Collector of Balasore (Supra)** is that it is not the law that the period of imprisonment must always be excluded. The judgment sought to be relied upon by the counsel for the plaintiff is not applicable and can be of no help to him. The imprisonment of a party may not constitute sufficient cause for excusing delay in all circumstances. There can be no

quarrel to this proposition. What is to be seen is whether a person in jail had proper legal facilities or was the person prevented from defending himself or was in a position to defend himself from jail. This would again depend on the facts of each case. An economically well off person with large resources may be able to engage a battery of lawyers to defend him while in jail and in such a case being in jail may not constitute sufficient cause for non-appearance. The present case does not fall in this category. Defendant no.1 is a widow, looking after her old in-laws and a minor son. Defendant no.1 is a person belonging to such a background that her family members did not pursue the litigation in her absence. In short, the overall circumstances of a person are to be taken into consideration before arriving at a conclusion that being in jail by itself is a sufficient cause for not filing written statement or for appearance. In case at hand, as already stated the applicant is a widow. She is looking after her old aged infirm mother-in-law. Her son was minor when she was in jail and he was studying. According to the applicant she is a teacher and has limited source of livelihood. In my view if such circumstances can be termed as sufficient cause for a person not having sufficient means to defend herself in jail, there cannot be any worse case than this. Under these circumstances, I am satisfied that there was good cause/ sufficient cause. Merely filing number of bail applications cannot be a ground to dismiss the present application.

In case when life and liberty of a person is affected such a person would take all steps which are available firstly to get herself released on bail rather than to take steps to defend a civil matter. Filing of series of applications which have been referred by the counsel for the plaintiff in the reply would show the desperate condition of defendant No.1 who was making repeated bail applications for her to be released and admittedly she remained in jail for more than three to four years. Having regard to the facts of the present case, I am satisfied that the defendant no.1 was prevented from sufficient cause from appearing in court and for not filing the written statement. Accordingly, the application is allowed. Consequently order dated 27.03.2008 proceeding defendant no.1 ex parte is recalled and the judgment/ decree dated 25.07.2008 is set aside.

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6. Let written statement be filed by the defendant within 30 days from today. Replication within 30 days thereafter. The parties will file documents within the same period.
7. List before the Joint Registrar, on 18th January, 2012 for admission/denial of the documents.

OCTOBER 21, 2011
'raj'

G.S.SISTANI, J