

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

+ **FAO 311/2012**

% Judgment delivered on: 25.07.2012

SURINDER GROVER Appellant
Through : Mr. Harvinder Singh Thethi, Adv.

versus

ANIL KUMAR Respondent
Through : None

CORAM:
HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.(oral)

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CM No. 12566/2012 (exemption)

Exemption as prayed is allowed, subject to just exceptions.

Application stands disposed of.

FAO No. 311/2012

1. By way of this appeal, a challenge has been made to order dated 02.05.2012 passed by learned ADJ, Delhi whereby while allowing application of the appellant under Order 9 Rule 13, a condition has been imposed directing the appellants to deposit the principal amount i.e. Rs.6,50,000/- in the form of FDR within one month from the date of

impugned order in the name of court.

2. Learned counsel for appellant submits that the appellant had moved an application under Order 9 Rule 13 of CPC for setting aside the ex parte judgment and decree dated 18.09.2008 passed against him whereby the learned ADJ had decreed the suit of respondent/plaintiff for an amount of Rs.6,50,000/- and interest of 9% p.a. from the date of filing of the suit.

3. Appellant had taken a stand before the learned trial court that he was never served with the summons of the suit. Even the service by way of publication was not proper and he had come to know of the ex parte judgment and decree only on 16.08.2011 when he was arrested in execution of warrant of arrest and thereafter he immediately moved an application on 30.08.2011 for setting aside of ex parte judgment and decree passed against him.

4. The aforesaid application was contested by the respondent/plaintiff has by filing reply wherein he denied that appellant was never served with the summons of the suit. He had also taken a stand that the appellant/defendant was aware of even the pendency of the execution petition and was deliberately not appearing in the matter. After hearing learned counsel for the parties, the learned ADJ has observed that the suit

was filed against the appellant/defendant on the basis of cheque bearing no. 756956 dated issued by him in the name of the respondent/plaintiff. It has been further observed that the summons of the suit were sent to him number of times at his first address but every time on reaching his address it was reported that he had shifted to 13, 2nd floor, Old Anarkali, Delhi-51 where the brother of the appellant/defendant had refused to take the summons and stated that he did not reside there nor he gave any other address of the appellant/defendant. The perusal of the impugned order shows that even the mother of the appellant/defendant had refused to take summons. Accordingly, the learned ADJ had observed that he was duly served with the summons. The relevant Paras of the impugned order are reproduced as under:-

“17. The summons of the suit were issued to the defendant number of times and the perusal of the report on the summon sent to the defendant on his 1st address for 8.11.2007 shows that the process server had taken the summons on the first address, but on reaching there, he came to understand that the defendant had shifted at 13, IInd floor, Old Anarkali, Delhi, where the brother of the defendant met who refused to take the summon of the defendant and stated that the defendant did not reside there and he did not tell about the address of the defendant, whereas, perusal of the report on the summons sent to the defendant on his address on A-7, Lal Quarter Delhi for dated 9.1.2008 shows

that the process server had reported that he was told that the defendant had come there few time before and the defendant is residing at 13, 2nd Floor, Old Anarkali Delhi and he went to the said place, where the mother of the defendant met to the process server and firstly she has stated that the defendant was inside the house and she went inside the said house and when she again came out, she had resiled from her earlier statement and stated that the defendant did not reside there and refused to take the summon.

18. Perusal of the record shows that the personal service of the defendant could not be effected, so on filing of the application u/o 5 rule 20 by the plaintiff, the service of the defendant was ordered to be effected by way of publication of summons in the newspaper, on both the addresses of the defendant. As the brother and mother of the defendant had refused to take the summons and also refused to tell about the defendant. Accordingly, the service of the defendant was effected by way of publication of summon in the newspaper Statesman in its edition dated 8.2.2008 for 29.2.2008. But despite of his service by way of publication of summon in the newspaper, the defendant failed to appear in the court and was proceeded ex parte by the court and the matter was adjourned for the ex parte evidence of the plaintiff and on completion of the evidence of the plaintiff and after hearing the counsel for the plaintiff, the predecessor of mine vide his judgment dated 18.9.2008 was pleased to decree the suit of the plaintiff.”

5. There is a categorical finding by the learned ADJ that the summons

were duly served. The brother and mother of the appellant had refused to accept the summons and as such in law refusal of accepting summons by the adult member of the family can be treated as service of summons. It has also been noticed that he was also served by way of publication in newspaper. Keeping in view the material on record, it has been observed that the appellant/defendant was watching the proceedings and the same were very much in his knowledge and accordingly his application which is moved after 2 years and 11 months of passing of the ex parte judgment and decree has to be time barred. Despite the above observation, in order to give an opportunity to contest the matter on merits, the ex parte judgment/decreed has been set aside by the ld. ADJ subject to deposit of the cheque amount i.e. Rs. 6,50,000/-.

6. Learned counsel for appellant has contended that though the application under Order 9 Rule 13 has been allowed but the condition imposed in allowing the said application is very harsh and appellant is not in a position to pay the aforesaid amount.

7. Perusal of impugned order shows that after considering the entire background of the case and observing that the appellant/defendant was duly served and has been deliberately not appearing in the matter, the appellant

has been given opportunity to contest the matter subject to deposit of the principal amount. The application has been allowed keeping in view the request of the learned counsel for the appellant/defendant. In these circumstances, appellant cannot make any grievance of the impugned order. Taking a lenient view of the matter, I have even asked the appellant who is present in court to deposit 50% of the principal amount i.e. Rs. 3,25,000/- but he is not even willing to deposit even the said amount.

In view of the circumstances, no illegality is seen in the impugned order which calls for interference of this Court.

The appeal stands dismissed.

CM No. 12565/2012 (stay)

In view of the order on the main appeal, no orders are required on this application.

The same stands disposed of accordingly.

VEENA BIRBAL, J

JULY 25, 2012
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