

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

+ CM(M) 1187/2011 & CM 18854/2011

Date of Decision: 03.09.2012

RAJ BALA

..... Petitioner

Through: Mr. K.C. Bajaj, Advocate.

Versus

KRISHNA KAUL

..... Respondent

Through: Mr. B.L. Wali, Advocate.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J. (Oral)

1. This petition under Article 227 of the Constitution impugns order dated 12th August 2011 of Additional District Judge-02, Saket District Courts, whereby applications of the respondent, who was defendant in the suit, under Order 9 Rule 13 CPC and Section 5 of Limitation Act, were allowed.

2. The petitioner had filed a suit for permanent injunction and specific performance against the respondent/defendant on 27th March 2009. Respondent having failed to appear to contest the suit, he was proceeded ex-pare and consequently ex-parte judgment and decree was passed against him on 09.11.2009. The respondent/defendant filed the instant applications for setting aside ex-parte judgment and decree and also for condonation of delay in

filing the application. The said applications were allowed by the learned ADJ vide the impugned order dated 12th August 2011. This order is challenged in the instant petition by the petitioner/ plaintiff.

3. The main ground that has been urged before me by the learned Counsel for the petitioner is that the application under Order 9 Rule 13 CPC was filed after the expiry of limitation period of 30 days and, so was not maintainable and further that there being no sufficient cause shown by the respondent/defendant for condoning the delay from the date of knowledge gained on 20.02.2010 till the filing of the application on 01.05.2010, the learned ADJ erred in condoning the delay in filing application under Order 9 Rule 13 CPC. It was also submitted that the respondent/defendant was duly served by ordinary process as also by publication and having failed to appear despite service, was rightly proceeded ex-parte on 25.05.2009. It was also submitted that in any case, the learned ADJ erred in allowing the applications and setting aside the judgment and decree, not appreciating that the decree has already been executed with the registration of sale deed of the suit premises in favour of the petitioner.

4. On the other hand the contentions of the learned counsel for the respondent are that the petitioner had played fraud on the respondent as also on the Court in not only filing false and frivolous suit against the respondent, but also in manipulating ex parte judgment and decree against him. It was submitted that no proper service was effected upon the respondent/defendant in terms of the

law as also as per the directions given by the Court. It was submitted that no notice was got issued by registered post and the report of ordinary process as also service by way of publication, were manipulated. It was also submitted that the suit filed was frivolous and deceptive inasmuch as the petitioner had already settled the matter with the respondent/defendant by taking the refund of the advance money vide written agreement dated 13.01.2008.

5. Before advertng to the respective submissions of learned counsel of the parties, I may reiterate that the power of this Court under Article 227 of the Constitution is not to act as a Court of appeal. This is only to ensure that the procedure followed by the Trial Court was as per law and the trial court did not exceed its authority and jurisdiction. This Court would not substitute its opinion or interfere with the findings of facts of the Trial Court, if there was no infirmity or perversity.

6. The submissions which have been made before me by both the counsel are same which were made before the learned ADJ dealing with the applications under Order 9 Rule 13 CPC and Section 5 of Limitation Act. On perusal of the records, the learned ADJ allowed both the applications reasoning as under:

“15. From the perusal of the record it appears that a suit for permanent injunction and specific performance was filed by the plaintiff on 27.03.2009 and on the same date summons in the suit and notice of the IA was issued to the defendants on filing of PF and RC returnable for 08.04.2009. Process was issued on 31.03.2009 and as per the report of the process server

the date and time of the first visit was mentioned as 06.03.2009 and he had mentioned in the report 'he visited on 06.03.2009 at the given address and at the given address the premises were locked, after enquiring he came to know that nobody is residing in house no. 60-A, and the owner had given the premises on rent as no witness was available hence the report': On 08.04.2009, my Ld. Predecessor court has ordered:

“Summons in this case received back with the report that no such person exists at the given address. In view of the report on record, Ld. Counsel for the plaintiff prays for sometime to take necessary steps. List this case on 14.04.2009 for further consideration.”

The matter was taken up on 15.04.2009 and order for publication was made and defendant was ordered to be served through publication returnable on 25.05.2009 and on 25.05.2009, he was proceeded ex-parte.

16. From the perusal of record it appears that plaintiff has not taken any steps to serve the defendant through registered AD as was ordered by my predecessor court.

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19. In the present case, defendant is not served through registered cover and even a copy of publication has not been sent to him. No affixation of summons on the suit property was done and defendant/applicant came to know about the ex-parte decree when warrants of possession were issued against him. The application has been filed along with

an application U/s 5 of the Limitation Act for condonation of delay and a reason for the delay has been sufficiently explained by the applicant in this application. I am satisfied that there were sufficient reasons for not applying to the court in time.”

7. I, having gone through the record, do not see any infirmity in the aforesaid findings of facts by the learned ADJ warranting any interference by this Court in this regard.

8. The submission of the learned counsel for the petitioner that the applications were time barred, is apparently misconceived. There is no dispute that the period of limitation for filing application under Order 9 Rule 13 CPC was to be reckoned from the date of knowledge of passing of ex-parte decree and that as per Section 3 of Limitation Act the Court had no jurisdiction to entertain such application after the expiry of the period of limitation of 30 days, from the date of knowledge, as per Article 123. According to learned Counsel for the petitioner, the respondent had, in any case, gained the knowledge of the decree on 20th February 2010 and the application had been filed on 01.05.2010, was apparently time barred. There is nothing on record to substantiate this statement of learned counsel for the petitioner. The petitioner filed execution of the decree vide execution No. 526/2010 and got issued summons to the respondent/defendant on 17.02.2010 for 19.03.2010. This summon was received by the respondent on 20.02.2010. By receipt of summon it could not be known that the petitioner had obtained

ex-parte decree against the respondent. It was in the backdrop of the fact that the respondent/defendant had, vide agreement dated 13.01.2008, resolved the matter with the petitioner and thus, could not have expected the petitioner having filed a suit and obtained ex-parte decree. In any case, the learned ADJ, based on the entire factual matrix, has exercised judicial discretion in condoning the delay, and I do not see any fault therein, and thus no reason to interfere therewith.

9. On being asked, the learned counsel for the petitioner could not satisfy regarding having filed registered cover at any point of time in compliance of order of 27.03.2009, for issue of notice by registered post. He only maintained that registered cover was filed, but it might have been misplaced in the Court. I am aware of the fact that the Court staff maintains record of receipt of processes by ordinary means as also by registered post. There being nothing on record to substantiate this submission of the learned counsel, it was rightly noted that no steps were taken by the petitioner for issue of notice by registered post. This was apparently non compliance of the order of the Court, by the petitioner, as also the provisions of Order 9 rule 9 CPC. Then there is a procedure for service of summons upon the defendant under Order 9 Rule 17, in the event of the defendant not being served by ordinary process. That was also not followed by the process server. Still further, the service by substituted mode could not be effected under Order 5 Rule 20 CPC unless the court was satisfied that there was reason to believe that

defendant was keeping out of the way for the purpose of avoiding service or that for any other reason the summons could not be served in ordinary manner. There was no such declaration recorded by the Court. From the proceedings it is seen that in the hurried manner the defendant was got proceeded ex-parte, resulting in miscarriage of justice to the respondent.

8. In view of my above discussion, I do not see any infirmity or illegality in the impugned order. Thus, the petition having no merit, is hereby dismissed.

M.L. MEHTA, J.

SEPTEMBER 03, 2012

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