

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

+ **F.A.O. No.229/2013**

Decided on : 22nd October, 2013

M/S ALLIANCE PETROLEUMS PVT. LTD Appellant

Through: Mr.Atul Kumar Sharma, Advocate.

Versus

YAKIA MARKETING SERVICES Respondent

Through:

**CORAM:
HON'BLE MR. JUSTICE V.K. SHALI**

V.K. SHALI, J. (ORAL)

**FAO No.229/2013, CM No.8247/2013 (Stay) and CM No.8698/2013
(Directions)**

1. The matter was heard yesterday and it was kept for today. Nobody has appeared in the matter today.

2. This is an appeal filed by the appellant against the order dated 07.02.2013 by virtue of which the application of the appellant under

Order 9 Rule 13 CPC was dismissed on the ground that the appellant had failed to show sufficient cause for his non appearance on 08.02.2012.

3. The learned counsel for the appellant, in the first instance yesterday, had sought time to comply with the order dated 27.08.2013 to deposit the decretal amount. The aforesaid order regarding deposit of decretal amount was passed in order to see the bona fides of the appellant & subject to such deposit, the operation of the impugned judgment was stayed. The appellant has not deposited the amount and preferred to address the arguments on merits of the appeal. It was contended by the learned counsel for the appellant that the trial court ought to have allowed the application of the appellant for setting aside the ex parte decree as the counsel for the appellant could not appear on 08.02.2012 because of the personal reasons for which he had chosen to file his personal affidavit. It was also contended that there was another application filed by the appellant for setting aside the ex parte decree which was filed on 30.10.2012 and that was erroneously rejected by the court on the ground that it was barred by limitation.

4. I have carefully considered the submission and gone through the record. Before dealing with the submissions urged by the learned counsel

for the appellant, it will be pertinent to give brief background of the case.

5. The brief background of the case becomes important because it reflects on the bona fides of the appellant to show that he is a person who is not trustworthy and wants to make averments with reckless impunity. The appellant/company had agreed to sell for a total sum of ₹ 8 lakhs a Mercedes Benz car, which was owned by it, to the respondent. The appellant nos. 2 & 3 are the officials/officers of the appellant no.1/company. Out of the said amount, ₹1 lakh was given to the appellant/company by way of advance. The balance amount of ₹ 7 lakhs was paid subsequently by way of three post dated cheques which were encashed and the possession of the car was also handed over to the respondent. Later on, it transpired that despite assurances by the appellants to the respondent that the vehicle was free from all encumbrances, it was found that the vehicle was hypothecated with ABN Amro Bank Ltd. The respondent approached the appellants and requested them to get the hypothecation removed failing which to take the vehicle back and return the money. The appellants took the vehicle back but failed to return the money of ₹8 lakhs which resulted in filing of a suit by the respondent for recovery of ₹ 8 lakhs along with interest at

the rate of 24% per annum. It was this suit which was contested by the appellants by filing a written statement. During the pendency of the suit, the counsel for the appellants Mr.Prabhjit Jauhar absented himself on 08.02.2012 as a consequence of which, the appellants were proceeded ex parte and the matter was adjourned to some time in March, 2012. On the next date of hearing, in the month of March, 2012 also there was no appearance on behalf of the appellants and consequently the ex parte evidence was recorded and a decree for a sum of ₹ 8 lakhs along with interest was passed against the appellants on 02.04.2012. On 06.06.2012, an application for setting aside the ex parte decree was filed by the counsel for the appellants Mr.Prabhjit Jauhar under his signatures wherein a plea was taken that he could not appear on 08.02.2012 on account of bereavement in his family in the months of December, 2011 and January, 2012. It was stated by Mr.Prabhjit Jauhar that on this account he had been taking dates in most of the matters through his junior counsel, but in the instant case, the junior counsel had also left the services of Mr. Jauhar and he had also failed to make an entry in the diary as to the next date of hearing in the matter, because of which the matter went unattended on 08.02.2012 and resultantly a ex parte decree was

passed against the appellants. While this application was pending, the appellant/company changed the counsel and another application for setting aside the ex parte decree dated 02.04.2012 was filed on 30.10.2012. In this second application for setting aside the ex parte decree dated 02.04.2012, a plea was taken by the appellants that they learnt about the ex parte decree only on 22.09.2012 when the bailiff had arrived for the purpose of effecting the attachment in pursuance to the orders of the executing court. This second application was held to be barred by limitation by the trial court and in my view rightly so, reason being that once an application for setting aside the ex parte decree dated 02.04.2012 had been filed by a previous counsel and the same was pending, there could not be a second application for the same cause. Therefore, no fault can be found with the rejection of the second application seeking setting aside of the ex parte decree dated 02.04.2012. In any case, the trial court has rightly held that the application for setting aside the ex parte decree dated 02.04.2012 was barred by limitation on account of the fact that the application for setting aside the ex parte decree has to be filed within thirty days from the date of the decree or at best within thirty days from the date of acquiring knowledge about the

decree having been passed. In the instant case, in the second application seeking to set aside the ex parte decree dated 02.04.2012 itself, it is stated that the appellant had learnt about the ex parte decree having been passed on 22.09.2012. If that be so, the application ought to have been filed within thirty days from the said date while as it has been filed beyond a period of thirty days. Even otherwise, the appellant is deemed to have knowledge about the decree having been passed on 06.06.2012 when the first application for setting aside the ex parte decree was filed because the knowledge of the counsel will be attributable to the knowledge of the client. That being the position, the second application has to be treated as barred by time in case the period of limitation is reckoned from either of these two dates. This is with regard to the second application. So far as the first application is concerned, the same does not evoke the sympathy of the court for the simple reason that the application itself on the face of it does not seem to be bona fide. The bona fides of the explanation given by the counsel are suspect because the affidavit and the application itself state that the counsel suffered bereavement in the months of December, 2011 and January, 2012. The bereavement was suffered by the counsel in the month of December, 2011 and January, 2012 and it has been stated by

him that he had been taking adjournments in all the matters and the junior counsel who was assisting him in taking the dates had also left the services without entering the next date of hearing in the diary maintained by the counsel. The bereavement had taken place much before the date of hearing and consequently it could not be assumed that the counsel could afford not to be appearing in the matters for such a long period of time and even if the explanation given is taken to be correct, still it is totally unbelievable that the counsel would not flip through the pages of his diary on a regular basis to see as to whether the dates of the cases which were attended to in his absence have been carried forward or not. If this is the attitude of the counsel, then he is totally negligent and he cannot be permitted to take advantage of his negligence. Similar is the behaviour of appellant no.1. The appellant no.1 is a private limited company and it cannot simply say that once the brief is handed over to the counsel, its responsibility is over whereas it is essentially the responsibility of the client to remain in touch with the counsel and to find out the developments in its case while as in the instant case, the appellants have not shown due diligence in attending to the matter assigned by them to their counsel nor have they shown as to what action

was initiated against the counsel pursuant to his negligent behaviour. Therefore, the explanation which has been given by the counsel in the first application seems to be a make-believe story or a manufactured explanation which does not in any manner show that it constitutes sufficient cause. I, therefore, feel that the trial court was absolutely right in rejecting the application of the appellants filed under Order 9 Rule 13 CPC for setting aside the ex parte decree dated 02.04.2012. The bona fides of the explanation also become suspect in the light of two important facts. Firstly, the appellant/company had allegedly made a wrong statement to the respondent while selling the vehicle in question that the vehicle was free from all encumbrances while it was hypothecated with the ABN Amro Bank and secondly, despite having been given an opportunity to pay the decretal amount in order to examine the validity of their plea, they have failed to deposit the said amount in the court. The appellants have also not returned the amount to the respondent despite having re-possessed the vehicle in question. All these facts cumulatively show that the appellant/company and its officers/officials are dishonest and the court cannot come to the rescue of a person or a company whose conduct is dishonest.

The accordingly the appeal is dismissed.

V.K. SHALI, J.

OCTOBER 22, 2013
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