

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

+ **RSA No.156/2013**

Decided on : 12.08.2013

INDIA ISLAMIC CULTURAL CENTRE Appellant

Through: Mr.T.R.Kukreja, Advocate.

Versus

DEEPAK KUMAR Respondent

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

V.K. SHALI, J. (ORAL)

1. This is a regular second appeal filed by the appellant against the judgment dated 04.07.2013 passed by Sh.Sandeep Yadav, learned ADJ, Saket Courts, New Delhi dismissing the appeal of the appellant being RCA No.65/2013 and upholding the judgment and decree dated 08.08.2012 passed by the Civil Judge decreeing the suit for recovery of money.
2. Briefly stated, the facts of the case are that the respondent filed a suit under Order 37 CPC for recovery of a sum of ₹2,41,979/-. The learned trial court, on considering the facts of the case, issued summons in the suit. The defendant was served. However, none

appeared on behalf of the defendant. The defendant was proceeded *ex parte* vide order dated 05.03.2011. The appellant/defendant moved an application on 16.03.2011 under Order 9 Rule 7 CPC for setting aside the *ex parte* order. The said application was allowed and the appellant/defendant was directed to file the written statement. The written statement was filed and the issues were framed on 18.01.2012 and the case was adjourned for recording of evidence. At the stage of recording of evidence, the appellant/defendant again absented on more than two dates, as a consequence of which, the appellant/defendant was again proceeded *ex parte* on 17.05.2012. It may also be pertinent to mention here that before being proceeded *ex parte* even costs had also been imposed on the appellant/defendant on 19.03.2012. The appellant/defendant had failed to comply with the directions of the court with regard to payment of costs. The *ex parte* evidence was recorded on 17.05.2012 and the matter was adjourned to 04.07.2012 and after hearing arguments, an *ex parte* decree was passed on 08.08.2012.

3. After about 10 months from the date of being proceeded *ex parte*, the appellant/defendant filed an application for setting aside the *ex parte* order dated 17.05.2012. The ground for setting aside the *ex parte* proceedings against the appellant/defendant was that their counsel was negligent who kept the appellant/defendant in dark about the progress of the case and consequently they were put in a situation where an *ex parte* decree was passed against them. The learned trial court after calling for the record, observed that the *ex parte* proceedings have to be set aside within 30 days from the date when the knowledge of having been proceeded *ex parte* is drawn and curiously the appellant/defendant having put in appearance had not mentioned in the application as to on what date they learnt that they had been proceeded *ex parte*. In addition to this, the learned trial court rejected the plea about the appellant having been kept in dark by the counsel inasmuch as after perusal of the order sheet, the trial court had noted that a senior officer of the appellant/defendant had appeared on three dates in court to attend the matter which clearly showed that they were not in dark and as a matter of fact they were following up the court proceedings. The

application for setting aside the *ex parte* proceedings was dismissed on 10.05.2013. After dismissal of the application for setting aside the *ex parte* proceedings and being permitted to participate in the proceedings, the appellant/defendant filed an appeal against the *ex parte* decree dated 08.08.2012. The learned trial court, after considering the stand of the appellant, did not condone the delay of 310 days in filing the appeal. The application which was filed by the appellant seeking condonation of delay in filing the appeal was found to be sketchy and bereft of any details. Still not being satisfied, the appellant/defendant filed the present regular second appeal. The substantial questions of law which the appellant/defendant has urged to be arising in the instant appeal are as under:

“I. Whether an appeal (being a valuable right of the appellant) should be dismissed straightway, by dismissing the accompanying application seeking condonation of delay (caused on account of negligence on the part of the then counsel), in filing appeal (i.e. without even entering into the actual case/merits of the appeal.

II. Whether the legal interests of a sincere litigant should be allowed to suffer merely for the

reasons of negligence / non-appearance on the part of its counsel.

III. Whether the grounds taken by the appellant / defendant in its leave to defend (treated to be its written statement by the Hon'ble Court) should not have been taken into account by the Hon'ble Trial Court while finally deciding the suit / case before it.

IV. Whether the Hon'ble Trial Court should have overlooked the documents (being part of Court file before it) which in fact substantiate and supported the case of the appellant / defendant;

V. Whether the bona fide intentions of the appellant (i.e. the defendant before the Hon'ble trial court in depositing Fixed Deposit Receipt of ₹1,00,000/- in compliance of its order for stay of execution proceedings) should not have been taken into account by the Hon'ble Appellate Court.

VI. Any other question(s) with permission of the Hon'ble Court."

4. A perusal of the aforesaid five questions would show that they are not questions of law much less substantial questions of law. These are questions of fact, which have been adjudicated by the court below.

5. I have heard the learned counsel for the appellant and gone through the record. At the outset, it must be mentioned that the appellant

has not only been negligent in pursuing the matter, they have also not been truthful and straightforward. This is one of the important components for setting aside the *ex parte* proceedings or a decree that a person must come to the court with clean hands and must truthfully disclose the complete facts. This is on account of the fact that the appellant/defendant has taken a plea for setting aside the *ex parte* proceedings which were initiated against the appellant on 17.05.2012 because they had failed to appear and evidence was recorded. The ground which was set up was that they were not informed by the counsel who was negligent. No action was shown to have been initiated in respect of the counsel being derelict in discharging his duties of attending the matter. This clearly shows that the appellant's intention was not bona fide and they were trying to shift the blame on to the counsel. This is evident from the fact that the learned trial court has noted after perusal of the order sheet that on different dates, a senior officer of the appellant/defendant was attending the matter. Therefore, it could not be said that the appellant was ignorant about the date of hearing or the progress of the case. Even if they are assumed to be ignorant

about the progress of the case having not received the information from the counsel, it is essentially the responsibility of the client to follow up the matter and if the counsel is not furnishing the information, they could have inspected the record. But this has not been done in the present case. Therefore, this clearly shows that the client is negligent and he cannot rest contented by handing over the brief to the counsel and shift the blame to him. In addition to this, the very basis of filing the appeal is inept. At the time when the application for setting aside the *ex parte* proceedings was filed by the appellant/defendant, an *ex parte* decree had already been passed.

6. The appellant/defendant instead of challenging or filing an application under Order 9 Rule 13 CPC for setting aside the *ex parte* decree has chosen to file an application under Order 9 Rule 7 CPC for setting aside the *ex parte* proceedings which were initiated against them on 17.05.2012 which has been rejected by the trial court on 10.05.2013 and curiously enough this order of rejection of their application has not been carried in appeal by the appellant and on the contrary an appeal is filed against the *ex parte* decree dated

08.08.2012, which has also been dismissed by the first appellate court on the ground that the application for condoning the delay of 310 days in filing the appeal against the *ex parte* decree has not been sufficiently explained. The application for condonation of delay was found to be bereft of any details and consisting of just two lines attributing the delay in filing the appeal to the negligence of the previous counsel of the appellant/defendant. In such circumstances, the appellant seems to be totally slack, grossly negligent and not intending to assail the *ex parte* decree having been passed against the appellant. It seems that the appellant only wanted a seal of legitimization on the decree so as to save their skin.

7. The aforesaid facts clearly show that the matter does not raise any question of law much less a substantial question of law.
8. I accordingly dismiss the appeal as it does not raise any substantial question of law which a prerequisite for entertaining the appeal.

V.K. SHALI, J.

AUGUST 12, 2013
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