

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

% *Judgment delivered on: July 10, 2013*

+ **CM(M) No.971/2012 & C.M. No.15104/2012**

MOHAN KUMAR Petitioner
Through Mr.R.D.Tyagi, Adv. with
Ms.Sushila Thakral, Adv.

versus

GAURAV PRIYA SINGH Respondent
Through None

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (ORAL)

1. The petitioner/plaintiff filed the suit under Order XXXVII for recovery of ₹9,60,000/- along with pendent lite and future interest against the respondent/defendant who was served on 24th May, 2010. The application for leave to defend was filed after the expiry of prescribed period of 10 days, with the total delay of 48 days. No application for condonation of delay was filed by the respondent.
2. Vide order dated 17th January, 2011, the suit of the plaintiff/petitioner was decreed up to the extent of ₹9,60,000/- as double the amount of payment received by the defendant/respondent.
3. The respondent after expiry of ten months filed an appeal being RFA No.545/2011 before this Court. However, when the appeal was listed on 15th November, 2011, the respondent was asked to approach the trial Court to get the judgment and decree passed on 17th January, 2011 set aside. In

view of the said order, the respondent filed an application under Order XXXVII Rule 4 read with Section 151 CPC in Ex.P. No.49/2011 dated 19th November, 2011 alongwith an application for condonation of delay under Section 5 of the Limitation Act for setting aside the impugned judgment and decree.

4. The case of the respondent in the said application was that it was only on 30th September, 2011 when the Court Bailiff visited his premises for execution of the warrants of attachment issued by the trial Court, that it transpired to the respondent that the Court staff by mistake told him about the dismissal of the suit of the petitioner. Thus, there was a delay of 281 days in filing the application. The said delay was neither deliberate nor intentional. Therefore, his application for leave to defend be allowed by condoning the delay by setting aside the judgment and decree.

5. By the impugned order dated 21st April, 2012, the learned trial Court though admitting that there is a delay on the part of the respondent/defendant in filing the application for leave to defend, allowed the application under Order XXXVII, Rule 4 CPC, subject to cost of ₹10,000/-, by holding that there exist special circumstances for setting aside the judgment and decree. The delay was also condoned.

6. The petitioner has challenged the said order by filing the present petition mainly on the reasons that the impugned order suffers from legal error, illegality, irrationality and procedural impropriety.

7. Notice of the petition was issued to the respondent on 31st August, 2012 when the interim order was also passed for stay of the trial Court proceedings.

8. When the matter was taken up on 12th February, 2013, no one appeared on behalf of the respondent despite of service. Even, on subsequent dates, i.e. 4th March, 2013, 9th July, 2013 and 10th July, 2013, none appeared on behalf of the respondent.

9. After hearing and having gone through the record and impugned order, I am of the considered view that the impugned order dated 21st April, 2012 must be quashed/set-aside for the following reasons:-

- (i) Admittedly, the respondent did not file the application for leave to defend within the prescribed period of 10 days. The said application was filed after a lapse of 48 days. The suit of the petitioner/plaintiff was decreed on 17th January, 2011. The appeal before this Court was filed on 11th November, 2011, being RFA No.545/2011 after the expiry of about 10 months. Even on 14th July, 2011 certified copy of the decree and order was received by the respondent but appeal i.e. RFA No.545/2011 in this Court was filed in the month of November, 2011 i.e. after more than three months. The respondent was admittedly served with the summons on 24th May, 2010 in the suit he had full knowledge about the pendency of the suit and passing of decree on 17th November, 2011. The respondent was very much aware that the application for leave to defend was not filed in time.
- (ii) A perusal of application under Order 37 Rule 4 read with Section 151 shows that the respondent has failed to explain any special circumstance for not filing the leave to defend application within the prescribed period of 10 days from the

date of service of summons. The application under Order 37 Rule 3(5) for grant of unconditional leave to defend the suit was filed on 21st July, 2010 and there was a delay of 48 days. The said application was filed without an application for condonation of delay. The application under Order 37 Rule 4 CPC was filed in November, 2011 though the respondent was served with summons in suit on 24th May 2010, there was a delay of about one year and six months. No sufficient cause was mentioned by the respondent in the application under Order XXXVII, Rule 4 CPC. There is a clear negligence on the part of the respondent who cannot take the advantage of his own wrongs. Therefore, the trial Court ought to have dismissed the application of the respondent under Order XXXVII, Rule 4 CPC. The impugned order passed by the learned trial Court is contrary to the object of Order XXXVII CPC.

10. The said order is, therefore, quashed.

11. Since, the suit has already been decreed on 17th January, 2011 no further orders are required to be passed.

12. The petition as well as the pending application stand disposed of.

(MANMOHAN SINGH)
JUDGE

JULY 10, 2013/ka