

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

+ **CM(M) 603/2013 & C.M.No.9035/2013**

% **19th AUGUST, 2014**

UNION OF INDIA Petitioner

Through: Mr.Jaswinder Singh, Advocate.

VERSUS

M/S MAK EXPORTS Respondent

Through: None

+ **CM(M) 229/2013**

UNION OF INDIA Petitioner

Through: Mr.Jaswinder Singh, Advocate.

VERSUS

M/S MAK EXPORTS Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. These petitions are being disposed of by this common order, inasmuch as, one CM(M) No.229/2013 impugns the order of the trial court dated 29.8.2012 allowing the application filed by the petitioner/defendant under Order 9 Rule 13 CPC but subject to the deposit of the decretal amount and the second CM(M) No.603/2013 impugns the order dated 21.3.2013 by which the judgment and decree dated 28.1.2003 has been held to be

executable for non-compliance of the direction of deposit made while allowing the application under Order 9 Rule 13 vide order dated 29.8.2012.

2. A reading of the impugned order dated 29.8.2012 shows that it is a detailed order of 10 pages which has been passed after evidence has been led by both the parties on the application under Order 9 Rule 13 CPC.

3. The petitioner/defendant as per the record of the trial court was duly served both through the process server (who is the court official) and by registered AD post. The impugned order discusses in detail as to how the relevant person who was on the seat to receive the *dak* has not been produced in evidence and as per pleading whose signatures qua the receipt of the summons by ordinary process were denied. The impugned order also discusses the fact that the concerned official whose signatures appeared on the AD card has also not been brought in the witness box by the petitioner. The impugned order dated 29.8.2012 is a detailed order discussing all aspects and some of the relevant observations showing due service of the petitioner/defendant are contained in paras 6 and 8 of the impugned order, which read as under:-

“6. I have heard the arguments from both sides in the light of available material on record. Counsel for the non-applicant/plaintiff has vehemently argued for dismissal of the application on the grounds that applicant was duly served and it has failed to prove

through the evidence led in preliminary enquiry that it was not duly served for the reasons that it did not produce Under Secretary, Sh T. D. Chabra as referred in statement of AW1Sh. I.B. Karn. It also did not produce as to who was on duties in C.R. Section where the summon was received duly endorsed on 03/06/86. The sitting official at window has also not been produced so there has to be presumption that defendant No. 1 has been duly served as RW1 has proved service report vide Ex. RW1/1. It has also been submitted that facsimile of stamp appearing on the original summons has not been disputed to be the similar stamp being used by Department.

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8. Execution was instituted on 27/05/03 and in pursuance of warrants of attachment issued by defendant No. 1 returnable for 26/09/03, Baillif went to the Ministry of Home Affairs and Sh. T.D. Chabra, Under Secretary from Ministry of Home Affairs gave in writing to Baillif Sh. Shyam Sunder on 11/09/03 that necessary action would be taken as per law after ascertaining the position as details of the parties involved in the case are not clear from the warrants and on 15/09/03 counsel for defendant No. 1/UOI inspected the execution petition and that is how the present application stands moved. In the given facts and circumstances, in view of the fact that defendant No. 1 is a huge organisation and Process Server has also while handing over the summons to the Department did not bother to take the full signatures, name and designation of the person receiving the same, the present state of affairs arose. From the mere initial it is very difficult to decipher the signatures of the person receiving the process. The registered AD card ordered by Ld. Dy. Registrar vide order dated 23/05/1986 has not been received back as per records. Even Ex. RW1/1 does not show the complete facsimile of the receiving stamp of the applicant's Department. As per AW2 Smt. Veena Khosla, the stamp being used by the Department used to be "square" or "rectangular" type of stamp containing date and diary number, which were also available in the office on the date of deposition of that witness before the court on 07/04/04. However, perusal of the office stamp on Ex. RW1/1 shows that there is no date and diary number thereat. In this context, I would refer to the

testimony of AW2 Sh. S.S. Negi, whose attention was invited during his own cross-examination to the stamp used on AD card Ex. PW1/11. It is noted that Ex. PW1/11 is acknowledgment card of the legal notice sent to the Secretary, Ministry of Home Affairs vide legal notice dated 26/04/85, which appears to have been received as per facsimile stamp on AD on 28/04/85. The same is the document prior to filing of suit.

Plaint was filed on 25/03/86 The close scrutiny of Ex. PW1/11 reflects that facsimile stamp is not very clear as the Ministry of Home Affairs is not at all visible in the stamp only "Affairs" is visible then date of delivery is shown as 28/04/85 and diary number is shown blank. If we would advert to the testimony of AW2 Smt. Veena Khosla, the stamp being used in Central Registry also reflected the date of delivery and diary number. The facsimile of Ex. PW1/11 fits in the description given by AW2. However, the stamp appearing on RW1/1 is not similar to one appearing on Ex. PW1/11. As regards the averments in the application that the remarks on process "refused to accept by the applicant" is false, it is noted that refused is by other defendants and not by defendant No. 1, UOI. In the given facts and circumstance, where the UOI being Government Department has to meet its liabilities if decree is not set aside and public money is to be paid in that event to the plaintiff and in view of the fact that the Department is a huge organisation and there was fault on the part of the Process Server also in not taking down the name of the person receiving the process and in view of above discussions, it would be just if the application for setting aside the ex parte decree is allowed. As such the application is allowed subject to condition that applicant would deposit the decretal amount in the form of FDR in the name of the court within three months from the date of receipt of this order so that interest is also earned thereon and also to pay cost of Rs.10,000/- to the plaintiff.

With these observations application U/o 9 Rule 13 r/w Sec. 151 CPC is allowed subject to the filing of the FDR and payment of cost, suit be restored to its original number. Put up on 20/12/12."

(underlining added)

4. The aforesaid observations and conclusions do not call for any interference by this Court in the facts of the present case, and the only issue which is urged before me is whether the petitioner/defendant could be called upon to deposit the entire decretal amount. In support of the arguments that the entire decretal amount could not be called upon to be deposited, counsel for the petitioner/defendant relies upon the judgment of the Supreme Court in the case of *Tea Auction Ltd. Vs. Grace Hill Tea Industry & Anr, (2006) 12 SCC 104*. The paras of this judgment which are relied upon are paras 16, 24 & 25, and which read as under:-

“16. Order IX Rule 13 of CPC did not undergo any amendment in the year 1976. The High Courts, for a long time, had been interpreting the said provision as conferring power upon the courts to issue certain directions which need not be confined to costs or otherwise. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when the decree was passed, but also other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to put the defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith. But, it would not be correct to hold that no error has been committed by the Division Bench in holding that the learned Single Judge did not possess such power. The learned Single Judge exercised its discretionary jurisdiction keeping in view that the matter

has been disposed of in fact finally at the interim stage at the back of defendant and it was in that view of the matter a chance was given to it to defend the suit, but, then the learned Single Judge was not correct to direct securing of the entire sum of Rs. 37 lakhs in the form of bank guarantee or deposit the sum in cash. The condition imposed should have been reasonable. What would be reasonable terms would depend upon facts and circumstances of each case.

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24. While setting aside a decree, conditions can be imposed but such conditions should not be unreasonable or harshly excessive.

25. Keeping in view the peculiar facts and circumstances, we are of the opinion that interest of justice would be sub-served if respondent No. 1 herein is directed to furnish security to the extent of Rs. 5 lakhs. Such security should be furnished to the satisfaction of the learned Single Judge. The security, other than the deposit of the amount in cash, should be furnished within 12 weeks from the date. Plaintiff-Appellant would be entitled to press his application for passing a decree on admission. Defendant-Respondent No. 1 would also be entitled to file his objection as to why a decree under Order XII Rule 6 shall not be passed. Such a cause, if not already filed, must be filed within 8 weeks from date.”

5. A reading of the aforesaid paras shows that, no doubt, the Supreme Court has observed that an unduly harsh condition must not be imposed while allowing the application under Order 9 Rule 13 CPC, simultaneously however, it has been also observed that there is a discretion of the Court to direct deposit of decretal amount which would depend upon the peculiar facts and circumstances of each case. The issue, therefore, is that what are

the facts and circumstances of this case and what should be the order of deposit of the decretal amount.

6. I have already reproduced above the relevant observations of the trial court, and have referred to the fact that the petitioner/defendant was duly served both in the ordinary process as well as by registered AD post. If in a case such as the present if only a small part of the decretal amount is ordered to be deposited then it will be a travesty of justice, inasmuch as it would mean holding that a petitioner/defendant in a suit inspite of service by two modes need not appear and can after passing of the decree simply ask for setting aside of the *ex-parte* judgment and decree and plead that decretal amount cannot be deposited in view of the observations of the Supreme Court in the case of ***Tea Auction Ltd. (supra)***. In my opinion, merely because the petitioner is the Union of India the same will not give reasons for any extra benefit to be given to the petitioner/defendant.

7. Keeping in view the facts and circumstances of the case, I modify the impugned order dated 29.8.2012 and it is directed that the application under Order 9 Rule 13 CPC will stand allowed on the petitioner/defendant depositing within a period of six weeks from today before the trial court

50% of the decretal amount which was due on the date of the filing of the application under Order 9 Rule 13 CPC.

8. The petitions are allowed and disposed of with the aforesaid observations, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J

AUGUST 19, 2014
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