

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

+ **FAO No.489/2012**

% **30th April, 2014**

M/S. BIHAR CARRYING CO. PVT. LTD. Appellant
Through: Mr. B.S. Chaudhary, Advocate.

Versus

M/S. UNITED INDIA INSURANCE CO. LTD. & ANR. Respondents
Through: Mr. S. K. Ray, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Order 43 Rule 1(d) of Code of Civil Procedure, 1908 (CPC) impugning the judgment of the court below dated 11.9.2012 by which the application filed by the appellant/defendant under Order 9 Rule 13 CPC for setting aside the exparte judgment and decree dated 10.12.2007 has been dismissed. By the exparte judgment dated 10.12.2007 against the appellant/defendant a money decree of Rs.4,30,555/- alongwith interest @ 12% per annum simple was passed on account of loss of the consignment by the appellant/defendant of Indian made foreign liquor sent by the plaintiff no.2/respondent no.2 through the appellant/defendant.

2. The claim was effectively under the Carriers Act, 1865 and which provides that liability of a carrier is equal to an insurer except the exceptions of act of God or act of enemy. The law in this regard is contained in the judgment of the Supreme Court in the case of *Nath Bros. Exim International Ltd. Vs. Best Roadways Ltd. (2000) 4 SCC 553* and which holds that liability of a carrier is absolute under the Carriers Act, 1865 except for an act of God or an act of enemy.

3. Admittedly, the appellant/defendant appeared in the suit originally and filed its written statement. Issues were thereafter framed on 17.2.2005 and reframed on 9.9.2005 and case was listed for plaintiffs' evidence. Subsequently, the case was listed on different dates and counsel for the appellant/defendant appeared on 10.4.2006 and 19.4.2006 but did not appear thereafter resulting in defendant's being proceeded ex parte vide order dated 25.10.2007. Ex parte judgment and decree thereafter was passed on 10.12.2007. Since there was a delay in filing of the application under Order 9 Rule 13 CPC of about 115 days, an application under Section 5 of the Limitation Act, 1963 was also filed. Both the applications i.e under Order 9 Rule 13 CPC and under Section 5 of the Limitation Act, 1963 have been dismissed.

4. In the application under Order 9 Rule 13 CPC, it was pleaded

that counsel for the appellant/defendant had left the profession in the month of July, 2006 and had joined in service without informing the defendant and consequently the defendant did not know the status of the case. On the assertion of the appellant/defendant that its erstwhile counsel had left the profession and joined service, the court below notes that this is a totally false statement because in the application no name of the Advocate was given and subsequently when the written statement was perused it was found that the defendant's Advocate was Ms. Manjeet Arya and she had not left practice but continued to practice with her chamber in Patiala House Courts. The Advocate for the respondents/plaintiffs has given a personal affidavit stating that he had made personal enquiries and found that Ms. Manjeet Arya was continuing practice. The case of the appellant/defendant that Ms. Manjeet Arya had left practice was therefore disbelieved.

5. The relevant observations made by the trial court are contained in paras 9 and 10 of the exparte judgment and which read as under:-

“9. At the outset, I am constrained to mention that the application u/o 9 Rule 13 CPC as well as the application u/s 5 Limitation Act, have been, generally, loosely and casually drafted, with no efforts having been made by the applicant/defendant to put forward any sufficient ground, leave alone any substantiated ground, while seeking setting aside of the judgment/ decree in question. The thrust of the application is on the assertion that the counsel for the defendant had left the active practice in July, 2006 and that she did not inform the applicant/defendant, due to which the suit was not

contested after 19.07.2006, resulting in the passing of the ex-parte decree. However, as pointed out by the non-applicant/plaintiff in the reply to the application, the applicant/defendant has not even bothered to give the name of the advocate, who had left the active practice and not informed the defendant about the same. If the record is to be perused, the Written Statement as well as the vakalatnama on behalf of the defendant was filed by Ms. Manjeet Arya and her complete address is mentioned in the vakalatnama and the Written Statement and as per the emphatic statement on behalf of the non-applicant/plaintiff, the said Ms. Manjeet Arya is still continuing in practice and continues to occupy the same chamber in Patiala House Courts, New Delhi. In fact, Sh. H.C. Goel, advocate for the plaintiff, has filed his affidavit in support of these assertions, stating therein that he had made personal inquiries and found that Ms. Manjeet Arya was still continuing in practice. This emphatic assertion on behalf of the counsel for the non-applicant/plaintiff, has not been refuted by the applicant/defendant by filing any rejoinder to the reply, with the result that there is no reason to doubt the assertion of the Ld. Counsel for the non-applicant/plaintiff. The defendant/applicant has not bothered to mention the name of any other counsel, who has been appointed by the defendant, to represent them and there being the vakalatnama of only Ms. Manjeet Arya on record, the contentions raised on behalf of the applicant/defendant do not have any force.

10. Further more, the applicant/defendant has again very vaguely asserted that the defendant had tried to contact his counsel but could not succeed but has not even bothered to give the dates and efforts, which were made by the defendant to contact the counsel, so as to establish its bonafides. Which representative came from Calcutta to Delhi and how he came to know that the matter has been disposed off ex-parte, has also not been detailed. The defendant, as already observed above, seems to have moved the application very casually and there appears to be a smell of making a mockery of the process of court. Similar is the case with the application u/s 5 Limitation Act, since the delay of 115 days, which has been caused, has not been explained day by day. It is not probable and therefore unbelievable that a company like the defendant, who is not even a chronic litigant, is likely to lose sight of its litigation, which perhaps

was a solitary one and not even have conversation with the counsel on or after every date of hearing. If the defendant/applicant was not in touch with its counsel regularly, the fault lies with the applicant/defendant and not with the counsel.”

6. Learned counsel for the appellant sought to place reliance upon the judgment of Punjab and Haryana High Court in the case of *M/s. N.K. Electronics Vs. Narinder Kumar 2013 (4) Civil Court Cases 373 (P&H)* of a learned Single Judge to argue that non-appearance of Advocate and his failure to communicate to the defendant of the defendant being proceeded ex parte is sufficient to set aside the ex parte judgment. However, in my opinion, the cited judgment will not apply to the facts of the present case where the case pleaded by the appellant/defendant has been found to be factually incorrect because Ms. Manjeet Arya, Advocate had not left practice but was in fact continuing in practice.

7. In view of the above, I do not find any merit in the appeal as there is no illegality in the impugned judgment by which the application of the appellant/defendant under Order 9 Rule 13 CPC was dismissed. Even if the delay in filing the application was condoned there is no reason, in the facts of the present case, for setting aside of the ex parte proceedings against the appellant/defendant and the ex parte judgment and decree.

8. The appeal is therefore dismissed, leaving the parties to bear
FAO 489/2012 *Page 5 of 6*

their own costs. The decretal amount deposited before the Registrar be released alongwith accrued interest thereon to the respondents/plaintiffs within a period of two weeks from today.

APRIL 30, 2014
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VALMIKI J. MEHTA, J.