

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

+ **FAO No. 380/2017**

% **26th September, 2017**

VINAY KUMAR RAI Appellant

Through: Mr. R.N. Dubey, Advocate.

versus

MEENA RAI Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 35455/2017 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

FAO No. 380/2017 and C.M. Appl. No. 35454/2017 (for stay)

1. This first appeal under Order XLIII(1)(d) is filed by the defendant impugning the order of the trial court dated 5.9.2017 by which the trial court has dismissed the application filed by the appellant/defendant under Order IX Rules 7 and 13 CPC for setting aside of the *ex-parte* judgment and decree dated 23.7.2015. By the

judgment and decree dated 23.7.2015 suit of the respondent/plaintiff/sister was decreed against the appellant/defendant/brother for a sum of Rs. 8,44,000/- along with interest at the rate of 12% per annum. Respondent/plaintiff had filed a suit against the appellant/defendant that she had given a loan to the appellant/defendant, and which was by withdrawing of moneys of Rs.5,00,000/- and 3,44,000/- from the bank account of the respondent/plaintiff. In order to secure the loan, the appellant/defendant had executed a promissory note dated 30.4.2010, and which was proved in the *ex-parte* evidence of the respondent/plaintiff as Ex.PW1/1. The Manager of State Bank of India appeared as PW-3 and proved the statement of account of the respondent/plaintiff for the period from 1.4.2010 to 30.4.2010 as Ex.PW3/1.

2. In the subject application under Order IX Rules 7 and 13 CPC, the appellant/defendant pleaded that there existed sufficient reasons for his non-appearance when the case was repeatedly listed for appellant/defendant's evidence because the wife of the appellant/defendant was seriously sick and the mother of the

appellant/defendant was also seriously sick. It was stated that the appellant/defendant came to know about the *ex-parte* judgment and decree dated 23.7.2015 in August, 2015 from reliable sources and thereafter the appellant/defendant tried to get in touch with his Advocate but the Advocate did not co-operate. After the certified copies were applied on 10.8.2015, the same could only be collected on December, 2015 since the son of the appellant/defendant met with an accident on 3.10.2015 and it was accordingly pleaded that the *ex-parte* judgment and decree be set aside as the appellant/defendant had sufficient cause for non-appearance.

3. From the facts of the case it is seen that the case was fixed for evidence of the appellant/defendant on 3.3.2015, 25.3.2015, 24.4.2015, 15.5.2015 and 6.7.2015. It was only on 6.7.2015 after appellant/defendant did not lead evidence for three dates of hearing (on two dates of defendant's evidence there was lawyer's strike) hence appellant/defendant's evidence was closed and he was proceeded *ex-parte* vide order dated 6.7.2015. As already stated above, the respondent/plaintiff proved her case in her *ex-parte* evidence.

4. There are four reasons argued by the appellant/defendant as justifications for his non-appearance on repeated dates fixed for his *ex-parte* evidence. First is of the illness of his wife, and which counsel for the appellant/defendant today states in this Court that illness was not of his wife but it was a typing mistake, because illness was of appellant/defendant's mother. The second justification which is given by the appellant/defendant is that his mother was not well, and today the counsel for the appellant/defendant states it was not appellant/defendant's mother but it was his step-mother who was not well. The mother of the appellant/defendant is stated to have expired on March, 2015 and the step-mother of the appellant/defendant is stated to have expired on September, 2015. The third justification which is given for non-appearance is that the son of the appellant/defendant met with an accident on 3.10.2015 and for which treatment continued till December, 2015. The fourth justification given in this Court, for the first time, is that the appellant/defendant himself was not well and undergoing treatment.

5. It is seen that the event of death of the mother/step-mother of the appellant/defendant are of March, 2015 and September,

2015, i.e not of the period when the case was fixed for evidence from March, 2015 till July, 2015. If the mother expired in March, 2015 then the death of the mother cannot be a reason for appellant/defendant's non-appearance from March, 2015 right till 6.7.2015. The step-mother of the appellant/defendant also expired on September, 2015 and which is after the period from March, 2015 to July, 2015. What is more important is that the appellant/defendant has not pleaded and given any particulars or details in the subject application under Order IX Rules 7 and 13 CPC and the nature of illness of his mother and step-mother and as to how the appellant/defendant therefore was completely occupied in the treatment and hence was not pursuing the court case or doing any of his ordinary avocation/business.

6. So far as the accident of the son in October, 2015 is concerned and his subsequent treatment till December, 2015, once again the period from October, 2015 to December, 2015 is not only beyond the period of dates fixed from March, 2015 to July, 2015 for the evidence of the appellant/defendant, but also that admittedly appellant/defendant admits that he applied for certified copy of the

record in August, 2015 and therefore the appellant/defendant had enough time from August, 2015 till beginning of October, 2015 to file the subject application for setting aside *ex-parte* proceedings, but the appellant/defendant did not do so.

7. Trial court has rightly observed that appellant/defendant has only conveniently blamed his Advocate and it is not as if even a single letter has been written by the appellant/defendant to his Advocate for the alleged default of the Advocate, much less of the appellant/defendant filing any complaint with the Bar Council. I must note that it is these days a habit that most of the litigants who are negligent in conducting their cases blame their Advocates for setting aside *ex-parte* proceedings or for setting aside the orders dismissing judicial proceedings for default/non-prosecution. Trial court has therefore rightly disbelieved the case of the appellant/defendant of blaming his Advocate.

8. Counsel for the appellant/defendant argued that appellant/defendant himself was not well in the relevant period, and reference is invited to a prescription slip of 31.7.2015 to show the illness of the appellant/defendant. This prescription slip is of one Dr.

Surender Mishra and all it shows is that the appellant/defendant conducted an EEG on 31.7.2015. There is not only nothing on record with respect to the length or seriousness of the alleged illness of the appellant/defendant, but also it is relevant to note two important aspects that firstly the date of the prescription slip is 31.7.2015 i.e after the appellant/defendant was proceeded *ex-parte* with the suit being decreed in terms of the *ex-parte* judgment and decree dated 23.7.2015 and secondly that this ground of the appellant/defendant's illness as being sufficient cause is not even pleaded in the subject application under Order IX Rules 7 and 13 CPC. I have carefully gone through the application and I do not agree with the argument of the appellant/defendant that the appellant/defendant's illness as pleaded is a reason and sufficient cause for setting aside the *ex-parte* proceedings in the application under Order IX Rules 7 and 13 CPC.

9. There is no merit in the appeal and the same is hereby dismissed.

SEPTEMBER 26, 2017

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VALMIKI J. MEHTA, J