

\$~6

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

+ RFA 189/2014

SAVINDER KAUR @ SEEMA Appellant
Through: Mr Sanobar Ali, Adv.

versus

RAJDULARI Respondent
Through: Mr Sanjeet Kumar, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

%

24.09.2015

RFA 189/2014 & CM No. 2294/2015 (Stay), CM No. 8529/2014
(Condonation of delay of 129 days in filing) & CM No. 8531/2014 (O. 41 R.
27 of CPC)

1. Let me first articulate the facts with regard to delay in filing the appeal.

2. The captioned application being: CM No. 8529/2014, is filed seeking condonation of delay of 129 days in filing the present appeal. The reason given by the appellant, is that, she became aware of the impugned judgement and decree dated 05.10.2013 only on 01.05.2014, when a slip was handed over by an unknown person to her minor daughter, which, later on was received by her.

2.1 It is averred that thereafter, the appellant, contacted her lawyer, who after obtaining certified copies of the suit papers, instituted the present appeal. The instant appeal was filed on 12.05.2014. It is stated that the delay was on the said account.

3. In so far as the merits of the appeal are concerned, it is the stand of the appellant that the impugned judgement was passed *ex parte*. It is submitted before me that service was not effected on the appellant and, therefore, the order being erroneous is required to be set aside.

3. Learned counsel for the respondent, on the other hand, says that service was complete as summons were issued on at least two occasions prior to the order of affixation. Learned counsel for the respondent says that address on the summons is the same as that which is mentioned in the memo of parties filed alongwith the instant appeal.

4. I have perused the record placed before me. The suit was registered on 04.02.2012. On that date the counsel for the respondent sought adjournment to file original cheques based on which the action under Section 37 of the Code of Civil Procedure, 1908 (in short the CPC) was instituted. An accommodation on the very same ground was sought thereafter, by the counsel for the respondent, on the following dates: 14.03.2012, 18.04.2012, 10.07.2012 and 09.11.2012.

4.1 In between, on one date i.e. 30.08.2012, the Presiding Officer was not available, and the matter was consequently posted for further proceedings on 17.09.2012. On that date (i.e. 17.09.2012) the matter, as indicated above, was posted by the trial court on 09.11.2012.

4.2 However, on 09.11.2012, even though the original cheques were not available, on the assurance of the counsel for the respondent that he would file the same as and when required, summons, were issued qua the appellant for the first time in the suit. The summons were made returnable on 24.01.2013.

4.3 On 24.01.2013, the report received by the trial court was that the

summons were not served. The reason given in the process server's report was that the appellant was not available at home as she was out of station. Consequently, fresh process was issued qua the appellant. The matter was posted for further proceedings on 02.03.2013.

4.4 On 02.03.2013, the same position obtained. As per the report of the process server, the summons were not served. This time around the trial court straightway directed issuance of summons by affixation. The matter was listed for further proceedings on 25.04.2013. The English translation of the report generated by the process server with regard to affixation (as appearing in the appeal paper book) reads as follows:

“....Reached at address of Smt. Savinder Kaur @ Seems as given in the summons. At the spot I met with a minor girl who orally stated that nobody is present at Home. Her statement was not recorded, who also did not state her name hence as per the order of the Hon'ble Court one copy of summons to gather with copy is pasted on the door. At the spot no witnesses was available. Report submitted.....”

5. Having read the report, I am of the view that service was not complete. Clearly, even according to the process server, a minor child was present at home. Her statement was not recorded. Since, witnesses were not available, their statements were also not recorded.

6. The appellant has disputed affixation of summons. It is, however, not disputed before me by the counsel for the respondent that, both the appellant as well as the respondent have been appearing before the concerned criminal court in the proceeding initiated by the respondent under Section 138 of the Negotiable Instruments Act, 1881 (in short the N.I. Act).

6.1 Learned counsel for the appellant says that the service by way of dasti could have been effected on the appellant.

6.2 It is also the endeavour of the counsel for the appellant to draw my attention to the forensic report generated in the proceedings under Section 138 of the N.I. Act. Learned counsel for the appellant says that the said report clearly establishes that the purported signature on the cheques in issue, are not those of the appellant.

7. According to me, this is an aspect which pertains to the merits of the matter. What has, however, clearly emerged, is that, the appellant was not served in the suit proceedings and, therefore, the proceedings from the date were clearly vitiated on account of opportunity not being given to the appellant to set up a case for leave to defend.

7.1 In so far as application for condonation of delay is concerned, notice in the said application was issued on 19.05.2014. On 03.12.2014, four weeks' were granted to file a reply to the said application. Despite, opportunity being given, no reply has been filed to the application. Therefore, the averments made in the application by the appellant have gone untraversed. Since, the application is supported by an affidavit, I have no reason to disbelieve the averments made therein. The clear assertion of the appellant is that she was unaware of the impugned judgement and decree having been passed against her. It is her case that she became aware of the impugned judgement and decree only on 01.05.2014. As indicated above, the instant appeal was filed on 12.05.2014. Therefore, in my view, the appellant has made out an adequate ground for condonation of delay in filing the appeal. The delay is, accordingly, condoned.

8. On the merits, I have already indicated hereinabove, my view, which is that, the appellant was clearly not served.

9. Accordingly, the impugned judgement and decree is set aside. The

proceeding, before the trial court, will commence from the stage at which it is presently positioned. Parties and their counsels shall appear before the trial court on 14.10.2015.

9.1 The appellant will file, on the aforementioned date, her application for leave to defend, whereupon the trial court, after giving due opportunity to the respondent to file a reply, will pass an appropriate order in the proceedings at hand.

9.2 In view of the above, CM No. 8531/2014 has been rendered infructuous.

10. The appeal and the pending applications are disposed of with the aforesaid directions.

RAJIV SHAKDHER, J

SEPTEMBER 24, 2015

kk