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

+ **FAO 112/2015 & CM No.7100/2015 (Stay)**

DHARMENDER SINGH

...Appellant

Through: Mr. Rudara Kalhone, Mr. Dalip Kumar
Santoshi and Mr. Sandeep Kumar, Advs.

versus

AMIT

...Respondent

Through: Mr. Dinesh Garg, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

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07.12.2015

1. This is an appeal directed against the order dated 28.2.2015 passed by the learned Additional District Judge on an application moved by the appellant/defendant under Order IX Rule 13 of the Code of Civil Procedure, 1908.
2. The said application was moved by the appellant / defendant for setting aside *ex parte* judgment and decree dated 4.10.2013.
3. The respondent/plaintiff had, evidently, filed a suit for recovery in the sum of Rs.16,12,500/-. This suit was moved on 8.2.2013. Summons in the suit were issued which, according to the trial court, were received by the appellant/defendant.
4. Since, there was no representation on behalf of the appellant/ defendant, the trial court proceeded *ex parte* against the appellant/defendant.
5. It is in these circumstances, that the judgment dated 4.10.2013, on merits, came to be passed in the matter.

6. Thereafter, as noticed above, an application was moved for setting aside the said order, which came to be dismissed vide the impugned judgment.
7. A perusal of the application filed by the appellant/defendant would show that he had contested both the intimation via post as well as the receipt of the summons on 13.3.2013 through process server.
8. The record shows that the summons, purportedly bear the signature of the appellant/ defendant, and that, the speed post cover bears an endorsement, albeit in vernacular, that intimation was given to the appellant/ defendant.
9. The appellant/defendant, however, contended to the contrary.
10. This situation, to my mind, presented a reason good enough for the trial court to enquire into the matter as to whether the service had been effected on the appellant/defendant by carrying out deeper scrutiny.
11. Comparing the signatures is surely one of the methods for ascertaining as to whether service has been effected. However, when it is put in issue, the trial court is required to carry out a more detailed enquiry.
- 11.1 This is so as Rule 18 of Order V of the CPC required the process server to put down the time and the manner of service as also the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. While the report of the process server adverts to the fact that summons were served on a person who claimed to be the appellant / defendant, there is no reference to the fact whether or not the appellant / defendant had been identified. The provision made in the summons for this purpose has not been utilized either way. Furthermore, a careful perusal of the process server's report would show that though the date of the purported service is given, the time at which service was effected is not set out. In this behalf, the observations of the Division Bench in **R.K.**

Sharma Vs. Ashok Nagar Welfare Association and Co. being apposite are extracted hereinafter :-

“..25. Apart from the above glaring omissions on the part of process server, there is one major glaring defect in the report on the summons, namely, non compliance of the provisions of Rule 18 of Order 5 of the Code. Before taking up that point, we may state that Rule 16 of Order 5 of the Code require that where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons. Rule 18 of Order 5 of the Code is salutary provision of which compliance is necessary. Service of summons upon a person is a very important step and the law requires that the person who is empowered to effect service of such summons must discharge his obligation meticulously by endorsing full particulars of the manner of service as required by Rule 18 of Order 5 of the Code, which reads:-

"Endorsement of time and manner of service - The serving officer shall, in all-cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons."

26. The requirement thus is that the serving officer shall endorse or annex to the original summons a report in all cases in which summons has been served under Rule 16 stating: (a) the time when the summons was served (b) the manner in which summons was served; (c) the name and address of the person, if any identifying the person served and (d) name and address of witness, if any, witnessing the delivery or tender of the summons.

27. None of the above requirements, which in our view, are mandatory in nature have been complied with. There is a salutary purpose behind in requiring meticulous compliance of these requirements, namely, to avoid fake persons being served as genuine ones in the absence of proper identification. Only with a

view that report be properly got testified later on has this requirement has been made. In case report is made by the servicing officer by complying with the provisions of law, there will be presumption attached to the correctness of the report and not otherwise. The process server nowhere recorded the time and the manner of effecting serve of summons. He did state the date of effecting service of summons. No where in the summons he stated that he made any effort to identify the person receiving summons. He also no where stated that he made any effort to get the identity of the person receiving summons established. It was also not stated that persons were known to him...”

11.2 Adherence to the rule and procedure prescribed therein, is required, in so far as the service of summons are concerned, as the failure to abide by the same results, often, in severe consequences for the opposite party. In this case, since the appellant / defendant was proceeded ex-parte, a judgment dated 04.10.2013 came to be passed, on merits, whereby the suit was decreed by the trial court without having benefit of examining the claim that may have been raised in the matter.

12. I may only note that during the pendency of the appeal, the appellant/ defendant deposited a sum of Rs.5 lakhs towards the decretal amount. Vide judgment dated 4.10.2013 a decree, was passed, in the sum of Rs.16,12,500/- with interest at the rate of 6% per annum from the date of filing the suit till the date of realisation of the decretal amount.

13. Having regard to the aforesaid circumstances, I am inclined to allow the appeal and set aside the impugned judgment dated 28.2.2015 as well as the *ex parte* decree dated 4.10.2013 with the condition, to which the appellant/ defendant has agreed, that the sum of Rs.5 lakhs which has been withdrawn by the respondent/plaintiff will not be sought recovery of during the pendency of the trial.

14. Needless to say, if the respondent/plaintiff were to lose, the said amount will be returned to the appellant/defendant with an appropriate rate of interest that the trial court may fix in that behalf.

15. Furthermore, to facilitate expedition of the proceedings before the trial court, parties and their counsels shall present themselves on 4.1.2016.

16. The appellant/defendant will carry the written statement to court and, file the same on that date, with a copy of the same being served on the counsel for the respondent/ plaintiff. If the needful is done, the trial court will grant two weeks to the respondent/plaintiff to file a replication in the matter.

17. The trial court will also fix a timeline for the appellant/defendant to file affidavit of evidence of witnesses he proposes to cite. The date(s) for cross-examination of the respondent/plaintiff witnesses shall also be fixed by the trial court. Similarly, date(s) for cross-examination of the appellant's/defendant's will also be fixed.

18. The entire exercise of concluding the trial and proceeding to pass the judgment will be completed by the trial court with due expedition, though not later than six months from today.

19. The appeal is disposed of, in the aforesaid terms.

20. At this stage, I am informed that interest in the sum of Rs.6,592/-, was earned, on the deposit of Rs.5 lakhs made by the appellant/defendant. The said amount has been invested by the registry in a fixed deposit, the maturity value of which is Rs.7,156/-.

21. Counsel for the respondent/plaintiff says that he has no objection if, the said amount is released in favour of the appellant/defendant.

21.1 It is ordered accordingly. Registry will do the needful upon the appellant/defendant and/or his authorised agent approaching the registry.

22. Registry will, forthwith, dispatch the record to the trial court.
23. Consequently, the surety bond provided will stand discharged and the original security furnished will be returned to the respondent/ plaintiff.

RAJIV SHAKDHER, J

DECEMBER 07, 2015

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