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

+ **FAO(OS) 618/2015**

M/S R L VARMA AND SONS (HUF) & ORS Appellants
Through: Mr M.K. Sharma

versus

DR R K GUPTA & ANR Respondents
Through: Nemo

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

ORDER

% **06.11.2015**

CM No. 26120/2015 (exemption)

The exemption is allowed subject to all just exceptions.

FAO(OS) 618/2015 and CM No. 26119/2015

This is an appeal against an order dated 30.09.2015 passed by a learned Single Judge of this court in an application under Section 5 of the Limitation Act, 1963 which was accompanied by an application under Order IX Rule 13 CPC for setting aside the *ex-parte* decree dated 15.05.2013. The application under Order IX Rule 13 CPC filed on behalf of the appellants herein was delayed by 735 days. Consequently, the appellants moved the application under Section 5 of the Limitation Act seeking condonation of delay in filing the said application under Order IX Rule 13 CPC. The said condonation of delay application stands dismissed by the learned Single Judge and, consequently, the application under Order IX Rule 13 CPC and other connected applications were also dismissed.

The learned counsel for the appellants sought to argue the merits of the matter pertaining to the *ex-parte* decree dated 15.05.2013. But, he cannot do so because unless and until the said decree is set aside by virtue of an order on an application under Order IX Rule 13 CPC, the merits of the matter cannot be gone into. Insofar as the application under Order IX Rule 13 CPC is concerned, that, too, cannot be looked into unless and until the delay in filing that application is condoned by the court. There has been a substantial delay of 735 days in filing the application under Order IX Rule 13 CPC. The appellants sought to explain the delay before the learned Single Judge who has not accepted the explanation offered by the appellants. In our view, the learned Single Judge was right in not accepting the said explanation.

The *ex-parte* decree was passed on 15.05.2013. It may be noted that the decree was passed after summons had, admittedly, been received by the appellants and, therefore, the period of limitation for filing an application under Order IX Rule 13 CPC would start from the date of the decree. Normally the application ought to have been filed within 30 days thereof.

It was sought to be explained by the appellants that defendant No. 3 / appellant No. 3 was suffering from paralysis and he partially recovered by the end of May, 2013 and defendant Nos. 2 and 4 (being appellant Nos. 2 and 4 herein) are the parents of the appellant No. 3 who are of the ages of 86 and 74 respectively. It is submitted that the parents are suffering from various ailments connected with old age. The defendant No. 1 / appellant No. 1 is the HUF of which the other appellants are members. Apart from stating that the defendant Nos. 2 and 4 are old, no other explanation has been given as to

why they could not have engaged the counsel and been represented before the court prior to the passing of the *ex-parte* decree or even thereafter. Insofar as appellant No. 3 / defendant No. 3 is concerned, the learned Single Judge has noted that the said appellant No. 3 had twice been sent to judicial custody from 04.10.2013 to 16.05.2014 and 10.02.2015 to 07.07.2015 which clearly indicated that he was not mentally or otherwise incapacitated from dealing with the case. It has also been observed by the learned Single Judge that the said party was fully conscious and there was no cogent reason offered to justify the plea to condone the delay of 735 days in filing the application under Order IX Rule 13 CPC. We do not find any infirmity in the view taken by the learned Single Judge.

The appeal is dismissed.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

NOVEMBER 06, 2015
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