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

Date of Decision: October 18, 2016

+ **FAO 243/2012 & C.Ms.10316/12, 13181/13**

U.P. HOTELS LTD

..... Appellant

Through: Mr. Amitabh Chaturvedi and Mr.
Sumit Kumar Shukla, Advocates

versus

MEENAKSHI VERMA

..... Respondent

Through: Mr. Ashok Chhabra and Mr. Nikhil
Karwal, Advocates

**CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR**

JUDGMENT
(ORAL)

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C.M. 13181/2013

This application is disposed of in terms of order of 8th October, 2013.

FAO 243/2012 & C.M.10316/2012

Impugned order of 12th April, 2012 rejects appellant's application under Order 9 Rule 13 of CPC to set aside an *ex parte* decree of 26th March, 2012 passed on an application under Order 12 Rule 6 of CPC whereby possession of the suit property has been decreed in favour of respondent-plaintiff.

The challenge to impugned order in this appeal by learned counsel for appellant is on the ground that it is quite evident from the order of 26th March, 2012 (Annexure A-37) that appellant-defendant was not present when this order was passed and even on a prior date, i.e. on 12th March, 2012, appellant was not present and so, order of 26th March, 2012 is an *ex parte* order and it is so recorded in paragraph No.2 of impugned order. It is submitted by appellant's counsel that trial court has not considered appellant's plea of a decree being passed in the absence of a party to be an *ex parte* decree and has erroneously dismissed appellant's application under Order 9 Rule 13 of CPC.

To submit that remedy of filing of appeal as well as an application under Order 9 Rule 13 of CPC is available to a party against a decree which is passed behind the back of a party, reliance is placed by appellant's counsel upon Supreme Court's decision in *Bhanu Kumar Jain v. Archana Kumar and Another*, AIR 2005 SC 626. Reliance is also placed upon Supreme Court's decisions in *Tea Auction Ltd. v. Grace Hill Tea Industry and Another*, (2006) 12 SCC 104 and *Asit Kumar Kar v. State of West Bengal and Ors.*, (2009) 2 SCC 703 to submit that when a decree on admission is passed in the absence of one party, then it would be in the nature of an *ex parte* decree and it is a basic principle of natural justice that no adverse orders should be passed against a party without affording him an opportunity of hearing.

It is further submitted by learned counsel for appellant that the stand taken by appellant in the application under Order 9 Rule 13 of CPC

was that on 23rd February, 2012, the next date of hearing given was 9th April, 2012 and in this regard, attention of this Court is drawn to counsel's court diary to show that this case was entered in counsel's diary for 9th April, 2012 and an affidavit to this effect was also filed by the associate advocate of appellant's counsel, whose copy is on record as Annexure A-3 Colly. Thus, while relying upon Supreme Court's decision in *Tea Auction (supra)*, it is submitted by appellant's counsel that sufficient cause was shown to set aside the decree which was actually *ex parte* and trial court has erred in rejecting appellant's application under Order 9 Rule 13 of CPC and so, the impugned order deserves to be set aside and appellant's application under Order 9 Rule 13 of CPC ought to be allowed.

To the contrary is the submission of learned counsel for respondent, who submits that there is no infirmity in the impugned order and that the reference to appellant being proceeded *ex parte* in the impugned order is a typographical error. To submit so, attention of this Court is drawn by respondent's counsel to trial court's order-sheet of 12th March, 2012 to contend that on the said date, appellant was not proceeded *ex parte* and so application under Order 9 Rule 13 of CPC would not lie against an order, which has not been passed *ex parte*. It is pointed out by respondent's counsel that false plea of wrong noting of date is usually taken in such kind of litigation with a view to prolong it. It is submitted by respondent's counsel that the decisions relied upon by appellant's counsel relate to cases where *ex parte* decrees were passed and have no application to the case in hand and so, this appeal deserves to be

dismissed.

Upon hearing and on perusal of impugned order, *ex parte* order of 26th March, 2012, the material on record and the decisions cited, I find that the provisions of Order 9 Rule 13 of CPC are to be widely construed to give discretion to the court to take into consideration the attending facts and circumstances while dealing with an application under the aforesaid provision of law. The dictum of Apex Court in *Tea Auction (supra)* aptly apply to the instant case. The pertinent observations made in the above citation are as under: -

“Order 9 Rule 13 CPC did not undergo any amendment in the year 1976. The High Courts, for a long time, had been interpreting the said provision as conferring power upon the courts to issue certain directions which need not be confined to costs or otherwise. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when the decree was passed, but also on other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to put the defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith. But, it would not be correct to hold that no error has been committed by the Division Bench in holding that the learned Single Judge did not possess such power. The learned Single Judge exercised his discretionary jurisdiction keeping in view that the matter had been disposed of in fact finally at the interim stage at the

back of the defendant and it was in that view of the matter a chance was given to it to defend the suit, but, then the learned Single Judge was not correct to direct securing of the entire sum of Rs 37 lakhs in the form of bank guarantee or deposit the sum in cash. The condition imposed should have been reasonable. What would be reasonable terms would depend upon the facts and circumstances of each case.”

In the light of the afore-noted dictum of Apex Court, I find that the facts and circumstances of this case justifies setting aside the decree of 26th March, 2012 upon reasonable terms. It is deemed appropriate to do so for the reason that appellant is holding on to the suit premises since long at a paltry rental, whereas rental of the similar properties as the suit property, as in the year 2012, was more than ₹1 lac per month. It is being so said in view of the copy of lease deeds (Annexure R-1 & R-2) of adjoining properties placed on record by respondent. Such a view is taken as often plea of wrong noting of date is taken in order to prolong eviction proceedings. However, an opportunity ought to be given to appellant to contest application under Order 12 Rule 6 of CPC to secure the ends of justice.

In the light of the aforesaid, impugned order is set aside and appellant's application under Order 9 Rule 13 of CPC stands allowed while setting aside the decree of 26th March, 2012 with a rider that appellant shall deposit user charges @ ₹1 lac per month from 1st April, 2012 till date with trial court and would continue to do so till possession of the suit property is retained by appellant.

To enable appellant to do so, four week's time is granted to

appellant. The said deposits be converted by trial court into Fixed Deposit Receipts for six months with automatic renewals during pendency of the suit and on culmination of suit proceedings, the deposits/FDRs with interest so accrued thereupon be released to successful party. In the event of appellant defaulting in complying with this judgment, appellant would derive no benefit under this judgment. Meaning thereby, the order/decreed of 26th March, 2012 shall prevail in such an eventuality. Considering that respondent's suit is pending since year 2011, it is directed that trial court shall make all endeavours to decide application under Order 12 Rule 6 CPC afresh within three months from the date so fixed for hearing the parties, who through their counsel shall appear before trial court on 3rd November, 2016 for proceeding further in terms of this judgment.

With aforesaid directions, this appeal and the applications are disposed of.

Dasti.

(SUNIL GAUR)
JUDGE

OCTOBER 18, 2016

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