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

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Date of decision:08.08.2016

+ CM(M) 757/2016

M/S VIVEK DATTA (HUF) & ORS Petitioners
Through Mr.Ankit Jain, Advocate.

versus

SANJAY KUMAR GUPTA Respondent
Through Mr.Swastik Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH. J.(ORAL)

CM No. 28346/2016 (exemption)

Exemption is allowed subject to all just exceptions.

CM(M) 757/2016 and CM No. 28345/2016 (stay)

1. By the present petition, the petitioners seek to impugn the order dated 25.04.2016 by which the application filed by the petitioner under Order 9 Rule 7 CPC seeking to set aside the ex parte order passed against the petitioners/defendants was dismissed.
2. The brief facts are that on 31.05.2013, the case was adjourned for filing of amended written statement by the defendants/petitioners. As none was present for the defendants on two consecutive dates, on 12.11.2013 the defendants were proceeded ex parte. The respondent/plaintiff led his ex parte evidence and ex parte final arguments were advanced by the counsel

for the plaintiff. The case was adjourned for judgment/orders.

3. On 01.07.2014 when the case was fixed for orders, an application was moved by the petitioners under Order 9 Rule 7 CPC seeking to set aside the order dated 12.11.2013.

4. A perusal of the impugned order shows that the trial court primarily dismissed the application as not maintainable relying upon the judgment of the Supreme Court in the case of *Arjun Singh vs. Mohindra Kumar & Ors.*, *AIR 1964 SC 993*, the judgment of this High Court in the case of *Suresh Kumar Mallik vs. M.S.Lakhani & Anr.*, *84(2000) DLT 21* and the judgment of the Allahabad High Court in the case of *Prahlad Singh & Anr. vs. Niyaz Ahmad and Ors.*, *AIR 2001 All 78* holding that as arguments have been heard and the matter was merely been adjourned for pronouncement, the application under Order 9 Rule 7 CPC was not maintainable as the matter was not adjourned for hearing.

5. I have heard the learned counsel for the parties.

6. Learned counsel appearing for the petitioners has taken me through the orders to contend that when the application was dismissed, on account of the fact that there was a change in the Presiding Officer, the matter cannot be said to have been pending for orders.

7. Learned counsel appearing for the respondent has reiterated the judgment of the Supreme Court in the case of *Arjun Singh vs. Mohindra Kumar & Ors.(supra)* and contended that the petitioners had no option but to wait for the judgment and then, to take steps as stated in the said judgment of the Supreme Court.

8. We may first look at the orders passed by the trial court. On 20.03.2014, the matter was fixed for final arguments on 16.04.2014. On

16.04.2014, ex parte final arguments were advanced by the learned counsel for the respondent. On 29.04.2014, as the counsel for the plaintiff/respondent was not available, the matter was adjourned for 12.05.2014. On 12.05.2014, the trial court passed the following orders:-

“Plaintiff in person.

Defendants already ex-parte

No time left due to heavy board.

Put up for further arguments/clarification, if any else for ex parte judgment for 08.06.2014.”

9. It transpires that though the matter was fixed for ex parte judgment/arguments/clarifications for 08.06.2014, the Presiding Officer on account of a transfer got changed. Hence, a new Presiding Officer took up the matter. Needless to add, now as the new Presiding Officer was to pronounce the judgment, the said Presiding Officer would have to re-hear the arguments. Admitted position here is that on 01.07.2014, the petitioners have filed an application for setting aside the ex parte order dated 12.11.2013. Hence, on the date when the impugned order was passed by the trial court, on the facts it is clear that matter was not fixed for arguments.

10. The Supreme Court in the case of *Arjun Singh vs. Mohindra Kumar & Ors.(supra)* in para 31 noted as follows:-

“31. So far as the case before us is concerned the order under appeal cannot be sustained even on the basis that the finding recorded in disposing of an application under O. IX, r. 7 would operate as res judicata when the same question of fact is raised in a subsequent application to set aside an ex parte decree under O. IX, r. 13. This is because it is not disputed that in order to operate as res judicata, the court dealing with the first matter must have had jurisdiction and competency to entertain and decide the issue. Adverting to the facts of the present appeal, this would primarily turn upon the proper construction of the

terms of O. IX, r. 7. The opening words of that rule are, as already seen, 'Where the Court has adjourned the hearing of the suit ex parte'. Now, what do these words mean ? Obviously they assume that there is to be "a hearing" on the date to which the suit stands adjourned. If the entirety of the "hearing" of a suit has been completed and the Court being competent to pronounce judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under O. XX, r. 1, there is clearly no adjournment of "the hearing" of the suit, for there is nothing more to be heard in the suit. It was precisely this idea that was expressed by the learned Civil Judge when he stated that having regard to the stage which the suit had reached the only proceeding in which the appellant could participate was to bear the judgment pronounced and that on the terms of rules 6 & 7 he would permit him to do that. If, therefore, the hearing was completed and the suit was not "adjourned for hearing", O. IX, r. 7 could have no application and the matter would stand at the stage of O. IX, r. 6 to be followed up by the passing of an ex parte decree making r. 13 the only provision in order IX applicable. If this were the correct position, it would automatically follow that the learned Civil Judge would have no jurisdiction to entertain the application dated May 31, 1958 purporting to be under O. IX, r. 7, or pass any order thereon on the merits. This in its turn would lead to the result that the application under O. IX, r. 13 was not only competent but had to be heard on the merits without reference to the findings contained in the previous order."

11. Hence, the Supreme Court noted that Order 9 Rule 7 CPC applies only where the court has adjourned the hearing of the suit meaning thereby that there is to be a hearing on the date on which the suit stands adjourned. If entirety of the hearing of a suit has been completed and the court being competent to pronounce, adjourns the suit merely for the purpose of pronouncing judgment under Order 20 Rule 1 CPC, there is no adjournment for "the hearing" of the suit and hence, Order 9 Rule 7 CPC would have no

application.

12. No doubt on 16.04.2014 and 12.05.2014, the matter was fixed for orders after hearing arguments. However, in view of the fact that the Presiding Officer who heard the arguments has ceased to hold the present court, the new Presiding Officer would necessarily have to hear the arguments afresh. Hence, when the application was filed by the petitioner on 01.07.2014, it cannot be said that the matter was merely adjourned for judgment under Order 20 Rule 1 CPC. Hence, the reasons on the basis of which the impugned order has been passed and the application of the petitioner was dismissed would not be correct. The judgment of the Supreme Court in the case of *Arjun Singh vs. Mohindra Kumar (supra)* would not be applicable to the facts of the present case. Accordingly, I set aside the impugned order dated 25.04.2016. The application of the petitioners under Order 9 Rule 7 CPC would be heard afresh by the trial court and disposed of as per law keeping in view the above observations.

13. The petition stands disposed of.

Dasti.

JAYANT NATH, J

AUGUST 08, 2016

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