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

Date of Decision: October 03, 2016

+ **FAO 417/2015 & C.M.No.29973/2015**

M/S GKB OPTOLAB PVT LTD Appellant
Through: Mr. Arvind Nayar and Mr. Surjeet
Singh Malhotra, Advocates
Versus

DINESH BATRA & ANR Respondents
Through: Mr. S. Goel, Advocate

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT
% **(ORAL)**

Impugned order of 24th September, 2015 dismisses appellant's application under Order 9 Rule 13 of CPC to set aside *ex parte* decree of 5th January, 2013. Impugned order notes that the receipt of summons by appellant-defendant's Office Manager on 18th April, 2012 or its stamp put on the summons as acknowledgement of receipt of summons has not been disputed by appellant-defendant in the application under Order 9 Rule 13 of CPC and that it is also not the case of appellant that the address as mentioned in the summons is not the correct address.

The challenge to the impugned order by learned counsel for appellant is on the ground that the report of the Process Server fails to comply with the mandate of Order 5 Rule 18 of CPC. Reliance is placed upon Supreme Court's decision in *Sushil Kumar Sabharwal v. Gurpreet*

Singh and Others, (2002) 5 SCC 377 to submit that service upon the Manager of appellant ought to have been witnessed by some employees to identify the person served, which has not been done in the instant case. Reliance is also placed upon Supreme Court's decision in *Gauhati University v. Niharlal Bhattacharjee*, (1995) 6 SCC 731 to submit that the limitation to file the application under Order 9 Rule 13 of CPC runs from the date of knowledge of the decree and in the instant case, appellant got the knowledge of the decree when the notice dated 5th March, 2013 was received by appellant from respondent and so, the application is within time and trial court record has erred in dismissing appellant's application under Order 9 Rule 13 of CPC as barred by time.

Further, reliance is placed upon Supreme Court's decisions in *G.P. Srivastava v. R.K. Raizada and Others*, (2000) 3 SCC 54 and *M/s. GMG Engineering Industries & Others v. M/s. ISSA Green Power Solution & Others*, AIR 2015 SC 2675 to submit that even if appellant is found to be negligent, still *ex parte* decree ought to be set aside as appellant has a good case on merits.

It is pointed out by learned counsel for appellant that in view of Settlement Agreement of 8th December, 2011, respondents have no case to seek the recovery of the arrears of rent, etc., because the security deposit of ₹6,60,000/- odd was adjusted and in the aforesaid Settlement Agreement, it was clearly stated that no claim, whether monetary or otherwise, remains between the parties. Thus, it is submitted that impugned order deserves to be set aside and appellant's application under Order 9 Rule 13 of CPC ought to be allowed and the respondents' suit ought to be tried on merits.

On the contrary, it is submitted by learned counsel for respondents that impugned order suffers from no infirmity and that the Settlement Agreement relied upon by appellant is with the rider that the Settlement Agreement is subject to without prejudice to the rights of respondents and this was stated by respondents-plaintiffs because appellant had locked the premises and without handing over the keys, respondents had gone away. It is pointed out that appellant is in arrears of ₹8 lac odd after adjusting the security deposit and that the trial court has rightly held that the factum of service has not been disputed by appellant and so, reliance placed upon Order 5 Rule 18 CPC and the decisions cited is of no avail to the case of appellant.

Upon hearing and on perusal of impugned order, trial court record and the decisions cited, I find that in view of the decision of Supreme Court in *Gauhati University (supra)*, dismissal of appellant's application under Order 9 Rule 13 of CPC being barred by time is an ignorance of the fact that notice of 5th March, 2013 was received by appellant within few days and so on this ground, the application could not have been dismissed as time barred.

So far as service upon the Manager of appellant-company is concerned, I have perused the report of the Process Server and that of the bailiff also and I find that the time of service is duly recorded in the summons and the official stamp of appellant-company is there on the summons. Since the official stamp of appellant-company is there, therefore, service upon the Manager of appellant-company is not required to be witnessed by any of the employees working there. Pertinently, the factum of service upon appellant or the report of the Process Server has

not been disputed by appellant and so, it cannot be said that appellant was not validly served. Thus, it cannot be said that there is any defect in the manner of service. Provisions of Order 5 Rule 18 of CPC were duly complied with.

Order 9 Rule 13 of CPC has two limbs. The first limb is that an *ex parte* decree can be set aside if the Court is satisfied that summons were not duly served. The second limb of the aforesaid provision is that if a party is prevented by sufficient cause from appearing in response to the summons, then also *ex parte* decree can be set aside. The instant case appears to fall under the second limb of the aforesaid provision. In *G.P. Srivastava (supra)* and *M/s. GMG Engineering (supra)*, Supreme Court has declared that even if a party is found to be negligent, the other side can be compensated with costs if such party has a good case on merits.

In the instant case, there is a Settlement Agreement between the parties, copy of which has been placed on record, and its bare perusal reveals that respondents have clearly given a note on the Settlement Agreement that the possession has been obtained. In such a case, appellant appears to have a good case on merits.

It is noted in the impugned order that there was a reshuffling of legal department of appellant. This plea has been discarded by trial court by observing that the date of reshuffling has not been mentioned. Even if the date of reshuffling is not mentioned, still the factum of reshuffling is not disputed. For this lapse, appellant needs to be put to terms. So, in view of the dictum of Supreme Court in *G.P. Srivastava (supra)* and *M/s. GMG Engineering (supra)*, *ex parte* decree deserves to be set aside upon putting appellant to terms.

Consequentially, impugned order is set aside and appellant's application under Order 9 Rule 13 of CPC is allowed subject to costs of ₹30,000/-. Regarding deposit of ₹3 lac made by appellant in this appeal, it be retained by trial court in the form of FDR for a period of one year with automatic renewals till the outcome of the suit and in the event of appellant succeeding, the said amount is liable to be refunded to appellant with interest. Registry to remit the deposit of ₹3 lac in the form of FDR with interest to trial court. Any observation herein shall not be construed as an expression on merits at trial. Since the *ex parte* decree is of the year 2013, therefore, trial court shall make all endeavours to decide the suit within a year from the date fixed by it. Parties through their counsel to appear before trial court on 3rd November, 2016 for proceedings further in accordance with the law.

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

Dasti.

(SUNIL GAUR)
JUDGE

OCTOBER 03, 2016

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