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

Date of Decision: September 16, 2016

+ **FAO 399/2015 & C.M.No.27120/2015**

MUKESH KUMAR SHARMA Appellant

Through: Mr. G.S. Sharma and Mr. R.A.
Sharma, Advocates

versus

GIRISH CHANDER Respondent

Through: Mr. Ansar Ahmad, Advocate

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT
(ORAL)

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Impugned order of 15th September, 2015 declines appellant's application seeking setting aside of *ex parte* judgment while holding that there was refusal of summons by sister of appellant-defendant and on another occasion, the summons was pasted on the door of the house of appellant as his mother had told the process server that appellant had gone outside and she did not know when appellant would return.

The challenge to the impugned order by learned counsel for appellant is on the ground that the report of the process server is not *per*

se admissible and the evidence of process server ought to have been recorded by the trial court before relying upon the report of the process server. It is submitted that had the evidence of the process server been recorded, the appellant would have had an opportunity to cross-examine the process server on the aspect of not affixing the copy of the plaint on the door of the appellant's house. Thus, it is submitted that impugned order deserves to be set aside.

On the contrary, it is submitted by learned counsel for respondent that impugned order suffers from no illegality as the report of 30th April, 2011 of the process server is clear regarding summons being affixed on the door of appellant's house. Thus, it is submitted that there is no substance in this appeal and it deserves to be dismissed.

Upon hearing and on perusal of impugned order and the material on record, I find that there has been a lapse of not recording the evidence of process server. In any case, this lapse would not be fatal for the reason that if appellant was keen to show that the summons was not accompanied with copy of the plaint, then nothing could have stopped appellant from moving application before trial court to seek direction to cross-examine the process server. However, in the facts and circumstances of this case, it is deemed appropriate to afford an opportunity to appellant to contest the case set up against him on merits provided appellant establishes his *bonafides* by depositing a sum of ₹4 lacs towards the decretal amount with the trial court. It is made clear that the amount so deposited would not be released to the respondent and

would be invested into an FDR initially for a period of one year with automatic renewals.

In the light of the aforesaid, impugned order is set aside subject to appellant depositing a sum of ₹4 lacs with the trial court within eight weeks. Needless to say, if appellant fails to deposit ₹4 lacs within the stipulated time, then the impugned order shall operate.

Let the parties through their counsel appear before the trial court on 1st October, 2016. Trial court record be remitted back forthwith.

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

SEPTEMBER 16, 2016

s

**(SUNIL GAUR)
JUDGE**