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

+ **FAO(OS) 639/2015**

M/S ABI OVERSEAS & ANR Appellant

Represented by: **Mr.Manish Mukhija, Adv.**

versus

ASHWANI KUMAR

..... Respondent

Represented by: **Mr.Arvind Sharma, Adv.**

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

05.05.2016

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1. The impugned order reads as under:

“I.A.Nos.9976/2015 (u/O 9 R 13 CPC for setting aside of ex-parte judgment dated 20.4.2015) & 9977/2015 (restoration)

1. These are applications on behalf of the defendant No.2 for setting aside the ex-parte order and decree of monies of ₹4.25 crores along with pendente lite and future interest at 15% per annum simple. Considering the facts of the present case where the right of the defendant No.2 was closed for filing of the written statement on 18.9.2013 and by which defendants were effectively proceeded ex parte, and thereafter a formal order of defendants proceedings ex parte was passed on 30.9.2013, and then plaintiff led evidence, and thereafter applications filed for setting aside ex parte proceedings and for filing written statement were dismissed in default on 13.8.2014, and further applications to set aside this dismissal order were also dismissed on 20.4.2015, hence subject to deposit of costs of ₹50,000/- in this Court as costs payable to the plaintiff within a period of four weeks from today, notice be issued to the plaintiff through counsel on filing of process fee after two weeks of the

applicant depositing the cost of ₹50,000/- in this Court. It is made clear that if costs are not deposited within a period of four weeks then applications will stand peremptorily dismissed.

2. Notice be issued to the plaintiff through counsel on filing of process fee both in the ordinary method as well as by registered AD post, returnable on 13th January, 2016.”

2. Suffice it to record that there cannot be a condition precedent to deposit of cost which may be payable to the plaintiff upon an application under Order IX Rule 13 of the Code of Civil Procedure being allowed and an ex-parte decree set aside.

3. The law is that if a party is able to show sufficient or a good cause for not appearing on a particular date when the party was proceeded against ex-parte, recompensing the opposite side with money for the inconvenience caused the order proceeding ex-parte against the applicant has to be set aside.

4. Meaning thereby, quantification of the cost as the panacea for the inconvenience caused has to be an integral part of the final order. If sufficient cause is not shown and the order proceeding against the applicant ex-parte is not set aside the question of recompense for inconvenience caused would not arise. Of course, if the application is found to be frivolous cost can be imposed.

5. Under the circumstances impugned order dated October 15, 2015 needs to be set aside.

6. The suit file which has been requisitioned by us shows that a consequential order was passed by the learned Single Judge on January 13, 2016. In said order learned Single Judge noted that since cost in sum of

₹50,000/- was not deposited the application filed under Order IX Rule 13 of the Code of Civil Procedure had to be dismissed.

7. Accordingly we dispose of the appeal setting aside the impugned order dated October 15, 2015 in so far it put a condition precedent of ₹50,000/- being deposited before notice would be issued in IA No.9976/2015. The direction of notice being issued is retained but sans condition precedent for cost to be deposited. Consequential order dated January 13, 2016 is also set aside.

8. IA No.9976/2015 is restored in CS(OS) 1497/2011.

9. The said application shall be listed for directions before the Joint Registrar of the concerned Court on May 16, 2016. On pleadings being completed the application shall be decided, if within the power of the learned Joint Registrar by the learned Joint Registrar, and if it is the power of the Court, by the Court concerned.

10. We clarify. Issue of imposition of cost is kept open to be decided by the learned Single Judge as an integral part of the decision when IA No.9976/2015 is decided.

11. As regards appeal there shall be no order as to cost.

CM 27341/2015 (stay)

Dismissed as infructuous.

PRADEEP NANDRAJOG, J.

MUKTA GUPTA, J.

MAY 05, 2016
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