

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) 142/2016 & CM 17007/2016**

Date of decision: 12th September, 2017

M/S. SARASWATI STEEL & ORS. Petitioners

Through: Mr.Sanjiv Bahl, Mr.Alok Singh,
Mr.A.Bahl, Advs. with appellant no.2 in person
Mr.S.S.Pandey and Mr.H.S.Tiwari, Advs.

versus

NITIN GARG

..... Respondent

Through: Mr.Ashish Kapur, Mr.Anil Garg, Ms.Chavi
Luthra, Mr.Jitesh Talwani, Advs.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J. (Oral)

M/s Saraswati Steel, partnership firm, Rohit Aggarwal and Hari Aggarwal have filed the present intra court appeal impugning the order dated 1st April, 2016, which dismisses their application, IA no.1379/2016 under Order IX Rule 13 of the Code of Civil Procedure, 1908 (Code for short), for setting aside the ex parte judgment and decree dated 29th September, 2015 in CS(OS) no.2742/2014, Nitin Garg vs. Saraswati Steel & Ors.

2. Nitin Garg, who is the respondent before us, had filed the aforesaid suit for recovery of Rs.33,49,627/- on account of supplies made during the period 27th June, 2011 to 30th October, 2011. The total value of supplies was Rs.50,21,587/-. The appellants had made payment of Rs.31,50,000/-, leaving a balance of Rs.18,71,587/- which was outstanding. The suit was filed for recovery of balance price of Rs. 18,71,587/- and interest of Rs. 14,78,040/-.
3. The aforesaid supplies as per the plaint, were made vide the invoices issued and enclosed. The appellants had handed over Form-38 issued by the Department of Commercial, Taxes, Govt. of UP, which was required for transportation of the supplies.
4. The address of three appellants as per the plaint was D-4, Industrial Area II, Amawa Road, Raiberali, UP.
5. By order dated 9th September, 2014, the plaint was registered and summons were directed to be issued to the appellants by all modes, returnable on 24th November, 2014.
6. Order dated 24th November, 2014 of the Joint Registrar records that the summons were served on the appellants on 20th October, 2014. None had appeared nor written statement was filed. The matter was directed to be placed before the Court on 9th January, 2015.
7. On 9th January, 2015, learned Single Judge recorded that the defendants had been served with summons in the suit on 20th October, 2014, and as none had appeared nor counsel had entered appearance, the appellants were proceeded ex parte.
8. The respondent thereafter filed affidavit by way of evidence. After hearing counsel for the respondent and taking into consideration the

evidence on record, ex parte judgment and decree for Rs. 33,49,627/- with *pendente lite* and future interest @ 12% from the date of filling of the suit till payment, was pronounced on 29th September, 2015.

9. On or about 21st January, 2016, the appellants filed the application IA No. 1379/2016 under Order IX, Rule 13 CPC for setting aside of the ex parte decree/judgment dated 29th September, 2015. In this application, the appellants accept that they were earlier served with legal notice dated 8th August, 2015 issued on behalf of the respondent. It is pleaded that thereafter, the appellants had tried to contact the respondent for settlement as there was some dispute regarding payment and were assured that the respondent would not take recourse to legal action. The appellants had not received any notice from Court or any other person about pendency of the legal proceedings in CS(OS) no.2742/2014. It was pleaded that the respondent had assured during conversion that the account would be settled and he was receiving part payment from the appellants. The appellants had received the call from the respondent, who had threatened them that he would recover Rs.33,19,627/- as there was a decree in his favour dated 28th December, 2015, in CS (OS) No. 2742/2014. Thereupon, the appellants had come to Delhi and had discussed the matter with the respondent, who had stated that he would not settle the matter as he had already obtained the ex parte decree. After taking legal advice, the application for setting aside of the ex parte decree, was filed. Pertinently, the supplies made, the invoices raised, and balance amount payable were not disputed and challenged.

10. Perusal of the suit records reveals that the summons in the suit issued for 24th November, 2014 by speed post on Rohit Aggarwal and

Hari Aggarwal, were served at D-4, Industrial Area-II, Amawa Road, Raibareilly (UP) on 25th September, 2014. The acknowledgement cards for service on Rohit Aggarwal and Hari Aggarwal are available on record. The respondent had also filed on record the tracking report issued by the Indian post confirming that the summons sent to the appellants, including partnership firm, were duly served at Rai Bareli.

11. Summons sent through process server were also served on the given address with the process server making the following endorsement:-

“On reaching the spot at M/s Saraswati Steel, D-4, Mill Area-II, Amaba Road, Rai Bareli, and enquiring about its partners, it was found that they do not stay there. One Bindra Prasad Bajpai was present there who received the summon and mentioned the above noted address and signed.”

12. The stand taken by the appellants at the time of hearing of the application under Order IX Rule 13 of the Code and before us was that the partners of the appellants firm were residing at B-952A, Sector-A, Mahanagar, Lucknow, UP and thus the summons were not served as per the provisions of Order XXX Rule 3 of the Code. This was not the stand and stance in the pleading i.e. I.A. No. 1379/2016, filed under order IX Rule 13 of the Code.

13. The learned Single Judge in our opinion, has rightly rejected the said contention as unworthy and one which does not merit acceptance. Noticeably, as recorded by the learned Single Judge, the application under Order IX Rule 13 of the Code, IA 1379/2016, is supported by an affidavit of Rohit Aggarwal, S/o Sh. Hari Aggarwal in which he has mentioned his address as D-4, Industrial Area-II, Amawa Road, Raibareilly (UP). In the power of attorney executed by Rohit Aggarwal, for moving this

application, he had given his residential address as D-4, Industrial Area-II, Amawa Road, Raibareli (UP). It is obvious to us that the appellants subsequently had changed their stand and stance and had tried to project as if they were not aware and were never served with the summons in the suit as they were residing at B-952A, Sector-A, Mahanagar, Lucknow, UP. The falsity is apparent.

14. The appellants do not deny that they have a factory at D-4, Industrial Area-II, Amawa Road, Raibareli (UP) and they also have an employee by the name of Bindra Prasad Bachpei. This is a case of valid and good service, albeit the appellants took the chance and deliberately did not appear and contest the case, apparently, because they had no case and ground to defend. Even in the application IA No. 1379/2016 no assertion on merits of the claim was made. The appellants wanted to adopt wait and watch policy to delay the proceedings by subsequently getting the judgment and decree reopened. This should not be permitted.

15. In view of the aforesaid position, we do not think, the present appeal has any merit and the same is dismissed with no order as to costs.

SANJIV KHANNA, J

NAVIN CHAWLA, J

SEPTEMBER 12, 2017

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