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

+ CM(M) 702/2016

MUKESH

..... Petitioner

Through: Mr.Salim Malik, Advocate.

versus

RATAN PRAKASH GUPTA & ANR

..... Respondents

Through: Mr.P.N.Malhotra, Advocate.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER

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17.05.2017

CM(M) 702/2016

1. The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India, impugning the order dated 4th June, 2016 whereby the application under Order IX Rule 7 CPC, filed by him for setting aside the ex-parte order dated 4th March, 2016 has been dismissed by the learned Trial Court.

2. Learned counsel for the petitioner has drawn the attention of this Court to the circumstances explained in the application under Order IX Rule 7 CPC under which the petitioner could not appear before the Court on the date he has been proceeded ex-parte.

3. Learned counsel for the petitioner has submitted that after the petitioner was released on regular bail, application was filed by him for setting aside ex-parte order but that application has been dismissed by the learned Trial Court without appreciating that it was under the compelling circumstances that he was unable to appear personally and his counsel sought discharge as he was unable to pay fee to the counsel.

4. Learned counsel for the respondent has strongly opposed the prayer mainly on the ground that the initial cost of ₹10,000/- was imposed on the petitioner and which was not paid within the stipulated time. It has been further contended that the conduct of the petitioner was same even before the High Court and the petitioner cannot be allowed to take advantage of the registration of a case against him as that was not a sufficient cause for non-appearance on 4th March, 2016 when he has been proceeded ex-parte.

5. The proceedings recorded by the Court are extracted hereunder:

*“Present: Shri P.N.Malhotra, advocate for the plaintiff.
Shri Jitender Kumar, Proxy counsel for the defendant*

Proxy counsel for the defendant stated that the defendant is not contacting main counsel and has not received any instructions from his side. It is further stated that the information has already been sent to the defendant, but despite it he has not come forward.

It is stated that the same information was given even in the Hon'ble High Court on 27.05.2015 as well as on 03.09.2015. Accordingly, in view of the request made Shri Vijay Kingar, Advocate for the defendant is discharged from this case. The defendants are proceeded ex-parte and further cross examination of PW-1 on their behalf is treated as NIL.

Counsel for plaintiff filed an application alongwith list of witnesses. In view of the submissions made the said application is allowed. Plaintiff is permitted to examine the remaining witnesses as mentioned in the application. List the matter on 14.04.2016 for remaining P.E. This date is given according to the convenience and choice of the counsel for the plaintiff.”

6. On 4th March, 2016, when the defendants have been proceeded ex-parte and the opportunity to cross-examine PW-1 has been recorded as ‘nil’, the presence of PW-1 is not recorded in the proceedings by learned

Trial Court, hence there was no question of recording the cross-examination of PW-1 as 'nil' on behalf of the defendants.

7. A perusal of the application under Order IX Rule 7 CPC reveals that the petitioner along with his brother was implicated in case FIR No.538/2015, PS Seelampur. The petitioner and his brother were released on regular bail and thereafter the application under Order IX Rule 7 CPC dated 22nd April, 2016 was filed, a day before the next date of hearing.

8. Learned Trial Court dismissed the application noting the fact that the Court notice was sent to the learned counsel for the defendants and he sought discharge on the ground that he was not getting any instructions. The past conduct of the defendant as well the fact that the cost was deposited only on 4th June, 2016 when the order impugned herein was passed. Learned Trial Court also noted that the application has been filed and signed by only defendant No.1 (petitioner herein) and not by defendant No.2. Learned Trial Court also noted that the matter was referred to mediation cell but there also the defendant failed to appear. The application under Section 5 of the Limitation Act was also dismissed recording that the application for setting aside the order was required to be moved on or before date of hearing which is next to the date of order on which the defendant has been proceeded ex-parte.

9. The law with respect to setting aside the ex parte proceedings is well settled since early 1950s when the Supreme Court passed the judgment in the case of Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya AIR 1955 SC 425. As per this judgment, once a person is proceeded ex parte that does not mean that the person is proceeded ex parte for all times, and the said person has a right to appear in all subsequent dates/proceedings, of

course though he cannot set the hands of the clock back by getting those things undone which are done when the said defendant had remained ex parte. Therefore, unless he can show good cause, the ex parte defendant must accept all that has happened before and such defendant must be content to proceed from the stage at which he comes in. Also, the endeavour of the court is that ex parte proceedings against the defendant, ordinarily in the interest of justice can be set aside unless the defendant by his deliberate action wants to cause irreparable prejudice to the plaintiff and condonation of delay in setting aside the ex parte proceedings can be allowed if the explanation for the delay is supported by sufficient cause. If the explanation does not smack of malafides or it is not put forth as part of a dilatory strategy the court must show utmost consideration for condoning the delay liberally. (Ref: N. Balakrishnan Vs. M. Krishnamurthy, AIR 1998 SC 3222).

10. Basically, the courts are liberal in allowing the setting aside of ex parte proceedings, including of restoration of suit dismissed in default, because, ordinarily persons should be allowed to have a judgment on merits and not on account of default.

11. In the application under Order IX Rule 7 CPC it has been specifically mentioned by the petitioner/defendant No.1 that due to the registration of the criminal case FIR No.538/2016, PS Seelampur, there was apprehension of arrest and not only the petitioner but also his brother was named in the FIR. Both of them were later released on regular bail.

12. The above reason was a sufficient ground for setting aside the ex-parte order but learned Trial Court noting the past conduct of the petitioner has preferred to dismiss the application. It is also relevant to mention here that the ex-parte proceedings were only for that date and the

petitioner could have joined the subsequent proceedings and also had a liberty to cross-examine the plaintiff's witnesses.

13. The Court notice sent by the Court was through counsel and the counsel did appear before the Court but informed that he was not having any instructions. The circumstances under which no instruction could be given have been duly explained in the application under Order IX Rule 7 CPC.

14. It is a matter of record that in respect of the ex-parte proceedings dated 4th March, 2016 the application has been filed on 22nd April, 2016 without any delay. The gap in between the two dates of hearing was not such as to cause either delay in the disposal of the case or to cause any kind of prejudice to the respondent/plaintiff. The effect of the impugned order is that for absence on one date of hearing, he has been denied the opportunity of cross-examination of PW-1 despite the fact that on that date the petitioner was unable to appear because of being implicated in a criminal case and was availing his legal remedy.

15. In the facts of the present case, the impugned order has caused gross injustice to the defendant. If the ex-parte order is not set aside, he would not be able to cross examine material plaintiff's witnesses i.e. PW-1 though can take part in the subsequent proceedings as also noted by the learned Trial Court in the concluding paras of the impugned order.

16. The petition is allowed and the ex-parte order dated 4th March, 2016 as well the order dismissing the application under Order IX Rule 7 CPC dated 4th June, 2016 are set aside, subject to cost of 5,000/- to be payable to the learned counsel for the respondent/plaintiff before commencement of cross-examination of PW-1.

17. Copy of the order be sent to the concerned Court for information and compliance.

18. Copy of the order be given dasti to the parties, as prayed.

CM No.26017/2016 (stay)

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 17, 2017

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