

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

+ **FAO No. 279/2017**

% **5th July, 2017**

UNION OF INDIA

..... Appellant

Through: Mr. Vivekanand Mishra and
Mr. Vipul Agarwal, Advocates.

versus

M/S J W T

..... Respondent

Through: Mr. Aayush Agarwala and Mr.
Pramod B. Agarwala, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CAVEAT No. 593/2017

Since counsel for the caveator has entered appearance the caveat stands discharged.

C.M. Appl. No. 23022/2017 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

FAO No. 279/2017 and C.M. Appl. Nos. 23023/2017 (for stay)

1. This first appeal is filed under Order XLIII (1)(d) CPC against the impugned judgment of the court below dated 21.3.2017 by

which the application of the appellant/defendant under Order IX Rule 13 CPC has been dismissed and the court below has refused to set aside the *ex-parte* judgment and decree dated 12.9.2013 by which the suit of the respondent/plaintiff was decreed for a sum of Rs.39,96,491.24 along with interest at the rate of 12% per annum.

2. (i) The facts of the case are that the appellant/defendant i.e the Ministry of Information and Broadcasting, Union of India, issued a public notice dated 12.5.2007 notifying expression of interest of appointment of ‘fabricating agency’ and ‘communication consultant/creative consultant’ for designing a mobile exhibition on train for an All India Run to celebrate 150 years of 1857, the first war of India’s independence. The offer of the respondent/plaintiff dated 3.7.2007 was accepted and a formal agreement Ex.P-2 was executed. Respondent/plaintiff was given the work of creative designs only and which were to include multimedia products for in-train display, pictorial panels, graphics, animation, 3D panels, audio visuals, etc etc. Respondent/plaintiff completed the job work and was agreed to be paid an amount of Rs.1,01,12,400/-. The final billed amount was Rs.90,00,000/- against the total purchase of Rs.92,00,000/-. The train exhibition was duly flagged off on 28.09.2007 and the entire work

assigned to the respondent/plaintiff was completed and handed over to the appellant/defendant. Since the appellant/defendant made only a total payment of Rs.70,00,068/- there remained a balance payment due of Rs.31,12,332/-. Appellant/defendant however only paid a sum of Rs.6,05,126/-, and hence by the subject suit the respondent/plaintiff claimed balance payment of Rs.25,07,206/- along with interest totaling to Rs.39,96,491/-.

(ii) Appellant/defendant was duly served in the suit. Appellant/defendant appeared through counsel in the suit firstly on 16.3.2011. Appellant/defendant, however, from 16.3.2011 right till 5.9.2012 did not file any written statement. The right of the appellant/defendant therefore to file written statement was hence closed vide order dated 23.5.2012 and appellant/defendant was thereafter also proceeded *ex-parte* on 5.9.2012. Respondent/plaintiff led *ex-parte* evidence and proved documents Ex.P-1 to P-21. Consequently, the Court on the basis of evidence led decreed the suit of the respondent/plaintiff.

3. Appellant/defendant pleads that even prior to the decree of the suit appellant/defendant had filed a written statement on 31.7.2013 but this was not taken on record because the appellant/defendant was

proceeded *ex-parte* on 5.9.2012 and its right to file the written statement was closed vide an earlier order dated 23.5.2012 and the appellant/defendant was proceeded *ex-parte* on 5.9.2012. It is argued on behalf of the appellant/defendant that there was difficulty on account of change of counsels by the appellant/defendant and hence written statement could not be filed. Time was also lost in taking instructions. These aspects and stand of the appellant is referred to in paras 4 and 5 of the impugned order dated 21.3.2017 and these paras read as under:-

“4. The defendant/applicant was proceeded *ex-parte* vide order dated 05.09.2012. It is submitted that Directorate of Advertising and Visual Publicity (DAVP) being one of the Ministry of Information and Broadcasting requested the Ministry of Information and Broadcasting to appoint a Government counsel on 24.08.2011. It is submitted that on 27.09.2011, the nominated counsel sought four weeks time to file written statement on behalf of the defendant. It is further submitted that on 03.11.2011, counsel for the defendant contacted the defendant that the comments forwarded to him were not sufficient to draft a suitable reply. It is further submitted that the on 24.02.2012, AD, DAVP was nominated to prepare a para wise comments and on 30.04.2012, a letter was written to the counsel asking about the current status of the matter. It is further submitted that the matter was listed before Hon’ble High Court on 23.05.2012 for filing the written statement and the previous counsel had already returned back the brief and no new counsel was appointed, therefore, on 23.05.2012, nobody was present and right to file the written statement was closed.

It is further submitted that on 11.06.2012 the Ministry of Information and Broadcasting again wrote a letter with regard to take steps for appointment of new counsel. It is further submitted that the on 24.02.2012, AD, DAVP was nominated to prepare a para wise comments and on 30.02.2012, a letter was written to the counsel asking about the current status of the matter. It is further submitted that the matter was listed before Hon’ble High Court on 23.05.2012 for filing the written statement and the previous counsel had already returned back the brief and no new counsel was appointed, therefore, on 23.05.2012, nobody was present and right to file the written statement was closed.

It is further submitted that on 11.06.2012 the Ministry of Information and Broadcasting again wrote a letter with regard to take steps for appointment of new counsel. It is further submitted that on 06.02.2013, the new nominated counsel prepared and finalized the affidavit based on comments provided to him and the counsel failed to attend the Court hearing on 04.03.2013. It is further submitted that on 10.05.2013, the counsel appeared and sought time to inspect the Court records and to take appropriate steps in the matter. It is further submitted that counsel contacted the department and drafted the written statement along with delay application and submitted the same on 31.07.2013. It is further submitted that the same was returned under the objection as the right to file written statement already stood closed vide order 23.05.2012 and the defendant was proceeded *ex-parte* on 05.09.2012, therefore written statement could not be brought on Court records. It is further submitted that on 04.04.2014, counsel was nominated for the purpose of filing appeal against the judgment dated 12.09.2014 before the Hon'ble Division Bench of High Court. It is further submitted that the complete documents along with the plaint were forwarded to the counsel on 23.04.2014 to prepare appeal against the order dated 12.09.2013.

5. It is further submitted that Government exchequer cannot be made to suffer such a huge loss without being heard on merits. It is further submitted that no cause of action has arisen in favour of the plaintiff and it is the plaintiff who has willfully violated the terms of the contract and the defendant has always acted in accordance with the terms of the contract. It is therefore prayed that the present application be allowed and *ex-parte* decree dated 12.09.2013 be set aside."

4. It is argued on behalf of the appellant/defendant that Government exchequer cannot be made to suffer by decreeing of the suit without the appellant/defendant being heard on merits.

5. The court below has dismissed the application under Order IX Rule 13 CPC finding that there is no sufficient cause for condonation of delay, for setting aside the *ex-parte* proceedings, and also for setting aside order closing right of the appellant/plaintiff to file written statement. In this regard, the court below has observed as

under in paras 16 and 17 of the impugned order and the same reads as under:-

“16. Further, a plain reading of the provisions of Order 9 Rule 13 CPC indicates that an ex-parte decree can be set aside when a defendant satisfies the court that the summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. As per second proviso of Order 9 Rule 13 CPC, this court is proscribed from setting aside the ex parte decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date of hearing and sufficient time to appear in court. In order to determine the application under Order 9 Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand.

17. In view of the aforesaid discussions and relevant law, the court has to examine as to whether the defendant has been able to show sufficient cause for not appearing in the proceedings before the Court. In the case in hand, the defendants were well aware regarding the pendency of the suit and had ample and sufficient opportunity to participate in the proceeding but no steps were taken by the applicants. As noted, the applicants have not shown sufficient grounds for not appearing before the court despite service. Even after the passing of the decree, applicants did not take any steps nor filed an application under Order 9 rule 13 CPC within the time and therefore the application for setting aside ex-parte decree is barred by time and explanation of applicants in this respect is not sustainable. In my considered view, the applicants failed to disclose “sufficient cause” for not appearing in the court when the suit was called for hearing. There is no merit or substance in the applications which are liable to be dismissed. The application under Order 9 Rule 13 CPC filed by applicants is therefore dismissed.”

6. To the conclusions given by the court below I would like to add that CPC was amended by the Amendments of 1999 and 2002 for ensuring that ordinarily the written statement should be filed within a maximum period of ninety days. No doubt, the period of ninety days is not mandatory and only directory, however, intention of legislature

was that not too much time should be taken for filing of the written statement. In the present case appellant/defendant was served in the suit on 16.3.2011 and it got time till 23.5.2012 i.e over one year and two months to file the written statement. That is the period of over one year and two months well beyond the period of ninety days and yet the appellant/defendant did not file the written statement. Accordingly, the right of the appellant/defendant to file the written statement was closed on 23.5.2012 and appellant/defendant was proceeded *ex-parte* on 5.9.2012. The court below was also right in observing that if the written statement was filed in July, 2013 which was not taken on record then why immediately thereafter the subject application under Order IX Rule 13 CPC was not filed because this application was only filed much later in August, 2014. The second name of the appellant is obviously 'lethargy'. No doubt, Government exchequer cannot be allowed to suffer, however, equally also the law of this country cannot be thrown to the winds just because the appellant is a Government department. In fact, the appellant must take action against all its officers in the complete chain who have caused passing of the *ex-parte* decree against the appellant/defendant instead of the appellant/defendant trying to wish away the delay and gross negligence

caused not only in filing of the written statement but also the filing of the application under Order IX Rule 13 CPC.

7. Provisions of setting aside of *ex-parte* decrees, as also setting aside the orders of closing the right of filing of the written statement, can only be interfered on their existing sufficient reasons and cause. If routinely *ex-parte* judgments and orders closing right to file written statement are set aside, then the purpose of the legislature in amending the provisions of CPC giving a specific schedule for filing of the written statement will be set at naught. As already stated above, appellant/defendant is at liberty and in fact should take action against all the concerned personnel down the line who have been responsible for causing *ex-parte* decree being passed against it.

8. There is no reason to interfere with the impugned judgment.

9. Dismissed.

JULY 5, 2017

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VALMIKI J. MEHTA, J