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

+ CM(M) 593/2017 & CM No.20250/2017 (for stay)

SANJAY NAYYAR

..... Petitioner

Through: Mr. Deepak Sharma & Ms. Anindita
Das, Advs.

Versus

SHAKTI BHOG FOODS LTD & ANR

..... Respondents

Through: Mr. P.C. Dogra, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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08.09.2017

1. This petition under Article 227 of the Constitution of India impugns the order [dated 6th January, 2017 in CivDJ/609460/2016 of the Court of Additional District Judge-05 (ADJ), West District, Tis Hazari Courts, Delhi] allowing the application of the respondents / defendants under Order IX Rule 7 of the CPC for setting aside the order proceeding *ex-parte* against the respondents / defendants and allowing the respondents / defendants to contest the suit.
2. Notice of the petition was ordered to be issued and the counsel for the respondents / defendants appears.
3. The counsels have been heard.
4. The contention of counsel for the petitioner is that in terms of the dicta of the Supreme Court in *Arjun Singh Vs. Mohindra Kumar* AIR 1964 SC 993, the application under Order IX Rule 7 was not maintainable.
5. The counsel for the petitioner / plaintiff in this regard has filed before this Court copies of the orders dated i) 10th February, 2016 admitting the suit

and directing issuance of summons thereof for 14th April, 2016; ii) 23rd April, 2016 when the suit was taken up owing to 14th April, 2016 having been declared a holiday and upon failure of the respondents / defendants to appear despite service proceeding *ex parte* against the respondents / defendants and posting the suit for *ex parte* evidence of the petitioner / plaintiff on 18th July, 2016; iii) 18th July, 2016 recording that the petitioner / plaintiff had examined himself and closed his evidence and posting the suit for *ex parte* final arguments on 28th July, 2016; and, iv) 28th July, 2016 adjourning the matter for final arguments to 17th August, 2016.

6. The order dated 17th August, 2016 is as under:

“Arguments heard.

Put up for further arguments if any / orders on 19/08/2016.”

7. The petitioner / plaintiff has not filed copy of the order dated 19th August, 2016 and has thereafter straightaway filed copy of the order dated 7th November, 2016 as under:

“Present Ms. Anandita Dass, Ld. Counsel for the plaintiff.

Sh. Gaurav Sood, Ld. Counsel for the defendant.

Ld. Counsel for the plaintiff filed documents for supporting her claim of gratuity.

Copy of application under Order 9 Rule 7 of CPC supplied to Ld. Counsel for the plaintiff.

Put up for reply / arguments on said application on 06.01.2017.”

8. The counsel for the petitioner / plaintiff contends that since the suit, on 17th August, 2016 was not adjourned for any hearing and only for orders on 19th August, 2016, in terms of the judgment aforesaid of the Supreme Court the application under Order IX Rule 7 did not lie.

9. The counsel for the respondents / defendants contends that the application under Order IX Rule 17 was filed on 26th October, 2016 and was taken up for hearing on 7th November, 2016 only when the order as reproduced above was passed. He further contends that the petitioner / plaintiff has not filed copies of the order dated 19th August, 2016 or any other orders before 7th November, 2016.

10. The counsel for the petitioner has no explanation therefor and is today also not carrying with her the copies of the said order. She has however also handed over copy of ***Suresh Kumar Mallik Vs. M.S. Lakhani*** 84 (2000) DLT 21 (DB).

11. At this stage, the counsel for the petitioner has handed over copy of the order dated 19th August, 2016 as under:

“Present Sh. Deepak Sharma, Ld. Counsel for plaintiff.
Defendants are ex-parte.

Some clarifications are required.
Put up for further arguments on 26/08/2016.”

She, however does not have the copy of the order dated 26th August, 2016 or any other orders before 7th November, 2016.

12. It is evident from the aforesaid orders that the dicta enunciated in the two judgments aforesaid is not applicable to the facts of the present case. From the non-filing of other orders also adverse inference has to be drawn against the petitioners.

13. I may in this respect also notice that the petitioner / plaintiff had filed CM No.31771/2017 for early hearing and which had come up on 1st September, 2017 when though arguments on the main petition itself were

commenced but owing to the unpreparedness as today also, the application for early hearing was dismissed.

14. Once in the facts aforesaid the application under Order IX Rule 7 is found to lie, no ground for interference in exercise of jurisdiction under Article 227 of the Constitution of India with the order setting aside *ex parte* against the respondents / defendants subject to costs of Rs.6,000/- is made out.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 08, 2017

‘gsr’..