

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

+ **RFA No. 659/2017**

% **20th November, 2017**

M/S SUNLIGHT CAFE PRIVATE LTD & ANR. Appellants
Through: Ms. Tulika Bhatnagar,
Advocate.

versus

RAJNISH DHAKA & ANR. Respondents
Through: Mr. Dhruv Madan, Mr. Mukul
Rawal and Mr. Biswajit Singh,
Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the two appellants. Appellant no. 1 is a company and it was the defendant no. 2 in the suit. Appellant no. 2 is a Director of the appellant no. 1 company, and he was the defendant no. 3 in the suit. The subject suit was a suit under Order XXXVII CPC filed by the respondent no.1/plaintiff for recovery of Rs. 35,50,000/- along with interest.

2. The impugned order shows that the suit has been decreed against the defendant nos. 2 and 4 in the suit, namely the appellant no.1/company and an other director Sh. Prashant Ojha, the respondent no.2 in this appeal. This appeal therefore is essentially with respect to passing of the judgment and decree under Order XXXVII CPC by the impugned order dated 1.2.2017 on account of service being effected of appellant no.1/defendant no. 2 and no appearance under Order XXXVII Rule 2(3) having been filed by the appellant no.1/defendant no.2.

3. Learned counsel for the appellants argues that appellant no.1/company could only have been represented in the suit by appellant no.2 herein, and who was the defendant no. 3 in the suit, inasmuch as, the other two directors of the appellant no.1/company/defendant no.2 were the plaintiff (respondent no.1) in the suit or the defendant no.4 (respondent no.2) in the suit, and that therefore by the impugned judgment dated 1.2.2017 the decree could not have been passed against the appellant no.1/company/defendant no.2 as the appellant no.1/company/defendant no.2 could only be treated as having been served of the summons of the Order XXXVII suit on the appellant no.2/defendant no.3 having come to know of the filing of the subject suit under Order XXXVII CPC against the appellant no.1/defendant no.2.

4. Admittedly in the present case the defendant nos. 2 and 4 in the suit i.e. appellant no.1/company and respondent no.2 herein were served by way of publication on 4.1.2017. As per Article 123 of the Limitation Act, 1963, an application to set aside an *ex-parte* decree can be filed within 30 days on date of knowledge. This principle will equally apply when a suit would be decreed under Order XXXVII CPC when there is service by publication, with the only difference that the appearance will have to be filed within 10 days of knowledge of the fact that the subject suit is a suit under Order XXXVII CPC.

5. Learned counsel for the appellants states that the appellant no.1/company can be said to have come to know of the subject suit under Order XXXVII CPC only when the appellant no.2 (who is the Director of appellant no.1) came to know of the *factum* of the suit being under Order XXXVII CPC, and to which issue there is no dispute, but in law once a decree is wrongly passed by the impugned order dated 1.2.2017 as against the appellant no.1/company, then, the remedy of the appellant no.1/company was/is to file an application under Order XXXVII Rule 4 CPC to set aside the decree and by stating the facts as to why the decree could not have been passed against the appellant no.1/company in terms of impugned order dated 1.2.2017.

6. Accordingly, since the appellant no.1/company claims that it came to know of the subject suit being filed under Order XXXVII CPC only on the date of passing of the impugned order dated 1.2.2017, and on which date the suit itself was decreed on account of not filing of appearance by appellant no.1/company, hence the remedy of the appellant no. 1/company is not to file an appeal, being the present appeal, against the impugned order dated 1.2.2017 which has decreed the suit against the appellant no. 1/company, but the remedy of the appellant no. 1/company is to file an application under Order XXXVII Rule 4 CPC along with an application seeking condonation of delay in accordance with law for taking on record the delayed appearance under Order XXXVII.

7. Accordingly, this appeal is disposed of as not maintainable with liberty to the appellant no. 1/company to file an application on behalf of the appellant no.1/company under Order XXXVII Rule 4 CPC in accordance with law.

NOVEMBER 20, 2017

VALMIKI J. MEHTA, J