

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

+ **FAO No. 351/2017**

% **25th August, 2017**

M/S BALAJI GLASS AND CROCKERY HOUSE AND ANR.

..... Appellants

Through: Mr. M.M. Singh, Advocate.

versus

M/S FAR EAST MARKETING (P) LTD.

..... Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Order XLIII(1)(d) of Code of Civil Procedure, 1908 (CPC) impugning the order of the trial court dated 3.5.2017 by which the trial court has dismissed the application under Order IX Rule 13 CPC filed by the appellants/defendants. By the application under Order IX Rule 13 CPC, the appellants/defendants prayed for setting aside of the *ex-parte* judgment and decree dated 11.4.2016 for a sum of Rs.10,57,212/- along with interest. The suit was filed for recovery of unpaid dues for

the home appliances sold by the respondent/plaintiff to the appellants/defendants and covered by the eight dishonored cheques.

2. The subject suit was filed by the respondent/plaintiff on the basis of cause of action that with respect to the unpaid bills raised upon the appellants/defendants for goods supplied, appellants/defendants had issued a total of eight cheques and which were dishonored. The subject suit therefore came to be filed and it was decreed by the trial court by its *ex-parte* judgment and decree dated 11.4.2016 by giving the following reasons:-

“4. For proving its case, the plaintiff has examined Sh. Sujeet Yadav, its Authorized Representative as PW1. PW1 in his evidence by way of affidavit has reiterated and reaffirmed the stand as taken by the plaintiff bank in the plaint. He has filed on record his affidavit as Ex.P-1, extracts of minutes of the meeting dated 14.01.2008 and 02.03.2015 as Ex.PW1/1 (OSR), statement of account as Ex.PW1/2 (colly), certified copies of the cheques issued by the defendant as Ex.PW1/3 (colly), certified copies of the bank return memos as Ex.PW1/4 (colly), original letter dated 08.07.2008 as Ex.PW1/5, legal notice dated 16.03.2009 as Ex.PW1/6 and the original invoices as Ex.PW1/7 (colly).

5. I have carefully gone through the entire material available on record and heard the submissions of the Ld. Counsel for the plaintiff.

6. Perusal of the invoices Ex.PW1/7 reveals that the goods were supplied by the plaintiff company to the defendants. The plaintiff has come to the court with the plea that the defendants were appointed as stockists of the plaintiff company and the goods were supplied to the defendants as per orders and specifications of the defendants. Perusal of the certified copies of the cheques Ex.PW1/3 on record and perusal of the bank returning memos Ex.PW1/4 on record show that despite the issuance of the cheques by the defendants to the plaintiff, the said cheques were dishonoured. Perusal of the statement of account Ex.PW1/2 shows that the amount of Rs.10,25,400.21/- is due and payable by the defendants. However, in the present suit, the plaintiff has claimed the amount of all the dishonoured

cheques to the tune of Rs.10,11,690/-. Despite the service, the defendants failed to appear and failed to contest the present suit. As such, the testimony of PW1 remains uncontroverted and unchallenged. I am of the opinion that there is no reason to disbelieve the uncontroverted testimony of PW1. To my mind, the plaintiff has been able to prove its case.”

3.(i) The appellants/defendants filed the subject application under Order IX Rule 13 CPC pleading that they were never served in the suit and they came to know of the pendency of the suit only for the first time when bailiff of the court visited the shop of the appellants/defendants on 4.8.2016.

(ii) The court below records in the impugned order that the facts of the present case are not that the appellants/defendants were endeavored to be served only once, but the fact is that various and repeated attempts were made to serve the appellants/defendants. First service was when the husband of the appellant no.2/defendant no.2 refused to accept the summons. Thereafter record of the trial court shows that the appellants/defendants were served through their employee at the same address. There was also a third occasion when service was again sought to be effected and was offered to one Sh. Surender Pal who refused to receive the same and consequently service was effected by affixation and which service the trial court accepted to be due service and accordingly proceeded the appellants/defendants *ex-parte*.

4. I may note that there is no dispute that address of the appellants/defendants is that very address at which service was effected of the summons in the suit. It is not in dispute that the address of the appellants/defendants in the suit is the address of the shop where the appellants/defendants are carrying on their business. Therefore, in my opinion, the trial court rightly proceeded the appellants/defendants *ex-parte* and which resulted in passing of the *ex-parte* judgment and decree dated 11.4.2016.

5. Learned counsel for the appellants/defendants argued that admittedly simultaneously proceedings under Section 138 of the Negotiable Instruments Act, 1881 were going on against the appellants/defendants and the appellants/defendants could have been served in the proceedings under the Negotiable Instruments Act by the respondent/plaintiff but the same was not done and therefore it should be held that the appellants/defendants were wrongly proceeded *ex-parte*. I cannot agree with this argument because as already stated above the address at which the appellants/defendants were served is very much the address of appellants/defendants and in fact is the shop premises where appellants/defendants are carrying on business and would be available throughout the day. There is no requirement of law that service of

summons in the suit had to be through the Court in the proceedings under Section 138 of Negotiable Instruments Act. This argument of the appellants/defendants is therefore rejected.

6. Learned counsel for the appellants/defendants then argued that this Court can give time bound directions for disposal of the suit after permitting the appellants/defendants to file their written statement, however in my opinion even this argument is misconceived because if the appellants/defendants wanted to contest the suit they should have appeared in the Court when summons were served upon them but they failed to do so. Also, it is seen that the suit has been decreed on the basis of eight dishonored cheques issued by the appellants/defendants. Therefore, in my opinion, there is no strength in the argument urged by the appellants/defendants that they should be given an opportunity to file their written statement and time bound directions be given for disposal of the suit.

7. No other argument is urged before this Court. Dismissed.

AUGUST 25, 2017/ Ne

VALMIKI J. MEHTA, J