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

+ FAO(OS) 232/2017 & CM Nos.29601-29602/2017

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Date of decision : 21st August, 2017

WG. CDR. NARENDER NATH

..... Appellant

Through : Mr. Jayant K. Mehta, Mr. Faisal
Zafar and Mr. Tarun Shankar,
Advs.

versus

PREMIER SHIELD PVT LTD

..... Respondent

Through : None

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

1. The appellant before us, a defendant in CS(OS) No. 1131/2013, assails an order dated 18th July, 2017 passed by the learned Single Judge, rejecting an application under Order IX Rule 7 of the Code of Civil Procedure being IA No.6640/2016. It appears that the appellant before us was an employee of the respondent herein.

2. The plaintiff (respondent herein) filed CS(OS) 1131/2013 against the appellant (herein as defendant no.1) *inter alia* alleging that the appellant is an employee who left the plaintiff company unauthorisedly without handing over the plaintiff its database. It is also the plaintiff's case that leaving the plaintiff company, the

appellant has joined the defendant no.2, who was not arrayed as defendant no.2 in the suit, and was using the plaintiff's database for soliciting its clients. Contending that this action of the appellant was in violation of not only the terms of the agreement, but also of the non-disclosure agreement specifically executed between the plaintiff and the appellant/defendant no.1, the plaintiff filed CS(OS) 1131/2013 praying for a decree of permanent injunction, mandatory injunction and damages.

3. On the plaintiff's application for interim injunction (IA No. 9541/2013) under Order XXXIX Rules 1 & 2 of the CPC, an *ex-parte* order dated 31st May, 2013 was passed restraining the defendants in the suit from soliciting the clients of the plaintiff.

4. It is an admitted position that the appellant was duly served with the summons in the suit and had entered his defence.

5. So far as the further proceedings in the suit are concerned, on 14th November, 2014, the defendant admitted six documents of the plaintiff which were marked as Exh.P-1 to P-6. The defendants had not filed any documents in support of its defence.

6. The matter stood adjourned for framing of issues on 23rd January, 2015.

7. The appellant admits that the 23rd January, 2015 was declared a public holiday and the case was then listed for the 27th of January, 2015. Unfortunately, neither the appellant nor counsel appeared for him and the defendants were both directed to be proceeded *ex-parte* by the order dated 27th January, 2015. The court directed filing of *ex-*

parte defence by the plaintiff and the matter was set down before the Joint Registrar.

8. It appears that thereafter the matter was listed on 9th April, 2015; 30th September, 2015 and 4th February, 2016. On these dates, there were issues with regard to the affidavits of the plaintiff which were filed and some discrepancies which had crept into the affidavits.

9. It was at this stage that the present appellant filed an application under Order IX Rule 7 on or about 17th May, 2016 which was registered as IA No.6640/2016. In the application, the appellant gives the following explanation for his non-appearance in the case :

“5. That in Mid-2014, the defendant suffered from “onset Asthema” due to air pollution in Delhi and in view of the deteriorating health, the defendant was advised by doctors for complete rest and not to take any stress. It is submitted that the defendant lives alone at Delhi and his family resides at Bhawali/Haldwani, Distt. Nainital, Uttarakhand at his native village. Since the defendant needed a helping hand for his care due to his ill-health, he went to Village and PO Bhimiadhar, Bhawali, District Nainital in July, 2014.

6. That the native place of the defendant viz. Village Bhumiadhar is a remote Village situated at/near Bhawali, District Nainital, Uttarakhand. It is submitted that the village is not equipped with modern facilities like internet, proper mobile network etc. and it was for this reason that the defendant failed to keep in contact with his counsel who was representing the defendant before this Hon’ble Court in the aforesaid case. It is submitted that the defendant on several occasions tried to contact his counsel to get an update on the aforesaid suit, however due to the weak mobile network the

telephone calls used to end abruptly and the defendant could not talk to him.”

10. The appellant claims to have returned to Delhi only on or about March, 2016 when he states that he contacted with his counsel who was representing him when he learnt that counsel had shifted to Chandigarh. No dates are mentioned by the appellant.

11. The above narration would show that the appellant was all along aware of the pendency of the suit and has taken no steps in the matter at all admittedly from mid 2014 till May, 2016 when the application was filed.

12. In this background, while considering I.A.No.6640/2016 on 18th July, 2017, by the impugned order, the learned Single Judge has rightly held that the appellant was well aware of the pending litigation could not have decided one fine day to abstain from appearance before the court under the impression that he could rejoin proceedings at any stage. We agree with the learned Single Judge that the application itself establishes beyond any doubt that the appellant has been deliberately negligent in prosecuting his defence in the suit. There is nothing at all on record which could support the finding that the appellant was quite ailing and that he could not appear or facilitate further proceedings in the suit. Additionally, the appellant claims to have contacted his lawyer on “*several occasions*” and that “*due to the weak mobile network the telephone calls used to end abruptly*” which shows that he did not bother about the litigation.

13. It is also necessary to point out that Order IX Rule 7 of the CPC postulates that an application for setting aside an ex-parte order has to

be filed on or before the next date of hearing. This application has been filed way beyond the next date of hearing which was scheduled on the 9th of April, 2015 after the appellant had been proceeded *ex-parte* on the 27th of January, 2015.

14. The learned Single Judge has also held that there is no explanation at all for the delay of 500 days. This position is correct.

15. It may be noted that none cared to enter appearance on behalf of the appellant before the Joint Registrar when the case was listed on 20th May, 2016 who noted the fact that the defendants were *ex-parte* and that none is present on their behalf. The plaintiff's *ex-parte* evidence was also closed on that date.

16. Before us, it is contended by Mr. Jayant Mehta, learned counsel that the expression 'hearing' under Order IX Rule 7 has to be treated as a substantive date of hearing and that hearing in the suit has so far not commenced. It is noteworthy that in the present case, the application has been pressed only after the evidence of the appellant was closed on the 20th of May, 2016. We are therefore, unfortunately unable to agree with learned counsel on this aspect. Acceptance of the proposition pressed by the appellant would mean that the appellant could surface after the plaintiff's evidence was over and the case had been set down for final hearing before he moved an application for setting aside an order directing *ex-parte* proceedings. This is certainly not the intent of the legislature.

For all these reasons, we find no merit in this appeal and the applications which are hereby dismissed.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

AUGUST 21, 2017
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