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

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Date of Decision: May 23, 2017

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**CM(M) No.860/2015**

ANUJ MALHOTRA

..... Petitioner

Through: Mr.Kunal Madan and Mr.Aman  
Anand, Advocates.

versus

SANJAY MALHOTRA

..... Respondent

Through: Mr.Rahul Bhagat, Advocate.

**CORAM:**

**HON'BLE MS. JUSTICE PRATIBHA RANI**

**JUDGMENT (Oral)**

CM(M) 860/2015

1. The petitioner Anuj Malhotra, who is plaintiff is Civil Suit No.34/2009, has filed the instant petition under Article 227 of the Constitution of India impugning the order dated 26<sup>th</sup> May, 2015 whereby the learned Trial Court has allowed the application under Order IX Rule 13 CPC and set aside the exparte judgment and decree dated 30<sup>th</sup> July, 2011.

2. The parties to this litigation are closely related. The petitioner Anuj Malhotra is nephew of respondent Sanjay Malhotra. Sh.Deepak Malhotra is father of the petitioner Anuj Malhotra and brother of respondent/defendant Sanjay Malhotra.

3. The above description of the parties has been necessitated in view of the fact that both the parties are claiming their title in respect of the suit

property bearing no.26/177, West Patel Nagar, New Delhi on the strength of Will. The claim of Anuj Malhotra is that Smt.Ram Pyari and her husband Sh.Pyare Lal adopted his father Sh.Deepak Malhotra as their son and Smt.Ram Pyari executed a Will in respect of the suit property in his father as her grandson. The claim of Sh.Sanjay Malhotra over the suit property is on the basis that Smt.Ram Pyari was his 'Tai' i.e. wife of elder brother of his father and they were issueless. She had executed a Will in respect of the suit property in his name and the said Will was witnessed by Sh.Deepak Malhotra (father of the petitioner Anuj Malhotra).

4. Civil Suit No.34/2009 was instituted by the petitioner Anuj Malhotra impleading his uncle (Chacha) Sh.Sanjay Malhotra as defendant seeking the decree for recovery of possession and future damages. In the above noted suit, though the respondent/defendant Sanjay Malhotra remained unserved, Sh.M.P.Sharma, Advocate appeared on his behalf as his counsel and on 24<sup>th</sup> October, 2009 also filed the written statement. Thereafter Sh.M.P.Sharma, Advocate stopped appearing. As the defendant also did not appear, the learned Trial Court proceeded exparte against the defendant and passed an exparte judgment and decree on 30<sup>th</sup> July, 2011.

5. The execution petition was filed and warrants of possession were issued. Pursuant to the execution of warrants of possession, possession of the ground floor was taken but possession of the first floor could not be taken by the petitioner/decree holder.

6. The respondent/defendant, at that stage, filed an application under Order IX Rule 13 CPC specifically pleaded therein that he has never been served nor he ever engaged Sh.M.P.Sharma, Advocate as his counsel. It was claimed that the written statement has not been filed by him or on his behalf in the case. The prayer for setting aside the exparte judgment and decree has

been made alleging that the plaintiff with malafide intention managed all the things to obtain an ex parte decree against him.

7. Notice of the application under Order IX Rule 13 CPC was served on the respondent/defendant to which he filed a reply denying all the averments.

8. Learned Trial Court settled the following issues on 12<sup>th</sup> September, 2012:-

‘(i) *Whether the summon of the suit was not duly served upon the defendant/applicant?*

(ii) *Relief.*’

9. The parties were given an opportunity to lead evidence. Both the parties appeared as witness. After considering the evidence adduced by the parties on the issue of service on defendant and whether Sh.M.P.Sharma, Advocate was engaged by the defendant and written statement was filed by him on behalf of the defendant, learned Trial Court in a well reasoned order held that the summons for settlement of issues was never effected on the defendant. Learned Trial Court also noted that the written statement was filed by Sh.M.P.Sharma, Advocate who was not engaged by the defendant and that complaint has already been made to the Bar Council by the defendant against Sh.M.P.Sharma, Advocate.

10. The grievance of the petitioner/plaintiff is that the learned Trial Court committed illegality in setting aside the ex parte decree by allowing the application under Order IX Rule 13 CPC as it was a case where service has been effected on the defendant and he also had the knowledge of pending proceedings. Learned counsel for the petitioner has relied upon Flight Center Travels Pvt. Ltd. vs. Flight Centre Limited & Anr. 2013 III AD (Delhi) 548 in support of his contentions.

11. Learned counsel for the petitioner has repeatedly contended that even if the service is not effected but the party had the knowledge of the pending proceedings, merely on the ground of technicality that service had not been effected, the exparte decree could not have been set aside by the learned Trial Court.

12. The reasons given by the learned Trial Court for arriving at the satisfaction that the defendant was never served are contained in paras 13 to 17 of the order impugned and it would suffice to just reproduce the relevant discussion on the issue involved, which reads as under:-

*'12. Per contra, Ld. Counsel for the plaintiff/non-applicant submitted that the present decree is alleged to have been procured by fraud, therefore, a separate suit lie and this application is not maintainable. Otherwise also, the decree has been partly executed, therefore, this application is not maintainable. The applicant/defendant was duly served and his counsel appeared and filed written statement, therefore, defendant was rightly proceeded ex-parte. This application is devoid of merits and deserves to be set-aside.*

*13. It may be noted that a bare perusal of the orders passed in the present suit before proceeding exparte against the applicant/defendant makes it crystal clear that the applicant/defendant was never served as per law but a written statement was filed by Sh.M.P.Sharma, Advocate on behalf of the defendant. It was reported by Ahlmad that plaintiff/non-applicant has not taken steps for service of defendant but written statement has been filed by defendant. Thereafter said Sh.M.P.Sharma, Advocate submitted that defendant/applicant is ready for settlement but despite directions issued by the Court, the presence of defendant counsel could not be procured. But thereafter said M.P.Sharma, Advocate, who had appeared for defendant, absented himself and was not present on behalf of defendant in the Court after 29.07.2010 and ultimately the defendant was proceeded exparte vide order dated 07.12.2010.*

14. The contention of the counsel for the applicant that the defendant has never been served with summons, but despite that some counsel namely Sh.M.P.Sharma appeared on behalf of the defendant and filed written statement admitting the averments of the plaint, therefore, the ex-parte decree has been got decreed by forging his signature, has substance in as much as there is no report on the record to conclude that defendant/applicant was every served but strangely enough one counsel Sh.M.P.Sharma, advocate file written statement on behalf of defendant/applicant and therefore he also disappeared from the Court and defendant was proceeded exparte. The defendant appeared as DW-1 and testified that he was neither served with summons nor he engaged a counsel.

15. The contention of the counsel for plaintiff/non-applicant that defendant was served properly and one counsel appeared on behalf of defendant appeared to be attractive but is fallacious in as much as defendant was never served as per law as discussed in forgoing paras. In the same manner the contention of the plaintiff that decree has been executed partly, therefore, this application is not maintainable is devoid of merits as execution of decree is no ground to dismiss this application. So far as contention of the counsel for the plaintiff/non-applicant that a decree is alleged to have been managed by the plaintiff fraudulently. Therefore, separate suit for challenging the said exparte decree will lie is also having no force as applicant/defendant was never served with summons for settlement.

16. Law is settled that if an application under this rule the Court has to satisfy itself (a) whether the summons has not been duly served or (b) whether applicant has been prevented by sufficient cause from appearing and if any of the conditions is satisfied, the Court is bound to set aside it on one or other ground. While setting aside ex-parte factors are to be considered are not confined to findings as to sufficiency of reasons for non appearance, the Court has also to find out the totality of the situation including the defect in its own procedure. The fact that the setting aside decree would cause hardship and loss to the plaintiff/non-applicant is not ground

*for refusing the application if otherwise the condition of this rule are satisfied.*

*17. In the present case the applicant/defendant was never served as per law but written statement was filed on his behalf by Sh.M.P.Sharma, Advocate against whom defendant/applicant has filed a complaint before Bar Council of Delhi, and further the said counsel Sh.M.P.Sharma did not pursue the matter on behalf of defendant and disappeared. The service of summons for settlement of issues was never effected upon the defendant/applicant as depicted in the above discussions, therefore, it cannot be said that defendant has failed to appear before Court despite service of summons. Therefore, I am of the opinion that the defendant/applicant was not proceeded ex-parte as per law, as such the impugned judgment/decreed dated 30.07.2011 is liable to be set aside and is hereby set aside. This application is allowed and disposed of accordingly.'*

13. During the course of hearing, LCR was requisitioned. Full opportunity was given to learned counsel for the petitioner to show from the record that at any point of time the defendant was served. He could not.

14. Perusal of the LCR shows that despite being given numerous opportunities to get the defendant served through speed post, courier etc., the petitioner/plaintiff failed to get the respondent/defendant served through speed post/courier.

15. It is a matter of record that on the day when Sh.M.P.Sharma, Advocate appeared on behalf of the defendant, the defendant was not served by any mode even for that date. It has also come on record that the respondent/defendant had made complaint against Sh.M.P.Sharma, Advocate to the Bar Council as well to the police.

16. Not only that, a criminal complaint has also been filed not only against the present petitioner but also against Sh.M.P.Sharma, Advocate wherein

after recording of the pre-summoning evidence, the petitioner Anuj Malhotra as well Sh.M.P.Sharma, Advocate had been ordered to be summoned as an accused.

17. Both the parties are closely related as real uncle and nephew. The subject matter of the litigation is Property No.26/177, West Patel Nagar, New Delhi and both the parties are claiming ownership on the strength of two Wills allegedly executed by Smt.Ram Pyari. The respondent/defendant would not have allowed the case to go undefended. He was dispossessed in execution of warrants of possession and only thereafter the record was inspected and application under Order IX Rule 13 CPC was filed.

18. The scope of power of this Court under Article 227 of the Constitution is not in the nature of appellate jurisdiction and so, the extent and scope of power with this Court is limited and restrictive in nature, and in the normal circumstance, it is exercised where there is want of jurisdiction, error of law or perverse findings by the trial Court. Such power is to be exercised to keep the subordinate court within limits of their jurisdiction and authority and it is not to act as an Appellate Court for correcting the decisions of the subordinate courts. This court would not substitute its opinion or interfere with the findings of the facts of the trial Court, if there was no infirmity or perversity. Thus, in the absence of there being any material illegality or perversity, the order of the court below is not to be faulted with or interfered with by this court in its supervisory power under Article 227.

19. This is a case where learned Trial Court, in my opinion, has passed a well reasoned order after examining the material for arriving at the satisfaction required for setting aside the exparte judgment and decree.

20. The order dated 26<sup>th</sup> May, 2015 vide which the exparte judgment and decree dated 30<sup>th</sup> July, 2011 has been set aside, does not suffer from any

illegality or infirmity. Rather it is based on proper appreciation of the material on record before arriving at the satisfaction that it was a case where defendant was never served. Hence, it does not require any interference by this Court in exercise of extraordinary jurisdiction under Article 227 of the Constitution of India.

21. The petition is dismissed.

22. LCR be sent back alongwith copy of this order.

CM No.19422/2015

Dismissed as infructuous.

**MAY 23, 2017**

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**PRATIBHA RANI, J.**

