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

\+ **FAO No. 429/2017**

% **6th November, 2017**

M/S FAIRGROWTH EXPORTS (P) LTD. ..... Appellant

Through: Mr. Deepak Jain, Advocate.

versus

SANJAY CHAUDHARY ..... 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) CPC challenging the impugned order passed by the court below dated 8.8.2017 by which the application filed by the appellant/defendant under Order IX Rule 13 CPC has been dismissed.

2. The facts of the case are that the respondent/plaintiff filed the subject suit against the appellant/defendant for recovery of Rs. 10,52,365/- along with interest pleading that respondent/plaintiff had supplied various ladies suits etc to the appellant/defendant and the appellant/defendant had issued various cheques for payment. These

cheques were however dishonoured, and therefore, after serving the demand notice dated 4.1.2013 the subject suit was filed.

3. As the appellant/defendant failed to appear in the suit it was proceeded *ex-parte* and the respondent/plaintiff proved his case which resulted in *ex-parte* judgment and decree dated 25.9.2013. The relevant paras of the judgment of the trial court dated 25.9.2013 showing that the respondent/plaintiff proved his case are paras 3 and 4 and which read as under:-

> "3. In ex-parte evidence, plaintiff has examined himself as PW1 and proved the computerized statement of account Ex.PW1/1, Requisite certificate under Section 65 & 65B of The Evidence Act, Ex.PW1/1A, Receipted copies of invoices pertaining to the defendant Ex.PW1/2 to Ex.PW1/13, Returned cheques and bank memos Ex.PW1/4 to Ex.PW1/22, Legal Notice Ex.Pw1/23, Postal Receipt Ex.PW1/24, Courier Receipt Ex.PW1/25 and AD Card Ex.PW1/26. Plaintiff also narrated the facts of his case. The evidence was tendered by way of affidavit which was formally tendered on 13.08.2013 and the opportunity was closed.
> 4. I have heard Sh. G.K.Seth, Adv. Ld. Counsel for the plaintiff and carefully perused the file. In view of the walkover given by the defendant to the plaintiff in the lis, there is nothing to perceive that they had grievance against the quality, quantity of service provided by the plaintiff. No correspondence has apparently been exchanged between the parties in this behalf. The statement of account reflects that the cheques of part amount issued by the defendant in discharge of liability were returned unpaid quite frequently. Nevertheless, the relationship somehow continued between the parties for about one and a half years. Manifestly, the plaintiff pressed for payments and was able to secure cheques Ex.PW1/14, Ex.PW1/16, Ex.PW1/18, Ex.PW1/20 & Ex.PW1/22 from the defendant but for reasons not disclosed to the court their payment was stopped by the drawer."

4. Appellant/defendant thereafter was served in the execution proceedings, and it was pleaded by the appellant/defendant that the appellant/defendant came to know only on 16.3.2015 of the judgment and decree having been passed against it. The relevant paras of the application under Order IX Rule 13 whereby appellant/defendant averred that respondent/plaintiff told him about the passing of the *ex-parte* decree are paras 5 and 6 and these paras read as under:-

> "5. That on 16.03.2015, the applicant/defendant came to know through Mr. Sanjay Chaudhary and his companies about the pendency of proceedings in Execution No.222/2014 in the court of District Judge, Gautambudh Nagar U.P., whereby the ld. Court has passed the order of attachment without hearing the application/defendant's.
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> 6. That in this way the applicant/defendant came to know about the aforesaid execution proceedings and about the passing of Ex-parte decree dated 25.09.2013 passed by the court of Shri Sunil Kumar Aggarwa ADJ, Central, Tis Hazari Court, Delhi, whereby the Ld. Court was pleased to pass the order decreeing the suit of the plaintiff or a sum of Rs.10,52,365/- with 14% interest p.a."

5. Trial court has dismissed the application under Order IX Rule 13 CPC both on the ground of limitation as also considering the issue on merits as regards the service upon the appellant/defendant and his knowledge of the *ex-parte* judgment and decree against him.

6. As regards the service of the appellant/defendant trial court notes that three attempts were made to serve the

appellant/defendant. In the first attempt it was stated in the report of the postal officer that the guard did not allow the postman to go inside the building where the office of the appellant/defendant is situated. Appellant/defendant therefore was directed to be served afresh by notice by post and on this occasion it was written in the postal report that there was no such firm of the appellant/defendant at the stated address. The trial court therefore found that the appellant/defendant is deliberately avoiding service but yet it issued the court notice to the appellant/defendant for the next date. The court notice was however not received back and therefore, appellant/defendant was proceeded *ex-parte* in the suit.

7.(i) It is relevant at this stage to refer to the provision of second Proviso to Order IX Rule 13 CPC which was introduced by Act 104 of 1976 w.e.f 1.2.1977. This provision was added because it was found that though there may be some irregularity in service but the defendant knew of the proceedings and yet chose not to appear, and in such cases the *ex-parte* judgment and decree was not to be set aside.

(ii) It is seen in the facts of this case that the trial court has drawn a correct presumption against the appellant/defendant of avoiding service. In any case, the appellant/defendant has been found after passing of the *ex-parte* decree to have got inspected court record through the Advocate Mr. Sanjay Chaudhary on 19.11.2013 but the application under Order IX Rule 13 CPC was filed after 1 ½ years on 24.3.2015 without being accompanied by an application for condonation of delay. It is also relevant to note that appellant/defendant entered into a settlement with the respondent/plaintiff on 8.12.2013 after the *ex-parte* decree was passed on 25.9.2013, and pursuant to the settlement had issued various cheques to the respondent/plaintiff towards payment. Though the appellant/defendant has chosen to deny that it ever engaged the Advocate Mr. Sanjay Chaudhary to inspect the court file or that certain cheques were kept in trust with the respondent/plaintiff, however, the trial court has rightly disbelieved this stand by observing as under in paras 6 and 7 of the impugned judgment and which paras read as under:-

> "6. When the aforesaid fact was brought to the knowledge of the learned counsel for the applicant, he took instructions from the applicant in court itself. The applicant denies having engaged Shri Sanjay, Advocate

to inspect the suit record. A perusal of the inspection application reveals that nothing was mentioned therein as to how the applicant came to know about the matter. The conduct of the applicant in the matter does not appear to be bonafide and the reasons for the same are as under:

(a) After having come to know that a false Vakalatnama and application for inspection was filed in the matter on its behalf, the applicant did not initiate any proceedings with the Bar Council of India against it lawyer/advocate, whose registration number has been duly mentioned in the Vakalatnama;

(b) In the instant application, the applicant has taken a false stand that it came to know about the decree passed in the matter from the non-applicant himself. The applicant has termed the settlement between the parties, which took place on 08.12.2013 to be false, fabricated and forged. He has, however, not denied the cheques mentioned in the said compromise letter not to have been given by it to the non-applicant;

(c) The aforesaid cheques got dishonoured on account of "insufficient funds", which shows that the applicant had not got the payment of said cheques stopped with his banker and;

(d) The applicant has taken false stand about its address as well. The suit record reveals that legal notice was duly served upon the applicant on this very address. Today also, some documents have been filed by the applicant to show that the speed pos envelope had gone to the correct address.

7. Therefore, it is clearly evident that the applicant had the knowledge of the suit proceedings. He got the suit record inspected on 19.11.2013 and thereafter appears to have settled the matter with the non-applicant by executing 52 post-dated cheques. Therefore, on account of the foregoing reasons, I do not find any merits in the application in question, same stands dismissed."

8. I may note that on the respondent/plaintiff filing reply to the application under Order IX Rule 13 CPC stating therein of a settlement having been arrived at on 8.12.2013 after the *ex-parte* judgment and decree was passed on 25.9.2013, the appellant/defendant did not chose to file any rejoinder to the reply filed by the respondent/plaintiff denying the factum of the settlement,

and therefore, the contents of the reply of averment of arriving at the settlement on 8.12.2013 is deemed to be accepted by the appellant/defendant. In any case, even before this Court there is no dispute that cheques issued do bear the signatures of the appellant/defendant.

9. In view of the above discussion, there is no merit in the appeal. Dismissed.

NOVEMBER 06, 2017/ib **VALMIKI J. MEHTA, J**