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

+ **FAO(OS) 16/2018, CM No. 3050/2018**

PIYOOSH GOYAL Appellant
Through: Mr. Rajiv Bajaj, Adv.

versus

SUNNY JAIN & ORS Respondents
Through: Mr. Amarjit Singh, Adv. for R1

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER
% **06.09.2018**

FAO(OS) 16/2018

1. This appeal has been filed by the appellant impugning the order dated January 08, 2018 passed by the learned Single Judge dismissing I.A. 253/2018 filed by the appellant under Order IX Rule 7 CPC in CS (OS) 461/2017 for setting aside the ex-parte proceedings initiated against him vide order dated December 08, 2017.
2. The factual matrix of the case is that the respondent No.3 Company owned a suit property being, 3rd floor property No.10425 (15-A/4), Plot No.4, Block No.15A, WEA Karol Bagh, New Delhi-110005. The appellant and the respondent No.2 were the Directors of respondent No.3 Company.

It was the case of the respondent No.1, who was the plaintiff before the learned Single Judge, that based on the assurance given by the appellant, he transferred Rs.2.9 crores for purchase of the suit property; Rs.50 lacs in favour of the respondent No.3 Company and Rs.2.4 crores to the respondent No.3 Company through the appellant herein, however, no sale deed could be executed in his favour. On November 06, 2017 when the suit was listed before the learned Joint Registrar, he on finding that the appellant has been served by ordinary method and no one is present for him, proceeded ex-parte against the appellant herein. The matter was again listed on November 27, 2017 when it was noted that no written statement was filed by the appellant herein nor any appearance on behalf of the appellant was filed. Since, the respondent Nos.2 and 3 herein had filed the written statement, the pleadings were treated complete and the matter was listed before the learned Single Judge on December 07, 2017 for framing of issues.

3. On December 07, 2017 once again no one appeared for the appellant. After some arguments, there was a compromise talks which included that the respondent No.1, who was the plaintiff before the learned Single Judge shall take a judgment / decree to the extent of Rs.50 lacs against the respondent No.3 which was the only amount credited in the account of the

respondent No.3 Company and the respondent No.1/ plaintiff shall have the entitlement to recover the balance amount of Rs.2.4 crores from the appellant herein. On December 8, 2017 no one appeared for the appellant herein, the suit was compromised in the manner stated above. A detailed order was passed and it was stated that no claim of the respondent No.1 / plaintiff shall remain against the respondent No.3 Company and the balance claim will be recovered from the appellant herein by the respondent No.1 / plaintiff.

4. The appellant filed an application under Order IX Rule 7 CPC on December 21, 2017 for setting aside the ex-parte proceedings. On the said application, the learned Single Judge has inter alia held that the appellant had deliberately avoided appearance in the case and has chosen to appear only when he realised that the suit has been compromised with the other defendants / respondents and the onus has been shifted on him to satisfy the claim of Rs.2.4 crores with interest. In paras 13 to 17 the learned Single Judge has held as under:

13. Firstly it is required to note that it is very curiously stated in this application that knowledge has been derived by the applicant/defendant no. 2 of the suit because of the information given to him on 9.12.2017 of the suit by a local property dealer. This curious averment is made in para 1 of this application and which para 1 reads as under:-

“1. That the above mentioned suit is listed before this Hon’ble Court on 26th February 2018 for making of exhibits of documents. It is submitted that the applicant who is defendant No.2 in the present case came to know on 9th December 2017 when the Local Property Dealer informed the applicant about the suit against him has been decreed by this Hon’ble Court.”

14. Obviously, this para is an apology of deriving of knowledge by the applicant/defendant no. 2 because neither the name of the property dealer is mentioned, nor it is stated why would that property dealer approach and inform the applicant/defendant no. 2, why there was a so called information given to the applicant/defendant no. 2 by the local property dealer only on 9.12.2017 and which is just one day after the compromise decree between the plaintiff and defendant nos. 1 and 3 on 8.12.2017, and all these aspects show that the averments made in para 1 are clearly false to the knowledge of the applicant/defendant no. 2 and actually the averments made in para 1 of the application are only to create a ground, obviously which is baseless, for filing of this application to set aside the ex-parte proceedings. It may be noted that if the applicant/defendant no. 2 was sincere then there was no reason why the applicant/defendant no. 2 would not have appeared on the repeated dates when suit was listed in Court after service, viz on 6.11.2017, 27.11.2017, 7.12.2017 and 8.12.2017.

15. No doubt, the timing of receipt of summons for defendant nos.2 and 3 by one Sh. Deepak as per the explanation sheet with the summons is shown at 2:50 p.m. , and that the addresses of the defendant nos. 2 and 3 are different by about one kilometer, however, obviously this ground that how could one Sh. Deepak receive summons at same point of time of 2:50 p.m. for defendant nos. 2 and 3 is a only superficially correct statement because there is no averment in the present application that the applicant/defendant no. 2 has no connection with or any relation to or in any manner defendant

no.2/applicant is not known to the said Sh. Deepak. Clearly, therefore, this issue of conflict of time is neither here nor there as applicant/defendant no. 2 has not pleaded that he has no relation whatsoever with said Sh. Deepak.

16. Another important aspect to be noted is that the applicant/defendant no. 2 was sent summons of the suit by registered post from this Court. The miscellaneous file of this Court shows that the registered post AD containing summons and notice for the next date of 6.11.2017 which was sent to the applicant/defendant no. 2 was refused by the applicant/defendant no. 2 on 14.10.2017. There is no averment in the present application that applicant/defendant no. 2 did not refuse the registered post containing the summons and notice on 14.10.2017. the applicant/defendant no.2 therefore cannot argue that he was not served in the suit.

17. It is also further noted that the plaintiff besides filing of process fee for service of the applicant/defendant no. 2 in the ordinary method, by registered post AD and by courier, had also sent the paper book of the suit to applicant/defendant no.2 in compliance of Order XXXIX Rule 3 CPC. Plaintiff has filed his affidavit of sending of the paper book of the suit to the applicant/defendant no. 2 by post. This affidavit is dated 25.9.2017 and is accompanied by the postal receipt. There would be presumption of service of the paper book sent under Order XXXIX Rule 3 CPC since the applicant/defendant no. 2 has not disputed in the present application that he has not received any paper book of the suit under Order XXXIX Rule 3 CPC. Thus on this Court knowledge of the pendency of the suit can be derived as against the applicant/defendant no. 2. It is relevant, at this stage, to note that Order IX Rule 13 CPC was amended by the Act 104 of 1976 whereby ex-parte proceedings need not be set aside on account of irregularity of service if the defendant is found to have knowledge of the proceedings in the suit. In my opinion, the intention of the Legislature to include the aspect of the Second Proviso to Order IX Rule 13

CPC will be borne out from the facts of the present case where this application for setting aside ex-parte proceedings is conveniently filed only after compromise is entered into between the plaintiff and defendant nos. 1 and 3 giving the plaintiff liberty to seek the balance amount of Rs.2,40,00,000/- from the applicant/defendant no. 2, and applicant/defendant no. 2 after service deliberately did not appear on repeated dates but was watching the proceedings.

5. The learned counsel for the appellant would reiterate the submission as made before the learned Single Judge that the summons have not been served on him. He has also stated that because of the order of the learned Single Judge, the appellant herein is precluded from filing a written statement and controvert the claim of the respondent No.1 / plaintiff in his suit. He states that this Court may subject to any cost, set aside the order of the learned Single Judge and allow the appellant herein to file a written statement by setting aside the ex-parte order.

6. On a pointed query by us to the learned counsel for the appellant that whether the appellant had named the property dealer, who had informed them about the pendency of the proceedings before the learned Single Judge, the learned counsel for the appellant stated that he may be given an opportunity to file an affidavit. Such a request cannot be acceded to now, more so, the appellant was required to state the name of the property dealer

in the application under Order IX Rule 7 CPC to justify the plea. We find no such averment has been made in this appeal as well. That apart on the issue of service, which was disputed by the appellant, the learned Single Judge rejected the plea on the ground that there is no averment in the application under Order IX Rule 7 CPC that the appellant has no connection with or relation to or in any manner the appellant is known to Sh. Deepak, the person said to have received the summons. It has also come on record that the registered post AD containing summons and notice for the date of hearing of November 06, 2017 which was sent to the appellant, was refused by the appellant on October 14, 2017 which conclusion has not been challenged by the appellant in the application. A reference is also made by the learned Single Judge on the aspect of paper book of the suit having been sent to the appellant in compliance of Order XXXIX Rule 3 CPC in support of which the respondent No.1 i.e. plaintiff had filed an affidavit of sending the paper book of the suit to the appellant on September 05, 2017. The learned Single Judge had drawn a presumption that such a paper book must have been received by the appellant herein. In substance the Id. Single Judge has held no sufficient cause has been shown by the petitioner to set aside the order proceeding ex-parte against him.

7. Having noted the aforesaid reasoning given by the learned Single Judge and the fact that the appellant is not precluded from participating in the suit proceedings from now onwards which would entitle him to cross examine the witnesses of the plaintiff and participate in the final arguments, we do not see any merit in the present appeal. The same is dismissed.

CM No. 3050/2018 (for stay)

Dismissed as infructuous.

CHIEF JUSTICE

V. KAMESWAR RAO, J

SEPTEMBER 06, 2018/*aky*