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

+ **RSA 49/2018 & C.M.Nos.12163-64/2018**

MAHENDER Appellant

Through: Mr. Anil Singh and Mr. Pankaj
Chauhan, Advocates.

Versus

BRAHAM PRAKASH Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

% **05.04.2018**

C.M.No.12164/2018 (for exemption)

Allowed, subject to all just exceptions.

The application stands disposed off.

RSA 49/2018 & C.M.No.12163/2018 (for stay)

1. This second appeal impugns an order dated 14.11.2017 passed by the learned Additional District Judge, Delhi, dismissing the appellant's appeal being RCA No.298/2016 against a decree under Order XXXVII Rule 2(3) CPC. The money suit was decreed since the appellant had not filed his appearance within the statutory period of 10 days of receipt of summons upon him. The respondent/plaintiff had sought return of an amount of Rs.3 lacs which had been lent to the appellant as a friendly loan. In discharge of this liability, the appellant had issued a cheque bearing No.587921 dated 01.09.2012, drawn on Corporation Bank, L-50, Vikas Marg, Preet Vihar, New Delhi through his account No.35499 in favour of the plaintiff. The

said cheque was dishonoured on account of payment having been stopped by the drawer. A legal notice was issued to the appellant on 12.09.2012 demanding the payment of the cheque, however, in the absence of any response, a suit for recovery of the said amount was filed. The summons issued under Order XXXVII CPC was received by the appellant's wife Ms. Lokesh Devi on 05.08.2015. Subsequently, a copy of the summons alongwith the plaint was also served upon the plaintiff at his office address: the East Delhi Municipal Corporation (EDMC) on 14.08.2015. The appellant entered appearance on 19.09.2015.

2. It is his case that he physically received the summons only on 14.09.2015, therefore, the filing of the appearance four days' later was within time; that the law requires for the summons to be served personally upon the parties concerned; the summons delivered at his office address on 14.08.2015 could not be physically delivered upon him anytime before 14.09.2015, due to routine administrative process and delays. In support of his contentions, he relies upon a photocopy of the Dak Receipt Register of the said Municipal Corporation showing, that although the summons was received by the Clerk concerned on 14.08.2015, it moved to the AAO on 21.08.2015 and then to the Junior Engineer on 24.08.2015. The appellant claims that the notice was delivered to him only on 14.09.2015. However, apart from a bald statement of the receipt of the summons on the said date, there is nothing on record to substantiate or prove the contention that the document was delivered upon him only on 14.09.2015. Furthermore, there is no explanation regarding the summons having been received by his wife nor any statement to the effect that he is not cohabiting with his wife. Indeed, in this regard the Trial Court has reasoned and observed as under:-

“10. As is evident from the Trial Court Record, the first copy of the summons alongwith plaint and other documents were served upon the appellant through his wife Smt. Lokesh Devi on 05.8.2015. This fact has not been denied by the appellant anywhere, either before the Ld. Trial Court or even during the present appeal. It is needless to say that it was a valid service upon the appellant. The only explanation tendered during arguments for the first time by Ld. Counsel for the appellant upon Court questioning was that wife of the appellant had misplaced the summons and the copy of the plaint and forgot to apprise the appellant about the same.

11. The second set of summons were served upon the appellant at his office address of EDMC on 14.8.2015. It was contended by the Ld. Counsel for the appellant that these summons were actually received by the appellant only on 14.9.2015 through proper channel. He placed a document on record during the arguments, i.e. a photocopy of the Dak Receipt Register of the Department of the appellant. This document contains entry No. 2661 dt. 14.8.2015 regarding receipt of the summons of the suit. It was pointed out by Ld. Counsel for the appellant that as per the said entry in the document, the summons were received by the concerned Clerk on 14.8.2015 and then delivered to the AAO on 21.8.2015 and then to the JE on 24.8.2015 and thereafter, were delivered to the appellant on 14.9.2015. The appearance was filed on 19.9.2015 and was thus, within the period of limitation. Ld. Counsel for the appellant placed reliance upon the judgment in **KV Murlidhar Vs. KV Ananda Rao & ors. (2016) (16) SCC 109**, wherein it was observed that "in the first appeal, the High Court did not properly consider two documents which determined the rights of the parties and hence, remitted the matter back to the High Court". This observation was relied upon by the Ld. Counsel to support his view that a document filed for the first time in first appeal should be considered by the Appellate Court.

12. The said document was never placed before the Ld. Trial Court nor these facts were ever pleaded in the appeal nor the said document was filed with it. Even otherwise, upon consideration of the said document it is to be noted that there is no date beneath the signatures of the appellant while receiving the summons from the JE and the presumption would be that he received it on 24.8.2015 through the JE, who had lastly received the summons and the plaint. There is nothing on record, including the said document, to suggest that the appellant had actually received the summons on 14.9.2015, except for his bald statement. The limitation period if calculated from the said date, would have expired on 03.9.2015, whereas the appearance was filed on 19.9.2015, i.e. much after the expiry of the statutory period of ten days. Ld. Counsel for the appellant relied upon the judgment in **Rajinder Singh Rathore Vs. Delhi Metro Rail Corporation 211 (2014) DLT 39 Delhi**, wherein it was held that "The prescribed period of limitation is to be calculated from the date of second service". The Ld. Counsel for the appellant further submitted the above document could not be produced by the earlier Counsel and relied upon the judgment in **Rafiq & anr. Vs. Munshi Lal & anr. (1981) 2 SCC 788**, wherein it was held that "the party should not suffer for the inaction, deliberate omission or misdemeanour of his agent, the lawyer".

13. However, in the given facts and circumstances, even if the prescribed period of limitation is calculated from the second service, the appearance by the appellant was beyond limitation, as observed herein above and therefore, the Ld. Trial Court rightly decreed the suit of the respondent under Order 37 Rule 2 (3) CPC. It is needless to say that at the stage of entering appearance, the merits of the case are not to be considered and in case, the defendant fails to enter appearance within limitation, the allegations in the suit are deemed to have been admitted by him."

3. What emerges from the above discussion is that the appellant had received the summons on 05.08.2015 upon it having been served on his wife on the said date, therefore, appearance ought to have been filed by 15.08.2015. In the second instance, assuming that the summons which was received in his office on 14.08.2015 was served upon him on 24.08.2015 and not on 14.09.2015, the limitation would expire on 03.09.2015, the appearance, however, was filed belatedly on 19.09.2015 i.e. after 16 days. The statutory time is specific and it does not provide for condonation of delay. Accordingly, the impugned order cannot be faulted.

4. In view of the above, there is no occasion for interference in the aforesaid reasoning and conclusion of the Trial Court. The appeal is without merits and is accordingly dismissed.

NAJMI WAZIRI, J

APRIL 05, 2018

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