

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

+ **RFA No.607/2018**

% **1st August, 2018**

SANJEEV BHASIN Appellant
Through: Mr. Krishna Dev Pandey,
Advocate.

versus

PREETI ARYA Respondent
Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No30349/2018 (for condonation of delay)

1. For the reasons stated in the application, delay of 59 days
in re-filing the appeal is condoned.

C.M. stands disposed of.

RFA No. 607/2018 and C.M. No.30348/2018(stay)

2. This Regular First Appeal under Section 96 of the Code
of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit
impugning the judgment of the Trial Court dated 9.1.2018 by which

trial court has decreed the suit filed by the respondent/plaintiff and has awarded to the respondent/plaintiff a money decree for a sum of Rs.7.25 lacs alongwith interest @ 9% per annum.

3. At the outset, it is to be noted that the impugned judgment and decree is an *exparte* judgment and decree against the appellant/defendant. The appellant/defendant was proceeded *exparte* on 2.11.2016. An application filed under Order IX Rule 7 CPC to join the proceedings at the stage of final arguments was dismissed on 18.12.2017. This order is also sought to be challenged in the present appeal.

4. The facts of the case are that the respondent/plaintiff filed the subject suit for recovery of money by pleading that the respondent/plaintiff was appointed as a C & F Agent by the appellant/defendant vide Agreement dated 12.9.2013. Respondent/plaintiff was the C & F Agent with respect to books, tablets, CDs etc which were published by the appellant/defendant. Under the Agreement entered into between the parties dated 12.9.2013, a sum of Rs.5 lacs was given by the respondent/plaintiff to the appellant/defendant through banking transaction of NEFT

payment. On account of disputes between the parties, the agreement was terminated because the respondent/plaintiff pleaded that the appellant/defendant did not pay the requisite commission on sales, the respondent/plaintiff vide her letter dated 9.9.2014 requested the appellant/defendant to refund the security deposit amount of Rs.5 lacs alongwith balance commission payable of Rs.2.25 lacs. The appellant/defendant issued a cheque no.417194 dated 25.11.2014 for Rs.5 lacs but the subject cheque was dishonoured on presentation. Respondent/plaintiff then served the legal notice dated 18.12.2014 upon the appellant/defendant and thereafter filed the subject suit.

5. As already stated above, the appellant/defendant was proceeded *ex parte* and the application to set aside *ex parte* proceedings was dismissed by the order dated 18.12.2017 and which order has also been challenged in this appeal in view of Section 105(1) CPC. This order dated 18.12.2017 reads as under:-

“Present: Sh. Iqbal Singh, advocate for plaintiff
Sh. Narender Singh, proxy counsel for defendant

Again adjournment prayed on behalf of defendant submitting that main counsel is not appearing due to illness. No written application or document showing the illness of

counsel is filed on behalf of defendant. Counsel for plaintiff opposed the adjournment.

Matter is fixed for arguments on the application of defendant u/o 9 Rule 7 CPC. On the last date of hearing, adjournment was granted to the defendant as it was submitted that counsel is unable to attend the court due to kidney stone problem and the same was not opposed. By way of the present application, it is submitted on behalf of defendant that he has not been served and is not aware about the suit and so unable to file the written statement. Whereas perusal of the file reveals that the defendant was served with summons on 20-09-2016 and on the date fixed i.e. 02-11-2016 none appeared on behalf of defendant and as period of 30 days prescribed by CPC for filing the WS had expired, the Predecessor of this Court proceeded the defendant ex-parte. The suit is filed against the defendant Sanjeev Bhasin showing him proprietor of M/s SBS Publication and the summons sent to him were received personally by him and bears his signatures with date 20-09-2016.

Considering the facts, the application is nothing but a dilatory tactics. Accordingly, the same is dismissed.

Put up for final arguments on 04-01-2018.

sd/-

(SUNIL CHAUDHARY)

ADJ-03 (N/W) ROHINI COURTS

DELHI: 18-12-2017"

6. In my opinion, no grounds are made out to set aside the order dated 18.12.2017 dismissing the application under Order IX Rule 7 CPC because this order specifically records that summons were personally served upon the appellant/defendant and bears the

signatures of the appellant/defendant for the receipt of the summons on 20.9.2016. Even with respect to the application for setting aside *exparte* proceedings the appellant/defendant deliberately sought one adjournment after another as noted in the order dated 18.12.2017, and therefore ultimately trial court with reference to the record dismissed the application Order IX Rule 7 CPC filed by the appellant/defendant. I have also seen the application filed by the appellant/defendant under Order IX Rule 7 CPC and in this application except making general statements that the appellant/defendant was not served and he allegedly came to know about the *exparte* order against him from the respondent/plaintiff herself who allegedly informed the appellant/defendant, however there is no denial that the summons of the suit served upon the appellant/defendant do not bear the signatures of the appellant/defendant. Therefore in my opinion there is no illegality in the order dated 18.12.2017 and consequently appellant/defendant cannot successfully impugn this order which is sustained.

7. On merits, the appellant/defendant would have no case because there is no written statement of the appellant/defendant in the

trial court, no evidence was therefore led on behalf of the appellant/defendant, and the respondent/plaintiff proved her case including the dishonoured cheque and these aspects are noted in paras 3 to 5 of the impugned judgment and which paras read as under:-

“3. The plaintiff has filed her affidavit in support of her averments in the plaint and has also placed on file certified copy of agreement dated 14-08-2013 executed between the parties which was attested by the Notary. As per clause 20 of the agreement, an amount of Rs. 5 lacs as a security deposit has been paid through cheque no. 32066251 dated 10-09-2013 drawn upon Union Bank of India by the C & F to the company and as per clause 21 the security deposit is returnable to the C & F by agency within 30 days of termination. The clause 22 of the agreement provides that *“C & F shall get 10 per cent commission on sale invoice amount. If any product is returned by customers then the same won't be considered for calculation of commission. Company assures a minimum commission of Rs. 3 lacs commission in a year. Company shall pay salary and TA DA to its staff directly.”*

4. The plaintiff has also placed on file the certified copy of cheque of Rs. 20,000/- and its returning memo as well as of legal notice dated 09-0-2014 vide which it was intimated to the defendant that the period of the C & F is complete and the plaintiff is entitled to amount of Rs. 7,25,000/-. The plaintiff has also placed on file the original cheque of Rs. 5 lacs dated 25-11-2014 and its return memo. Ex. PW1/11 is the legal demand notice issued for the plaintiff and sent to the defendant against postal receipt Ex. PW1/11.

5. The deposition of the plaintiff is unrebutted and unchallenged. Considering the documents placed on file by the plaintiff, I found no reason to have suspicion on the testimony of plaintiff qua the entitlement of the plaintiff

for the amount of Rs. 7,25,000/- as principal amount. In the agreement, there is no mention that the C & F will be entitled for the interest on unpaid amount. The transactions between the parties were commercial in nature and the defendant has not paid / returned the amount to the plaintiff despite notice got issued to him by the plaintiff on 18-12-2014 and no ground is brought on file to justify the withholding of the amount, as such, the plaintiff is entitled for the interest on the principal amount @ 9 per cent per annum from the date of notice till realization.”

8. In view of the aforesaid discussion, I do not find any merit in this appeal. Appellant/defendant has no case either on merits or for setting aside the order dated 18.12.2017 dismissing the application of the appellant/defendant under Order 9 Rule 7 CPC. Dismissed.

AUGUST 01, 2018

Ne

VALMIKI J. MEHTA, J

न्यायमेव जयते