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

Date of Decision: 31st May, 2018

+ **RFA 357/2017 & CM APPL. 13445/2017 (stay)**

NABIN CHANDRA PATRA Appellant

Through: Mr. Satya Saharawat, Mr. Aditi
Laxman and Mr. Ajit Kesariya
Advocates (M-9990317772).

versus

M/S MAYA JEWELLERS Respondent

Through: Mr. Surendra Mishra, Advocate.
(M-6447534576)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (oral)

CM APPL. 13446/2017

1. By this application, the Appellant/Defendant (*hereinafter* 'Defendant') seeks condonation of delay. The ground, on which the condonation is sought, is that the Defendant had no knowledge of the civil suit which was pending and neither was he ever served in the suit. In fact, according to the Defendant, the entire case is put up fraudulently inasmuch as the Defendant has never purchased the so-called gold from the Respondent/Plaintiff (*hereinafter Plaintiff*) and the cheque which was relied upon by the Plaintiff were misplaced/stolen and intimation about the same was given to the Bank as on 13th January, 2010.

2. The Court had called for the trial court record. A perusal of the trial court record reveals that summons in the suit were issued on 3rd January, 2012 and on the very next date, the following order was passed: -

“CS No.02/2012

28.02.2012

Present:- Sh. Rajesh Sharma, counsel for the plaintiff.

Signed AD card received from the defendant. In view of the same, the defendant stands served. It is 02:25 p.m. None has appeared on behalf of the defendant since morning despite repeated calls. The defendant is thus proceeded ex-parte.

Put up for ex-parte PE on 25.07.2012”

3. A perusal of the A.D. card which is relied upon by the Trial Court shows that the AD card does not have any postal stamp of any post office in West Bengal and even the alleged signature on 27th January, 2012 when compared with the signature of the Appellant in the appeal filed herein do not match even by a bare look. Apart from this A.D. card, there is no other mode in which service has been affected in the suit.

4. Considering that the knowledge of the Defendant about the impugned decree was acquired when the execution was filed, the delay in filing the appeal is condoned. CM is disposed of.

RFA 357/2017 & CM APPL. 13445/2017 (stay)

5. This is an appeal against the impugned judgment/order dated 1st June, 2016 by which the suit filed by the Plaintiff for a sum of Rs.18,50,875/- along with *pendente lite* interest @ 12% has been decreed. The suit is based on an invoice and a cheque dated 6th May, 2011 for a sum of Rs.16,75,968/- It is the case of the Defendant that he had written to his Bank i.e. United Bank of India that the said cheque was misplaced, on 13th January 2010 itself. Further the Defendant submits that a criminal complaint under Section 138 of the Negotiable Instruments Act was filed by the Defendant against

the Plaintiff in respect of the said cheque. Due to an oral settlement between the parties, on 05.06.2014 the case of the Defendant was dismissed in default and no restoration of the same has been sought.

6. These submissions of the Defendant are completely denied by the Plaintiff who submits that the Defendant was served in the suit and the decree has been rightly passed.

7. The decree is for a substantial sum and same was passed ex-parte. Considering the nature of the allegations and the disputes between the parties, this Court is of the opinion that the Defendant ought to be given the liberty to place his defence in the suit. Clearly there is nothing on record to show that the Defendant was served, except the AD card. The absence of any postal marks of West Bengal on the AD card as also the non-matching of the signatures of the Appellant, on the said card, casts a doubt as to whether service was properly effected. Moreover, if the cheque had been misplaced and intimation of the same was given by the Defendant on 13th January 2010, then it appears quite suspicious that the same cheque is shown to have been given to the Defendant for an amount of Rs.16,75,968/- on 6th May 2011, i.e., one year and four months after it was misplaced. These issues will need to be looked into in the evidence to be led by parties. The decree has been passed ex-parte, as the Defendant had not appeared. Thus, the defendant ought to be given an opportunity to plead its defence and lead evidence.

8. Accordingly, the impugned judgment/decreed is set aside. Defendant is permitted to file his written statement. Same shall be done in a time bound manner. The judgment is being set aside on the condition that the Defendant shall adhere to the timeline being fixed herein.

9. Written statement be filed within 30 days from today. Replication, if any, be filed within two weeks thereafter.

10. List for framing of issues before the Trial Court on 16th July, 2018. The evidence already led by the Plaintiff would be read in the suit. If the Plaintiff wishes to adduce any further evidence, opportunity would be given. Defendant is permitted one opportunity to cross examine the witness of the Plaintiff who has already given evidence. However, the Defendant thereafter would lead evidence and the evidence of the Defendant would be completed within one month from 16th July, 2018.

11. The matter shall be taken up for final arguments on 1st September, 2018 and the Trial Court shall render judgment thereafter. An endeavour would be made by the Trial Court to dispose of the matter by 31st December 2018.

12. The Appellant is permitted to take electronic copies of the trial court record from this Court.

13. The appeal is allowed in the above terms. Pending application also stands disposed of.

PRATHIBA M. SINGH
JUDGE

MAY 31, 2018

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