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

% *Date of decision: 09.08.2019*

+ CS(COMM) 863/2018

VAISHNAVI BUILDING SOLUTIONS PVT. LTD. Plaintiff
Through Mr.Pradeep Singh, Adv.

versus

SHAIN KUMAR Defendant
Through Mr.Mritunjay Kr.Singh, Adv.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

IA No.687/2019

1. This application is filed by the defendant under Order 9 Rule 13 CPC seeking recall/setting aside the judgment dated 15.11.2018.
2. It is pleaded in the application that the defendant was served with summons of the present proceedings in July, 2018. However, the defendant could not file the written statement due to his ill health. It is further stated that the defendant is suffering from dementia (a mental disorder) for long because of which he tends to forget things. The defendant could not pursue the captioned suit due to this reason as he forgot to remember the date of hearing before this court. He also forgot to share information with regard to the captioned suit to his family members and failed to file his written statement.
3. Learned counsel for the applicant/defendant has also stated that the

applicant was working as Sub Staff at Kendriya Vidyalaya, Airforce Station, Gurgaon and that he had sought voluntary retirement on account of his illness.

4. The order-sheets reveal that on 23.07.2018 the learned Joint Registrar noted that defendant is served. Time to file written statement was granted. As no written statement was filed on 10.10.2018, the matter was directed to be placed before the court for direction. On 15.11.2018, this court noted that the plaintiff have paid a sum of Rs.54,55,052/- through a banker's cheque drawn in favour of the defendant as earnest money pursuant to the agreement to sell dated 08.04.2013. This court in terms of Order 8 Rule 10 CPC, as no written statement has been filed, passed a decree in favour of the plaintiff for the principal sum of Rs.54,55,052/- along with simple interest @ 10% per month.

5. I may only note that this application gives following reasons for non-appearance in court after service of summons, which are as follows:

“8. That it is submitted that the Defendant has been suffering from dementia (a mental disorder) for long, because of which he tends to forget things. The Defendant could not pursue the captioned suit due to this reason as he forgot to remember the date of hearing before this Hon'ble Court. He also forgot to share information with regard to the captioned suit to his family members and ultimately failed to file his Written Statement, as he remained indisposed during the said period.

9. It is further submitted that the Defendant was working as Sub-Staff at Kendriya Vidyalay, Airforce Station, Gurgaon, Haryana. However, due to his illness, the Defendant was forced to seek Voluntarily Retirement from his Service (VRS). The Defendant vide letter dated 11.05.2018, which was sent to the Principal, Kendriya Vidyalaya, Air Force Station, Gurugram, he sought VRS (Voluntarily Retirement) due his poor mentally

and physical health, which was duly received by the Principal Mr.Satish Kumar, Kendriya Vidyalaya.

10. That it is further submitted that the Defendant was on leave without pay (LWP) for approximate 910 days due to his poor mental as well as physical health. In this regard a certificate dated 13.12.2018, was issued by Dy. Commissioner, Kendriya Vidyalaya Sangathan.”

The above is the sum and substances, reasons given for non-appearance of the defendant in court and default in filing of the written statement.

6. I may also note that alongwith this application no documents were filed. The documents were filed subsequently. A perusal of the said documents would show that only one medical certificate is attached of some Deepam Hospital. There is no date mentioned in the said medical certificate. The said medical certificate is also not legible. The diagnosis appears to be a suggestion to the defendant to get his CT scan of his head. There is no mention of dementia anywhere.

7. The nature of the medical record of the defendant as submitted does not inspire any confidence whatsoever. The claim/the submission of the defendant that the defendant is suffering from medical problem dementia appears to be only an afterthought to wriggle out of the decree that has been passed by this court against the defendant.

8. Order 9 Rule 13 CPC reads as follows:

“Order 9 Rule 13. Setting aside decree ex parte against defendant

In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was

passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation.-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.”

9. In the present case, it is admitted that the summons were served on the defendant. Factual background as narrated does not seem to lead to any conclusion that any sufficient cause is shown by the defendant for not appearing in the suit when it came up for hearing.

10. At this stage, when the order is being dictated, the learned counsel for the applicant/defendant relies upon the judgment of the Supreme Court in the case of ***G.P.Srivastava v. R.K.Raizada & Ors, 2000 (3) SCC 54***. That was a case in which the applicant could not appear before the court, which passed an *ex-parte* decree, on account of the fact that he was posted as Assistant Engineer in the Irrigation Department and on account of the

construction of the bridges over the casual drains he had to remain at the site. He became indisposed in the evening at the site which was more than 85 Km. away and was not able to reach the court. Young nephew of the counsel for the appellant had met with an accident and expired which prevented his counsel also to appear in court on that date. In those facts and circumstances, the Supreme Court held as follows:

“7. Under Order 9, Rule 13, C.P.C. an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any 'sufficient cause' from appearing when the suit was called on for hearing. Unless 'sufficient cause' is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex parte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as elastic expression for which no hard and fast guidelines can be prescribed. The Courts have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case.

The 'sufficient cause' for non-appearance refers to the date on which the absence was made a ground for proceeding ex-parte and cannot be stretched to rely upon other circumstances anterior in time. If sufficient cause' is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side

can be compensated by adequate costs and the lis decided on merits.”

11. As noted above, there is nothing on record to show as to why the defendant could not appear after service of summons on 23.07.2018, 10.10.2018 and 15.11.2018. The documents filed by the defendant do not give any plausible explanation for inability of the defendant to appear in court on the above noted dates.

12. There is no merit in the application. The same is dismissed.

AUGUST 09, 2019/v

JAYANT NATH, J.



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