

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

% *Date of Judgment: 27.11.2018*

+ **F.A.O. No.539/2018**

BAKEER BHAI Appellant
Through: Mr. Mukesh M. Goel, Advocate.

Versus

YASHWANT GUPTARespondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J. (ORAL)

C.M. No.59197/2018 (for exemption)

Exemption allowed, subject to all just exceptions.

The application is disposed of.

F.A.O. No.539/2018 & C.M. No.49196/2018 (for stay)

1. The impugned order dated 03.10.2018 passed by the court of learned Additional District Judge-13, Central District, Tis Hazari Courts, Delhi ('ADJ') dismissing the application of the appellant (defendant) under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure, 1908 (CPC) for setting aside the ex-parte judgment and decree dated 05.06.2018 in Civil Suit No.16778/2016 is the subject-matter of challenge in this appeal.

2. The brief facts of the case are that the respondent (plaintiff) instituted a civil suit for recovery of Rs.19,11,340/- against the

appellant. The appellant received summons of the suit from the said court in the month of September/October, 2009 and appointed one Sh. Syed Ahmed Saud, Advocate to represent him. The appellant is a permanent resident of Chennai and was unable to appear before the trial court on each and every date of hearing. The said counsel assured him that the proceedings are of civil nature and parties are not required to appear on each and every date of hearing and he would take care of the matter without any fail. The appellant had paid to his counsel his professional charges and executed a *vakalatnama*. The appellant remained in constant touch with the said counsel and received information from him regarding the case. His counsel used to apprise the appellant about the next date of hearing. On instructions of his counsel, the appellant had also appeared before the trial court on 17.08.2010. The appellant continued to remain in touch with his counsel who assured him that the case was going well and whenever his presence would be required he would call him. On 07.07.2018, the appellant received a letter/notice from the counsel for the plaintiff to the effect that the suit has been decreed and asked him to make the payment. On receiving the said letter, the appellant immediately contacted his said counsel and on making inquiries his counsel failed to give satisfactory answers. The appellant engaged another counsel and it was found that suit of the plaintiff was decreed by a judgment and decree dated 05.06.2018. The appellant filed an application under Order IX Rule 13 CPC for setting aside the ex-parte judgment and decree on 30.07.2018, which was dismissed by the impugned order.

3. By impugned order, the learned ADJ observed that *'there is a serious allegation against the counsel who was representing defendant. If the application for setting aside is accepted, it would mean accepting the allegations against the counsel without hearing him. There is no procedure to enter into trail against lawyer in the present case before or after setting aside the ex-parte judgment. As per the allegations, it is the act of counsel due to which defendant has suffered decree. The relationship between the defendant and that of his counsel is of faith and trust and therefore, counsel is under pious obligation to represent his client to the best of his ability and if the counsel was acted against this obligation then defendant has of his remedy to recover the loss from him personally. Irrespective of the merit of the case, if one suffer decree purely on account of negligence of his counsel, then defendant has cause of action against said counsel to seek damages from his counsel by filing independent suit. Only in the said suit negligence or otherwise of the counsel would come to the fore and if counsel would satisfy the court that he had done his job with all sincerity and to the best of ability, then defendant would bear the loss. But by simply blaming previous counsel he cannot be allowed to take advantage and thereby jeopardising the accrued entitlement of the plaintiff. Therefore, this court is of the opinion that there is no ground for setting aside the ex-parte judgment and defendant is at liberty to take action in the form of recovery of amount which he has lost due to negligent act of counsel who had undertaken to defend the defendant to the best of his ability. Therefore, the*

application under Order 9 Rule 13 CPC for setting aside the judgment and decree is hereby dismissed. All other application stands disposed off accordingly.'

4. Learned counsel for the appellant contends that the appellant is a layman and his counsel Sh. Saud kept him in the dark by not informing him about the dates and particulars of the hearings. He submits that the *vakalatnama* and written statement were filed on 10.12.2009 before the learned ADJ. He submits that the appellant appeared before the trial court on 17.08.2010 at the time of admission/denial of documents. The case was adjourned by the learned ADJ to 06.03.2013 to record the evidence of the plaintiff. The appellant was proceeded against ex-parte on 26.11.2014 by the learned ADJ. Eventually, by an ex-parte judgment and decree dated 05.06.2018, the suit for recovery of Rs.19,11,340/- was decreed against the appellant and in favour of the plaintiff.

5. He contends that instead of deciding the application under Order IX Rule 13 CPC on merits, the learned ADJ gave liberty to the appellant to take action to recover the damages from his counsel. He urged that his application requires disposal on merits.

6. I have heard the learned counsel for the appellant.

7. In **Moddus Media Pvt. Ltd. Vs. M/s. Scone Exhibition Pvt. Ltd.;** *2017 SCC OnLine Del 8491*, I have taken the view that '*the litigant owes a duty to be vigilant of his rights and is also expected to be equally vigilant about the judicial proceedings pending in the court*

of law against him or initiated at this instance. The litigant cannot be permitted to cast the entire blame on the Advocate. It appears that the blame is being attributed on the Advocate with a view to get the delay condoned and avoid the decree. After filing the civil suit or written statement, the litigant cannot go off to sleep and wake up from a deep slumber after passing a long time as if the court is storage of the suits filed by such negligent litigants. Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory put forth by the appellant/applicant/defendant company, which cannot be accepted and ought not to have been accepted. The appellant is not a simple or rustic illiterate person but a Private Limited Company managed by educated businessmen, who know very well where their interest lies. The litigant is to be vigilant and pursue his case diligently on all the hearings. If the litigant does not appear in the court and leaves the case at the mercy of his counsel without caring as to what different frivolous pleas/defences being taken by his counsel for adjournments is bound to suffer. If the litigant does not turn up to obtain the copies of judgment and orders of the court so as to find out what orders are passed by the court is liable to bear the consequences.'

8. I have relied upon the judgment of the Division Bench of this court in **Man Singh (deceased) through LRs. Vs. Gaon Sabha Jindpur**; 2012 (4) ILR (Del) 50 wherein it was contended that the appellants were under the bonafide impression that the matter is being properly looked after by the counsel. It was held that the litigant has

to be vigilant and he should contact and take part in the proceedings with due diligence and if negligence on the part of the litigant is established in a particular case, then the courts are not to come to the rescue of such applicants. The Division Bench of this court has cited the decision of the Apex Court in **Hameed Joharan vs. Abdul Salam**; (2001) 7 SCC 573 having made the following observation :-

“..... It cannot but be the general policy of our law to use the legal diligence and this has been the consistent legal theory from the ancient times: even the doctrine of prescription in Roman law prescribes such a concept of legal diligence and since its incorporation therein, the doctrine has always been favoured rather than claiming disfavour. Law courts never tolerate an indolent litigant since delay defeats equity - the Latin maxim vigilantibus et non dormientibus jura subveniunt (the law assists those who are indolent). As a matter of fact, lapse of time is a species for forfeiture of rights....”

9. I have perused the application filed by the appellant under Order IX Rule 13 read with Section 151 CPC for setting aside the ex-parte judgment and decree. The appellant has, in his application, vaguely asserted that the ‘defendant/applicant was also in touch with his counsel and used to enquire about the proceedings in the case. It is pertinent to mention here that the counsel always assured the applicant that case is going well and whenever his presence would be required, he will be called by him as he had done in the past. The counsel for the Defendant/applicant further stated that in fact, these are civil proceedings and time is taken in these proceedings and therefore, there is nothing to worry about and whenever the presence

of Defendant/applicant would be required, he will inform the Defendant/applicant.’ It is further alleged that the appellant having received a letter on 07.07.2018 immediately contacted Sh. Syed Ahmed Saud, Advocate and made inquiry in this regard but ‘the said counsel failed answer the defendant satisfactorily and gave evasive reply. Thereafter, the Defendant/applicant made repeated calls to the said counsel but did not even answer the calls made by the Defendant/applicant.’

10. Even in the list of dates filed along with the ground of appeal it is pleaded that the ‘*appellant was also in constant touch with his counsel and taking all the information from him. It is further pertinent to mention here that the counsel for the appellant used to apprise the appellant about the next date of hearing in the matter and always assured the appellant that proceedings are going well and whenever personal appearance of the appellant would be necessary, he would inform him and call him.*’

11. The appellant has also filed an application under Order VI Rule 17 CPC on 20.10.2010 to amend written statement which must have been filed along with an affidavit. He filed amended written statement on 17.10.2012, and the cost of Rs.1000/- was paid to the plaintiff. On 26.07.2013, another application was filed by the appellant under Order XIV Rule 2 CPC read with Section 151 CPC to treat issue pertaining to jurisdiction as preliminary which was dismissed on 10.07.2014. He must have filed an affidavit in support of the application. It is noticed

that in his application under Order IX Rule 13 CPC he has neither specified the dates on which he contacted his counsel after 17.08.2010 nor has he specified the particulars of what was conveyed to him on each date of hearing. The appellant has put the entire blame on his counsel and tried to make a case as he was totally unaware of the proceedings of the case particularly when he has pleaded that he has been in 'constant touch' with his counsel. The appellant is not an ordinary person but the proprietor of a firm, M/s.Poona Engineering Company. If such a litigant leaves the case at the mercy of his counsel without caring to find out from his counsel as to what transpired on the date fixed by the court, even during the era of Information Technology where services such as SMS, Whatsapp, E-mail, etc. are available, then he is bound to suffer the consequences. Therefore, even on merits, the appellant has made out no case in his application under Order IX Rule 13 read with Section 151 CPC for setting aside the ex-parte judgment and decree that was passed against it. In my view, the learned ADJ has taken the right approach in holding that the appellant for the purpose of making his counsel responsible for the passing of ex-parte judgment and decree he may, if so advised, claim damages from his counsel, who would be able to defend his case at that stage. Moreover, if there really was any negligence or lapse on the part of the counsel, the appellant should have taken action but admittedly, he has neither taken any action nor has he lodged any complaint with the Bar Council against his counsel. From the conduct of the appellant it appears that he having been in constant touch with

his counsel yet having not taken any action against his lawyer, just intends to prolong the execution of money decree against him in the garb of these proceedings.

12. Even otherwise, the application filed under Order IX Rule 13 CPC for setting aside the ex-parte judgment and decree dated 05.06.2018 having been filed on 30.07.2018 is hopelessly time barred. Under Article 123 of the Limitation Act, 1963, the limitation to set aside an ex-parte decree is 30 days from the date of decree or where the summon or notice was not duly served from the date, when the applicant had knowledge of the decree. In this case, admittedly, the appellant was duly served with the summons of the suit and therefore, the period of limitation shall start from the date of the decree, that is, 05.06.2018 and not from the date of knowledge of the decree.

13. So viewed from any angle, I do not find any merit in the appeal. The appeal is accordingly dismissed with no order as to costs along with C.M. No.49196/2018.

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(VINOD GOEL)
JUDGE

NOVEMBER 27, 2018
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