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

% Judgment pronounced on: August 02, 2018

+ **FAO(OS) 291/2017 AND CM APPL. 41009/2017**

SAI KRIPA ENGINEERING WORKS & ORS. Appellants

Through: Mr. Siddharth Dutta and

Mr.Kumar Dushyant Singh, Adv.

versus

NARENDER KUMAR SHAH Respondent

Through: Mr. Roshan Santhalia, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

J U D G M E N T

A. K. CHAWLA, J

1. The appellants challenge the order dated 10.10.2017 passed by the learned Single Judge, which rejected two applications filed by the appellants, one under Section 151 CPC -seeking condonation of delay in filing an application under Order IX Rule 13 CPC (in short "the condonation application") and the other under Order IX Rule 13 CPC seeking setting aside of *ex-parte* decree dated July 9, 2014 passed in favour of the respondent in CS(OS) 431/2010 in short 'the setting aside application'.
2. The relevant facts are that the respondent filed a suit for recovery against the first appellant, a partnership firm (hereafter "the

firm”), arising out of their commercial transactions. Summons of the suit were sent to the firm at three addresses i.e. B-35, Indira Enclave, Neb Sarai, New Delhi; I-93, Lajpat Nagar, Part II, 2nd Floor, Bikanerwala, New Delhi; and, I-21, 1st Floor, Part III, Lajpat Nagar, New Delhi, through ordinary process as also Regd. AD process. Later, the second and third appellants (hereafter “the partners”) were sought to be impleaded as defendants, and being residents of I-93, Lajpat Nagar, Part II, 2nd Floor, Bikanerwala, New Delhi and I-21, 1st Floor, Part III, Lajpat Nagar, New Delhi (where the firm too was sought to be served with the summons of the suit earlier). Notice of such application as also the summons of the suit were thus ordered to be served on them as well. Notices so issued to the partners through ordinary process were received back with the reports of refusal. Then, fresh summons of the suit were ordered to be issued for them. Summons so issued to the partners through ordinary process, as per the process server's report, were attempted to be served at the given addresses on 13.04.2012 and 20/23.04.2012. In terms of the process server's report, the partners could not be found at the addressees and a lady, who represented herself to be the wife of the third appellant, refused to accept the summons.

3. In this background, the Registrar proceeded to order service of the partners by way of affixation and recording service on the appellant no.1 being complete as on 06.09.2011. Affixation, as per the report of the process server was effected on 07.08.2012. The appellants were unrepresented and were proceeded *ex-parte*

and a decree followed. During execution proceedings, the appellants filed the condonation application and the setting aside application. The condonation application stated that the appellants came to know of the suit and the execution proceedings only on 20.01.2015. On this, according to them, they engaged an Advocate, who filed his *Vakalatnama* on 03.02.2015 and conducted inspection of the court file on 04.02.2015 and thereafter, applied for certified copies of the plaint, documents and the annexures on 05.02.2015 and ultimately, in pursuance of the directions of the court, having been supplied with the certified copy of the plaint only, made the condonation application along with the setting aside application on 30.04.2015. Thereby, the appellants sought delay of 65 days in preferring the setting aside application being condoned.

4. Under the setting aside application, the appellants adverted to the diverse proceedings in the suit, and sought setting aside of the *ex-parte* decree on the premise that the partners were never served with the notice or summons of the suit and that the reports of the process servers on the notices, summons and the affixation, were incomplete, defective and/or not trustworthy. According to them, the partners did not refuse the receipt of notice as had come to be reported by the process server and that it was evident from the endorsement dated 06.09.2011 inasmuch as it does not record the name of the person refusing to accept the summons. Also, according to them, the order of service of summons on the partners through affixture/affixation was made without any

application and the affixture carried out was also not effected as per the procedure prescribed by law. It also the urged that the partners that no notice was affixed at their premises and even the endorsement of the process server does not mention as to where was the notice affixed. According to them, for substituted service under Order 5 Rule 20, it is essential to know that the party was purposely keeping away with a view to avoid service and that in the case in hand, no attempt was made to serve by means of regd. post or courier. The learned Single Judge considered the diverse aspects of the matter and by the impugned order, dismissed both applications. Aggrieved, the appellants have preferred the appeal in hand.

5. Learned counsel urged that none of the appellants was duly served with the summons of the suit or the notice of the applications in terms of the prescribed procedure and in accordance with law. He submitted that none of the appellants were duly served with the summons of the suit either through ordinary process, Regd. post or affixture. Also, according to him, even if it is taken that the partners were served by way of affixture/affixation, there was nothing on record to show that the firm was actually served with the summons of the suit. It was also contended that even if the notice of the application under Order 1 Rule 10 issued for 03.11.2011 is taken to be complete on its alleged refusal , this *ipso facto*, cannot be treated to be a service of summons of the suit upon the firm as held by the Court. It was thus contended that in the absence of due service

and the appellants' remaining unaware of the suit proceedings till 20.01.2015, the *ex-parte* decree 09.07.2014 was liable to be set aside. No submissions however, were made as regards the merit of the condonation application, which had equally come to be dismissed by the impugned order.

6. At the onset, it would be appropriate to consider the aspect of delay in filing of the setting aside application. In terms of averments made in the condonation application, the appellants became aware of the suit and the execution proceedings, only on 20.01.2015. The averments so made in the condonation application, do not state as to the date when the appellants actually had the knowledge of the *ex-parte* decree in question. The time prescribed under the Limitation Act to maintain an application for setting aside such decree is 30 days from the date of decree or when the applicant had knowledge of the decree and not the suit or execution proceedings. Be that as it may, even if it is taken that such knowledge be construed to be the date of knowledge of the subject *ex-parte* decree, it is a matter of record that the setting aside application came to be filed only on 30.04.2015 i.e. after 99 days, though the stipulated time is of 30 days. The delay is sought to be explained on the premise of the Advocate's inspecting the file and then awaiting certified copies of the plaint and documents etc. This cannot be a ground for condoning the delay, given that the statute has provided a time bound action. There is no requirement much less statutory or procedural, for an application seeking setting aside of the *ex-*

parte decree to be accompanied with the certified copies of the plaint or the documents, which form part of the suit. The application for setting aside of an ex-parte decree lies before the same Court, which had passed the ex-parte decree and maintains the record as well. Strictly speaking, there was no merit in the condonation application filed by the appellants.

7. As for the setting aside application, which proceeds on the premise that the summons of the suit were not duly served either on the firm or its partners i.e. they had no knowledge of the suit proceedings at any stage till 20.01.2015, a few undisputed facts need to be taken note of. They are that the first appellant is a partnership firm and the other appellants are its partners and that, all processes of summons/notices of the application filed to implead the firm's partners, were always sent to be served at their correct addresses. Processes were so issued in the first instance through not only ordinary means but through Regd. AD post as well. It is also a matter of record that the processes issued repeatedly could not be delivered at such correct addresses of the appellants despite repeated attempts, which the learned Single Judge has duly taken note of in the impugned order, as follows :

"5. Plaintiff Narender Kumar Shah, Proprietor of M/s. Jay Bharat Steel filed the present suit i.e. CS(OS) 431/2010 impleading M/s. Sai Kripa Engineering Works as the sole defendant on 28th January, 2010. Three addresses of defendant i.e.

M/s. Sai Kripa Engineering Works were given as (i) D-35, Indira Enclave, Neb Sarai, (ii) I-93, Lajpat Nagar, Part-II, 2nd Floor, Bikanerwala and (iii) I-21, 1st Floor, Part-III, Lajpat Nagar, all at New Delhi. Suit came up before this Court for the first time on 10th March, 2010 when summons in the suit were issued to the defendant on filing the process fee, registered cover and through courier returnable for 31st May, 2010. On 31st May, 2010 this Court noted that as per office report, summons issued to the defendant were received back unserved. Thus directions were issued for fresh summons to the defendants on filing of the process fee/ RC and through approved courier and taking all steps by the plaintiff within a week returnable for 17th August, 2010. As process fee was not filed no summons could be issued to the defendants. On 6th October, 2010 when the matter came up before the learned Joint Registrar, learned counsel for the plaintiff submitted that he had filed an application vide diary No. 147621 seeking amendment of the memo of parties. However, the said application was not on record and thus the matter was renotified for 21st January, 2011. On 21st January, 2011 again matter had to be adjourned to 6th April, 2011 as the amended memo of parties had not been filed. On 6th April, 2011, IA 5197/2011 under Order V Rule 20 CPC along with Section 151 CPC filed by the plaintiff seeking permission to file the amended memo of parties came up before the learned Joint Registrar and the learned Joint Registrar rejected the said application on the ground that the defendant in the suit was a partnership firm with two

addresses and by amending the memo of parties the plaintiff could not introduce new defendants and a proper application in this regard had to be filed. Thus granting liberty the application under Order V Rule 20 CPC was dismissed.

6. Thereafter the plaintiff filed an application under Order I Rule 10 CPC for impleading the names of partners of the defendant firm being IA 11785/2011 on which notice was issued to the defendants i.e. defendants No.2 and 3 returnable for 3rd November, 2011. On 3rd November, 2011 the learned Joint Registrar allowed IA 11785/2011 under Order I Rule 10 CPC observing that the proposed defendants Sandeep Sehgal and Arun Manchanda refused to take notice of the application as per the endorsement dated 6th September, 2011 and the proposed defendants being necessary parties to the suit they were directed to be impleaded. Plaintiff was also directed to file amended memo of parties and summons in the suit were issued to the newly impleaded defendant No.2 and 3 on the plaintiff taking steps. On 22nd February, 2012 the learned Joint Registrar further noted that no summons were issued since the process fee was under objection and thus issued fresh summons. The order sheet dated 18th May, 2012 notes that defendant No.1 was served on 6th September, 2011 whereas to defendant No.2 and 3 service of notice was directed by way of affixation with fresh process fee to be paid. On 30th August, 2012 the learned Joint Registrar noted that defendant No.1 was served on 6th September, 2011 and defendants No.2 and 3 were served by affixation on 7th August, 2012. As none appeared for the

defendants they were proceeded ex-parte vide order dated 7th March, 2013 whereafter the plaintiff led its ex-parte evidence and examined PW-1 Shri Narendra Kumar Shah. On perusal of the evidence led by the plaintiff, this Court passed the judgment and decree dated 9th July, 2014.

7. The first contention of learned counsel for the defendants is that defendant No.1 was never served with the summons in the suit and thus the noting of the learned Joint Registrar in the order sheet dated 18th May, 2012 and 30th August, 2012 that the defendant No.1 had been served on 6th September, 2011 is erroneous which has led to the defendants being proceeded ex-parte. As noted earlier three addresses of the defendant No.1 were given which was impleaded as the sole defendant initially. Summons on defendant No.1 were sought to be served at D-35, Indira Enclave, Neb Sarai on 1st April, 2010 when it was informed by the security guard that the owners of the house were not present. Again on 24th May, 2010 when the process server visited D-35, Indira Enclave, again the security guard informed that the owners were not present and when a request was made to speak on phone he refused. Efforts were made to serve the defendant No.1 at I-21, 1st Floor, Part-III, Lajpat Nagar on 1st April, 2010 where again the servant stated that the owners were not present in home and on 24th May, 2010 when fresh efforts were made at I-21, 1st Floor, Part-III, Lajpat Nagar it was informed by a lady that the premises was not an office, however after speaking on phone she refused to accept the notice. Even at the third address given in the memo

of parties for defendant No.1 i.e. I-93, Lajpat Nagar, Part-II, 2nd Floor, Bikanerwala, efforts was made on 1st April, 2010 when the premises was found locked and on 24th May, 2010 where again the door was not opened and on the intercom it was informed that the owners of the defendant were not present at home. Further the person speaking on phone refused to accept summons. It is in the light of these refusal the learned Joint Registrar noted that service to defendant No.1 had been effected.

8. Notices were also issued to proposed defendants No.2 and 3 in IA 11785/2011 which were refused to be accepted. Learned counsel for the defendants vehemently submits that as per the noting the process server met the person who stated himself to be the partner of the concern M/s. Sai Kripa Engineering Works, however refused to accept summons. It is contended that it is highly improbable that having accepted that the said person was a partner he would refuse to accept summons. Same report is in respect of defendant No.3 Sandeep Sehgal who also refused to accept the said summons. It may be noted that after allowing IA No. 11785/2011 on 3rd November, 2011 the Court permitted the plaintiff to file amended memo of parties and issued summons in the suit to defendant No.2 and 3. Efforts were made to serve Arun Manchanda on 20th April, 2012 when on the first date the employee of Arun Manchanda stated that he had gone out and even on the subsequent date Arun Manchanda was stated to be out of the house. In respect of Sandeep Sehgal the house was found locked on 13th April, 2012 and on 20th April, 2012

wife of defendant No.3 was present but she refused to accept the notice. As apparently there was no response on repeated visits on 7th August, 2012 summons were pasted on the residences of defendant No.2 and 3 on which the learned Joint Registrar held that summons have been served on defendant No.2 and 3 by affixation.

9. In *Johri Lal (supra)*, *Bondla Ramalingam (supra)* and *Teharoonchand (supra)* relied upon by learned counsel for the defendant, it was held that when the Court is satisfied that defendant is keeping out of the way for the purpose of avoiding service or that for any other reason summons could not be served it could direct service by way of affixation. Learned counsel for the defendant has relied upon decision on *Sushil Kumar Sabharwal (supra)* wherein the Supreme Court held that before noting that the summons were duly served the Court is required to be satisfied in the sense of being proved "that the summons were properly and effectively served on the defendants and it is thereafter on its failure to appear in the Court that he can be proceeded ex-parte".

10. As noted above various attempts were made; either the premises was found locked or the summons were refused to be accepted even when family members were present. Moreover, this Court finds that the three addresses of defendant No.1 were D-35, Indira Enclave, Neb Sarai; I-93, Lajpat Nagar, Part-II, 2nd Floor, Bikanerwala and I-21, 1st Floor, Part-III, Lajpat Nagar; the two latter addresses being of defendant No.2 and 3

respectively. In the Execution Petition defendants No.2 and 3 have admittedly been served on the two latter addresses i.e. I-93, Lajpat Nagar, Part-II, 2nd Floor, Bikanerwala and I-21, 1st Floor, Part-III, Lajpat Nagar. Further the address of the defendant No.1 firm is in all the invoices is D-35, Indira Enclave, Neb Sarai, Delhi which is not disputed. It is not the case of the defendants that wrong address of the defendants was given or that there was any collusion between the plaintiff and the process server.

11. Vide order dated 6th May, 2015 while issuing notice in the three applications this Court directed the process server who had filed the report, affixed the notices to file an affidavit in support of the service report which has been duly filed by Shri Dalel Singh, S/o Rulia Ram wherein he affirmed receiving three summons for affecting service upon M/s. Sai Kripa Engineering Works (defendant No.1) at the three different addresses vide entry No.3125 dated 27th March, 2010 and his visits on 1st April, 2010 and 24th May, 2010 at about afternoon at the three given addresses and his reports thereon.

8. The above factual matrix taken note of by the learned Single Judge leaves no doubt that repeated attempts were made to serve the summons and the notice of the application under Order 1 Rule 10 on the appellants. Though the Regd. AD and the courier process for the service of the summons on the firm was issued only once and all the subsequent processes were issued through ordinary process only, what can be taken note of the fact that all

the appellants were residing within the jurisdiction of this Court and for such parties, in terms of chapter XXI Rule 1 of the Delhi High Court Rules, ordinarily, such parties are not required to be served by Regd. Acknowledgment Post. There is therefore, no substance in the submissions made on behalf of the appellants that each process of service of summons and/or notice was required to be issued through Regd. AD, Courier etc. as well. Repeated summons/notices were issued by the Court to be served upon the appellants and repeated attempts were made for the purpose, the appellants do not dispute in the setting aside application. They also do not dispute the fact that such attempts were made to serve them at their correct addresses only. It is also not in dispute that the notices of the application under Order 1 Rule 10 CPC were received back with the report of refusal by the partners respectively. According to the appellants, the reports of refusal were not acceptable, as the prescribed procedure to record such refusal was not followed. May be, the procedure was not strictly followed by the process server in recording such refusal, but, it *ipso facto*, does not belie the correctness of the report of refusal. The Court having accepted such report of refusal, it was incumbent upon the appellants to seek leave to, and adduce sufficient evidence to rebut it. From the court record, it does not emerge that the appellants at any stage even sought to lead any evidence to rebut the reports of refusal. Mere denial cannot be said to be sufficient in itself to dispute it. More so, for the reason that the notices were duly sent at the correct addresses, where the

partners, were actually resident of and it is not their case that during such periods, when the processes were sought to be served upon them, they were away from their such places of residence.

9. It is also not the case of the appellants that the reports of refusal were given by the process server in collusion with the respondent. Therefore, this Court does not find any error for the trial Court in the first instance proceedings to accept report of refusal of notices of the application by the partners on 06.09.2011 and then, the learned Single Judge finding no error therein and rejecting the contention raised to the contrary. Why the service so effected on the partners on 06.09.2011 be not construed to be notice of date of hearing by any of the appellants, this Court does not find explanation in the setting aside application. Suffice to say, the setting aside application is made invoking Rule 13 of Order IX CPC which attracts the proviso attached to it, as under :

"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 plaintiffs claim."

10. It is worth recalling that the second and third appellant are none else but the partners of the firm, which can sue and be sued in its own name or in the name of its partners. In other words, a partnership firm and its partners are intrinsic to each other and can be said to be two sides of the same coin. Thus, service on any

of the partners, has to be construed to be service not only on the partnership firm but the other partners as well. It is a matter of record that besides the service of notice of the application, the partners of the firm, were also served with the summons of the suit, though through affixation. In the given conspectus, this Court finds that the first appellant firm had not only notice of the dates of hearing but also sufficient time to appear and answer the respondent's claim. In the given facts and circumstances, heavy burden was cast upon the appellants to negate such conclusions with sufficient grounds and material to substantiate any of their pleas to the contrary. Proviso attached to Rule 13 by itself makes it clear that mere irregularity in the service of summons/notice is not sufficient to set aside an ex-parte decree. The contention raised to the contrary is therefore, unmerited.

11. In view of the foregoing, we do not see any reason to interfere in the conclusions arrived at by the learned Single Judge in dismissing both the applications. Consequently, the appeal is dismissed. No order as to cost.

A. K. CHAWLA, J

S. RAVINDRA BHAT, J

AUGUST 02, 2018

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