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

+ **CS(COMM) 808/2018**

HSIL LIMITED

..... Plaintiff

Through: Mr. Manav Gupta, Ms. Esha Dutta,
Mr. Sahil Garg and Mr. Devang
Kumar, Advs.

versus

GUJRAT CERAMIC INDUSTRIES & ANR

..... Defendants

Through: Counsel (appearance not given)

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

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27.08.2019

I.A. 6408/2019 (for delay)

This is an application filed by the defendants under Section 5 of the Limitation Act read with Section 151 CPC seeking condonation of 5 days delay in filing the application under Order IX Rule 13 read with Section 151 CPC for setting aside the ex-parte decree / judgment dated January 08, 2019.

For the reasons stated in the application, the delay of 5 days in filing the application is condoned, the application stands disposed of.

I.A. 6407/2019

1. This is an application filed by the defendants under Order IX Rule 13 read with Section 151 CPC for setting aside the ex-parte decree / judgment dated January 08, 2019.

2. It is stated in the application that the aforesaid suit has been filed by the plaintiff for infringement, passing off of trademark. The suit was decided ex-parte against the defendants (applicants herein) vide order dated

January 07, 2019. It is the case of the defendants / applicants and contended by their counsel that in March 2019, the defendant No.2 for the first time became aware of the proceedings when a notice to show cause dated February 19, 2019 has been issued by this Court against the defendants in RFA(OS) COMM No.8/2019, which was filed by the plaintiff challenging order dated January 07, 2019, denying damages to the plaintiff.

3. That upon becoming aware of the above pending proceedings, the defendants engaged the services of the present counsel through telephonic instructions, who in turn entered the appearance before the Division Bench of this Court on March 07, 2018 and subsequently filed his *Vakalatnama* and inspected the case file. It is averred in the application and stated by the counsel that plaintiff had earlier filed a suit for infringement, passing off of trademark etc. against the defendants herein being CS(COMM) 1087/2016. At that relevant point of time the defendant No.2 was handling the day to day affairs of the defendant No.1 and dealt with the previous suit by engaging services of the counsel to defend the said suit.

4. It is also stated that the father of defendant No.2 is not very literate and is 8th fail in Gujarati medium and the defendant No.2 was helping this father with the running of defendant No.1 including defending the previous suit. In the said suit the defendants had filed an application under Order VII Rule 10 CPC seeking return of the plaint. During the pendency of the said suit on account of family disputes, there was a complete breakdown of relationship between the father of defendant No.2 who is also a partner of defendant No.1 and the defendant No.2 as a result of which defendant No.2 has completely isolated himself from the business activities of defendant No.1 and stopped talking to his father altogether and shifted his base from

Thangarh to Mumbai to commence business in food industry / hotel management alongwith his friends. With the result the day to day affairs of the defendant No.1 including the manufacturing operations of defendant No.1 had completely stopped. Because of the shutdown of the manufacturing activity of defendant No.1 and continued impasse between the father of defendant No.2 and the defendant No.2, i.e. partner of defendant No.1 they decided to sell manufacturing facilities of defendant No.1 and began to search for a suitable buyers.

5. In the meantime, this Court had allowed the application filed by the defendants under Order VII Rule 10 and returned the plaint to the plaintiff on the ground of lack of territorial jurisdiction relying upon the order dated January 30, 2017 passed in CS(Comm) 1382/2016 namely ***HSIL Ltd. v. Marvel Ceramics & Anr.*** It is stated and contend by the counsel for the defendants / applicants that an agreement to sell dated April 11, 2018 was executed wherein most of the land on which factory of sanitaryware was built has been sold to a third party. Immediately thereafter, the purchaser took over the factory premises for renovation / updation / improvement of the plant and machinery. This resulted in the defendants ceasing to be in the business of manufacture, sale / distribution of sanitary ware. It is also stated the father of the defendant No.2 who was suffering from health disorders was under *bona fide* belief that as the previous suit has been returned due to lack of territorial jurisdiction, all litigation in this Court has come to an end.

6. There is no dispute that on July 30, 2018 the Court had proceeded ex parte against the defendants. This also further resulted in the judgment dated January 08, 2019 whereby the suit was decreed in favour of the plaintiff

against the defendants in terms of paragraphs ‘a’ and ‘b’ of the prayer clause of the plaint which are reproduced as under:

“a. Pass and pronounce a decree of permanent injunction restraining the Defendants, their family members, dealers, their suppliers, their franchisees, agents, sister concerns or any entity incorporated by the CS (COMM) 808/2018 Page 2 of 9 Defendant or their family members, Directors, distributors or anyone acting for and on their behalf from using the trademark HINDUSTAN VITREOUS or H VITREOUS or any other mark that is deceptively similar to it or to the trademarks of the Plaintiff on its products or in any manner whatsoever so as to result in infringement the trademarks of the Plaintiff; and

b. Pass and pronounce a decree of permanent injunction restraining the Defendants, their family members, dealers, their suppliers, their franchisees, agents, sister concerns or any entity incorporated by the Defendant or their family members, Directors, distributors or anyone acting for and on their behalf from using the trademark HINDUSTAN VITREOUS or H VITREOUS any other mark that is deceptively similar to the trademarks of the Plaintiff on its products or in any manner whatsoever so as to result in passing off its goods as that of the Plaintiff or in any manner misrepresenting or holding out to be connected or related to the Plaintiff in any manner whatsoever; and”

7. It is stated and submitted by the counsel for the defendants / applicants that the defendants were proceeded ex parte on July 30, 2018 on the basis of service deemed to have been effected vide email, which was an incorrect email ID provided by the plaintiff / counsel for the plaintiff. In this regard, he has stated that email address provided by the learned counsel for the plaintiff was navedkaladia@gmail.com while the correct email address is naved.kaladia@gmail.com. That apart, he submitted that when the defendants have successfully defended the previous suit before this Court on an earlier occasion, they would have defended the present suit filed by the plaintiff if they had knowledge of such suit / proceedings.

8. A reply to this application has been filed by the plaintiff wherein the plaintiff / non applicant has stated that the defendants / applicants have not raised any cogent defence for their non-appearance even after service in the suit. According to the learned counsel for the plaintiff / non-applicant that the plea of father's illness taken by the counsel for the defendants is just an afterthought as the previous suit was being defended by the father of the defendant No.2 who is also the partner of the defendant No.1. In this regard, he has drawn my attention to page 11 of the reply to the application which is an affidavit filed by Sh. Lukman Ismail Kaladia in that suit. He stated, the father was aware of the nature of proceedings which were filed against the defendants. Further, the pleadings being in English, it cannot be said that the petitioner's father is an illiterate person. He has also drawn my attention to the translation of the Bailiff reports to contend, the summons were received by the father of defendant No.2 who is also partner of the defendant No.1.

9. In other words, despite service if the defendants have not cared to

appear in the suit, they have been rightly proceeded ex parte resulting in an ex parte judgment. In fact, the defendants intentionally chose to play hide and seek with the Court knowing well the position of law and the fact that a lenient view has been taken by this Court in not granting damages against them. It was only after the plaintiff filed the Regular First Appeal challenging the ex-parte judgment, seeking damages that the defendants got scared and filed the instant application for setting aside of the decree passed by this Court.

10. It is the submission of the counsel that a threadbare reading of the application shows that the defendants have clearly misunderstood the law, as applicable to an application under Order IX Rule 13 CPC and have instead delved into the merits of the case which cannot be adjudicated by this Court while exercising jurisdiction under Order IX Rule 13 CPC. He submitted, as the defendants have already filed cross objections in the appeal and keeping in view the scope and ambit of Order IX Rule 13 CPC, this application needs to be dismissed. In support of his submission, he has relied upon two judgments passed by this Court in *Sunny Jain S/o Pawan Kumar Jain v. M/s B.M.R.C. Construction Pvt. Ltd. & Ors.*, 2018(2) AD (Delhi) 24 and *Ms Shoes East Ltd. v. Delhi Stock Exchange Asso. Ltd. & Ors.*, 2019(1) RLR 211.

11. This Court has heard the submissions made by the learned counsel for the parties. The moot question which arises for consideration is whether the defendants could not appear before this Court because they were not served with the summons. The answer to this has to be in the negative, in view of the English translation of the reports of the Bailiff, which I reproduce as under:

“May 05, 2018

I do hereby declare on oath that the copy of the notice of defendant No.1 has been served to his father who has received and signed on behalf of defendant No.1. The date of adjournment is also informed to him. Thus, the notice received from Hon’ble High Court of Delhi has been validly served at the address shown in the said notice and the copy of duly acknowledged notice is returned herewith. This is for kind information of this Hon’ble Court.

May 05, 2018

I do hereby declare on oath that the copy of the summons of defendant No.2 has been served to his father who has received and signed on behalf of defendant No.2. The date of adjournment is also informed to him. Thus, the summons received from Hon’ble High Court of Delhi has been validly served at the address shown in the summons and the duly acknowledged copy of the summons is returned herewith. This is for kind information of this Hon’ble Court.

May 05, 2018

I do hereby declare on oath that the copy of the summons of defendant No.1 has been served to his father who has received and signed on behalf of defendant No.2. The date of adjournment is also informed to him. Thus, the summons received from Hon’ble High Court of Delhi have been validly served at the address shown in the summons and the

duly acknowledged copy of the summons is returned herewith. This is for kind information of this Hon'ble Court.

May 05, 2018

I do hereby declare on oath that the copy of the notice of defendant No.2 has been served to his father who has received and signed on behalf of defendant No.2. The date of adjournment is also informed to him. Thus, the notice received from Hon'ble High Court of Delhi has been validly served at the address shown in the said notice and the copy of duly acknowledged notice is returned herewith. This is for kind information of this Hon'ble Court.

July 26, 2018

I do hereby declare on oath that the copy of the summons of defendant No.1 have been served to No.1 in person at the address shown in the summons received from the Hon'ble High Court of Delhi. The date of adjournment is also informed to him. Thus, the summons have been validly served and the copy of the duly acknowledged summons is returned herewith. This is for kind information of this Hon'ble Court.

July 26, 2018

I do hereby declare on oath that on inquiry at the address of defendant No.2 as shown in the summons received from

Hon'ble High Court of Delhi, he was not available there. Hence, the copy of the summons have been delivered to the father of No.2 who has received and signed on behalf of No.2. The date of adjournment is also informed to him. Thus, the summons received from Hon'ble High Court of Delhi has been validly served at the address shown in the summons and the copy of duly acknowledged summons is returned herewith. This is for kind information of this Hon'ble Court."

12. From the above, it is clear that the father of the defendant No.2 who is also partner of defendant No.1 had in fact received the summons issued by this Court on May 05, 2018 and July 26, 2018. Surely, he being the person who had pursued the earlier suit, would have known the meaning and the effect of summons of the Court. He is also an adult member of the family and could have received the summons on behalf of defendant No.2. Having received the summons and not cared to appear in the proceedings, the Court had rightly proceeded ex-parte against the defendants. In fact, even after the defendants were proceeded ex-parte on July 30, 2018 the defendants have not cared to file an application in the Court, seeking setting aside of the order by which they were proceeded ex-parte till the judgment dated January 08, 2019 was passed where by the suit was decreed to the extent of prayers 'a' and 'b'.

13. The plea of the learned counsel for the defendants that the father of the defendant No.2 and partner of defendant No.1 was under the *bona fide* impression that as the earlier plaint has been returned under Order VII Rule

10 CPC, no litigation is pending is not appealing for the reason that the father of the defendant No.2, a partner of the defendant No.1, had pursued the earlier suit and in fact had filed an application for return of the plaint, which was accepted by the Court. He would be aware of the earlier suit number and could have easily compared it with the summons issued by this Court depicting suit number, which was surely other than the suit number earlier prosecuted by him and could have easily come to a conclusion that the summons were in the fresh suit. Even otherwise, when the summons have been received from the Court, it presupposes existence of a litigation. They should have made efforts to ascertain the details of the suit of which summons have been received. This conduct does not appear to be *bona fide* rather it was intentional act to avoid appearance before this Court. It is a case where parties who despite knowledge about the pendency of the suit had avoided the Court process till adverse orders have been passed and then seeking setting aside of the order. A party who, with complete knowledge chose to stay away has to face the consequence of the same.

14. That apart, the plea of the defendants that the defendant No.1 has shifted to Mumbai also does not appeal to this Court. The summons were validly sent on the last known address of the defendants. That apart, when service has been effected on the adult member of the family of a party, the same is valid in terms of the provisions of Order V Rule 15 CPC which stipulates so.

15. That apart, the defendants would have had the knowledge of the pendency of the proceedings as there is a presumption of service of paper book sent under Order XXXIX Rule 3 CPC which the plaintiff was required to comply with on the passing of order under Order XXXIX Rules 1 and 2

which position has not been disputed by the defendants. I may only refer to the conclusion as arrived at by a Coordinate Bench of this Court in the judgment as referred by Mr. Gupta in the case of *MS Shoes East Ltd.* (*supra*) wherein para 12 reads as under:

“12. One of the biggest challenges in a civil dispute is the service of defendants. It is usually noticed that at the stage of service of summons and notices, considerable time is elapsed and enormous effort is spent even by the Registry of the Court in ensuring the issuance, delivery and reporting of summons. Parties who are served and who have knowledge usually keep avoiding the court process till adverse orders are passed and then seek setting aside of the orders, as has been done in the present case. The Defendant was served way back in 1998. Twenty years have gone by. The factum of service may not have been brought to the notice of the Court, leading to further fresh summons being issued and service by publication being effected. However, that does not mean that the service done in 1998 is to be ignored and simply made a ‘relic’ in the records of this Court. The Defendant had complete knowledge of the present suit, but chose to stay away. Such conduct is always fraught with severe consequences. Since the award has been passed, the Defendant has already filed a separate petition challenging the award. The same would be considered on its own merits. But to set aside the appointment of the arbitrator at this stage, would be giving a premium to conduct such as in the

present case, wherein a party after acquiring knowledge can chose at its own luxury to approach the court seeking setting aside of the said appointment.”

16. In view of the above, I do not see any merit in the application. The same is dismissed.

V. KAMESWAR RAO, J

AUGUST 27, 2019/aky