

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

+ **CS(OS) No. 461/2017**

% **8th January, 2018**

SUNNY JAIN S/O SH. PAWAN KUMAR JAIN Plaintiff

Through: None.

versus

M/S B.M.R.C. CONSTRUCTION PVT. LTD. & ORS.Defendants

Through: Mr. Rajiv Bajaj, Advocate for
D-2.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

I.A. No. 253/2018 (under Order IX Rule 7 CPC, filed by defendant no. 2)

1. This application is filed by the defendant no. 2 under Order IX Rule 7 Code of Civil Procedure, 1908 (CPC) for setting aside the *ex-parte* proceeding initiated against the defendant no. 2 vide order dated 8.12.2017.

2. The subject suit is a suit which was filed by the plaintiff for specific performance or in the alternative for refund of the amount

of Rs.2,90,00,000/- paid under the agreement to sell, with the further prayer for interest on the amount paid.

3. As per the suit plaintiff defendant no. 1 is a company which owns the suit property situated at 3rd floor with terrace/roof rights of property No. 10425 (15-A/4), Plot No. 4, Block No. 15A, WEA Karol Bagh, New Delhi-110005. Defendant nos. 2 and 3 in the suit namely, Sh. Piyoosh Goyal and Sh. Rajnish Gupta, were the Directors of the defendant no. 1/company. As per the plaint the plaintiff pleaded that he relied upon assurance of the applicant/defendant no. 2 for purchase of the suit property, inasmuch as, the applicant/defendant no. 2 was the Director of the defendant no. 1/company. The total consideration for purchase was of Rs.2,90,00,000/-. Plaintiff had transferred a sum of Rs.50,00,000/- to the bank account of defendant no. 1/company by RTGS as detailed in paragraph 5 of the plaint and had paid further amounts totalling to Rs. 2,90,00,000/-. the amounts of Rs 2.40 crores were paid to defendant no.1 through the applicant/defendant no.2. Receipt in this regard of receipt of the amount was executed by applicant/defendant no.2.

4. Plaint thereafter refers to repeated efforts made by the plaintiff to get the sale deed executed in his favour, but the same could not be done on account of the deliberate inaction of the applicant/defendant no. 2.

5. The order of the Joint Registrar of this Court dated 6.11.2017 records that applicant/defendant no. 2 was served by ordinary method but no one appeared for applicant/defendant no. 2. Joint Registrar did not however proceed the defendant no.2 *ex-parte* but was liberal and passed an order granting time to the applicant/defendant no. 2 to file the written statement.

6. The matter was then listed on the next date on 27.11.2017 when it was noted that no written statement was filed by the applicant/defendant no. 2 nor was there any appearance on behalf of applicant/defendant no. 2. Since defendant nos. 1 and 3 in the suit had filed their written statement and pleadings were complete, the matter was hence listed in Court on 7.12.2017 for framing of issues.

7. On 7.12.2017, once again no one appeared for the applicant/defendant no. 2 and after some arguments there were

compromise talks in the peculiar facts of the present case for the plaintiff to take a judgment and decree to the extent of Rs.50,00,000/- against the defendant no. 1, and which was the only amount credited in the bank account of defendant no.1, with entitlement of the plaintiff to recover the balance amount of Rs.2,40,00,000/- from the applicant/defendant no. 2. On 7.12.2017 the matter was adjourned to 8.12.2017 and once again on 8.12.2017 the applicant/defendant no. 2 did not appear. On 8.12.2017 the suit was compromised in a limited matter as against defendant no.1/company on defendant no. 1 being held liable to pay only a sum of Rs.50,00,000/- with interest, and liberty was granted to the plaintiff to seek recovery of the balance amount from the applicant/defendant no. 2. This order dated 8.12.2017 reads as under:-

1. Yesterday, arguments were heard at the stage of requirement of framing of issues.

2. It is seen that the present suit is a suit for specific performance of an oral agreement to sell with respect to the property being the entire third floor of 10425 (15A/4), Plot No.4, Block-15A, WEA Karol Bagh, New Delhi. Plaintiff entered into an agreement to sell as a proposed buyer with the defendant no.1 who was the owner of the suit property.

3. During the course of hearing, it had transpired yesterday that the agreement to sell which was entered into of the plaintiff with the defendant no.1 was through the defendant no.2 and there were disputes as to whether defendant no.2 was or was not authorized to act for and on

behalf of the defendant no.1-company. Therefore, during the course of hearing, it transpired that if the plaintiff could be satisfied with a money decree against the defendant no.1 to the extent of Rs.50 lacs which was credited to the bank account of the defendant no.1 and for the balance amount of Rs.2.40 crores, the plaintiff is entitled to pursue this suit as against the defendant no.2 for recovery of such balance amount.

4. Counsels for the parties took adjournment for today in view of the aforesaid position to take instructions from their clients.

5. Today, counsels for the parties state that the suit can be partly disposed of and can partly continue in the following terms:-

(i) The suit will stand decreed for a recovery of Rs.50 lacs in favour of the plaintiff and against the defendant no.1 and money decree is accordingly passed in favour of the plaintiff and against the defendant no.1 for recovery of Rs.50 lacs with interest in favour of the plaintiff and against the defendant no.1 at 7 ½ % per annum simple from 1.3.2016. Defendant no.1 is granted a period of six months to make the payment under this decree and in case payment is not made by the defendant no.1 within six months under the present decree of an amount of Rs.50 lacs with interest at 7 ½ % from 1.3.2016, then, the rate of interest payable to the plaintiff will become 12% per annum simple from 1.3.2016. Decree sheet be prepared.

(ii) On the aforesaid decree being passed against the defendant no.1 and in favour of the plaintiff, no other claim of the plaintiff will remain as against the defendant no.1 and the balance claim of the plaintiff will be recovered from the defendant no.2 by the plaintiff leading evidence in the present suit to prove his claim for recovery of money as against the defendant no.2 for a sum of Rs.2.40 crores with interest. Since defendant no.2 is not appeared in spite of service, defendant no.2 is hence proceeded ex parte.

(iii) Defendant no.1 will not dispose of the suit property till the decree passed today in favour of the plaintiff is satisfied.

6. Let the plaintiff file affidavits by way of evidence as against the defendant no.2 with respect to the balance claim of an amount of

Rs.2.40 crores alongwith interest and which be done within a period of four weeks from today.

List before the Joint Registrar for marking of exhibits to the documents on 26th February, 2018. The Joint Registrar thereafter will list the suit in Court for ex parte arguments against the defendant no.2.

8. Now, this application is filed by the applicant/defendant no. 2 on 21.12.2017 for setting aside the *ex-parte* proceedings initiated against him vide order dated 8.12.2017.

9. Ordinarily, learned counsel for the applicant/defendant no.2 is justified in arguing that Courts take a liberal view in setting aside *ex-parte* proceedings, especially when a long period has not expired from the date of service till the date of filing of the application under order IX Rule 7 CPC, however, in the peculiar facts of this case noting that applicant/defendant no. 2 actually has been silently watching the proceedings in the suit and deliberately did not appear, but has now chosen to appear in the suit by filing the present application only after the plaintiff has compromised the suit with defendant no. 1 , and liberty was given to the plaintiff to recover the balance amount of Rs.2,40,00,000/- with interest from the applicant/defendant no. 2.

10. Learned counsel for the applicant/defendant no. 2 has argued for setting aside of the *ex-parte* proceedings against the applicant/defendant no. 2 on the ground that the applicant/defendant no. 2 was never served in the suit. It is further argued that the summons in the suit and notice in the interim application were issued for 6.11.2017 to the applicant/defendant no. 2, and which are stated to have been received by one Sh. Deepak, for defendant no. 2 and defendant no. 3, and that the service report in the file of this Court shows that Sh. Deepak received summons in the suit and notice in the application both for defendant no. 2 and defendant no. 3 (which were at different addresses which are pleaded to be about a kilometer apart) at the same time of 2.50 P.M which is not possible. It is, therefore, argued that there is no service on the applicant/defendant no. 2 allegedly on account of receipt of the summons and notice by one Sh. Deepak.

11. It is then argued on behalf of the applicant/defendant no. 2 that there is no other report in the miscellaneous file of this Court which would show service upon the applicant/defendant no. 2.

Accordingly, it is prayed that *ex-parte* proceedings be set aside as the applicant/defendant no.2 was never served with summons of the suit.

12. In my opinion the present application is liable to be dismissed because no doubt there is no long period of delay in filing the application for setting aside the *ex-parte* proceedings, however depending on the facts of a case Court would be fully justifiable in refusing to set aside *ex-parte* proceedings where it is found that defendant is deliberately avoiding appearance in the case and has chosen to appear only when the applicant/defendant no. 2 realised that the suit has been compromised with the other defendants and now the onus will be upon the applicant/defendant no. 2 to satisfy the balance amount of the claim of Rs.2,40,00,000/- with interest. The reasons showing why this application has to be dismissed as also the lack of honesty of the applicant/defendant no.2 becomes clear from the discussion given herein after including the facts showing that applicant/defendant no.2 was served both through the process server as also by the registered post AD.

13. Firstly it is required to note that it is very curiously stated in this application that knowledge has been derived by the

applicant/defendant no. 2 of the suit because of the information given to him on 9.12.2017 of the suit by a local property dealer. This curious averment is made in para 1 of this application and which para 1 reads as under:-

“1. That the above mentioned suit is listed before this Hon’ble Court on 26th February 2018 for making of exhibits of documents. It is submitted that the applicant who is defendant No.2 in the present case came to know on 9th December 2017 when the Local Property Dealer informed the applicant about the suit against him has been decreed by this Hon’ble Court.”

14. Obviously, this para is an apology of deriving of knowledge by the applicant/defendant no. 2 because neither the name of the property dealer is mentioned, nor it is stated why would that property dealer approach and inform the applicant/defendant no. 2, why there was a so called information given to the applicant/defendant no. 2 by the local property dealer only on 9.12.2017 and which is just one day after the compromise decree between the plaintiff and defendant nos. 1 and 3 on 8.12.2017, and all these aspects show that the averments made in para 1 are clearly false to the knowledge of the applicant/defendant no. 2 and actually the averments made in para 1 of the application are only to create a ground, obviously which is baseless, for filing of this application to set

aside the *ex-parte* proceedings. It may be noted that if the applicant/defendant no. 2 was sincere then there was no reason why the applicant/defendant no. 2 would not have appeared on the repeated dates when suit was listed in Court after service, viz on 6.11.2017, 27.11.2017, 7.12.2017 and 8.12.2017.

15. No doubt, the timing of receipt of summons for defendant nos.2 and 3 by one Sh. Deepak as per the explanation sheet with the summons is shown at 2:50 p.m. , and that the addresses of the defendant nos. 2 and 3 are different by about one kilometer, however, obviously this ground that how could one Sh. Deepak receive summons at same point of time of 2:50 p.m. for defendant nos. 2 and 3 is a only superficially correct statement because there is no averment in the present application that the applicant/defendant no. 2 has no connection with or any relation to or in any manner defendant no.2/applicant is not known to the said Sh. Deepak. Clearly, therefore, this issue of conflict of time is neither here nor there as applicant/defendant no. 2 has not pleaded that he has no relation whatsoever with said Sh. Deepak.

16. Another important aspect to be noted is that the applicant/defendant no. 2 was sent summons of the suit by registered post from this Court. The miscellaneous file of this Court shows that the registered post AD containing summons and notice for the next date of 6.11.2017 which was sent to the applicant/defendant no. 2 was refused by the applicant/defendant no. 2 on 14.10.2017. There is no averment in the present application that applicant/defendant no. 2 did not refuse the registered post containing the summons and notice on 14.10.2017. the applicant/defendant no.2 therefore cannot argue that he was not served in the suit.

17. It is also further noted that the plaintiff besides filing of process fee for service of the applicant/defendant no. 2 in the ordinary method, by registered post AD and by courier, had also sent the paper book of the suit to applicant/defendant no.2 in compliance of Order XXXIX Rule 3 CPC. Plaintiff has filed his affidavit of sending of the paper book of the suit to the applicant/defendant no. 2 by post. This affidavit is dated 25.9.2017 and is accompanied by the postal receipt. There would be presumption of service of the paper book sent under Order XXXIX Rule 3 CPC since the applicant/defendant no. 2 has not

disputed in the present application that he has not received any paper book of the suit under Order XXXIX Rule 3 CPC. Thus on this Court knowledge of the pendency of the suit can be derived as against the applicant/defendant no. 2. It is relevant, at this stage, to note that Order IX Rule 13 CPC was amended by the Act 104 of 1976 whereby *ex-parte* proceedings need not be set aside on account of irregularity of service if the defendant is found to have knowledge of the proceedings in the suit. In my opinion, the intention of the Legislature to include the aspect of the Second Proviso to Order IX Rule 13 CPC will be borne out from the facts of the present case where this application for setting aside *ex-parte* proceedings is conveniently filed only after compromise is entered into between the plaintiff and defendant nos. 1 and 3 giving the plaintiff liberty to seek the balance amount of Rs.2,40,00,000/- from the applicant/defendant no. 2, and applicant/defendant no. 2 after service deliberately did not appear on repeated dates but was watching the proceedings.

18. I may note that though *ex-parte* proceedings are not set aside and therefore defendant no.2 will not be allowed to file his written statement, however, defendant no.2 always can participate

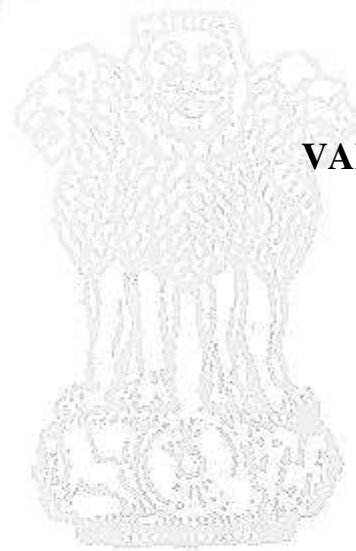
from this stage and which would be entitlement of cross-examining the witnesses of the plaintiff and also participate for final arguments in the suit.

19. In view of the above discussion, finding the application to be completely *malafide* and dishonest, the same is accordingly dismissed.

JANUARY 8, 2018

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VALMIKI J. MEHTA, J



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