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

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Judgment delivered on: 18.12.2020

+ CM(M) 435/2020 & CM APPL.21453/2020 & 21454/2020

GANPAT RAI

..... Petitioner

versus

RAJIV GARG

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Rachit Batra, Advocate.

For the Respondent: Mr. Sanjeev Kumar, Advocate.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. The hearing was conducted through video conferencing.
2. Petitioner impugns order dated 23.06.2020 whereby the application of the petitioner under Order IX Rule 13 CPC has been dismissed.
3. Respondent had filed the subject eviction petition under Section 14(1)(e) of the Delhi Rent Control Act. Petitioner was proceeded ex parte by order dated 19.07.2011 and finally an eviction order was passed. Subsequently petitioner came to know about the eviction order when he was disposed in execution proceedings and filed the application under Order IX Rule 13 CPC.

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to HMJ Sanjeev Sachdeva.

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4. The case of the petitioner is that the petitioner was never served with the summons of the eviction petition and respondent has manipulated the record and shown an advocate as having appeared for the petitioner, who failed to appear after his first appearance because of which petitioner was proceeded ex parte.

5. He further contends that respondents have forged and fabricated title documents to show title to the property whereas there is no relationship between the petitioner and the respondent of landlord and tenant. He submits that an FIR has been registered against the respondents in which a charge sheet has already been filed and trial is in progress.

6. Perusal of the Trial Court record shows that the petition for eviction was filed and listed before the Court for the first time on 21.01.2011 when the Court directed issuance of summons and filing of process fee and registered cover, returnable for 08.03.2011.

7. The Trial Court record does not reveal any summons having been sent through registered post. Summons was sent only through the process server. The report of the process server is that on 24.02.2020 he had gone to the address mentioned in the summons to serve the summons on the petitioner Ganpat Rai. At the spot he met one person who gave his name as Sanjay, whom the process server says he does not know. As per the report said person read the summons and refused to accept the summons.

8. The endorsement made by the reader of the Court on the order sheet as his report for the next date is “summons unserved”. On the returnable date i.e. 08.03.2011 the order records that one Mr.Virender Singh, Advocate appeared on behalf of the respondent, filed his memo of appearance and requested for an adjournment for filing vakalatnama and written statement.

9. The case was thereafter adjourned to 19.07.2011 on which date none appeared and accordingly petitioner was proceeded ex parte and thereafter the case proceeded ex parte against the petitioner, resulting in the ex parte judgment which is sought to be set aside by this application under Order IX Rule 13 CPC.

10. Memo of appearance which has been filed on record and alleged to be filed by Mr.Virender Singh, Advocate has the column *‘as to who has authorised him to appear’* left blank.

11. The case of the petitioner is that he does not know any lawyer by the name of Virender Singh. He had never been served with the summons nor had authorised any person to appear on his behalf.

12. In the impugned order the Additional Rent Controller has dismissed the application primarily on the ground that the petitioner has been unable to satisfy the Court that summons were not duly served on him. Further the Court has held that petitioner is unable to satisfy the Court that he was not aware of the proceedings prior to the date of taking possession or that the summons were not duly served

upon him.

13. The Additional Rent Controller has shifted the burden on the petitioner to prove the negative. It is settled position of law that only proof of affirmative can be produced and not of the negative. The Additional Rent Controller has clearly erred in holding that the petitioner has been unable to satisfy that summons was not duly served upon him.

14. The report of the process server as well as the endorsement made by the reader on the Court file clearly shows that the summons was never served on the petitioner. Merely because a memo of appearance was filed by an advocate person on behalf of the petitioner claiming to be his advocate would not amount to sufficient service in the absence of any other corroborative material.

15. Even respondent has not produced the said advocate as his witness to support that he was authorised by the petitioner to appear before the Trial Court.

16. The Additional Rent Controller has clearly fell in error in holding that petitioner was duly served with the summons of the Suit. On the other hand, record reveals that summons were neither tendered nor served upon the petitioner.

17. The process server has reported that he had met one Sanjay whom he did not identify and did not know. Such an endorsement on the summons cannot amount to service on the petitioner of the

summons.

18. In view of the above, I am of the view that the Additional Rent Controller has clearly erred in dismissing the application of the petitioner under Order IX Rule 13 CPC.

19. Accordingly, the impugned order dated 23.06.2020 is set aside. The application filed by the petitioner under Order IX Rule 13 CPC is allowed.

20. Consequently, the ex parte judgment dated 16.02.2012 is set aside and the order dated 19.07.2011 proceedings ex parte against the petitioner is also set aside.

21. The matter is remitted to the Additional Rent Controller.

22. Petitioner shall file the written statement in accordance with law within the statutory period. Replication shall be filed by the respondent within 30 days thereafter.

23. List before the concerned Additional Rent Controller for directions and further proceedings on 08.03.2021.

24. Copy of the order be uploaded on the High Court website and be also forwarded to learned counsels through email by the Court Master.

SANJEEV SACHDEVA, J.

DECEMBER 18, 2020/rk

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