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

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Date of decision: 18.11.2020

+ RFA 246/2020

SOLACE BIOTECH LTD

..... Appellant

Through: Ms. Sakshi Bhasin & Mr. Kapil
Kumar Giri, Advocates

versus

RAPROSS PHARMACEUTICALS LTD

..... Respondent

Through: None

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

CM APPL. 25961/2020

For the reasons stated in the application, the same is allowed and the delay of 30 days in filing the Appeal is condoned.

Application stands disposed of.

RFA 246/2020 & CM APPL. 25959/2020

1. This is an appeal filed against the impugned judgment dated 07.06.2018, Decree dated 14.02.2019 as well as order dated 23.05.2020 whereby the Trial Court has dismissed the application filed by the Appellant under Order IX Rule 13 CPC declining to set aside the ex-parte decree.

2. Appellant is stated to be engaged in the business of Manufacturing and Marketing Ayurvedic, Medicine and Pharmaceutical preparations since 2000 under the Trademark Zymase, Zymase-D and Zymase-DP and

have filed an application in 2006 for registration of the said mark before the Registrar, Trademarks.

3. The Respondent herein filed a suit bearing No. 299/2011 against the Appellant for permanent injunction restraining the use of the said mark and/or any other deceptive or similar trademark, alleging infringement and passing off. The Appellant appeared in the suit on receipt of summons in 2008 and filed the Written Statement along with supporting documents. After the issues were framed on 22.11.2014, Respondent filed its list of witnesses and evidence by way of affidavit of PW-1. The Appellant was proceeded ex-parte on 25.05.2017. After the completion of ex-parte evidence, the suit was fixed for final arguments on 09.10.2017 and thereafter a judgement was passed on 07.06.2018.

4. As per the Appellant, Respondent sent a legal notice dated 10.01.2019 informing the Appellant about the judgement dated 07.06.2018, where upon the Appellant filed an application under IX Rule 13 CPC to set aside the ex-parte judgement. The application was dismissed vide order dated 23.05.2020 which is assailed before this Court along with the judgement and decree.

5. Application filed before the Trial Court under Order IX Rule 13 CPC is on record. Relevant part of the Application is extracted hereunder for ready reference:

“3. That there was a non-communication between the Defendant and the then counsel of the Defendant, who did not communicate the Defendant regarding the change of the court because of which the Defendant could not appear before this court.

4. Further, though the Defendant was regularly appearing before this Hon’ble Court up to the time the matter was transferred from the court of Ms. Sarita Birbal to this Hon’ble

Court. The defendant has not been actually served with the proper court notice for the change in the court on the correct address in Ambala District, Punjab. Though the Plaintiff knew the correct and new address of the Defendant, it did not bother to inform the Defendant and sought to have an ex-parte decree against the Defendant.”

6. As is evident the ground taken in the application was that there was non-communication between the Appellant and its counsel, who did not communicate regarding the change of the Court, because of which the Appellant could not appear before the Court which passed the judgement. It was further averred that the Appellant was regularly appearing before the Court upto the time the case was transferred from the Court of Ms. Sarita Birbal and once the Court changed he was not served with a notice, despite the fact that the Respondent knew the address of the Appellant in Punjab and yet did not intimate about the change of Court. The Appellant came to know of the judgement only through the legal notice dated 10.01.2019 sent by the Respondent.

7. The Trial Court has dismissed the Application by placing reliance on the judgment of this Court in ***Sweety Gupta vs. Neety Gupta 2016 (160) DRJ 93***, relevant portion of which reads as under:

“10. The last corrective provision in the Code of Civil Procedure, 1908 is Rule 13 of Order IX which provides the circumstances under which an exparte judgment and decree could be set aside/rescinded. Rule 13 of Order IX reads as hereunder:-

13. Setting aside decree exparte against defendant—In any case in which a decree is passed exparte against the defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not

duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payments into Court or otherwise as it thinks fit, and shall appoint a day for proceedings with the suit. Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a decree passed exparte merely on the ground that there has been 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 plaintiff's claim]

[Explanation:- Where there has been an appeal against the decree passed exparte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that exparte decree.]

11. It would be relevant here in this context to state that before the amendment in the Code of Civil Procedure, Rule 13 of the Order IX provided that when a decree had been passed exparte against the defendant who satisfied the Court that summons were not duly served upon him, the Court was bound to set aside the decree. It was immaterial whether the defendant had knowledge about the pendency of suit or whether he was aware as to the date of hearing and yet did not appear before the Court. The Law Commission, after considering the expression "duly served", recommended for amendment of Rule 13 and a second proviso was added mandating that an

exparte decree shall not be set aside merely on the ground of irregularity in the service of summons if the Court was satisfied that the defendant was aware of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

12. Thus, the amended provisions it makes no difference as to whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in order V of the Code, but whether (I) he had notice of the date of hearing of the suit, and (II) whether he had sufficient time to appear and answer the claim of the plaintiff. If the answer to the aforesaid two posers are found in affirmative, there can be rescinding of an exparte decree even if it is proved that the summons were not duly served. What is of importance now is that the court is required to be convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the claim of the plaintiff.”

8. The Trial Court has also recorded that summons were duly served on the Appellant herein being the Defendant in the Trial Court. The order is predicated on the amendment to Rule 13 of Order IX CPC whereby a second proviso was added mandating that an ex-parte decree shall not be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the Defendant was aware of the date of hearing and had sufficient time to appear and answer the Plaintiff's claim.

9. The Trial Court has noted that the plea of the Appellant in the application that on transfer of the case from the earlier Court of Ms. Sarita Birbal Learned ADJ he did not receive any Court notice from the Court to which the case was transferred, is incorrect and untenable. The record revealed that the file was transferred to the Court of Shri N.K. Goyal and again transferred on 23.09.2010 to the predecessor of the

Court. On 22.03.2011 counsel for the Appellant had appeared and argued the injunction application, which was allowed vide order dated 22.11.2014 against the Appellant. Subsequently also a proxy counsel had appeared for the Appellant and it was only on 25.05.2017 that the Appellant was proceeded ex-parte. Thus according to the Trial Court the Appellant had complete knowledge of the case even after the same was transferred and the plea of non-issuance of notice was rejected.

10. Pursuant to the directions of this Court the Appellant has filed on record the order sheets of the Trial Court. Perusal of the order sheets indicates that the counsel/proxy counsel of the Appellant was appearing off and on on different dates upto 03.03.2016. On 21.07.2016 there was no appearance on behalf of the Appellant and in the interest of justice the Court adjourned the matter for further cross-examination of PW-1. On 27.10.2016 again there was no appearance for the Appellant and the Court records that the case was called and re-called repeatedly. PW-1 was present with the document proposed as Ex.PW-2/A which was allowed to be tendered in additional evidence. PW-2 was examined in chief and last and final opportunity to cross-examination of PW-2 was granted to the Appellant subject to cost of Rs. 10,000/- and the case was adjourned to 27.01.2017 for further cross-examination of PW-1. Again there was no appearance on 27.01.2017 and the opportunity to cross-examine was closed. Subject to payment of cost imposed earlier Appellant was granted opportunity to lead defence evidence on 13.04.2017.

11. On account of the Court being on leave the case was adjourned to 25.05.2017 on which date the Appellant was proceeded ex-parte and the relevant order is as under:-

“M/s. Rapross Pharmaceuticals Vs. M/s Solace Biotech

TM no. : 54/10 (1034/16)

25.05.2017

Present: Ms. Renu Narula, Ld. proxy counsel for the plaintiff.

None for the defendant.

A perusal of order sheet starting from 03.03.2016 till today reveals that the defendant has not been appearing in the matter. The defendant is accordingly proceeded ex parte. Plaintiff has already closed its evidence.

Now list for ex parte final arguments on 09.10.2017.

(Vinod Yadav)

Addl. District Judge (Central)-10

Delhi: 25.05.2017”

12. The case thereafter fixed on 09.10.2017 on which date ex-parte arguments were heard on behalf of the Respondent and finally on 12.02.2018 final arguments were heard and the judgement was pronounced subsequently.

13. The record shows that the Appellant had complete knowledge of the pendency of the case even after it was transferred and therefore the plea set up by the Appellant that there was no notice issued, is completely untenable.

14. In the Application filed before the Trial Court, there are no pleadings or averments as to why the Appellant or his counsel did not appear on 25.05.2017 or on any subsequent dates till the pronouncement of the judgement. Learned counsel for the Appellant argued before this Court that the counsel who had been appearing for the Appellant was

negligent and did not pursue the case properly and did not communicate about the case proceedings and the hearing dates. The Appellant is situated in Ambala and the Director managing the day to day business, due to his business commitments could not attend the hearings personally.

15. This contention of the Appellant, in my view, cannot be accepted for twofold reasons. Firstly, there is no such pleading in the Application filed under Order IX Rule 13 CPC. It is not averred that the counsel was negligent and therefore the Appellant had no notice of the proceedings. Learned counsel for the Appellant during the hearing, on a pointed query by the Court if any complaint had been made against the counsel answered in the negative. The record also shows that the Appellant had complete knowledge of the proceedings as it was being represented by the counsel/proxy counsel, who could not have been appearing without the instructions of the Appellant. Therefore it cannot be contended that the counsel did not inform the Appellant of the dates of hearing.

16. Supreme Court in the case of ***Sunil Poddar v. Union Bank of India (2008) 2 SCC 326***, delineated the scope and conditions required to be satisfied for setting aside an ex-parte decree. Relevant para reads as follows:-

“19. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the defendant had otherwise knowledge of the

proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code. Since the said provision applies to Debt Recovery Tribunals and Appellate Tribunals under the Act in view of [Section 22\(2\)\(g\)](#) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before the DRT, they had no sufficient time to appear and answer the claim of the plaintiff-bank and on that ground, ex parte order deserves to be set aside.”

17. This Court in the case of ***Pranesh Gupta and Ors. v. Jagdish Bansilal Khurana***, (2019) 173 DRJ 661 relying on the principles culled out in the case of ***Sunil Poddar*** (*supra*) and the judgement of the Division Bench of this Court in ***Sweety Gupta*** (*supra*), held as follows:-

“12. This Court is satisfied that the defendant had full knowledge of these proceedings and could have appeared and answered the claim of the plaintiff. No case for setting aside of the ex parte decree is made out. The defendant has also failed to show sufficient cause for condonation of delay of 475 days in filing and 75 days in re-filing the application under Order IX Rule 13 of the Code of Civil Procedure. The defendant has raised the plea of medical illness. However, it is not disputed that the defendant appeared before the learned Metropolitan Magistrate on 25th June, 2012, 13th March, 2013, 21st June, 2013, 09th July, 2013 and 10th July, 2013. No case for condonation of delay in filing as well as re-filing of the application under Order IX Rule 13 of the Code of Civil Procedure is also made out.”

18. Having perused the application under Order IX Rule 13 CPC as well as the impugned order dated 25.05.2017, this Court finds no infirmity with the order, more particularly, in view of the amendment to

the provision of Rule 13 Order IX CPC and the judgements referred to above.

19. Appeal along with the accompanying application is accordingly dismissed.

JYOTI SINGH, J

NOVEMBER 18, 2020/rd

