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

+ **FAO(OS)(COMM) 37/2021 & CM APPLs. 8493-8495/2021**

ROHIT SHARMA

.....Appellant

Through: Mr. Vishnu Shankar Jain, Advocate

versus

A.M. MARKET PLACE PVT. LTD. & ORS.

....Respondents

Through: Ms. Shwetasree Majumder,

Mr. Prithvi Singh and Ms. Vasundhara
Majithia, Advocates.

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Date of Decision: 03rd March, 2021

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

MANMOHAN, J (Oral):

1. The appeal has been heard by way of video conferencing.
2. Present appeal has been filed challenging the order dated 14th January, 2020 passed by the learned Single Judge disposing of IA No.7667/2019 in CS (COMM) No. 1055/2018 filed under Order IX Rule 7 of CPC by appellant-defendant No.1 for recall of the order whereby the Trial Court decided to proceed *ex parte* against the appellant-defendant No.1. The appeal is accompanied by an application seeking condonation of delay of 263 days in refiling the appeal.

3. The learned Single Judge by the impugned order imposed cost of Rs.30,000/- for setting aside the order dated 19th December, 2018 to the extent that the Court had proceeded *ex parte* against the appellant-defendant No.1. However, the learned Single Judge held that appellant-defendant No.1's right to file written statement was closed. The relevant portion of the impugned order dated 14th January, 2020 is reproduced hereinbelow:-

"3. The present application seeking recall of order dated December 19, 2018 reads as under:

"4. That the applicant/Defendant No.1 could not appear on 19.12.2018 as it had no knowledge about the pendency of the instant suit. The non presence of the applicant was neither deliberate nor intentional. The Hon'ble Court has passed an order to proceed ex-parte against the applicant vide order dated 19.12.2018.

5. That the instant application is being filed for recalling/setting aside of order dated 19.12.2018 to proceed ex-parte against the applicant/Defendant No.1 on the ground that he had no knowledge about the filing and pendency of the case and the summons of the court were never delivered on the applicant or any member of his family and further that no summons have been issued by the Court in the State of Uttar Pradesh under Section 28 of CPC. It is further submitted that the order to presume service on the applicant is erroneous and subsequent order passed on the basis of such presumed service to precede ex-parte is also liable to be recalled in the interest of justice.

6. That it is respectfully submitted that no such summon was ever came at the residence of the applicant and his mother never came to know about any summons and she never refused to receive the postal envelop.

7. That it appear that Plaintiff with a view to get favourable order from the Court managed the postal department and got the

noting of refusal even though no such postal article was ever given or tried to be given to the mother of the applicant.”

4. The averments made in the application are not at all inspiring. In fact, by way of this application, defendant no.1 is casting aspersion on the postal authority. The application does not disclose the fact as to how defendant no.1 came to know about the pendency of these proceedings. In fact, it is argued, that the postman had not come. No supporting affidavit of the plaintiff's mother has been filed. Be that as it may, as this application is only for recall of order dated December 19, 2018, in the interest of justice and subject to the condition that the defendant no. 1 shall pay an amount of Rs.30,000/- to the plaintiff, the order dated December 19, 2018 is recalled. It may be clarified here that as the defendant no.1 has not filed the written statement within the stipulated period of 120 days, he has lost the opportunity to file the same. The application is allowed to the aforesaid extent. The cost shall be paid within a period of four weeks.

4. Learned counsel for the appellant-defendant No.1 states that no summons were served or tried to be served on the appellant-defendant No.1 and alleged refusal of the appellant-defendant No.1's mother cannot be deemed to be sufficient service of summons on the appellant-defendant No.1 and therefore, the right of filing the written statement could not have been taken away. In support of his submission, he relies upon Order V Rules 15, 17, 19 and 21 of CPC.

5. Learned counsel for the appellant-defendant No.1 further submits that as the Trial Court had issued summons by all modes, the Trial Court had to be satisfied that the appellant-defendant No.1 had in fact been served by all modes before proceeding *ex parte* against the appellant-defendant No.1.

6. *Per contra*, Ms. Shwetasree Majumder, learned counsel for respondents states that the impugned order suffers from no illegality and the

present appeal should be dismissed. She also states that the delay in filing/re-filing the present appeal is much more than what has been stated in the accompanying application.

7. Having heard learned counsel for the parties, this Court finds that the respondent-plaintiff has filed a suit for permanent injunction restraining infringement of trademarks, passing off, dilution, damages, rendition of accounts, delivery up, transfer of domain name etc. During the hearing it transpires that in the plaint, it has been averred that the respondent-plaintiff runs and operates an e-commerce marketplace under the flagship brand LIMEROAD from the website and domain name www.limeroad.com. It is further averred that the defendants have opened a website called www.limeroadwinner.in wherein they are posing as the respondent-plaintiff's Prize Department and are offering lottery and LIMEROAD lucky draws. The website of the defendants allegedly contains hoax pictures of winners of the LIMEROAD Lottery and luck draw. It is the case of the respondent-plaintiff that executives of appellant-defendant posed as executives of the respondent-plaintiff and made calls to various individuals stating that they were calling from respondent-plaintiff's Gift Department asking them to deposit a sum of money with a particular bank account in order to avail free gifts such as LED Televisions, Cars, Laptops, etc. On 02nd August, 2018, summons in the suit were issued to the appellant-defendant by all modes and an injunction order was passed.

8. On 25th September, 2018, the learned Joint Registrar of this Court noted that affidavit of compliance had been filed and summons issued to appellant-defendant No.1 had been deemed to have been served through

speed post. The relevant portion of the order dated 25th September, 2018 passed by the learned Joint Registrar is reproduced hereinbelow:-

“Notice. Notice accepted by Learned counsel for the defendant no.4, 5, 7, 8 and 9. Time sought to file reply.

Affidavit of compliance have been filed. Summons issued to D-1 through speed post, received back with remarks "refused by mother." In these circumstances it appears that defendant no.1 is having knowledge of the pendency of the present suit. So, he is deemed to be served....”

9. In pursuance to the aforesaid order, the Trial Court vide order dated 19th December, 2018 proceeded *ex parte* against the appellant-defendant No.1.

10. It is pertinent to mention that Chapter VI(1)(e) of the Delhi High Court (Original Side) Rules, 2018 provides that Court may at the first instance issue summons by all or any of the modes of service, viz., registered post (acknowledgement due); speed post; authorized courier; fax; electronic mail service; SMS with a hyperlink (if required) or any other web based or virtual communication mode; or dasti service in addition to service of summons in the ordinary way.

11. Since in the present case, the appellant-defendant No.1 had been served by one of the modes of service i.e. by way of speed post, as held by the learned Joint Registrar vide order dated 25th September, 2018, which has not been challenged, this Court is of the view that the appellant-defendant No.1 is deemed to have been served in accordance with the Delhi High Court (Original Side) Rules, 2018.

12. Neither the Code of Civil Procedure nor the Delhi High Court (Original Side) Rules, 2018 stipulate that the defendant has to be served by all modes before he/she is proceeded *ex parte* in the event the summons are

issued by the Court by all modes. This court is of the view that the intent behind incorporating different modes of service was to make use of the latest technology to expedite the disposal of suits and to ensure that suits do not drag on for a long period of time on account of lack of service on the defendant. However, if the submission of the appellant-defendant is accepted that the defendant has to be served by all modes before it is proceeded *ex parte*, it would negate the intent of the legislature and of this Court in amending the Code of Civil Procedure and the Delhi High Court (Original Side) Rules, 2018 respectively.

13. Further, even if it is assumed that there is any conflict between the provisions of CPC and Delhi High Court (Original Side) Rules, 2018, it is settled law that the High Court (Original Side) Rules will prevail. [See: ***M/s. Print Pak Machinery Ltd. vs. M/s. Jay Kay Papers Conveters*, AIR 1979 Del 217 (F.B.)** and ***Iridium India Telecom Ltd. vs. Motorola Inc.*, (2005) 2 SCC 145**].

14. This Court is also of the opinion that the order of the learned Joint Registrar dated 25th September, 2018 is the foundational order and as it has not been challenged till date by way of a chamber appeal, the order dated 19th December, 2018 as well as the impugned order dated 14th January, 2020 are its logical sequitur and/or its logical consequence.

15. This Court is in agreement with the finding of the learned Single Judge in the impugned order that the application under Order IX Rule 7 CPC filed by the appellant-defendant No.1 does not disclose as to how the appellant-defendant No.1 came to know about the pendency of the said proceeding. In fact, no supporting affidavit of appellant-defendant No.1's mother has been filed to dispute the report of the Postal Authority.

16. As admittedly, the appellant-defendant No.1 did not file its written statement within one hundred and twenty days, the learned Single Judge was right in law in not extending the time to file the written statement by the appellant-defendant No.1. In fact, the Supreme Court in ***SCG Contracts (India) Private Limited vs. K.S. Chamankar Infrastructure Private Limited & Ors., (2019) 12 SCC 210*** has upheld the view of a learned Single Judge of this Court in ***OKU Tech Pvt. Ltd. Vs. Sangeet Agarwal & Ors., 2016 SCC OnLine Del 6601*** that in the event the defendant fails to file the written statement within one hundred and twenty days from the date of service of summons, no further time can be granted. The relevant portion of the judgment of the Supreme Court is reproduced hereinbelow:-

“8. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 came into force on 23-10-2015 bringing in their wake certain amendments to the Code of Civil Procedure. In Order 5 Rule 1, sub-rule (1), for the second proviso, the following proviso was substituted:

“Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.”

Equally, in Order 8 Rule 1, a new proviso was substituted as follows:

“Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such

other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred and twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.”

This was re-emphasised by re-inserting yet another proviso in Order 8 Rule 10 CPC, which reads as under:

“10. Procedure when party fails to present written statement called for by court.—*Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the court, as the case may be, the court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up:*

Provided further that no court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement.”

A perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days. However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the fact that beyond 120 days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record. This is further buttressed by the proviso in Order 8 Rule 10 also adding that the court has no further power to extend the time beyond this period of 120 days.

10. Several High Court judgments on the amended Order 8 Rule 1 have now held that given the consequence of non-filing of written statement, the amended provisions of the CPC will have to be held to be mandatory. See Oku Tech (P) Ltd. v. Sangeet Agarwal [Oku Tech (P) Ltd. v. Sangeet Agarwal, 2016 SCC OnLine Del 6601] by a learned Single Judge of the Delhi High Court dated 11-8-2016 in CS (OS) No. 3390 of 2015 as followed by several other judgments including a judgment of the Delhi High Court in Maja Cosmetics v. Oasis Commercial (P) Ltd. [Maja Cosmetics v. Oasis Commercial (P) Ltd.

11. We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order 8 Rule 1 on the filing of written statement under Order 8 Rule 1 has now been set at naught.”

(emphasis supplied)

17. Consequently, the impugned order is in conformity with law and suffers from no infirmity. Accordingly, the present appeal and applications, being bereft of merit, are dismissed.

18. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through e-mail.

MANMOHAN, J

ASHA MENON, J

MARCH 03, 2021

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