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

% *Judgment reserved on : 20th April, 2022*
Judgment pronounced on : 05th May, 2022

+ **FAO (OS) (COMM) 51/2020**

1. **M/S. MAINI SCAFFOLD SYSTEMS**

Having its office at
B-1/A-21, Ground Floor,
Mohan Cooperative Estate,
New Delhi – 110044.

2. **Mr. Ajay Maini,**
Managing Partner, M/s. Maini Scaffold Systems
Having its office at
B-1/A-21, Ground Floor,
Mohan Cooperative Estate,
New Delhi – 110044.

..... Appellants

Through : **Mr. Rohit Kumar Yadav, Mr. Gaurav
Sarkar and Mr. Ankit Rao, Advs.**

versus

1. **Mr. S. K JAIN**
Proprietor-Padmawati Metals
902/290, Gali No. 9,
Shalimar Industrial Area
New Delhi-110088.

2. **Mr. Pramod Maini,**
S/o. Sh. P.L. Maini,
R/o. Plot No. 23,
Sector-29, Faridabad,
Haryana.

..... Respondents

Through : **Mr. S.S.Lingwal, Adv. for R-1.
Mr. Suchakshu Jain, Adv. for R-2.**

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE POONAM A. BAMBA

[Physical Hearing/Hybrid Hearing (as per request)]

POONAM A BAMBA, J.

- 1.0** The instant appeal has been preferred by the appellants under Section 104 of the Code of Civil Procedure, 1908 (“CPC”) read with Order XLIII rule 1(d) and Section 151 of the CPC against the order dated 21.01.2019 passed by the Ld. Single Judge in I.A. no.2086-2087 of 2018 in CS(OS) No.2222 of 2013 (“**impugned order**” in short). Vide impugned order, the Ld. Single Judge had dismissed the application filed by the appellants and the respondent no. 2 herein under Order IX rule 13 CPC for setting aside the ex-parte judgment/decreed dated 15.01.2015 passed against them in CS(OS) no.2222 of 2013.
- 2.0** Let me briefly mention the factual backdrop in which the present appeal came to be filed:
- i.** Mr. S.K Jain, the respondent no. 1 herein had filed a suit bearing no. CS(OS) No. 2222/2013 for recovery of Rs 25,00,000/- along with pendente lite and future interest etc. against the appellant no. 1, the partnership firm and its partners i.e. the appellant no. 2 and the respondent no. 2 herein;
 - ii.** summons vide order dated 18.11.2013, were issued to the defendants i.e. the appellants and the respondent no. 2 herein, through all modes i.e. through ordinary course, registered post, speed post and through approved courier, returnable on

13.02.2014;

- iii. On the next date of hearing i.e. 13.02.2014, the Joint Registrar has *inter alia* recorded about the summons as under :

*“Summons issued by **ordinary process** received back unserved with the report **that defendants have left the given address**. However, **summons sent by Registered Cover have been served as per the tracking report of the India post**.*

Summons have also been served on defendant no. 3 by courier.

Ld. Counsel for plaintiff has filed the tracking reports. In view of the tracking report of India post, I deem it to be an appropriate service on the defendants. Defendants are at liberty to file their written statements within the stipulated period with advance copy to ld. Counsel for plaintiff.

Put up on 22.05.2014.

*Anil Kumar Sisodia (DHJC)
JOINT REGISTRAR*

FEBRUARY 13, 2014”

- iv. as neither anyone appeared on behalf of the defendants i.e. appellants and the respondent no. 2 herein nor did they file written statement, the **Learned Single Judge vide order dated 15.01.2015 passed a decree in favour of the plaintiff i.e. respondent no. 1** herein observing *inter alia* as under:

“

1. The Joint Registrar in his order dated 13.2.2014 has noted that the summons sent to the defendant by Registered Cover have been served as per the tracking

report of the postal department. None has appeared for the defendant nor has a written statement been filed.

2. *A perusal of the plaint shows that the suit is filed for recovery of Rs.25 lacs.*

3. *The plaintiff served a legal notice on 30.09.2013. On 21.10.2013, Counsel for the defendant sent a reply where defendants have admitted the receipt of a sum of Rs.25 lacs by RTGS on 29.8.2013.*

4. *Accordingly, in view of order 8 Rule 10 CPC, I pass a decree in favour of the plaintiff for a sum of Rs. 25 lacs alongwith costs. The plaintiff shall also be entitled to pendent lite interest @ 9% per annum from the date of filing of the suit till recovery.*

JAYANT NATH, J

JANUARY 15, 2015”

- v. against the aforesaid order dated 15.01.2015, the appellants and the respondent no. 2 herein, filed an application under Order IX rule 13 CPC bearing I.A No. 2086/2018 in CS(OS) No. 2222/2013, for setting aside of the said order/decreed dated 15.01.2015; **The said application was dismissed by Learned Single Judge vide order dated 21.01.2019 i.e. the impugned order** for the reasons recorded therein;
 - vi. It is against this order of Learned Single Judge, the appellants have preferred the present appeal.
- 3.0 The appellants have challenged the impugned order dated 21.01.2019 of Learned Single Judge mainly on the grounds that :
- i. the Ld. Single Judge failed to appreciate that the

summons/notices issued to the appellants and respondent no. 2 were never served upon them as they had shifted/left (on 13.11.2013 i.e. prior to issuance of summons on 18.11.2013) the given address i.e. B-1/D-5, Mohan Co-operative Industrial Estate, Mathura Road (Opp. NTPC Power House) Delhi prior to the issuance/delivery of summons;

- ii. the Learned Single Judge also failed to appreciate that the Ld. Joint Registrar in his order dated 13.02.2014 had wrongly construed that the summons were served upon the respondent no. 2 through courier as the tracking report of the same showed 'attempted' whereas, the same was never delivered to the respondent no. 2. The said status of 'attempted' is not the same as delivered to the consignee because the consignee was not staying any more at the given address where the delivery was attempted;
- iii. the Ld. Single Judge also failed to appreciate that all the speed post envelopes were received back undelivered and therefore, erred in assuming delivery merely on the basis of a courier receipt of a private company (DTDC) which also does not show the delivery as complete. It merely shows the delivery to be attempted;
- iv. the Ld. Single Judge also failed to appreciate that the delivery in the present case was never clear and was very much doubtful and a money decree could not have been passed on the basis of the same.

- 3.1** Ld. counsel for the respondent no. 2 (defendant no. 3) submitted that the respondent no. 2 was never served. Ld. counsel argued that ‘unclaimed’ and ‘refusal’ are different; and “unclaimed” cannot be treated as ‘refusal’, particularly as the process server/postal department’s reports on summons sent through ordinary course, RC and Speed Post clearly mentioned about the addressees having already left the given address.
- 4.0** Per Contra, Ld. Counsel for the respondent no. 1 herein/plaintiff in the original suit, argued that the present appeal is frivolous and is only a ploy to protract the execution proceedings. He also argued that the respondent no. 2 who was the partner of appellant no. 1 firm along with appellant no. 2 at the relevant point of time, was duly served. In fact, the appellants and the respondent no. 2 were duly served with legal notice dated 21.10.2013 at the same address upon which the summons for the suit were delivered; the appellants and the respondent no. 2 had even replied to the said legal notice through their counsel. They were therefore, well aware about the ongoing proceedings in the suit CS(OS) No. 2222/2013 but deliberately avoided the service of summons. Ld. for the respondent no. 1 also argued that only after the receipt of legal notices and service of summons, the appellants and the respondent no. 2 deliberately shifted to nearby location in order to avoid service of summons in the matter. It was further argued that the collusion and deceit on the part of the appellants and the respondent no. 2 is also apparent from the fact that they have chosen to be on the different sides of this appeal and have

been misleading this court by material suppression of facts despite being well aware of the ongoing *lis*.

4.1 Ld. Counsel for the respondent no. 1 also submitted that the factum of due service is evident from the tracking report of speed post of Indian Postal Service showing- “Delivery Attempted:Unclaimed” which means that the appellants and the respondent no. 2 did not claim/refused to receive the summons issued to them and the same kept lying with the postal department as unclaimed for over a week. To buttress his argument that the same amounted to due service, learned counsel for the respondent no. 1 placed reliance on the judgment of the Coordinate Bench of this Court in the case titled as *Ajay Jain vs. Rajat Sharma, CM(M)/777/2012, decided on 06.08.2012*. It was argued that the Learned Single Judge rightly dismissed the appellants’ and the respondent no. 2’s application under Order IX rule 13 CPC in view of the facts and the settled position of law.

5.0 We have duly considered the submissions made by both the sides and have perused the record carefully.

6.0 The appellants as well as the respondent no. 2 have refuted service of summons on them. Record shows that vide order dated 18.11.2013, the service of summons on the appellants and the respondent no. 2 was directed through PF, RC, speed post and through approved courier. As per record,

(A) Summons sent through **ordinary process** to all the defendants

i.e. the appellants and the respondent no. 2 herein at the given address were received back with the similar reports dated 01.02.2014 of the Process Server mentioning –

आज दिनांक 30/1/14 को मौके दिए गए पते पर आकर M/s MAINI SCAFFOLD SYSTEM/ AJAY MAINI /SH. PARMOD MAINI को तय समय पर किया तो मौके पर मौजूदा गार्ड/ गार्ड जिसने अपना नाम GOVIND RAM बताया जुबानी बयान किया की **कंपनी/व्यक्ति खाली करके चले गए गवाही तहरीर** ना मिला लिहाज़ा रिपोर्ट पेश है।

(B) Summons sent through **Registered Post**, were received back with the following reports dated 16.01.2014:

- (i) M/S Maini Scaffold System: Registered AD No. RD367525493IN “**deficiency of Rs. 10 in postal stamp** hence returned”.
- (ii) Ajay Maini: Registered AD No. RD367525462IN “Leftwa” (without address).
- (iii) Parmod Maini: Registered AD No. RD367525476IN “Leftwa” (without address).

C(1) Summons sent through **Speed Post** received back with the following reports dated 16.12.2013:

- (i) **M/S Maini Scaffold System**, [defendant no. 1/appellant no. 1 herein], Speed Post No. ED315720815IN “**left without address**”.
- (ii) to **Ajay Maini**, [defendant no. 2/appellant no. 2 herein], Speed Post No. ED315720801IN “**left without address**”.

(iii) To **Parmod Maini**, [defendant no. 3/appellant no. 3 herein,
Speed Post No. ED315720917-IN “**left without address**”.

C(2) There are also on record, copies of track results of the aforesaid summons sent through speed post, to the defendants/appellants and the respondent no. 2 herein, bearing similar reports, which read as follows:

Tracking Report for ED315720815IN – Appellant no.1/Defendant no. 1

Date	Time	Status at	Status
16/12/2013	17:50:00	Badarpur S.O (South Delhi)	Delivery Attempted: Unclaimed

Tracking Report for ED315720801IN- Appellant no.2/Defendant no. 2

Time	Date	Status at	Status
17:50:00	16/12/2013	Badarpur S.O (South Delhi)	Delivery Attempted: Unclaimed

Tracking Report for ED315720917IN – Respondent no.2/Defendant no. 3

Date	Time	Status at	Status
16/12/2013	17:50:00	Badarpur S.O (South Delhi)	Delivery Attempted: Unclaimed

(D) Summons sent through **Courier DTDC** :

As per courier receipts on record, the summons to all the defendants

i.e. appellants and the respondent no. 2 were sent through DTDC – Courier and Cargo Ltd. vide receipts no. Z07255527, Z07255528 & Z07255529, respectively. Neither is any returned envelope nor is any delivery report on record. However, as far as defendant no. 3 i.e. Parmod Maini, the respondent no. 2 herein is concerned, there is one tracking result on record, which reads as under :

Shipment Dates		
Origin:	Booking Date	Status
I.P. Extension - Delhi	Mon, Dec, 16, 2013 12:00 AM	Attempted
Destination:	Delivery Date	
Delhi	Wed, Dec, 18, 2013 04:00 PM	

7.0 From the above record, it is evident that the summons sent through ordinary course, registered post (except for M/s. Maini Scaffold System/appellant no. 1 herein, to whom the summons through registered post could not be sent due to deficiency in postal stamp) and speed post were **received back with the report “*Khali Karke Chale Gaye Hain/Leftwa/Left Without Address*”**. From the same it is apparent that summons remained unserved through all the three modes and were returned accordingly.

7.1 Ld. Counsel for the respondent no. 1 herein (plaintiff in the suit) argued that the tracking report of speed post of Indian Postal Service showing- “Delivery Attempted:Unclaimed” w.r.t. all the defendants/appellants and the respondent no. 2 herein, means not claiming/refusal to receive summons. Thus, the defendants/appellants

and the respondent no. 2 were duly served. Reliance upon the judgment of Co-ordinate Bench of this court in *Ajay Jain's case* (*supra*) was placed. On the other hand, Ld. counsel for the appellants and the respondent no. 2 argued that 'unclaimed' cannot be treated as 'refusal', particularly as the service reports on summons sent through ordinary course, RC and Speed Post clearly mentioned about the addressees having already left the given address.

7.1.1 Suffice it to state that in view of the report "Left without address" of the postal department on the summons sent through speed post and registered AD; and similar report of the process-server on the summons sent through ordinary course, 'Tracking Result' of speed post showing status as "Delivery Attempted: 'Unclaimed' can hardly be treated as proof of due service. Once the addressees (as per Postal Department's reports) were not staying at the given address, they cannot be faulted with "not claiming" the envelop/summons. It would also be not out of place to mention here that in *Ajay Jain's case* (*Supra*), as relied upon by Ld. counsel for respondent no. 1, summons were sent at the correct address of petitioners. In view of which, the court had arrived at a finding that presumption of service as contemplated under section 27 General Clauses Act could be drawn; and in that fact situation "Unclaimed" was considered as not claimed and hence, was treated as nothing but refusal. Whereas as mentioned above, in the instant case, the report of the process server as well as that of the postal department on summons sent through, Registered Post and Speed Post mentions that the addresses "Left without

Address”. Thus, the judgement in *Ajay Jain’s* case is hardly of any assistance to the respondent no. 1.

7.2 As far as the summons sent to the respondent no. 2 herein (defendant no. 3 Pramod Maini) through courier DTDC is concerned, the ‘Tracking Result’ shows status on 16.12.2013 as ‘Attempted’. The same also does not in any manner indicate service of summons, as pleaded by ld. counsel for respondent no. 1. More so, in the light of above reports of “Left Without Address” on summons sent through ordinary course, registered post as well as speed post.

7.2.1 In this regard, Ld. counsel for the respondent no. 1 pleaded that the Tracking Result also mentions “Delivery Date - Wed. Dec,18, 2013 04:00 PM”, which clearly shows that the summon was duly delivered on 18.12.2013. In rebuttal, Ld. counsel for the appellants and respondent no. 2 argued that Tracking Result clearly mentions the status as “ATTEMPTED”. The reference to delivery made on 18.12.2013 is the return/delivery to the courier office. Ld. counsel further submitted that had the summon been delivered, the Tracking Result would have clearly reflected the status as “Delivered”/ “Successfully Delivered”. To espouse this argument, ld. counsel drew this court’s attention to “Tracking Results”/Annexure A-7 (Page 56 of appeal file), submitting that to demonstrate this fact, they had sent a dummy parcel through the same courier i.e. DTDC; the Tracking Result (Annexure A-7) of which clearly mentions the status as “Successfully Delivered”. Had the summon been delivered to the respondent no. 2 herein, the aforesaid tracking result would have

mentioned the status as ‘Successfully Delivered’. Whereas, the status in the said tracking result is shown as ‘Attempted’.

7.2.2 I am inclined to accept the contention of the ld. counsel for the appellants and the respondent no. 2 that the status indicated is “Attempted” and not “delivered”. Even if the respondent no. 1’s argument that status is ‘delivered’, is considered for a while, though not accepted, such ‘delivery’ report would be highly suspect in the light of the fact that the summons sent through all the modes were returned with the report ‘Left Without Address’,.

8.0 In view of the above facts and circumstances, due service of summons on the defendants/the appellants & the respondent no. 2 herein is not made out from the record.

9.0 Ld. counsel for the respondent no. 1 also argued that the appellants and the respondent no. 2 were duly served with legal notice dated 21.10.2013 at the same address upon which the summons for the suit were issued; the appellants and the respondent no. 2 had even replied to the said legal notice through their counsel. Thus, they were well aware about the ongoing proceedings in the suit, but deliberately avoided the service of summons. It was argued that the said knowledge itself amounts to service. The Ld. Single Judge, therefore, rightly declined any relief under Order 9 rule 13 CPC to the appellants and the respondent no. 2.

9.1 On the other hand, ld. counsel for the appellants and the respondent no. 2 submitted that in view of clear report about they having left the

premises, no knowledge of the proceedings/ date of hearing in the civil suit, could be imputed to them merely because, earlier they were served with legal notice at the given address and had replied to the same.

9.1.1 Ld. counsel also argued that the respondent no. 1 was very well aware of their factory/permanent address as he himself has mentioned the same in para 2 of his plaint, but failed to provide the said address in the plaint. Further, in the execution petition bearing Ex. No. 314/17 filed by the respondent no. 1, Show Cause Notice to them was issued at their changed address i.e. B-1/A-21, Mohan Co-operative Industrial Estate, Mathura Road, (Opp. NTPC Power House), New Delhi which clearly shows that the respondent no. 1 was well aware about the change in their address. Attention of this court was drawn to para 2 of the plaint/suit and to the show cause notice issued in the aforesaid Execution Petition filed as Annexure A-3 (at page 47 of the appeal). These documents are not disputed by the respondent no. 1. It is seen that para 2 of the plaint reads— “2. *That defendants are having their factory premises located at Sector-6, Plot No. 1, 1-A, 2 Integrated Industrial Estate (IIE) Pantnagar, Rudrapur, Udham Singh Nagar-263153 (Uttarakhan) and at 3.4 Mile Stone, Village Gauchi, Sohna Road, Ballabgarh, Haryana.*” Further, Annexure A-3/ the show cause notice in Execution Petition, shows that it mentions the subsequent address i.e. B-1/A-21 of the appellants and the respondent no. 2, to which they claimed to have shifted.

9.2 As far as the contention of the Ld. counsel for the respondent no.1

that the appellants and the respondent no. 2 had knowledge of the proceedings, having received the legal notice at the given address and replied to the same; and therefore, no relief under Order 9 rule 13 of CPC could be granted to them, is concerned. Let me refer to the said provisions which reads as under:

“ORDER IX

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE

.....

13. Setting aside decree ex parte against defendants.—*In any case in which a decree is passed ex parte against a 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, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding 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 ex parte merely on the ground that there has been an 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.]”

9.2.1 From the plain reading of the second proviso to rule 13, it is clear that the court shall not set aside an ex-parte decree, if it is satisfied *that the defendant had notice of the date of hearing*. In view of the findings recorded in preceding paras and as the summons sent through all the

modes could not be delivered/served on any of the defendants/appellants and the respondent no. 2 herein, for the reason that they had shifted from the given address, knowledge of pendency of the proceedings/date of hearing in the suit filed by the respondent no. 1, cannot be imputed to them, merely because the legal notice was earlier served on them at the given address.

10.0 For the aforesaid reasons, the impugned order dated 21.01.2019 passed by Ld. Single Judge, cannot be sustained and hence, is set aside.

11.0 Accordingly, order dated 15.01.2015 whereby *ex parte* decree, in view of Order 8 rule 10 CPC, was passed in favour of the respondent no. 1 herein, is also set aside.

12.0 Parties shall appear before the concerned Registrar on **13th May 2022**, who shall proceed in the matter with completion of pleadings etc. as per law.

13.0 Appeal is disposed of accordingly.

(POONAM A. BAMBA)
JUDGE

(RAJIV SHAKDHER)
JUDGE

MAY 05th, 2022/manju

Click here to check corrigendum, if any