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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 499/2022 & CM APPL. 25425/2022, CM APPL. 25424/2022

PREETI ALIAWADI @ PREETI GUPTA Petitioner
Through: Mr. Braj Bhushan Lal and Ms. Pooja Tiwari, Advs.

versus

SHAMBHU NATH Respondent
Through: Mr. Ishan Jain, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER (ORAL)
17.10.2022

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1. At the very outset, learned Counsel for the respondent submitted, with commendable fairness, that the order dated 22nd March 2021, to the extent it strikes off the defence of the petitioner, was not sustainable in law. Accordingly, this Court, while recording its appreciation for the fair stand taken by learned counsel, sets aside the impugned order dated 22nd March 2021, to the extent it strikes off the defence of the petitioner.

2. The court proceeds to consider the challenge in the present petition on other aspects as below.

3. Given the limited peripheries of the dispute in this petition, no allusion to the facts of the case is necessary. One may, therefore,

commence the recital from 22nd March 2021, on which date the following order was passed by the learned Additional Civil Judge (“the learned ACJ”) in CS 702/2019 (*Shambhu Nath v. Preeti Alaiwadi @ Preeti Gupta*).

“CS No. 702/2019
Shambhu Nath Vs. Preeti Aliawadi @ Preeti Gupta

22.03.2021

Present: Sh. Aryendar Singh, Ld. Counsel for plaintiff.
None is present on behalf of the defendant.

Even the notice was issued upon the defendant but the premises was found locked. Though it is the duty of the defendant to pursue the matter diligently but none is appearing on behalf of the defendant. The previous conduct of the defendant from the file shows that the defendant wants to delay the matter as once the defence has already been struck off but despite that, the defendant is not pursuing the matter diligently.

The matter is pending for arguments on application under Order VII Rule 11 CPC but as none is present on behalf of the defendant, the defence of the defendant is struck off and the defendant is proceeded ex parte.

Put up for ex-parte PE on 03.06.2021.

(Rohit Gulia)
ACJ/CCJ/ARC (South)
Saket Courts, New Delhi/22.03.2021”

4. The petitioner, as the defendant in CS 702/2019, moved an application under Order IX Rule 7 of the Code of Civil Procedure, 1908 (CPC), for setting aside the order dated 22nd March 2021, to the extent it proceeded against him *ex parte*.

5. The said application came up for consideration before the

CM(M) 499/2022

Page 2 of 8

learned ACJ on 29th November 2021, on which date the following order was passed:

“CS No. 702/2019

Shambhu Nath Vs. Preeti Aliawadi @ Preeti Gupta

29.11.2021

Present: Plaintiff in person with Ld. Counsel Sh. Saravjeet Singh.

Defendant is ex-parte.

An application under Order IX Rule 7 CPC has been filed on behalf of the defendant for setting the ex-parte order dated 22.03.2021 on the ground that the counsel for the defendant had reached the Court at 2.00 pm but came to know that his matter had been proceeded ex-parte before lunch.

As per the order dated 22.03.2021, the defence of the defendant was struck off and the defendant was proceeded exparte as none appeared on behalf of the defendant. Put up at 2.00 pm for the appearance of the defendant.

(Rohit Gulia)

ACJ/CCJ/ARC (South)

Saket Courts, New Delhi/29.11.2021

At 2.00 pm

Present: Plaintiff in person with Ld. Counsel Sh. Saravjeet Singh.

Defendant is ex-parte.

None has appeared on behalf of defendant to argue on his application under Order IX Rule 7 CPC. The same is dismissed in default for non-prosecution. Plaintiff Sh. Shambhu Nath has examined himself as PW 1 and discharged.

On Statement, ex-parte PE is closed.

Put up for ex parte final arguments on 29.01.2022.

(Rohit Gulia)
ACJ/CCJ/ARC (South)
Saket Courts, New Delhi/29.11.2021”

6. The petitioner, thereafter, moved yet another application under Order IX Rule 7 of the CPC, for setting aside the order dated 29th November 2021. In the said application, the petitioner sought to submit that he was unrepresented on 29th November 2021 as his counsel was “feeling unwell”.

7. Strictly speaking, the petitioner ought to have moved an application for restoration of the earlier application under Order IX Rule 7, which came to be dismissed on 29th November 2021.

8. One may, however, ignore that aspect, as it is in view of the settled principle that citing of a wrong provision does not imperil an application if it is otherwise maintainable.

9. This second application under Order IX Rule 7, for setting aside the order dated 29th November 2021 came to be dismissed by the impugned order dated 5th April 2022, passed by the learned ACJ.

10. The impugned order reads as under:

“CS No. 702/2019
Shambhu Nath Vs. Preeti Aliawadi @ Preeti Gupta

05.04.2022

Present: Plaintiff in person with Ld. Counsels Sh.
Aryendar Singh and Sh. Saravjeet Singh.

Sh. Ramakant Sharma alongwith Sh. Vinod

Kumar Ld. Counsels for defendant.

An application under Order IX Rule 7 CPC has been filed on behalf of defendant on 03.01.2022 for setting the exparte order dated 29.11.2021 and allow the defendant to cross examine the plaintiff and his witness.

Reply to the abovesaid application has been filed on behalf of plaintiff.

It is submitted' by Ld. Counsel for plaintiff that the said application is not maintainable because the defendant wants to delay the matter unnecessarily and the defendant has no ground for non-appearance on 29.11.2021 and therefore, it is prayed that their application be dismissed.

Perusal of the record shows that this is the third application under Order IX Rule 7 CPC filed by the defendant wherein first application was allowed but the second application was dismissed vide order dated 29.11.2021 and this is the third application filed by the defendant for seeking remedy under Order IX Rule 7 CPC. It is alleged in the said application that Ld. Counsel for defendant was not well and therefore, could not appear before the Court but neither the illness is mentioned in the application nor any medical record has been filed to substantiate the ground of illness. Moreover, the conduct of the defendant throughout the proceedings of the case depicts the intention of the defendant to delay the proceedings as far as proceeding as this is the third application under Order IX Rule 7 CPC when the first application under Order IX Rule 7 CPC was allowed, thereafter also defendant failed to appear before the Court on the date fixed which shows the intention of the defendant to delay the proceedings

In my considered opinion, enough opportunity have been granted to the defendant to pursue the case diligently and no further opportunity can be granted and accordingly, the said application is dismissed.

Put up for final arguments on 08.06.2022.

(Rohit Gulia)
ACJ/CCJ/ARC (South)

11. Aggrieved by the aforesaid order, the petitioner has moved this Court under Article 227 of the Constitution of India.

12. I have heard Mr. Braj Bhushan Lal, learned Counsel for the petitioner and Mr. Ishan Jain, learned Counsel for the respondent and perused the record.

13. The reference, in the impugned order, to the application before the learned ACJ being the “third application under Order IX Rule 7 CPC” is not strictly relevant. This is because the first application under Order IX Rule 7 CPC was much prior in point of time to 22nd March 2021, and is not, therefore, of relevance to the present proceedings.

14. The first application under Order IX Rule 7 CPC, which is relevant for the present proceedings, is the application which sought setting aside of the order dated 22nd March 2021 insofar as it proceeded *ex parte* against the petitioner, and which itself came to be dismissed on 29th November 2021.

15. The application that was subsequently dismissed by the impugned order dated 5th April 2022 was, therefore, essentially the second relevant application under Order IX Rule 7 CPC – which, as already noted, ought to have been filed as a restoration application.

16. The impugned order dated 5th April 2022 rejects the petitioner’s

application for setting aside of the order dated 29th November 2021 on the ground that the petitioner had not satisfactorily explained his remaining unrepresented on 29th November 2021. The learned ACJ has noted that the only explanation tendered was that the counsel was unwell, but that the details of the illness of the counsel were not forthcoming from the application and no supporting documents had been filed in that regard.

17. Mr. Lal, learned Counsel for the petitioner prays that, in the interests of justice, his client may be given one opportunity to urge the application filed by him for setting aside of the order dated 29th November 2021, subject to terms.

18. I am of the opinion that, in the interests of justice, the request deserves to be accepted.

19. Accordingly, subject to the petitioner paying, to the respondent, by way of crossed cheque/demand draft, an amount of ₹ 5,000/- within a week from today, the impugned order dated 5th April 2022, insofar as it dismisses the petitioner's application for setting aside of the order dated 29th November 2021, is quashed and set aside.

20. The learned ACJ is requested to reconsider the petitioner's application for setting aside of the order dated 29th November 2021. The petitioner would, in the said proceedings, be entitled to attempt to satisfy the learned ACJ that there was sufficient cause for the petitioner having remained un-represented on 29th November 2021. Needless to say, this Court has not expressed any opinion on the

merits of the petitioner's application. It shall be for the learned ACJ, to arrive at its own subjective satisfaction as whether the petitioner's absence on 29th November 2021 was sufficiently explained.

21. In that process, should the learned ACJ require the petitioner to produce any documents in support of his contention that his counsel was unwell on 29th November 2021, he shall be at liberty to call upon the petitioner to produce the same.

22. Needless to say, in the event the learned ACJ allows the petitioner's application for setting aside of the order dated 29th November 2021, the learned ACJ would proceed to consider the application filed by the petitioner under Order IX Rule 7 CPC for setting aside of the order dated 22nd March 2021, to the extent it proceeds *ex-parte* against the petitioner.

23. Subject to costs of ₹ 5,000/-, as above, this petition is disposed of.

C. HARI SHANKAR, J.

OCTOBER 17, 2022
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