IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Neutral Citation No.2023:PHHC:125390-DB

FAO-COM-14-2023 (O&M)
Reserved on : 05.09.2023
Pronounced on: 22.09.2023

Makarwa Foods Pvt. Ltd. ……Appellant (s)

Versus

Del Monte Foods Pvt. Ltd. and others ……Respondent(s)

CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA
HON'BLE MR.JUSTICE ALOK JAIN

Present:- Mr. Kunal Dawar, Advocate for the appellant (s).

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G.S. Sandhawalia, J.

CM-34-FACOM-2023

Application for condonation of delay of 2 days in filing the appeal is allowed, in view of the averments made in the application, duly supported by the affidavit and keeping in view the fact that delay is nominal. Delay of days 2 in filing the appeal is condoned.

CM stands disposed of.

CM-35-FACOM-2023

Exemption application is allowed, as prayed for.

CM stands disposed of.

FAO-COM-14-2023 (O&M)

The present appeal is directed against the order passed by the Commercial Court at Gurugram dated 30.05.2023, whereby the application under Order 9 Rule 13 CPC read with Order 9 Rule 7 CPC was dismissed.

2. Vide the impugned order the said Court came to the conclusion that the notice issued to the applicant/defendant No.1 was sent at the correct address, which was the registered office of the company. The

same was verified from the Aadhaar Card of Shri Devan Kumar Yadav, Director of the Company and since the registered office was shown at House NO.1252, Sector-17C, Gurugram. It was recorded that notice had been served upon the father of defendant No.1 Shri Tula Ram Yadav as per the report of the Process Server and who had not accepted the notice and told that his son is residing at Dehradun for the last 5-6 years. It was found that since the father of defendant No.1 was present at the registered office, the report of the Process Server was correct, may be it was not signed by a witness but no prejudice had been caused by non-affixation of summons, since the same had been sent at the premises of the defendant No.1 and read by the Director's father. Therefore, knowledge of the summons could not be denied. Summons which had been sent for the next date of hearing at the same address was served upon a lady, who claimed to be a tenant in the said premises and, who had reached out on the telephone call to father of the Director on his mobile number, who had again taken the same stand that his son is staying away for last many years.

3. Resultantly, substituted service by way of publication had been done in the newspaper *'The Tribune'* for 16.09.2021 and notice was duly published on 21.08.2021. It was held that the appellant had knowledge about the filing of the suit, but he was intentionally avoiding contesting the same. Accordingly, the argument raised that the appellant was not properly served at the Dehradun address, though being aware of the cash memos/sale invoices issued by the appellant company, did not weigh with the Trial Court while dismissing the said application.

4. Counsel for the appellant has vehemently argued that the affixation was not done at some conspicuous place in the Court and the procedure which is prescribed had not been adhered to. The publication had been done in the newspaper which was not circulating in Uttarakhand and, therefore, the service was not properly effected and the appellant should be given a chance to contest the proceedings.

5. A perusal of the paper-book would go on to show that the suit for recovery of ₹2,75,16,000/- alongwith interest was initiated on account of the fact that purchase orders had been placed upon the defendant-appellant which were for the purposes of packaging material for food items. Raw material had also been supplied for converting the same into finished goods and a running account had been maintained. A delivery of the requisite finished items was not upto the mark and ₹78,25,010.35 had been paid alongwith the packaging material. Apparently, the Bank had sealed the factory of the defendants which had led to the litigation with the suit being filed on 22.02.2021. Summons were issued for 24.03.2021 and as per the report dated 24.02.2021 the Process Server had gone to the registered office and met the father of the Director who had stated that his son did not stay there and was residing at Dehradun for the last 5-6 years and he had refused to take the summons and to write anything on it. Fresh summons were issued on 15.07.2021 for 06.08.2021 when the communication of the Process Server took place with a lady tenant and she rung up the father again and who had informed that his son was not available and he did not know his whereabouts.

6. Apparently, an application for substituted service came to be filed (Annexure A-4) dated 06.08.2021 that notice sent through ordinary

process as well as through registered cover had been returned despite furnishing all details and even the service had been effected through email on 26.07.2021 and had been served one of the addresses namely vinodwatwani@yahoo.co.in. Accordingly, it had been pleaded that defendant was evading service. Resultantly, the publication was ordered for the hearing fixed for 16.09.2021 which was duly done in the newspaper 'The Tribune' on 21.08.2021, which had wide circulation in the States of Punjab and Haryana. The *ex parte* proceedings were ordered on account of non-appearance on 16.09.2021 and 29.10.2021, leading to the *ex parte* evidence PW-1. The suit was decreed against the appellant after a period of almost one year on 02.08.2022 for the principal amount of ₹3,55,98,825/- alongwith interest.

7. The application under Order 9 Rule 13 CPC then came to be filed just after a period three months on 09.11.2022 through the same Director on the ground that summons had not been served and he had never refused service of the summons. Thus, *ex parte* order dated 16.09.2021 and the subsequent judgment dated 02.08.2022 was sought to be set aside, since the Director of the defendant-company was residing in Central Hope Town, Selaqui, Dehradun. It was also further pleaded that summons sent at Dehradun address belongs to the individual person, but in spite of that summons had been sent at Uttarakhand also. Thus, apparently a admission has been made regarding the knowledge aspect of the summons sent to Dehradun which is in contradiction to the argument now raised that he was unaware of the proceedings. Relevant averments made in the application read as under:-

> "4 (d) That from the bare perusal of the documents of the case file that even after receiving the first report made by the process server, why the applicant has not been served upon and no efforts were made by the plaintiff to get the service effected in Dehradun. That the summons sent to Dehradun address in the name of the company, whereas, the said address belongs to individual person i.e. Devan Kumar Yadav and the said facts was very much in the notice of the plaintiff instead of the said facts they sent the summons with the name of the company i.e. defendant No.1only to achieve its own wrong without reflecting the name of the applicant as Devan Kumar Yadav.

8. The averments were made that the publication was done in the newspaper 'The Tribune', which has no circulation in Dehradun and, therefore, the appellant had no notice and knowledge about the pendency of the civil suit. The Director had come to know about the proceedings from a letter sent by the plaintiff in second week of October, 2022 whereby they had asked for payment on the basis of judgment and decree. Copy of the said letter dated 06.10.2022 had not been placed on record but formally the same was supplied in the Court at the time of arguments.

9. A perusal of the same would go on to show that plaintiff formally sent a letter at House No.1252, Sector-17C, Gurugram which is the registered address of the Company, which would be also clear from the memo of parties and resultant proof attached which shows the said address in support of the filing of the present appeal. The Aadhaar Card also shows that the Director's address as the same and, therefore, the argument now being raised that he is a residence of Uttarakhand is without any basis. The appellant was, thus, well aware of the proceedings initially as service had been effected upon his father and filing of the present application is only an attempt to delay the proceedings and to deny the

plaintiff the fruits of litigation. Service was rightly sought to be effected on the registered office and the respondent-plaintiff was not under obligation to find out the personal address of the Director. The argument now raised that the appellant was not served and was not aware about the pendency of the suit is baseless. The demand on the basis of the judgment and decree which was again sent to the registered office is the knowledge of the same and, therefore, it is apparent that the appellant cannot be allowed to blow hot and cold and it is not at the time of execution at a different address he came to know about the *ex parte* order and the judgment.

10. It is also to be noticed that when it was put to counsel that principal amount should be deposited, so that the interest of the plaintiff can be safeguarded, counsel for the appellant points out that he had clear instructions that the appellant was not in a position to deposit the said amount. The respondent-plaintiff has been contesting the suit since the date of filing i.e. 22.02.2021. The matter was pending before the Trial Court and service has been effected in February, 2021 upon the father who has chosen to stay away. In spite of *ex parte* proceedings on 16.09.2021 after due publication, it had taken almost a year for the judgment to be passed. No effort was made to put in appearance before the Court earlier. Proviso of under Order 9 Rule 13 CPC provides that no Court shall set aside a decree passed *ex parte* on the ground that there is 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. The exceptions to the proviso are there, but the same are squarely applicable against the appellant.

11. A Single Bench of this Court in **The Punjab State Cooperative Bank Vs. Shri Baldev Krishan, 1994 (1) PLR 627** has held that a appellant who does not even care to appear in spite of notice being served does not qualify for any relief as it would be an abuse of the process of law if the order is set aside mechanically. The Apex Court in **Sunil Poddar & others Vs. Union Bank of India, (2008) 2 SCC 326** while dealing with a similar issue where the publication had been done for the proceedings which were pending in DRT had relied upon recommendations of the Law Commission and the proviso that if the applicant had knowledge of the proceedings *ex parte* proceedings cannot be set aside on the ground that there is irregularity of service of summons. Accordingly, it was held that the appellant had tried to delay the proceedings and being aware of such proceedings, the dismissal of the application which has been upheld by the High Court, could not be held to be wrong. Relevant paragraphs of the said judgment read as under:-

> "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 5 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 Order 9 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."

12. Resultantly, keeping in view the above, we are of the considered opinion that the appellant firstly stayed away from the proceedings due to which *ex parte* proceeding had been initiated against him. The plaintiff was only to serve the Company at the registered address which has now been found to be the address where the Director of the Company is also having Aadhaar Card. Therefore, the plea taken that affixation was not done and service was not on the official address of the company and there was no pasting is without any basis, in view of the proviso of Order 9 Rule 13 CPC. Even the filing of the application for setting aside the *ex parte* order was on the basis of the letter sent through registered post by the plaintiff-company dated 06.10.2022 which was also served at the same address to which the appellant-company has responded. Therefore, the appellant cannot be allowed to blow hot and cold at the same time. The averments of para No.4(d) of the application also show that the Director was also aware of the pendency of the suit having been served at the Dehradun address also.

13. Resultantly, we do not find any infirmity in the well reasoned order of the Commercial Court dismissing the application under Order 9

Rule 13 CPC read with Order 9 Rule 7 CPC. Accordingly, there is no merit in the present appeal and the same is dismissed in limine.

(G.S. SANDHAWALIA)
JUDGE

(ALOK JAIN)
JUDGE

22.09.2023
Naveen

Whether speaking/reasoned :	Yes	
Whether Reportable :		No