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

% Judgment delivered on: 13.01.2023

+ CM(M) 86/2021

M/s. B B METALS

..... Petitioner

versus

BOBINDER SINGH & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Aabhas Dahiya, Mr. Nitish Dahiya
and Mr. Vikas Chaudhary, Advocates

For the Respondents : None

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

Date-13.01.2023

TUSHAR RAO GEDELA, J. (ORAL)

[The proceeding has been conducted through Hybrid mode]

1. None appears for the Respondents today and none had been appearing for the Respondents for the past many dates of hearing.
2. Accordingly, Respondents are proceeded *ex parte*.
3. Learned counsel appearing for the Petitioner submits that the impugned order was passed contrary to the records of the case, in that, vide order dated 25.05.2015 passed by the Joint Registrar of this Court, it was noted that Respondent was duly served with the summons of the suit.

4. Learned counsel on above basis submits that setting aside of the *ex parte* decree on the ground that Respondent was never served, is contrary to the record of the Trial Court. Learned counsel thus submits that the impugned order dated 11.02.2020 be quashed and set aside.

5. Perusal of Order IX Rule 13 CPC brings to fore that the burden of satisfying the Court that summons of the suit was not duly served upon the Defendant is squarely upon the Defendant and only on the subjective satisfaction thereof would the Court set aside the decree.

6. It is trite that setting aside of the *ex parte* decree is not for the asking and it is incumbent upon the Court to first peruse the records available with it to ascertain whether any such summons were served upon the Defendant or not. It is only thereafter and subject to the satisfaction of the Court that any order in respect of the application under Order IX Rule 13 CPC ought to be passed.

7. It is apparent that vide order dated 25.05.2015, the Joint Registrar of this Court had noted that Defendants had been served by way of publication in the Times of India dated 10.01.2015 and copy of the publication was also placed on record.

8. The order also notes that no one had appeared on behalf of the Defendants, despite service of summons nor any written statement was filed on behalf of the Defendants despite opportunities being given. For the reason that 90 days period for filing written statement from the date of service of summons had already expired, the right to file written statement was also closed by order dated 25.05.2015.

9. In view of the aforesaid order, which categorically notes that summons by way of substituted service was effected upon the

Respondent and other defendants before the learned Trial Court and possibly the learned Trial Court could not have overlooked the order dated 25.05.2015 establishing the fact of service of summons upon present Respondent No.2.

10. In that view of the matter, learned Trial Court has committed grave illegality and material irregularity in overlooking and bypassing order dated 25.05.2015 and resultantly passing the impugned order.

11. In view of the above, impugned order dated 11.02.2020 passed by the learned Trial Court in Misc. DJ 99/19 is quashed and set aside with no orders as to costs.

12. Petition is disposed of in above terms.

JANUARY 13, 2023/yg

TUSHAR RAO GEDELA, J .

