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

% *Date of Decision: 22nd March, 2023*

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+ **FAO 55/2023**

**M/S SISOTIYA EDUCATION
SOCIETY REGD. & ANR.**

..... Appellants

Through: Ms. Aakanksha Kaul and
Mr. Piyush Kaushik, Advocates.

versus

INTROMAX FURNITURE SYSTEM

..... Respondent

Through: Mr. Shakeel Ahmed Saifi,
Advocate.

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+ **C.R.P. 40/2023**

**M/S SISOTIYA EDUCATION
SOCIETY REGD. & ANR.**

..... Petitioners

Through: Ms. Aakanksha Kaul and
Mr. Piyush Kaushik, Advocates.

versus

INTROMAX FURNITURE SYSTEM

..... Respondent

Through: Mr. Shakeel Ahmed Saifi,
Advocate.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

FAO 55/2023 & CM APPL. 11629/2023

1. By this appeal, Appellants assail the impugned order dated 06.03.2023 passed by the learned Trial Court and seek restoration of the order dated 05.01.2023 to the extent the Trial Court had set aside the *ex parte* decree dated 06.02.2019.

2. Briefly stated, the relevant facts as averred in the appeal are that Appellant No. 1 is a Society which runs a School/Appellant No. 2.

Respondent supplied furniture to the Appellants and as per the Appellants, the entire payments were duly made to the Respondent. However, subsequently the Respondent raised a claim towards an alleged outstanding amount of Rs. 12,04,887/- vide a demand notice dated 03.02.2016. The demanded amount was sought to be rectified by another notice whereby Respondent claimed Rs.17,04,887/-. As per the Appellants, the rectified amount was based on some bank statement but without disclosing the amounts already received by the Respondent in cash from the Appellants.

3. Without waiting for the Appellants to respond, Respondent hurriedly filed a suit for recovery of Rs.17,04,887/- on the basis of a forged invoice, which the Appellants never acknowledged. Summons were issued in the suit on 23.02.2017 and admittedly, the Appellants were not served through the ordinary mode of service. Respondent thereafter filed an application under Order 5 Rule 20 CPC seeking permission to serve the Appellants through publication. The application was allowed by the Trial Court on 15.11.2017 and Respondent was directed to serve the Appellants through publication in English newspaper 'The Statesman' in Delhi Edition.

4. The Appellants were unserved, as according to them, they resided in Haryana and not Delhi and even the publication was not in accordance with Order 37 CPC as it did not contain the plaint and documents which was a pre-requisite. Appellants were proceeded *ex parte* vide order dated 12.04.2018 wherein it was recorded that the Appellants were served. The suit was decreed against the Appellants vide judgment dated 06.02.2019 by the Trial Court.

5. Execution petition was subsequently filed by the Respondent before the Executing Court at Delhi, but was later transferred to the District Court, Gurugram, noting that the Appellants reside outside the

territorial jurisdiction of the District Court at Delhi. After issuance of transfer certificate, Execution petition bearing No. 183/2019 was filed before the learned Civil Judge, Gurugram, Haryana on 02.09.2019 and notice was issued to the Appellants. Notice was received by the Appellants on 15.10.2019 upon which they learnt of the proceedings in the suit as well as the *ex parte* decree. Appellants engaged a lawyer and inspected the file on 18.11.2019 and soon thereafter filed an application under Order 9 Rule 13 CPC along with an application seeking stay of the execution proceedings as well as an application under Section 5 of the Limitation Act for condonation of delay in filing the application under Order 9 Rule 13 CPC.

6. Notices were issued in the applications and Respondent filed the replies. On 24.03.2021, the Trial Court stayed the execution proceedings pending before the Executing Court and vide order dated 05.01.2023 allowed the application under Order 9 Rule 13 CPC subject, however, to pre-deposit of the entire decretal amount.

7. Challenging the order dated 05.01.2023 to the extent the Trial Court had imposed the pre-condition of deposit of the decretal amount, Appellants filed Civil Revision before this Court being CRP No. 40/2023 in which this Court issued notice on 10.02.2023. When the matter came up before the Trial Court on 06.03.2023, the Appellants apprised the Court of the pendency of the revision petition in this Court against the order of deposit of decretal amount, however, the Trial Court while noting the pendency of the petition, dismissed the application under Order 9 Rule 13 CPC solely on the ground of non-deposit of the entire decretal amount. It is this order and judgment which is challenged by the Appellants before this Court in the present appeal.

8. Since the revision petition being CRP No. 40/2023 challenges the order dated 05.01.2023 and the issues raised therein are inextricably linked to the present appeal, this Court vide order dated 16.03.2023, with the consent of the parties, had directed the Registry to list the CRP No. 40/2023 along with the present appeal today and therefore, both have been taken together and heard.

9. The contentions raised on behalf of the Appellants are that:-

(a) Respondent was fully aware that Appellants are based in Haryana and yet carried out publication in a newspaper 'The Statesman', Delhi Edition, which does not have sufficient circulation in the place of residence of the Appellants; (b) summons published in the newspaper did not have the plaint and the documents which is a mandatory condition for publication under Order 37 CPC; (c) Trial Court failed to look into the issue if there was proper service on the Appellants in the eyes of law and erroneously proceeded *ex parte* and decreed the suit; (d) the stand of the Appellants is fortified by the fact that subsequently when the execution was filed by the Respondent before the Executing Court at Delhi, the Court recording that the Judgment Debtor was residing outside the jurisdiction of the Court and satisfaction of the decree could not be obtained within its jurisdiction, transferred the matter to the concerned Court at Gurugram, directing issuance of transfer certificate in terms of Order 21 Rule 6(b) CPC; (e) once the Trial Court was conscious of the fact that the Appellants had not been properly served and wrongly proceeded *ex parte*, there was no reason for imposing the condition of pre-deposit of the entire decretal amount while allowing the application under Order 9 Rule 13 CPC; and (f) Trial Court erred in not waiting for the outcome of the revision petition filed in this Court wherein the Appellants had challenged the order dated 05.01.2023 to the extent of the condition of pre-deposit

and erroneously proceeded to dismiss the application despite being told that this Court had taken cognizance of the matter and issued notice.

10. Counsel for the Respondent has repeatedly urged only one ground in opposition to the appeal that the condition of pre-deposit was justified while allowing the application under Order 9 Rule 13 CPC and emphasised that this was the mandate of law. On a pointed query by the Court as to under what provision of law, the Trial Court was bound to impose the condition of deposit of entire decretal amount while allowing an application for setting aside the *ex parte* decree, learned counsel for the Respondent relied on the judgments of the Supreme Court in ***Rajni Kumar v. Suresh Kumar Malhotra and Another, (2003) 5 SCC 315*** as well as of this Court in ***North Eastern Carrying Corporation Ltd. v. New India Assurance Co. Ltd. & Anr., 2007 SCC OnLine Del 1048*** and submitted that even if this Court was inclined to remand the matter back for hearing the application under Order 9 Rule 13 CPC, the pre-condition of deposit of entire decretal amount should not be varied.

11. Responding to the submission of the counsel for the Respondent, learned counsel for the Appellants submits, on instructions, that Appellants are willing to deposit 50% of the decretal amount and therefore, the matter be remanded back to the Trial Court after setting aside the impugned order dated 06.03.2023 and restoring the order dated 05.01.2023 to the extent the Trial Court had set aside the *ex parte* decree.

12. I have heard the learned counsels for the parties and examined the aforesaid contentions.

13. From the aforementioned facts, it clearly emerges that the Appellants were not served through the ordinary mode of service and

on an application filed by the Respondent, the Trial Court had permitted the Respondent to serve them through publication as a substituted mode of service. According to the Appellants, they were not served since the publication was carried out by the Respondent in 'The Statesman', Delhi Edition which did not have sufficient circulation in Haryana, the place of residence of the Appellants. It was only when the notices were received by the Appellants from the Executing Court that they learnt of the suit filed by the Respondent as well as the *ex parte* decree, whereupon they filed an application for setting aside the *ex parte* decree.

14. There can also be no dispute that the Trial Court did find merit in the contention of the Appellants that they were not served and after due consideration, the application was allowed by an order dated 05.01.2023 subject, however, to a pre-condition of deposit of the entire decretal amount in the form of FDR in the Court within two months. From the order dated 05.01.2023, it is thus clear that the Trial Court had accepted the fact that the Appellants were unserved and which is why the application under Order 9 Rule 13 CPC was allowed.

15. Appellants challenged the order dated 05.01.2023 to the extent it directed the Appellants to deposit the entire decretal amount and as a matter of record, notice was issued by this Court in CRP No. 40/2023 on 10.02.2023 and the civil revision is pending. When the matter came up before the Trial Court on 06.03.2023, the order itself reflects that the Trial Court was apprised of the pendency of the revision petition before this Court and yet it proceeded to dismiss the application solely on the ground of non-deposit of the entire decretal amount.

16. The neat legal nodus that thus arises in the present appeal is whether the Trial Court was right in dismissing the application under Order 9 Rule 13 CPC on the ground that the condition imposed vide order dated 05.01.2023 was not complied with. In my view, the Appellants are correct in their submissions that firstly, the Trial Court ought to have waited for the outcome of the Civil Revision petition pending in this Court, wherein the only issue that this Court was in seisin was the correctness of the direction to deposit the entire decretal amount and secondly that the condition of deposit of the entire decretal amount was unreasonable and harsh, when the Appellants were not served before the *ex parte* decree was passed.

17. Order 9 Rule 13 CPC provides that in a case where an *ex parte* decree is passed by a Court, Defendant may apply for setting aside the same and if the Court is satisfied that the summons were not duly served, the Court shall make an order setting aside the decree upon such terms as to costs, payment into Court or otherwise as it thinks fit. This Court does not and cannot read into this provision any mandate of law which compelled the Trial Court to direct deposit of the entire decretal amount. In fact, the Supreme Court in ***V.K. Industries and Others v. M.P. Electricity Board, Rampur, Jabalpur, 2002 SCC OnLine SC 286***, has while deciding an appeal by the Defendants in a suit for recovery against an order of the Trial Court setting aside the *ex parte* decree wherein the Trial Court had dismissed the application under Order 9 Rule 13 CPC and the High Court had allowed the appeal imposing the condition of Rs.2,00,000/- with the Trial Court, held that ordinarily, a money decree is not stayed unconditionally and the Judgment Debtor would be put to terms, however, such conditions must be reasonable having regard to all relevant factors. It was further held that once an *ex parte* decree is set aside by a Court on the ground

of non-service of summons in the suit, while restoring, the Court may impose conditions to deposit costs or decretal amount, but such pre-conditions should be reasonable and not harshly excessive.

18. In the present case, having come to a conclusion that the *ex parte* decree deserves to be set aside as the Appellants were not at fault in not appearing in the suit proceedings, in my view, the direction to deposit the entire decretal amount was onerous, harsh and unreasonable. The judgments relied upon by the Respondent are distinguishable from the facts of the present case. Learned counsel for the Respondent relied on para 14 of the judgment in **Rajni Kumar** (*supra*), which reads as follows:-

“14. We directed the appellant to deposit the decree amount to serve as security for the suit amount in the event of this Court granting him leave to defend the suit. Since that relief is not granted to him, it will be open to him to withdraw the said amount or have it adjusted in satisfaction of the decree.”

19. From a reading of the judgment, it is clear that in the said case, the Supreme Court had directed the Appellant to deposit the decretal amount in the event of the Court granting him leave to defend, however, since the leave was not granted, it was held that the Appellant would not withdraw the amount or have it adjusted in satisfaction of the decree. The case is inapplicable to the present set of facts. In **North Eastern Carrying Corporation Ltd.** (*supra*), this Court had condoned the delay in filing the application under Order 9 Rule 13 CPC and set aside the *ex parte* decree subject to deposit of entire decretal amount. This direction was passed in the facts of the said case but this Court is unable to read this as a mandate in every case, as sought to be argued by the Respondent.

20. The facts of this case are in fact very telling as the Respondent had not served the Appellants through the ordinary mode in the first instance and even thereafter when the Respondent was granted

permission to serve the Appellants through the mode of substituted service, publication was done in a newspaper of Delhi Edition with insufficient circulation in Gurugram, despite being aware of the fact that the Appellants were not residing in Delhi. Trial Court being satisfied with the position adopted by the Appellants chose to set aside the *ex parte* decree and in these circumstances, it would be harsh and onerous, as rightly contended on behalf of the Appellants, to direct the Appellants to deposit the entire decretal amount.

21. The appeal is accordingly allowed setting aside the order of the Trial Court dated 06.03.2023 and restoring the order dated 05.01.2023, with a modification that the Appellants shall deposit 50% of the decretal amount before the Trial Court in the form of an FDR within a period of six weeks from today.

22. Appeal along with pending application stands disposed of.
C.R.P. 40/2023 & CM APPL. 6605/2023

23. In view of the order passed in FAO No. 55/2023 hereinabove, the revision petition along with pending application is allowed, modifying the order dated 05.01.2023 to the aforesaid extent.

JYOTI SINGH, J

MARCH 22, 2023/shivam