

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

% **Date of decision: 14th February, 2023**

+ **FAO (COMM) 39/2023 & CM APPLs. 7327-7328/2023**

M/S SHIVAM PLASTIC INDUSTRIES & ORS. Appellants

Through: Ms. Archana Sahadeva & Mr.
Siddharth Raj Choudhary, Advocates

Versus

NIKHIL GUPTA

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

SAURABH BANERJEE, J. (Oral)

1. Appellants seek to impugn the order dated 05.12.2022 passed by the learned Trial Court¹ whereby their application under *Order IX rule 13* of the Code of Civil Procedure, 1908² seeking setting aside of the *ex-parte* decree dated 22.12.2020 has been dismissed.

2. Brief facts disclose that in a suit for recovery of Rs. 12,76,189/- (*Twelve Lakhs Seventy Six Thousand One Hundred Eighty Nine Only*) instituted by the respondent against the appellants before the learned Trial Court, after issuance of summons for 16.01.2019, appellants despite being

¹ Hereinafter referred as “**Impugned Order**”

² Hereinafter referred as “**CPC**”

served on 10.10.2018 (corrected by the learned Trial Court as it was incorrectly shown as 10.01.2018 when the suit was instituted subsequent thereto), failed to appear on the said date and entered appearance through their counsel only on 03.04.2019, albeit did not file their written statement. In view thereof, the appellant's right to file written statement was closed.

3. Thereafter, when the suit was listed on 31.07.2019, though the lawyers were on strike, the learned Trial Court proceeded to frame the issues and put it up for recording of respondent's *ex-parte* evidence. Thence, when it was listed on 27.11.2019, after duly examining the respondent's witness and closing the evidence, the learned Trial Court put it up for respondent's *ex-parte* final arguments. Then, though the suit was listed for 18.03.2020 and 13.10.2020, it was only after finally proceeding the appellants *ex-parte* on 16.12.2020 that the *ex-parte* decree dated 22.12.2020 was passed by the learned Trial Court.

4. In the meanwhile, appellants claim that though their counsel advised them to file a requisite application for seeking recall of order dated 03.04.2019 and though they sent all the requisite documents to him on 18.05.2019, no steps were taken by the said counsel. Appellants further claim to have come to know of the *ex-parte* decree dated 22.12.2020 only on 08.03.2021 and that too through the respondent and his counsel. Interestingly, not to ignore that is all that appellants have to say with respect to the period from 03.04.2019 and 08.03.2021.

5. Upon coming to know of the *ex-parte* decree dated 22.12.2020, in or around April 2021, the appellants filed an application under *Order IX rule*

13 of the CPC seeking setting aside of the said *ex-parte* decree, which as per appellants was filed within the statutory time period. It is the dismissal of this application by way of the impugned order of the learned Trial Court which has brought the appellants before this Court by way of this appeal.

6. Though the learned counsel for appellants has raised various grounds but has primarily argued that the appellants were under a bona fide belief that they were being duly represented through their *erstwhile* counsel (as they have a new counsel now) who was duly representing them on all dates, especially post 03.04.2019 and they cannot be made to suffer for the inactions of their *erstwhile* counsel. Relying upon *A. Murugesan vs Jamuna Rani*³; *Nanda Dulal Pradhan & Anr. vs Dibakar Pradhan & Anr.*⁴ and *Rafiq & Anr. vs Munshilal & Lal & Anr.*⁵, learned counsel for appellants contended that the appellants ought not be made to suffer for any wrongs/ inactions of their *erstwhile* counsel as they have a good case on merits and there is a lot at stake.

7. We have heard the learned counsel for appellants and also carefully perused the documents filed on record. Records reveal that the learned Trial Court passed all the orders in a very systematic manner over a period of time after first closing the rights of appellants to file their written statement and then proceeding them *ex-parte* and finally only after recording of respondent's evidence passing the *ex-parte* decree against the appellants. Records also reveal that the appellants were all throughout casual in

³ (2019) 20 SCC 803

⁴ 2022 SCC OnLine SC 822

⁵ (1981) 2 SCC 788

proceeding with the pending case. Party before a Court of Law is expected to be extremely vigilant and attentive, more so, whence such party is a defendant, against whom a claim has been raised. Alas, the conduct of appellants does not inspire any confidence in the present case.

8. We say so, as right from the beginning after being served on 10.10.2018, they failed to appear before the learned Trial Court on the very first returnable date, i.e., 16.01.2019. Not only that, even though their counsel appeared on the next date, i.e., 03.04.2019 they failed to file the written statement and finally since then there was a complete lull till 08.03.2021, when the appellants allegedly claim to have come to know about the passing of the *ex-parte* decree dated 22.12.2020. For this, all that the appellants have filed is a general affidavit bereft of material/ better particulars. It is a matter of common knowledge that during the said period of pandemic, all orders of the respective Courts, including the District Courts were immediately uploaded and easily available on the respective websites and thus were surely easily accessible to everyone from all across India. Appellants, hailing from the State of Gujarat, have not disputed the said position. Drawing an adverse inference from the conduct of appellants specified hereinabove, it can be safely inferred that they deliberately chose not to act diligently and further not to deliberately challenge any order passed by the learned Trial Court between 03.04.2019 onwards till 22.12.2020 with a view to wait till the end, i.e. passing of the impugned *ex-parte* decree so as to gain the best/ most possible time.

9. Not appearing, suffering an order and then coming back again before the Court blaming the counsel, most importantly, when there are no proofs or materials to substantiate them, alas, are wrong practices adopted by the parties and this certainly irks the conscience of a Court. In the opinion of this Court, the non-appearance and non-challenge of the appellants in the present case was only to prolong the suit proceedings and the attribution of negligence and blaming of their erstwhile counsel is also only to derive benefit of the same to cover its deliberate wrong-doing. The appellants were all throughout guilty of acting as per their whims and fancies. The fact that appellants have not initiated any step(s) against the erstwhile counsel is sufficient reasoning to substantiate the same. In any event, appellants cannot be allowed to give a lame excuse contrary to what is borne out from the factual position.

10. Legally speaking, the provision contained in *Order IX rule 13* of the CPC mandate that it is for the appellants to satisfy that they were prevented from/ by any ‘*sufficient cause*’ from appearing when the suit was called for a hearing. Thus, a bare perusal establishes that depending upon the facts and circumstances of a case, an order of passing an *ex-parte* decree is to be/ can be/ should be set aside only after a party seeking so is able to make out a good ground. In the present case, the appellants have not been able to make out any such ‘*sufficient cause*’.

11. The present appeal is more of a mercy petition, which, in view of the factual matrix of the case and the legal position involved, is not to be doled out to a party, especially one like the appellants herein. Doing so, will

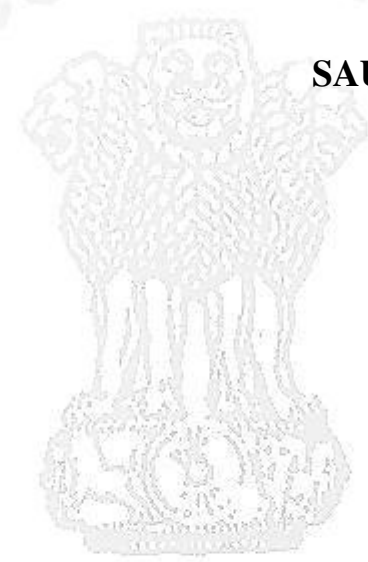
set a bad precedent and will not advance the cause of justice. Conversely put, appellants have not been able to make out any case for seeking mercy and that too at the appellate stage.

12. In view thereof, this Court finds no plausible reason for interfering with the decision rendered by the learned Trial Court. Accordingly, finding no merit in the present appeal, the present appeal is dismissed with no order as to costs.

SAURABH BANERJEE, J.

MANMOHAN, J.

FEBRUARY 14, 2023/rr



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