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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% Judgment delivered on: 17.02.2023

+ CM(M) 259/2023 & CM APPL. 7895/2023 (for stay)
ANSHUL GUPTA Petitioner

versus

AJAY GUPTA Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Gaurav Bhatt, Advocate.

For the Respondent : None

CORAM:
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J. (ORAL)

[The proceeding has been conducted through Hybrid mode]

1. Petitioner challenges the order dated 09.12.2022 passed in 7 CS No. 761/2019 titled as “Ajay Gupta vs. Anshul Gupta & Anr.”, whereby the learned Trial Court has listed the suit for final hearing without considering the application under Order XXXVII Rules (3) and (7) of the CPC, 1908.

2. Learned counsel for petitioner/ defendant No.1 submits that as per him the petitioner/ defendant No.1 was served on 14.09.2022 and that he received only a copy of the summons and not the copy of the plaint and annexures appended thereto.

3. Learned counsel submits that a duly executed *vakalatnama* was also filed on the very same day. Learned counsel submits that as per his

contention, the petitioner/ defendant No.1 entered appearance within ten days of service which was effected on 14.09.2022.

4. Learned counsel submits that *vide* order dated 10.10.2022, the learned Trial Court had made an observation that there was no application showing entering of appearance on behalf of defendant No.1 till date, to which the learned counsel had submitted that he had filed his *vakalatnama* on 22.09.2022, meaning thereby that there was sufficient compliance to that extent.

5. Learned counsel submits that on that basis, the learned Trial Court had straightaway listed the matter for final arguments for passing necessary orders on 29.10.2022.

6. Learned counsel further submits that on 29.10.2022, the learned Presiding Officer was on leave and the matter was thereafter listed on 09.12.2022, whereby the impugned order was passed.

7. For abundant precaution, the petitioner/ defendant No.1 had filed an application under Order XXXVII Rule 3(1) and (3) read with Section 151 of the CPC, 1908 for registering the entering of appearance on behalf of petitioner/ defendant No.1.

8. For further abundant precaution, learned counsel had also filed an application under Order XXXVII Rule 3 (7) r/w Section 5 of the Limitation Act, 1963 seeking condonation of delay, if any, in filing the application for entering appearance on behalf of petitioner/ defendant No.1.

9. Learned counsel submits that the aforesaid applications were filed on 20.10.2022.

10. Learned counsel submits that the learned Trial Court did not

consider any of these applications and has proceeded to fix the matter for final arguments.

11. Learned counsel submits that the direction to hear the suit finally without permitting the petitioner/ defendant No.1 to file its leave to defend would seriously prejudice the petitioner and seeks quashing of the impugned order.

12. Learned counsel further submits that the advance notice of the present petition was served upon the counsel for the respondent on 14.02.2023 at 04:05 PM on the email address as given in the memo of parties in the plaint, as filed by the respondent/ plaintiff pending before the learned Trial Court.

13. As per the notified practice directions of the Hon'ble Delhi High Court Circular no.69/Rules/DHC dated 5.12.2019, if advance service is effected, and the opposite party does not appear before the court on the date, adverse orders may be passed. This Court proceeds to dispose of the present petition on that basis keeping in view the urgency involved.

14. This Court has given thoughtful consideration to the arguments put forth by the learned counsel for the petitioner/ defendant No.1 as well as perused the impugned order along with the earlier orders passed by the learned Trial Court.

15. This Court has also perused the applications dated 20.10.2022 under Order XXXVII Rule 3 (1) & (3) as well as Order XXXVII Rule 3 (7) r/w Section 5 of the Limitation Act, 1963.

16. It appears from the record as well as the orders, specially order dated 22.09.2022, that the counsel had entered appearance on behalf of petitioner/ defendant No.1 by filing his *vakalatnama* which has been

taken note of by the learned Trial Court in the order dated 22.09.2022.

17. Vide the order dated 10.10.2022, the learned Trial Court had observed that no application had been filed on behalf of petitioner/defendant No.1 showing entering of appearance and the matter was further listed for consideration to 29.10.2022. However, on 29.10.2022, the Presiding Officer was not holding the Court and the matter was further posted to 09.12.2022.

18. Curiously, though the aforesaid applications were filed on 20.10.2022, the impugned order dated 09.12.2022 does not refer to either of the applications and proceeds to fix a date for final hearing.

19. This Court is not commenting upon the merits of either of the applications, however, the manner in which the Trial Court has proceeded, without doubt, is prejudicial to the rights, contentions and interests of the petitioner/ defendant No.1, in that the applications under Order XXXVII Rule 3 as well as Order XXXVII Rule 3 (7) of the CPC, 1908 has been simply ignored and the valuable right of petitioner to file leave to defend has been taken away without application of mind. The Trial Court has not even considered in a preliminary manner, the facts stated in the said applications.

20. In view of the above, there is no doubt that principles of natural justice and fair play have been violated and the learned Trial Court has passed an order, which is unsustainable in law.

21. In view thereof, the impugned order dated 09.12.2022 directing that the suit be listed for final arguments on 21.02.2023, is quashed and set aside.

22. The learned Trial Court shall list the aforesaid applications

pending before it for disposal on 21.02.2023 in accordance with law after giving opportunity to the respondent/ plaintiff to file objections, if any. Only thereafter, would the learned Trial Court proceed to determine other issues.

23. The aforesaid petition is disposed of with no order as to costs.

24. Order *Dasti* under the signatures of Court Master.

TUSHAR RAO GEDELA, J

FEBRUARY 17, 2023/nd

