

\$~44 & 55

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

% Judgment delivered on: 23.03.2023

+ **CM(M) 476/2023 & CM APPL. 14225-14228/2023**

SH RAJEEV KUMAR Petitioner

versus

SH. PREM CHANDRespondent

AND

CM(M) 479/2023 & CM APPL. 14327-14320/2023

SH RAJEEV KUMAR Petitioner

versus

SH. VIKAS Respondent

Advocates who appeared in this case:

For the Petitioner : Ms. Jyoti Nambiar and Mr. Abhishek Gupta, Advocates

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. The petitioner challenges the impugned judgment dated 21.02.2023 passed by the First Appellate Court in MCA DJ No. 25/2022

titled '*Rajeev Kumar vs. Prem Chand*' whereby the first appeal of the petitioner herein was dismissed.

2. Ms. Jyoti Nambiar, learned counsel appearing for the petitioner submits that the petitioner had laid two challenges, one to the dismissal of the application under Order XXXVII Rule 4 of Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") seeking setting aside of the *ex parte* judgment and decree and the second was against the impugned judgment and decree itself.

3. Learned counsel submits that the entire judgment is replete with references to the challenge to the impugned judgment and decree and there is no reference at all to the challenge to dismissal of the application under Order XXXVII Rule 4 of CPC.

4. Ms. Nambiar, learned counsel submits that having regard to the fact that in a parallel proceeding under Section 138 of Negotiable Instruments Act, 1881, the petitioner/defendant was acquitted on the ground that there is no legal debt or liability which has been proved against the petitioner/defendant, the learned First Appellate Court ought to have set aside the impugned orders. Learned counsel submits that even this aspect was not considered.

5. Learned counsel further submits that the petitioner/defendant had made a specific averment and a challenge in his first appeal that the petitioner was never served and it was only his brother who was served with the summons of the suit. Learned counsel submits that there was an infraction of procedure as prescribed under Order V Rule 15 of CPC which would entail setting aside of the impugned order itself.

6. Learned counsel also submits that the impugned judgment of the

Appellate Court in para 11 has summarily dismissed the oral application seeking condonation of delay in filing the first appeal, though it was vehemently emphasized that it was for the reason that the petitioner being not well in the month of June that the appeal was not filed in time. On that basis too, learned counsel submits that the impugned judgment of the First Appellate Court ought to be set aside.

7. Learned counsel relies upon the judgment of the Supreme Court in '*Sesh Nath Singh vs. Baidyabati Sheoraphuli Co-operative Bank Limited and Another*' reported in (2021) 7 SCC 313, to submit that under Section 5 of the Limitation Act, 1963 it is not incumbent to file a formal application and the Court can in its discretion can allow the application seeking condonation of delay in filing the appeal.

8. This Court has considered the submissions made by learned counsel for the petitioner as also perused the impugned order and the other relevant documents placed on record and renders its judgment as under.

9. There is no doubt that on a plain reading of the First Appellate Court's order, that there is no reference to the dismissal of the application under Order XXXVII Rule 4 of CPC challenging the passing of the *ex parte* judgment and decree. However, in the facts and circumstances of the case, the said submission would not be relevant for consideration since the learned First Appellate Court, in any case, had considered the case on merits.

10. Learned First Appellate Court also considered the relevant judgment in regard to the fact that if there are plausible findings rendered by the learned Trial Court, the First Appellate Court would be

loath in interfering unless something absolutely perverse comes to the notice of the First Appellate Court.

11. The submissions of Ms. Nambiar, on the aspect that the summons of the suit were never served upon the petitioner/defendant and thereby infracting the provisions of Order V Rule 15, CPC is concerned, on a query Ms. Nambiar submits that though the summons were not served personally upon the petitioner/defendant, however, the same were served upon the brother of the petitioner/defendant who is residing with the petitioner.

12. Since the challenge has been made to the impugned judgment on the basis of infraction of provisions of Order V Rule 15 CPC, it would be apposite to extract the said provision hereunder:-

“15. Where service may be on an adult member of defendant’s family.-Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him. Explanation: A Servant is not a member of his family within the meaning of this rule.”

13. A plain reading of the aforesaid provision would bring to fore the fact that the summons which were sought to be effected upon the petitioner/defendant at his residence would be infracted only in the circumstances if the person upon whom the summons are effected, is not a family member or that the defendant has not empowered any agent to accept summons on his behalf.

14. In the present case, it is admitted that the summons were served upon the brother of the petitioner/defendant, who was also residing with him and that would suffice the requirement of Order V Rule 15 CPC.

15. The other submission of Ms. Nambiar based on the judgment of the Hon'ble Supreme Court in the case of **Sesh Nath Singh** (supra) that there is no requirement of a formal application to be filed seeking condonation of delay in filing of appeal is concerned, it is noted to be rejected.

16. The reason for such rejection is that the judgment itself noted that in those cases where there are materials available on record already, that the formal application seeking condonation of delay would not be required.

17. However, in cases where there is no material available on record itself, no such permission could be readily inferred.

18. The Hon'ble Supreme Court in the aforesaid judgment had in paragraphs 63 and 64 held as under:-

63. As observed above, Section 238-A makes the provisions of the Limitation Act applicable to proceedings under the IBC before the adjudicating authority and the appellate authority (NCLAT) "as far as may be". Section 14(2) of the Limitation Act which provides for exclusion of time in computing the period of limitation in certain circumstances, provides as follows:

"14. Exclusion of time of proceeding bona fide in court without jurisdiction. —

(1) * * *

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of

jurisdiction or other cause of a like nature, is unable to entertain it.”

64. Similarly under Section 18 of the Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgment is signed. However, the acknowledgment must be made before the period of limitation expires.”

19. If viewed from the angle of the aforesaid judgment, it is crystal clear that there was no document at all filed before the First Appellate Court either alongwith the appeal or an application under Order XLI Rule 27 of CPC, which would have given an opportunity to the petitioner/defendant to place such arguments.

20. The other limb of the argument of Ms. Nambiar, learned counsel regarding the acquittal of the petitioner in the proceedings under Section 138 of NI Act is concerned, the said issue would not come to her rescue in the present circumstances.

21. This is for the reason that while weighing the rival issues, the quality of evidence which is needed by a Criminal Court to reach its conclusion, would have to be beyond reasonable doubt, whereas, in civil proceedings, it is only preponderance of probabilities whereon the Civil Court renders its judgment.

22. That apart, more importantly, what is to be considered is that the impugned order is challenged by way of present petition under Article 227 of Constitution of India, which circumscribes a limited jurisdiction upon this Court to consider procedural errors or any judicial impropriety or the subordinate Courts acting with material irregularity. It is only in

such cases that this Court is permitted to examine the impugned orders and correct the same, if required. This aspect stands covered by the judgments of Hon'ble Supreme Court in '*Sadhna Lodh vs. National Insurance Co. Ltd. and Another*' reported in (2003) 3 SCC 524 and is no more *res integra*.

23. In view of the aforesaid, this Court is of the considered opinion that there is no judicial impropriety, illegality or material irregularity with which the learned First Appellate Court has acted.

24. In view of the aforesaid, the petitions are devoid of any merit and are dismissed along with the pending applications with no order as to costs.

TUSHAR RAO GEDELA, J.

MARCH 23, 2023

ॐ