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

% Judgment delivered on: 19.04.2023

+ CM(M) 611/2023

M/S NAYAK SANITATION PVT LTD

..... Petitioner

versus

SHRI ANIL KUMAR SINGH

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Sameer Dewan and Mr. Prabhat
Ranjan Tiwari, Advocates

For the Respondent : Mr. Prakash Kumar Singh, Advocate

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J. (ORAL)

[The proceeding has been conducted through Hybrid mode]

CM APPL. 18655/2023 (Exemption)

1. This is an application seeking exemption from filing certified copies of the annexures/documents.
2. Exemption is allowed, subject to all just exceptions.
3. The application stands disposed of.

CM(M) 611/2023 & CM APPL. 18912/2023 (Stay)

4. The petitioner challenges the order dated 13.02.2023 passed in CS (Comm) No. 554/2022 titled *Anil Kumar Singh vs. M/s. Nayak Sanitation Private Limited*, whereby the application under Order IX Rule 7 of the Code of Civil Procedure, 1908 (hereinafter "CPC") filed on behalf of the petitioner/defendant was dismissed.

5. Mr. Sameer Dewan, learned counsel appearing for the petitioner fairly submits that though the learned Trial Court has correctly held that the summons were sought to be served upon the petitioner on 21.11.2022, which was refused by the employee of the petitioner, the refusal will be taken as service.

6. Learned counsel further submits that at the time of engagement of the counsel, the party had informed that the next date of hearing was 10.01.2023, however, which was entered in his diary as 11.01.2023 erroneously. Learned counsel however submits that when the counsel checked up the status of case on the evening of 10.01.2023, he found that the matter was already listed and petitioner proceeded *ex parte*.

7. Learned counsel submits that an application under Order IX Rule 7 CPC seeking setting aside of the *ex parte* proceedings was sought to be filed immediately on 11.01.2023, however, the filing procedure being by way of e-portal, learned counsel had to first serve advance copy to the respondent and thereafter alone it could be accepted through the e-portal.

8. Learned counsel submits that the finally the application was served upon the respondent on 11.01.2023 and brought on record of the learned Trial Court on 13.01.2023. Learned counsel submits that these facts were mentioned in the application under Order IX Rule 7 CPC, however, were not considered by the learned Trial Court.

9. Learned counsel submits that the order dated 10.01.2023, whereby the petitioner was proceeded *ex parte* had also a drastic effect to the extent that the learned Trial Court had also closed the right to file the written statement simultaneously.

10. Learned counsel submits that the impugned order as well as the order dated 10.01.2023 now precludes the petitioner from raising his defence before the learned Trial Court and therefore, this Court ought to interfere under the Supervisory jurisdiction under Article 227 of the Constitution of India.

11. *Per Contra*, Mr. Prakash Kumar Singh, learned counsel appearing for the respondent/plaintiff invites attention of this Court to page 32 of the impugned order to submit that the learned Trial Court had considered the submissions made on behalf of the petitioner in detail and after appreciating the conduct of the party and the manner in which the party had not taken action even after having been served, the learned Trial Court was constrained, in such circumstances, to pass the order dated 10.01.2023 and there was no legal impediment in dismissing the application under Order IX Rule 7 CPC filed on behalf of the petitioner.

12. Learned counsel submits that this suit is filed under the Commercial Courts Act, 2015 and therefore the timelines are strictly to be adhered to. On that basis, learned counsel submits that the impugned order is sustainable in law and does not warrant any interference at all.

13. This Court has considered the rival submissions, the impugned order dated 13.02.2023 as also the order dated 10.01.2023 when the learned Trial Court proceeded the petitioner/defendant *ex parte* as also closed the right to file the written statement.

14. At the outset it has to be mentioned that this suit has been filed under Commercial Courts Act, 2015 and yet the fact still remains that the procedures are handmaid of justice and wherever the party has been precluded from exercising its rights to file its defence, this Court ought

to interfere under its supervisory jurisdiction.

15. Appreciating the facts of the present case, even if it is assumed that the petitioner was served on 21.11.2022 and the time to file the written statement within initial 30 days would close on 21.12.2022, yet the extended period of 90 days as applicable to the Commercial Courts Act, 2015 under Order VIII Rule 1, as amended, would still be available to the petitioner to exercise its right to file the written statement with the application seeking condonation of delay.

16. In the present case, it is apparent that the learned Trial Court had not only proceeded the petitioner/defendant *ex parte* on 10.01.2023, but also had simultaneously closed the right of the petitioner/defendant to file the written statement on the ground that the same was not filed within the 30 days' period.

17. It goes without saying that the learned Trial Court had all the liberty, procedurally, to proceed *ex parte* against the petitioner/defendant on its non-appearance. However, the direction of closing the right to file the written statement before the extended period closed, appears to be an error apparent on the face of the record and contrary to the rights as conferred upon the parties under Order VIII Rule 1 of CPC. To that extent, the learned Trial Court had committed an error.

18. Learned Trial Court also lost sight of the fact that the petitioner/defendant, though was proceeded *ex parte* on 10.01.2023, however, had taken urgent steps on 11.01.2023 to seek setting aside of the said *ex parte* proceedings. It is apparent that the petitioner/defendant did not lose any time before taking action to resurrect its status pre the

order dated 10.01.2023. Learned Trial Court ought to have given credence to the petitioner/defendant in having moved the learned Trial Court immediately.

19. The appreciation of the learned Trial Court on facts are not gone into by this Court purely for the reason that procedurally the learned Trial Court has committed an error by not setting the *ex parte* proceedings dated 10.01.2023 for the aforesaid reasons. That apart, the learned counsel has already submitted that the service upon the petitioner would be deemed to be complete on 21.11.2022 and the first date of hearing thereafter was only on 10.01.2023.

20. This Court is of the considered opinion that it was immediately thereafter that the petitioner took steps to seek setting aside of the order dated 10.01.2023 whereby it was proceeded *ex parte*.

21. In view of the aforesaid, this Court is of the considered opinion that the order dated 13.02.2023 is unsustainable in law and is set aside accordingly. The order dated 10.01.2023 to the extent whereby the petitioner was proceeded *ex parte* is set aside alongwith the order closing the right to file its written statement.

22. The aforesaid directions are subject to payment to cost of Rs.15,000/- to be paid by the petitioner to the respondent before the next date of hearing against a proper receipt.

23. The petition and application stand disposed of in above terms.

TUSHAR RAO GEDELA, J.

APRIL 19, 2023

