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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 05th September, 2023

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FAO (COMM) 107/2023 & CM APPLs. 23528/2023, 23529/2023

MOOL CHAND

..... Appellant

Through: Ms. Anita, Mr. Jaydip Pati, Mr. Dev
Bharti, Mr. Mohit Chawla & Ms.
Akanksha C., Advocates.

versus

KRISHAN PAL

..... Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T (oral)**

1. Despite service being effected upon the respondent through his son, none appears on his behalf.
2. The respondent is proceeded *ex parte*.
3. The present Appeal under Section 13 (1 & 1-A) of the Commercial Court Act, 2015 read with Section 151 of the Code of Civil Procedure, 1908 (*hereinafter referred to as 'CPC'*) has been filed against the Order dated 21.02.2023 of learned District Judge, Commercial Court, Rohini dismissing the application under Order IX Rule 7 read with Section 151 CPC filed on behalf of the appellant herein (*defendant in the suit*) for setting aside the *ex parte* Order dated 12.02.2020.
4. **The facts in brief are that** a Commercial Suit for Recovery of Rs.20 lakhs was filed by the respondent (*plaintiff in the suit*) against the appellant. The summons were issued on 16.07.2019. On 11.09.2019, it was observed by the learned Commercial Judge that the dasti summons were tried to be



served by the process of Civil Court, Ghaziabad, U.P. but as per the report, the appellant herein was not found available and his wife after reading the summons, refused to accept the same. Copy of the summons were affixed at the residence of the appellant on 06.09.2019. Despite the service, the appellant failed to appear and contest the suit. The learned Commercial Judge granted time to the appellant to file Written Statement till 09.10.2019 but when he failed to do so, his right to file the Written Statement was closed vide Order dated 27.11.2019 and he was proceeded *ex parte* on 12.02.2020.

5. The appellant then moved an application under Order IX Rule 7 CPC read with Section 151 CPC at the stage when the evidence of the plaintiff as PW-1 had already been recorded and the case was listed for *ex parte* final arguments for 28.09.2022.

6. The appellant has stated in his application that when he appeared in another case titled as *Krishan Pal Vs. Mool Chand* pending before the learned Metropolitan Magistrate, Tis Hazari, Delhi, he was informed by the learned counsel of the opposite side about the pendency of other two Civil Suits which included the present one. The counsel for the appellant on enquiry, came to know about this Suit and also that it is listed for *ex parte* final arguments.

7. The appellant explained in his application that he is a Driver by profession and most of the times, is out of station as he travels to Gujarat, Calcutta and Orissa. His wife is illiterate and was not able to understand the process of Court. It is asserted that neither the Process Server had gone to his residence nor did he make any efforts to trace him. In March, 2020 due to COVID-19, the appellant got stuck in the other State and was not able



to return back home for a long time. A prayer is therefore, made to set aside the *ex parte* Order dated 12.02.2020.

8. The application under Order IX Rule 7 CPC was contested by the respondent who asserted that despite service, the appellant had not appeared even in the case under Section 138 of the Negotiable Instruments Act, 1881 and it is only after the arrest warrants were issued that he attended the Court. It is claimed that the reasons given for non-appearance are false and the *ex parte* Order is not liable to be set aside.

9. The learned District Judge, Commercial Court observed in the impugned Order that due service had been effected on the appellant on 06.09.2019 and the present application has been made after the next adjourned date. The application of the defendant in the suit was beyond the period of limitation and highly delayed for which no condonation was sought. Moreover, no good cause for non-appearance had been given. The application was thus, dismissed being beyond the period of limitation.

10. Aggrieved by the said Order, the present Appeal has been filed by the appellant.

11. **Submissions heard.**

12. Essentially, the learned Commercial Judge has declined to set aside the *ex parte* order dated 12.02.2020 on the ground that the application under Order IX Rule 7 CPC had not been filed before the next adjourned date. It was highly belated and no application for condonation of delay was moved.

13. In the present case, the claim of the appellant was that because he remains away from his house for long period of time being the Driver by profession, he never received the summons of the suit. Moreover, his wife is an illiterate woman who does not understand the Court procedures. Once



the appellant has claimed that he had not received the summons, there was no question of he having moved the application before the next adjourned date. He on coming to know about the pending suit from the counsel of the respondent in another proceedings, immediately thereafter moved the present application.

14. It is in the interest of justice if the suits are decided on merits and not on technical grounds. A pedantic approach while interpreting “good cause” for non-appearance is counter-productive and does not enure to the benefit of judicial system essentially based on fairness and Principles of Natural Justice. In the present case, the trial has not been concluded as the final arguments are yet to be addressed on behalf of the respondent.

15. In the totality of circumstances, we find that the appellant must be given an opportunity to contest the suit and put his defence before the Court for adjudication of the commercial dispute. We accordingly, set aside the impugned Order dated 21.02.2023 and allow the application under Order IX Rule 7 CPC of the appellant, and direct the appellant to file his Written Statement before the learned District Judge, Commercial Court within 30 days, in accordance with Law.

16. The Appeal is accordingly disposed of.

17. The pending applications, if any, are also disposed of.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

SEPTEMBER 05, 2023/akb