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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 01.08.2023

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CM(M) 1208/2023, CM APPL. 38703-38704/2023

RAJEEV FUTELA

..... Petitioner

Through: Mr. Karan Veer Tyagi and Mr. Mohit Sharma, Advocates.

versus

GURCHARAN KUMAR

..... Respondent

Through: None.

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. This petition filed under Article 227 of the Constitution of India, impugns the order dated 13.03.2023 passed by the Civil Judge-01, Central District, Tis Hazari Courts, New Delhi ('Trial Court') in CS SCJ 2170/2021, dismissing the Petitioner's application filed under Order IX Rule 7 Code of Civil Procedure, 1908 ('CPC').

2. The Petitioner herein is the defendant and the Respondent is the plaintiff in the civil suit.

3. The learned counsel for the Petitioner has placed on record the orders passed by the Trial Court and the orders passed by the Appellate Court under cover of an index dated 01.08.2023, the same are taken on record.

3.1 The learned counsel for the Petitioner states that the civil suit has been filed by the Respondent, herein for recovery of Rs. 1,96,975/- (Rupees one lakh Ninety-Six Thousand Nine Hundred Seventy-Five Rupees Only) with respect to the goods dispatched to the Petitioner by the Respondent.



3.2 He states that it is the defence of the Petitioner herein that the payment towards the goods delivered stands paid and the Petitioner herein is in possession of a receipt executed by the Respondent, which duly evidences the payment of monies and receipt thereof by the Respondent.

3.3 At the outset, he states that he admits there has been negligence on the part of the Petitioner herein, in filing his written statement upon receipt of service of summons on 18.07.2022.

3.4 He states that as per the process server report the Petitioner was served on his WhatsApp with double tick, but since the Petitioner is of 55 years of age, suffering from ailment and not well-versed with using WhatsApp, he was not aware that the summons have been served on him for appearing in the matter and therefore he could not appear before the Trial Court. He further states that due to non-appearance of the Petitioner, the Trial Court closed the right of the Petitioner to file his written statement and proceeded *ex parte*.

3.5 He states that, however, grave prejudice will be caused to the Petitioner if he is not permitted to place on record his written statement and the suit is decided without his defence being considered.

3.6 The learned counsel for the Petitioner prays that legal costs be imposed on the Petitioner for the delay, however, he may be granted an opportunity to file his written statement and lead his evidence.

3.7 He states, on instructions, that the Petitioner shall not seek any adjournment before the Trial Court and will remain present on each date. He further states that the Petitioner shall take all steps to ensure that he is duly represented by a counsel and no adjournment is sought on the ground of unavailability of the counsel.

4. None appears for the Respondent despite advance service.



5. This Court has considered the submissions counsel of the Petitioner and perused the paper book.

6. The Petitioner was proceeded *ex parte* on 22.09.2022 and the matter was thereof listed for plaintiff's evidence on 12.12.2022. However, no evidence was led by the plaintiff on the said date.

6.1 The Petitioner herein filed an application under Order IX Rule 7 CPC on 07.02.2023 for setting aside the *ex parte* proceedings, which was dismissed by the Trial Court *vide* impugned order dated 13.03.2023. The suit was still at the stage of plaintiff evidence and it had not been led. However, the Trial Court in the facts of the case was not persuaded by the explanation offered by the Petitioner for his non-appearance and dismissed the application.

6.2 The Petitioner herein impugned the order dated 13.03.2023 by filing an appeal MCA DJ 30/2023; notice was issued on the said appeal and proceedings before the Trial Court was stayed until the next date of hearing i.e. 17.07.2023.

6.3 Upon an objection being raised by the Respondent with respect to the maintainability of the appeal, Petitioner herein conceded to the said objection and agreed to avail his remedy in accordance with law. Accordingly, the appeal was dismissed as withdrawn on 19.07.2023, with liberty reserved to the Petitioner herein and the direction for stay also stood vacated.

7. This Court has been apprised that *ex parte* plaintiff evidence stands recorded on 24.05.2023 and the matter is listed for judgment and clarification thereon on 03.08.2023. The Petitioner herein neither cross examined the plaintiff witness nor addressed final arguments.

8. A learned Single Judge of this Court in ***Randhir Singh v. Urvashi Suri*** decided in ***CM (M) 717/2023 dated 04.05.2023*** after taking note of the



judgments of the Supreme Court and this Court, while considering the issue of closing the right of the defendant to file written statement, held that the effort of the Court is always that disputes should ordinarily be decided on merits. The relevant portion of the said judgment reads as under:

“10. It is beyond cavil that the Supreme Court and the High Court by a catena of judgments have held in deserving cases that the delay in filing the written statement can be condoned, however, subject to a compensatory cost.

11. The Supreme Court in the judgments of Bharat Kalra v. Raj Kishan Chabra reported as 2022 SCC OnLine SC 613, Salem Advocate Bar Association, T.N v. Union of India, reported as (2005) 6 SCC 344, Kailash v. Nanhku, reported as (2005) 4 SCC 480 has held that the disputes ordinarily ought to be resolved on merits rather than on technicalities and, therefore, in situations where the trial has not reached advanced stages, it could be possible for the courts to condone the delay so as to ensure that the pleadings are complete and the disputes are resolved on merits.

12. Learned Division Bench of this Court in Jamaluddin v. Nawabuddin Neutral Citation Number - 2023/DHC/001211, has also considered the similar issues which were raised and condoned the delay, subject to compensatory costs.

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14. The petitioner himself is aged about 69 years and this Court cannot overlook the fact that the age coupled with the past medical history of the petitioner/defendant, could have possibly, been the reason for the delay in filing the written statement.”

(Emphasis supplied)

9. In the opinion of this Court the impugned order dated 13.03.2023 passed by the Trial Court does not suffer from any infirmity, but in the light of the above said dicta, this Court deems that it would subserve the interest of justice if the defence of the Petitioner is considered and a judgment is passed on the merits of the claim raised by the Respondent. It will also preclude arguments of non-consideration of the defence of the Petitioner and save multiplicity of proceedings. The summons in the suit were issued on 02.08.2022 and the Petitioner entered appearance on 13.03.2023 when the suit was still at the stage of pleadings. In the opinion of this Court the Respondent can be compensated for the delay caused by the Petitioner by imposing legal



costs.

10. In the facts and circumstances of this case, this Court deems it appropriate to set aside the order dated 13.03.2023, subject to the condition that the Petitioner will take the following steps within three (3) days i.e. by 03.08.2023 and file:-

- (i) The written statement duly supported by an affidavit;
- (ii) Affidavit of admission/denial of documents filed by the plaintiff along with the plaint;
- (iii) List of documents relied upon by the defendant;
- (iv) Cost of Rs.15,000/- to be paid to the respondent herein on or before 03.08.2023.
- (v) The undertaking of the Petitioner recorded at paragraph 3.7 is taken on record and he is bound down to the same. Any request for adjournment shall be subject to costs as contemplated under Order XVII CPC.

11. It is made clear that if the Petitioner fails to avail this opportunity within the time granted by this Court, the right to file written statement and documents shall stand closed and the order of the Trial Court will be at liberty to proceed with the pronouncement of the judgement.

12. With the aforesaid directions, the present petition is allowed and the impugned order dated 13.03.2023 passed by the Trial Court is set aside. Pending application stands disposed of.

MANMEET PRITAM SINGH ARORA
(JUDGE)

AUGUST 1, 2023/mr/sk

Click here to check corrigendum, if any