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

Date of decision: 10.11.2023

+ CM(M) 1855/2023, CM APPL. 58712/2023 & CM APPL. 58713/2023

MOHD. SHUBHAN & ANR. Petitioners

Through: Mr. Absar Ahmad, Advocate.

versus

SMT. NASEEM BANO 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 13.10.2023 passed by ADJ-02, District Shahdara, Karkardooma Courts, Delhi ('Appellate Court') in RCA DJ 59/2023, titled as **Sh. Mohd. Shubhan & Anr v. Smt. Naseem Bano** dismissing the appeal filed by the petitioner and upholding the order dated 01.03.2023 passed by the Trial Court.

1.1. The Petitioners herein are defendants and the Respondent herein is the plaintiff before the Trial Court.

1.2. The Trial Court vide order dated 01.03.2023 dismissed an application filed on 13.02.2023 by the Petitioners herein under Order IX Rule 13 of the Code of Civil Procedure, 1908 ('CPC') for setting aside the judgment and ex parte decree dated 12.01.2023 passed in CS No. 1210/2021.



1.3. The Trial Court's order dated 01.03.2023 was passed in continuation of its order dated 22.02.2023, whereby the Trial Court observed that the summons of the suit were duly served upon the defendant no.2 i.e. Petitioner No.2 herein on 12.01.2022 and 13.01.2022.

2. The learned counsel for the Petitioner states that the Appellate Court and the Trial Court did not appreciate that the summons in the suit were not served either on the Petitioner no. 1 or Petitioner no. 2.

2.1. He states that the stand of the Petitioners herein is that the signatures of the Petitioner no. 2 on the summons had been forged by the sister of the Petitioner no. 1 namely, Ms. Urvi.

3. This Court has considered the submissions of the Petitioners and perused the record.

4. The Petitioners upon learning of the eviction decree dated 12.01.2023 availed two (2) remedies for challenging the said decree by filing :

- (i) An application under Order IX Rule 13 CPC on 13.02.2023.
- (ii) A substantive appeal under Section 96 CPC read with Order XLI CPC on 20.03.2023.

5. In the application filed under Order IX Rule 13 CPC, the Trial Court after examining the suit record, duly recorded in its order dated 22.02.2023 that the summons have been duly received by Petitioner no. 2 herein i.e. Uzama Bano. The order reads as under:-

"This is an application filed U/o IX Rule 13 CPC for setting aside judgment and decree dated 12.01.2023 passed by the present court against the applicants/defendants. It is submitted by the counsel that applicants were not duly served in the main suit and they were not available at the given address on the alleged date of service i.e. 12.01.2022 and 13.01.2022 and hence the present application. Heard. It is to observe that Order IX Rule 13 empowers the court to set aside an ex parte decree if the defendant/applicant satisfy the court if summons were not duly served or he was prevented by sufficient cause from appearing before the court on the



date of hearing. Main file of the suit has been called and on perusal of the summons sent to the defendants/applicants, it is clear that they were duly served upon the applicant/defendant no.2 namely Uzama Bano, W/o defendant no.1 on 12.01.2023 as well as on 13.01.2023. Accordingly, I am of the prima facie view that present application has no grounds. At this stage, adjournment sought by the counsel for applicant to satisfy the court at request, be put up on 01.03.2023 for said purpose.

(Emphasis supplied)

5.1 In fact, after the said fact of due service of summons on Petitioners was pointed out, the counsel for the Petitioners sought an adjournment to address arguments before the Trial Court. Thereafter, when the matter was listed before the Trial Court on 01.03.2023, the counsel for Petitioners was not available to address arguments and the application filed under Order IX Rule 13 CPC was dismissed in view of the finding of service recorded by the Trial Court in earlier order dated 22.02.2023.

6. After the dismissal of the application under Order IX Rule 13 CPC, the Petitioners herein on 20.03.2023 filed a substantive appeal under Section 96 read with Order XLI CPC i.e., RCA No. 25/2023 against the decree of eviction dated 12.01.2023.

6.1. The Petitioners were aware of the finding of the Trial Court in the order dated 22.02.2023 as regard due service on Petitioner No. 2. In the memorandum of appeal (RCA No. 25/2023) no ground was raised alleging that service on Petitioner No.2 has been forged by Ms. Urvi (sister of Petitioner No.1).

6.2. The concerned appellate Court which heard the said appeal dismissed the challenge vide judgment dated 09.05.2023 and upheld the decree of eviction dated 12.01.2023, on merits. The said judgment of the concerned appellate Court dated 09.05.2023 has attained finality.

7. It was after the aforesaid judgment dated 09.05.2023; the Petitioners filed an appeal (RCA No. 59/2023) under Order XLIII Rule 1 CPC against



the Trial Court's order dated 01.03.2023 dismissing the application filed under Order IX Rule 13 CPC. It was in this appeal, for the first time, that the Petitioners raised the alleged plea that the Petitioner No.2's signatures on the summons allegedly served on 12.01.2022 was forged by Ms. Urvi. The plea of forgery in the facts of this case was clearly an afterthought. No such plea was raised before the Trial Court or the appellate Court which heard RCA No. 25/2023.

8. The record of these proceedings leads to the following two (2) conclusions; firstly, that Petitioners did not dispute the finding of the Trial Court that the summons had been duly received by Petitioner no. 2 on 12.01.2022 in the proceedings filed under Order IX Rule 13 CPC before the Trial Court and secondly, that the Petitioners having elected not to raise the said plea in memorandum of appeal in RCA No. 25/2023, the said ground has rightly been held by the Appellate Court as barred under Section 11 CPC and more particularly Explanation IV thereto which reads as under:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.-The expression former suit shall denote a suit which has been decided prior to a suit in question whether or not it was instituted prior thereto.

Explanation II.-For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.-The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.-Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to



have been refused.

Explanation VI.-Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating .

Explanation VII.-The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.”

(Emphasis supplied)

8.1. The Petitioners could have impugned the Trial Court’s findings recorded in orders dated 22.02.2023 and 01.03.2023 in the substantive appeal filed on 20.03.2023 bearing RCA No. 25/2023. The Petitioners were entitled to challenge the said orders as a ground of objection in the memorandum of appeal. The Petitioners having elected not to challenge the said orders are precluded under Section 11 CPC from subsequently challenging the said orders in view of the subsequent judgment dated 09.05.2023 passed in RCA No. 25/2023.

9. The Petitioners cannot set at naught the finality of the judgment dated 09.05.2023 by filing a subsequent separate appeal against the Trial Court’s order dated 01.03.2023.

10. It is evident from the record that RCA No. 59/2023 (filed on 30.05.2023) from which the impugned order dated 13.10.2023 arises, has been filed after the dismissal of RCA No. 25/2023 on 09.05.2023.

11. In the facts of this case, therefore, the finding of the Appellate Court that the appeal i.e., RCA No. 59/2023 itself was not maintainable in view of the dismissal of RCA No. 25/2023 is correct in law. The relevant portion of



the order of the appeal dated 13.10.2023 reads as under:

“I also concur with the submissions of the respondent that if the appellants had any grievance with respect to the order dated 01.03.2023 passed by Ld. Trial Court dismissing the application under Order 9 Rule 13 CPC on the ground that the appellants were not served with the summons of the present suit and that it is the daughter of the respondent' who had signed on behalf of appellant/defendant no.2 namely Uzama Bano and not by the appellant/defendant no.2 herself on 12.01.2023 as well as on 13.01.2023, then it was open for the appellants/defendants to challenge the said observation of Ld. Trial Court in the earlier appeal bearing RCA No. 25/2023. However, perusal of record shows that neither the appellants took any such plea before Ld. Predecessor of this Court in their previous appeal nor taken any such liberty to file a fresh appeal on this ground.

In view of the above reasons, the present appeal is hereby dismissed.”

(Emphasis supplied)

12. The order of the appellate Court is correct and does not suffer from any infirmity. In view of the same this petition being without any merits is accordingly dismissed.

13. Pending applications stands disposed of.

MANMEET PRITAM SINGH ARORA, J

10 NOVEMBER, 2023/MR/sk