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

+ C.R.P. 51/2024

DHANANJAY PANDAY Petitioner

Through: Ms. Deepali Aggarwal, Adv.

versus

RAJESH KATARIA AND ANR. Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

06.03.2024

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1. This Civil Revision Petition under Section 115 of the Code of Civil Procedure, 1908¹ is preferred by the petitioner, who is plaintiff in a suit for recovery of some money filed against the respondents/defendants, assailing impugned order dated 05.10.2023, passed by learned Additional District Judge-01 (South-East), Saket Courts, New Delhi², whereby application of the respondents/defendants under Order IX Rule 13 of the CPC was allowed and the judgment/decreedated 26.11.2019 was set aside.

2. No one appeared for the respondents/defendants despite advance notice.

3. Learned counsel for the petitioner has vehemently urged that the learned Trial Court has committed grave irregularity in allowing the application for setting aside the *ex parte* judgment/decreed overlooking the fact that the respondents/defendants deliberately

¹ CPC



avoided receiving summons and did not appear before the Court and thereby have prolonged the present litigation.

4. It would be expedient to extract the relevant observations by the learned Trial Court while allowing the application of the respondents/defendants, which read as follows:

“On perusal of the record, it becomes clear that the defendants were neither served by speed post or by courier. The case of the plaintiff is that the defendants were served by way of affixation on 09.06.2017 and 04.08.2017. Perusal of order dated 21.07.2017 reveals that the defendants were not properly served and summons were re-issued against the defendants on 21.07.2017. Again, on 01.11.2017, it is revealed from the record that defendants were unserved as on that date. However, perusal of order dated 23.11.2017 reveals that the defendants had been purportedly served by way of affixation on 09.06.2017 and 04.08.2017. Resultantly, the process server was summoned to appear and give his statement regarding affixation done by him. As per the statement of the process server dated 01.02.2018, he has stated that the service of summons by way of affixation was done on 09.06.2017 and no statement regarding service dated 04.08.2017 has been made by the process server. (Paragraph 11)

Thus, as per record, it is revealed that on the basis of affixation done on 09.06.2017, the order dated 01.02.2018 was passed. However, as pointed by the Ld. Counsel for the applicant, no proof of such affixation either through any witness or taking photographs of the summons affixed has been placed on record. As per Order V Rule 17 C.P.C., in case of refusal of acceptance of service, the process server was required to endorse the name and address of the person by whom the house was identified and in whose presence the copy was affixed. Admittedly, in the present case, no such endorsement or statement of any witness is enclosed with the report of process server. Thus, the said action of the process server is in teeth of the provisions of law as well as the judgment of Hon'ble High Court of Delhi in Gurmeet Singh & Ors. (Supra). Thus, the present is a case

² Trial Court



where no service as per law has been made and this is a case of non-service of defendant. (Paragraph 12)

Further, as discussed herein above, the service dated 09.06.2017, upon which the defendants were proceeded ex parte had already been discarded on 21. 07.201 7 by this court. In view of the same, the service by way of affixation dated 09.06.2017 cannot be made basis of declaring the defendants as ex parte. Further, as far as service by way of affixation dated 04.08.2017 has not been proved as per the provisions of Order V Rule 17 C.P.C. and thus, cannot be taken on record for declaring the defendants as ex parte.

(Paragraph 13)

In view of the above discussion, the present application under Order IX Rule 13 C.P.C. is allowed and judgment and decree dated 26.11.2019 is set aside. (Paragraph 14)

5. A careful perusal of the aforesaid observations would show that the learned Trial Court found that the service of the summons for settlement of issues upon the respondents/defendants had not been carried out either through registered post or by Courier service and based on the reports submitted by the Process Server about serving of summons by way of affixation on 09.06.2017 and 04.08.2017, the respondents/defendants were proceeded *ex parte* and eventually suffered judgment/decreed dated 26.11.2019.

6. Based on the proceedings and service reports on the record, learned Trial Court found that the statement of Process Server had not been recorded in respect of affixation report dated 04.08.2017 and service of summons by affixation was not substantiated by any photographs of the affixation of summons and a bare perusal of the service report would show that it was not clear as to who identified the premises of the respondents/ defendants. Evidently, the *ex parte* proceedings were initiated in terms of report dated 09.06.2017, which already stood discarded later on *vide* order 21.07.2017.



7. Therefore, this Court finds no illegality, infirmity or incorrect approach adopted by the learned Trial Court in allowing the application and passing the impugned order dated 05.10.2023.

8. The present revision is dismissed accordingly.

9. Nothing expressed herein shall tantamount to any expression of opinion on the merits of the case.

DHARMESH SHARMA, J

MARCH 6, 2024/sm