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

+ C.R.P. 111/2024

MALI RAM SHARMA Petitioner

Through: Mr. S.K. Singh, Adv.

versus

RAJESH KUMAR SONI Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

% **ORDER**
19.03.2024

CM APPL. 16896/2024 (exemption)

1. Allowed, subject to all just exceptions.
2. The application stands disposed of.

C.R.P. 111/2024 and CM APPL. 16895/2024 (Stay)

3. The petitioner has preferred this civil revision petition under Section 115 CPC read with Article 227 of the Constitution of India assailing the impugned order dated 05.12.2023, whereby his application under Order XXXVII Rule 4 CPC for setting aside the *ex-parte* judgment-cum-decree dated 02.05.2016 has been dismissed by ADJ-01, West District, Tis Hazari Court, Delhi.
4. Shorn of unnecessary details, the respondent in the present revision petition, who is the plaintiff (hereinafter referred to as the respondent/plaintiff) instituted a suit bearing CS No.214/2015 for recovery of Rs. 5,00,000/- under Order XXXVII CPC against the present petitioner/defendant on 23.12.2016.



5. Summons for appearance of the petitioner/defendant had been issued in terms of Order XXXVII Rule 3(2) CPC and the matter came up before the Court on 02.05.2016 and it was observed that summons have been served upon the petitioner/defendant on 17.02.2016. Since no appearance was filed within the prescribed period or even thereafter, the suit was decreed in favour of the plaintiff and against the defendant for a sum of Rs. 5,00,000/- along with simple interest @ 9% p.a. w.e.f. 24.12.2016 till realisation.

6. The present petitioner/defendant moved an application for setting aside the judgment-cum-decree dated 02.05.2016 *inter alia* on the ground that he was never served with the summons for his appearance in the present matter and it was only during the criminal proceedings instituted by the complainant i.e., plaintiff/respondent under Section 138 of Negotiable Instruments Act, 1881 titled as 'Rajesh Kumar Soni v. Mali Ram Sharma' that a copy of the *ex-parte* judgment-cum-decree dated 02.05.2016 was handed over to the petitioner/defendant on 31.01.2020 upon which he filed the application. It was also the plea of the petitioner/defendant that on inspection of the judicial records in CS No.214/2015, it was revealed that the summons issued by the learned Trial Court through the District Judge, Dibrugarh, Assam, were served upon one Mr. Ravi Sharma, who is son of the petitioner/defendant, through process server at his address at Dibrugarh, Assam but the said summons were never handed over to him, and therefore, he never received any copy of the summons.

7. The said application under Order XXXVII Rule 4 CPC came to be dismissed by learned Trial Court *vide* impugned order dated 05.12.2023. It would be expedient to reproduce the impugned order



dated 05.12.2023, which goes as under:

“05.12.2023

Present :

Sh. M. S. Rawat, Ld. Counsel for applicant. Sh. Digvijay Singh, Ld. Counsel for respondent/non- applicant.

Vide this order, I shall dispose off the application u/o 37 Rule 4 r/w Section 151 CPC moved on behalf of applicant/defendant. Arguments have already been heard on the same.

Brief facts relevant for deciding the present application are that one suit i.e. suit no. 214/15 titled "Rajesh Kumar Soni Vs. Mali Ram Sharma" was filed u/o 37 CPC and in pursuance of the order dated 11.01.2016, summons under prescribed proforma of order 37 CPC were issued to defendant. As per record, said summons were duly served upon son namely Sh. Ravi Sharma of defendant, however, despite service, appearance was not entered on behalf of defendant. So, vide order dated 02.05.2016 suit was decreed in favour of plaintiff and against defendant.

The present application has been moved qua order dated 02.05.2016. It is submitted on behalf of applicant/defendant that said Sh. Ravi Sharma did not hand over to him the summons sent by the Court. It is submitted that if summons had been in the knowledge of applicant/defendant, he must would have appeared in Court. It is submitted that applicant/defendant came to know about present case during proceedings of another matter between the parties and immediately thereafter, he filed the present application.

Perusal of record shows that summons were sent to defendant by way of PF and RC and as per report received on summons sent by above-stated modes, summons were served upon one Ravi Sharma and as per the report of process-server, Sh. Ravi Sharma is son of defendant. This Court is of the considered view that as per order 5 Rule 15 CPC, "where defendant is absent from his residence at the time when the service of summons is sought to be effected on him, service may be made on any adult member of the family, whether male or female, who is residing with him". This Court is of the considered view that this is not the case of the applicant/defendant that address mentioned on the summons was not his residential address. It is also not the case of applicant/defendant that Sh. Ravi Sharma is not his son and not a major or did not reside with him at that point of time. This Court is of the considered view that in view of the same, applicant/defendant has failed to show any special circumstance (as mentioned in order 37 Rule 4 CPC) and accordingly not entitled for setting aside the impugned judgment/order/decreed. Accordingly, this application is dismissed.



File be consigned to Record Room after due compliance.”

8. Learned counsel for the petitioner/defendant vehemently urged that the summons were not served upon the petitioner/defendant as per the provisions of Order V Rule 15 CPC and in the submissions, he relied upon a decision in **The Punjab Oil Expellers Co. v. M/s Madan Lal Nanda**, AIR 1967 Delhi 28. It would be relevant to reproduce the provisions of Order V Rule 15 CPC which reads as under:

“15. Where service may be on an adult member of defendant’s family.- Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him.

Explanation: A Servant is not a member of his family within the meaning of this rule.”

9. A bare perusal of the aforesaid provision would show that where the defendant is not found within a reasonable period of time, the summons can be served upon an adult member of the family. A bare perusal of the report by the process server dated 17.02.2016 would show, he gave a clear declaration that summons had been served on 17.02.2016 upon his adult son Sh. Ravi Sharma in the absence of the defendant, who in turn, signed and received the notice as well. The said position has not been disputed by the learned counsel for the petitioner/defendant. It is not the law as is being propounded to be made that the Court should have directed for issuance of summons for appearance afresh by way of abundant caution. There is no *iota* of whisper that the petitioner was not in Dibrugarh for a long time either.

10. The cited case of **The Punjab Oil Expellers Co.(supra)** is clearly distinguishable as it was a case where on the date of



registration of the suit, the learned Trial Court while issuing summons for the first time also directed that in case nobody is found at the site or if it is refused, the service of summons shall be affected by way of affixation at any conspicuous part of the premises. It was one such report that was relied upon and it is in the said backdrop that it was held that it was obligatory on the part of the court to satisfy itself upon the examination of the process server that the service of notice/summons had been duly affected upon the defendant by way of affixation. The same is not the position in the present matter. A lame excuse is taken that the son was at loggerhead with him and he never intimated him that the summons had been received by him in the present suit.

11. In the aforesaid view of the matter, this Court finds that the learned Trial Court has committed no illegality, perversity nor any jurisdictional error in passing the impugned order dated 05.12.2023.

12. The revision petition is accordingly dismissed along with the pending application.

DHARMESH SHARMA, J.

MARCH 19, 2024/ck