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

+ C.R.P. 112/2024

MALI RAM SHARMA Petitioner

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

versus

GAJENDER KUMAR Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER
19.03.2024

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CM APPL. 16898/2024 (exemption)

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

C.R.P. 112/2024 and CM APPL. 16897/2024 (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 28.11.2023, whereby his application under Order XXXVII Rule 4 CPC for setting aside the *ex-parte* judgment-cum-decree dated 26.05.2016 has been dismissed by ADJ-05, 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.191/2015 for recovery of Rs. 21,00,000/- under Order XXXVII CPC against the present petitioner/defendant on 22.12.2015.



5. Summons for appearance of the petitioner/defendant had been issued in terms of Order XXXVII Rule 3(2) CPC first time by the Court *vide* order dated 05.01.2016 and secondly on 03.03.2016. Thereafter, the matter came up before the Court on 10.05.2016 and it was observed that summons have been served upon the petitioner/defendant on 19.02.2016. 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. 21,00,000/- along with simple interest @ 12% p.a. w.e.f. 22.12.2015 till realisation.

6. The present petitioner/defendant moved an application for setting aside the judgment-cum-decree dated 26.05.2016 *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 'Gajender v. Mali Ram Sharma' that a copy of the *ex-parte* judgment-cum-decree dated 26.05.2016 was handed over to the petitioner/defendant on 17.12.2021, 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.191/2015, 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 the 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 the learned Trial Court *vide* impugned order dated 28.11.2023. It would be expedient to reproduce the impugned order dated 28.11.2023, which goes as under:

“28.11.2023

ORDER

1. Vide this order, this Court shall dispose off applications under Order XXXVII Rule 4 of CPC for setting aside the *ex parte* decree/ judgment dated 26.05.2016 passed by Sh. Mahavir Singhal, Ld. ADJ, Tis Hazari Courts Delhi alongwith under Section 5 of Limitation Act and application under Order XXXVII Rule 3 (5) CPC filed on behalf of defendant/applicant for permission to file leave to defend application.

2. Ld. counsel for applicant/defendant submits that on 17.12.2021, during the cross-examination of Sh. Gajendra Kumar, plaintiff herein before the Court of Sh. Mayank Goel, Ld. MM-03, North, Rohini Court, Delhi titled as "Gajendra Kumar Vs Mali Ram Sharma" has disclosed that he had also filed a civil suit against the defendant pertaining to the same cheque in question and the same was decree *ex parte*. On receipt of information of the aforesaid *ex parte* decree of the said civil suit, the counsel of the defendant immediately enquired about the case and made an inspection of the judicial file on the same day ie. 17.12.2021 itself and on the same date applied for certified copy of the complete judicial file. It is further submitted that due to winter vacation and later pandemic situation certified copy of the case file received on 28.01.2022, hence, the present application under Order XXXVII Rule 4 CPC for setting aside *ex parte* decree/judgment dated 26.05.2016 as well as leave to defend on behalf of the defendant filed. It is further submitted that on receipt of the aforesaid certified copy, it reveals that summons were purportedly served upon one Mr. Ravi Sharma, hence, he had no knowledge about the said civil suit against him. It is further submitted that defendant is earning his livelihood by running a small hotel in Moran, District Dibrugarh, Assam in the name and style of "Shankar Hotel". The defendant has also rented upper portion to the said hotel building to Indian Overseas Bank and he also resides with his family in one portion of the said hotel building and his married son namely Sh. Ravi Sharma is also residing there in another portion, however, the plaintiff has not been in talking terms with the son due to his marrying to his choice of girl against the wishes of the family. It is further stated that in fact the plaintiff in connivance with Mr. Ajay Sharma and Mr. Kali Charan Sharma hatched a conspiracy to extort money from the defendant I by filing the present false and frivolous case on the basis of stolen, forged and fabricated signed



blank cheques, blank signed paper and revenue stamp affixed and papers of property of the defendant by the said Ajay Sharma, while he was admittedly working under the defendant lastly as Manager in his hotel. In this respect a criminal complaint has also been filed by the defendant against the said Mrs. Ajay Sharma and the plaintiff U/s 420/406/383/468/471/34 IPC which is pending adjudication in the Court at Assam. It is further stated that the plaintiff has not made any demand of the decretal amount granted vide decree/judgment dated 26.05.2016 even after more than five years till date, so far, with ulterior motive. It is further stated that the defendant never issued any cheque in favour of the plaintiff against any legally enforceable debt or any other liability. It is further stated that there is no privity of contract between the plaintiff and the defendant towards any financial transaction.

3. The applicant/defendant has taken the following grounds for setting aside the ex parte decree/judgment dated 26.05.2021:-

(i) the summons for appearance were never served upon the defendant in the present case.

(ii) the defendant first time came to know about the aforesaid ex parte decree/judgment on 17.12.2021 only during the cross examination in complaint case u/s 138 NI Act.

(iii) the plaintiff has managed the aforesaid service of summons through his younger brother Mr. Ajay Sharma who was ex-employee of the defendant.

(iv) the plaintiff has even not made any demand of the aforesaid decree/judgment dated 26.05.2016 from the defendant, even after nearly more than five years till date with ulterior motive.

4. The present application is filed with application under Section 5 of Limitation Act, 1963 for condonation of delay in filing an application for setting aside the ex parte decree/judgment dated 26.05.2016 as he was unaware of filing of present civil suit and notice of the suit under Order 37 CPC were not duly served upon him as stated above.

5. Reply to the present applications filed by the plaintiff/non-applicant stating that the instant application is not maintainable as there is a huge undue and unexplained delay of 2063 days and the defendant has failed to explain "Special Circumstances" as envisaged under Order 37 Rule 4 CPC. It is further stated that the present application has been filed by the defendant on the sole ground of knowledge, which is actually a vague defence. It is further stated that defendant had the knowledge of the pendency of the suit as he was served with the ordinary summons of the Hon'ble Court on 19.02.2016 first time through his son Mr. Ravi Sharma, Second time himself with the registered post somewhere between 03.03.2016 & 10.05.2016 and third time on 14.11.2019 during



cross-examination of the present plaintiff in case titled as "Rajesh Soni Vs Mali Ram Sharma" bearing CC no. 6036/2016 pending before the Ld. JMIC, Gurugram, the said facts of service can be verified by the returned process and acknowledgement card available on record and the cross-examination dated 14.11.2019.

6. I have heard the arguments addressed on behalf of both the parties and perused the material available on record.

7. The applicant/defendant has taken the ground that summons of the suit under order 37 CPC were not served upon him. However, the registered AD sent to defendant was received back with his own signatures and defendant has not denied by filing any rejoinder that the signatures are forged. Hence, in the view of the presumption raised under Section 27 of The General Clauses Act, the defendant stood serve on the date of signatures on the registered AD apparently made between March & April, 2016 as stated in the reply of the plaintiff. Further perusal of record reveals that summon in summary suit sent to defendant received back served through Sh. Ravi Sharma who is admittedly son of the defendant who is residing with the plaintiff in the same property but defendant stated that he has disowned his son and he has no talking terms with alleged Sh. Ravi Sharma, the defendant did not file any newspaper or any other document which shows that he has disowned Sh. Ravi Sharma and Sh. Ravi Sharma is not residing with him. Therefore, the plea taken by defendant that he came to know about the pendency of present suit on 17.12.2021 during the cross-examination conducted in complaint case U/s 138 N.I. Act is without any merits. Lastly, the defendant has taken the plea that after passing of decree and judgement dated 26.05.2016, the plaintiff did not take any step till date. However, record shows that execution petition has already filed by the plaintiff/DH which is still pending disposal. Further, the present application has been filed by the defendant admittedly with the delay of 2063 days, however, the defendant failed to give any sufficient reason/ 'special circumstances' for the said huge delay.

8. Hence, the Court is of considered view that the application under Section 5 of Limitation Act is not maintainable at this stage because it is very apparent from the record that the defendant did not appear in the Court despite service of summons and there is huge delay of 2063 days. Very purpose of the summary suit under Order XXXVII CPC would be defeated if the aforesaid applications filed on behalf of defendant are allowed. Accordingly, the application under Section 5 of Limitation Act and the application under Order 37 Rule 4 CPC stand dismissed for not showing special circumstances as to why inordinate delay of 2063 days occurred even after service of summons and why the decree should be set aside in absence of such special circumstances. However, I may note that Order 37 is a complete code in itself and



the grounds for setting aside the decree including reasons for delay in filing leave to defend can be shown under Order 34 Rule 4 CPC and there is no need of separate application under Section 5 of Limitation Act. Hence, the application under Order 37 Rule (5) CPC seeking leave to defend also stands dismissed being infructuous after dismissal of the application for condonation of delay filed under Order 37 Rule 4 CPC.

9. File be consigned to the 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 19.02.2016 would show that he gave a clear declaration that summons had been served on 19.02.2016 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 the summons are refused then 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 or perversity and there is no jurisdictional error in passing the impugned order dated 28.11.2023.

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

DHARMESH SHARMA, J.

MARCH 19, 2024/ck