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

% Date of decision: 10th January, 2024

+ C.R.P. 118/2022

HARENDER SINGH (HAWALDAR) Petitioner

Through: Mr. Nishant Khatri, Advocate.

versus

KAVIT KUMAR Respondent

Through: Mr. H.S. Sodhi, Advocate.

CORAM:

HON'BLE MR. JUSTICE DHARMESH SHARMA

DHARMESH SHARMA, J. (ORAL)

CM APPL. 18981/2023

1. This is an application seeking condonation of delay of 58 days in filing the revision.

2. For the reasons stated in the application and in the interest of justice, the application is allowed and delay in filing the revision is condoned.

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3. The petitioner, who was the defendant in suit bearing No. 1147/2018, has filed the present Civil Revision Petition under Section 115 of the Code of Civil Procedure, 1908¹ challenging the legality and validity of the impugned order dated 25.04.2022 passed by Mr. Suresh Kumar Gupta, learned Principal District & Sessions Judge, North-West District, Rohini Courts, Delhi² in Misc. DJ No. 138/2021.

¹ CPC

² PD&SJ



4. Shorn of unnecessary details, a summary suit filed against the petitioner for non-filing of the appearance despite due service of the summons upon him was decreed vide judgment dated 03.01.2019. The petitioner/defendant filed an application under Order XXXVII Rule 4 of the CPC to set aside the impugned decree and the main plank of his objection was that summons were issued on 12.11.2018 and the process server apparently visited his residential premises on 14.11.2018 for service of the summons but he was not present in the house and the process server told his wife that she was bound to receive the Court orders on his behalf. The summons were thus served upon her in complete contravention of the provisions contained under Order V Rule 15 of the CPC.

5. It was also the case of the petitioner/defendant that the second address in the memo of parties was incorrect to the knowledge of the respondent/plaintiff and his correct address was deliberately concealed as he was not posted at Rohini Jail but at Mandoli Jail. The said application was dismissed by the learned PD&SJ setting out the following reasons:

“16. The question arises whether there is due service of the summons upon the defendant/applicant and whether he was aware of the pendency of the suit or not.

17. The summons was issued to the defendant at the correct address as shown in the memo of the parties. There is no dispute to this effect. The process server visited the house of the defendant where his wife met and summons was handed over to her under her signatures. The process server had gone to his work place but he was not found posted at Rohini Jail as well as Mandoli jail.

18. The wife of the defendant nowhere disclosed to the process server that her husband has not been residing with her. The wife could have refused to take summons in case she was not having good relations or strained relations with the defendant. Nothing is



brought on record by the defendant that he has stayed at a particular barrack for a particular period including the period under reference. He could have placed documentary evidence on record from his office that he has stayed in a particular barrack for particular period. There is nothing on the record that defendant has been residing separately from his wife from a particular date or month. In the absence of all these particulars, an adverse inference has to be drawn against him.

19. The process server has visited the Rohini and Mandoli jail for the service but he was not found posted at both the places. The place of posting was not disclosed by the officials of Mandoli Jail to the process server in order to effect the service at that address. The process server had made an effort to serve the defendant personally but in vain.

20. The wife is residing with the defendant as nothing is on the record that both had been living separately from particular month. The summons was served upon her being the spouse of the defendant which to my mind is a complete service in terms of Rule 15 of Order 5 CPC.

21. Ld. counsel for the defendant has admitted that execution petition is pending disposal wherein reply to the application u/o 21 Rule 106 CPC is filed by him. Ld. Counsel has also admitted that the application to stay the proceedings against the decree has also been filed by defendant.

22. The copies of the ordersheets, reply and application are filed by the plaintiff in this application. The perusal of the ordersheets show that the defendant/JD has appeared with his counsel in the execution proceedings on 20.09.2019 and 05.12.2019. The present application has been filed on 15.03.2021. The defendant was very well aware about the execution proceedings. The execution proceedings starts when judgment and decree is passed. No explanation is forthcoming why the defendant did not move the application u/o 37 Rule 4 CPC on coming to know about the execution proceedings. There is no explanation to this effect.

23. The perusal of the application to stay the proceedings against the decree passed by this court shows that he has taken a different stand for his non appearance in the court on the date of hearing. Para7 of the application shows that he could not appear in the court due to demise of his sister in law (bhabhi) wife of Sh. Manjeet Mathur. He has taken a different stand from the stand taken in the present application. Both the stands are different. The stand taken in the application for stay shows that he was aware of the pendency of the suit where he could not appear due to the demise of his bhabhi. The two different stands clearly shows that he was aware of the proceedings of the suit and an afterthought plea has been



taken in this application for the reasons best known to him. He has not come to the court with clean hands as he is blowing hot and cold in the same breath.

24. The entire facts show that the summons was duly served upon him through his wife. He was aware of the proceedings of the suit but chose not to appear for the reasons best known to him.

25. The defendant has not only to show the special circumstances in order to set aside the decree or to stay or set aside the execution but he has also to show by affidavit or otherwise which would entitle him for leave to defend the suit.

26. The defendant has taken a plea in his application that plaintiff has forged his signature on friendly loan agreement and he is not bound by the agreement which is based on forgery.

27. The plaintiff has based his case upon friendly loan agreement dt.17092017 as well as on receipt dt.17092017. The friendly loan agreement and receipt bear the signatures of plaintiff and defendant as well as that of marginal witnesses. The addresses of marginal witnesses are reflected in the receipt. Nothing is mentioned in the application that receipt was not signed by him as well as by marginal witnesses. There is nothing in the application that signatures of marginal witnesses on both the documents were taken later on by the plaintiff. There is no explanation why any action was not taken against the plaintiff immediately after coming to know of the decree in the execution proceedings which calls for an adverse inference against the defendant. There does not exist any special circumstance in favour of defendant. The defendant has raised a plea of forgery to show that he is entitled for leave to defend and he can prove it during the course of trial. To my mind, the bald plea of forgery is not enough to show that he is entitled for leave to defend as there is no other material on record in support of said plea. The plea raised by the defendant does not inspire confidence.

28. In view of the foregoing reasons, there is no merit in the application. The application u/o 37 Rule 4 CPC of the defendant is dismissed. It be tagged with the main case file.”

6. Notice of the present revision petition was issued and served upon the respondent/plaintiff and on appearance, the present revision petition is opposed.



7. Having heard the learned counsel for the rival parties at the Bar for a considerable time and on perusal of the record, I find that the present revision petition is bereft of any merits.

8. **First things first**, it is borne out from the record that the respondent/plaintiff, i.e., the Decree Holder filed an execution application, which, upon notice was served upon the petitioner. A reply/objection was filed on his behalf wherein under paragraph (7) it was stated by the petitioner/Judgment Debtor that he could not appear before the Court on 03.01.2019, on which date, decree had been passed, due to demise of his sister-in-law (*wife of brother Manjeet Mathur*). In the subsequent paragraph viz., paragraph (8) it was averred by the petitioner/judgment debtor that his father had suffered attack in the nature of Brain Haemorrhage and remained hospitalized for 4-5 months. Therefore, he remained busy in discharging his social, moral and spiritual duties.

9. As brought out by the learned counsel for the respondent/plaintiff, a new twist in the tale was sought to be introduced by the petitioner/defendant that although summons have been served upon his wife on 14.11.2018, he was having strained relationship with her, which fact has not been substantiated in any manner. Be that as it may, the main plank of the objection to the passing of the impugned decree dated 03.01.2019 is that there was no compliance by the process server with provisions of Order 5 Rule 15 of the CPC. The said provision is re-produced 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.”

10. A careful perusal of the aforesaid provision would show that in the event of absence of defendant from his residence at the time of visit of the process server, coupled with no likelihood of the addressee/ defendant being found at his residence within a reasonable time, the process server has the discretion to effect service of the summons upon any adult male or female member of the family, residing with him. The provision mandates that service on servant would not be a valid service of summons. The expression ‘reasonable time’ is not defined in the statute.

11. In the face of admission by the petitioner/defendant that summons were otherwise duly served upon his wife on 14.11.2018, the question arises, whether there was ‘reasonable time’ within which the petitioner/defendant could have made his appearance at his residence and had received the summons. It would be unconscionable to assume that on a visit by the process server to the residence of the defendant, he should be compelled to wait for ‘unreasonable’ period of time so as to wait for the defendant to come at home and then serve summons upon him. The expression ‘within reasonable time’ means and connotes - within the reasonable time of such visit by the process server. In other words, it means reasonable time within, which, on visit by the process server, the defendant would be available.



12. I may hasten to add that but for the fact that there is admission that summons were duly served upon his wife, the learned Trial Court should ensure examination of the process server so as to satisfy itself whether or not summons have been duly served upon any adult member of the family.

13. In the instant matter, what turns the table against the petitioner/defendant is that the service report, which is Annexure-III, appears to be duly signed by his wife, Smt. Savita Devi putting date as '14.11.2018' and also writing that she is wife of Harender, to whom on enquiries, summons and copy of the plant was delivered. It is also brought out on the record that a different process server visited Rohini Jail on 15.11.2018 upon which he was told that the petitioner/defendant was posted at Mandoli Jail and thereafter he went to Mandoli Jail No. 12 where he made enquiries about the petitioner/defendant and he was informed that he was not posted thereat. There is no challenge by the petitioner/defendant to the said reports.

14. In view of the fact that the petitioner/defendant has tried to improve over his case at every stage of the matter and lack of *bonafides* on his part, this Court finds that no illegality, perversity or incorrect approach was adopted by the learned PD&SJ in passing the impugned order. Hence, the present revision petition is dismissed.

DHARMESH SHARMA, J.

JANUARY 10, 2024

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