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

% ***Date of decision: 15th July, 2024***

+ **CM(M) 2914/2024 & CM APPL. 39034/2024**

AJAY KUMAR RASTOGI AND ANRPetitioners

Through: **Mr. Akshit Gadhok, Advocate**
(through VC).

versus

SMT SONAM JAINRespondent

Through: **None.**

CORAM:

HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT (oral)

1. Petitioners are defendants before the learned Trial Court.
2. Respondent-Ms. Sonam Jain had filed a suit for recovery.
3. Admittedly, when the suit was taken up by the Court of learned ADJ-02 (Shahdara), Karkardooma Courts on 09.11.2022, Mr. Asghar Khan, learned counsel appeared for them before the Court through video conferencing.
4. However, during the proceedings conducted that day itself, Mr. Khan made a statement that he was not representing the defendants and rather he was representing them in a criminal matter. It was in the aforesaid back-drop, the request of Mr. Khan was allowed and the application moved by him, perhaps seeking his discharge, was allowed.
5. The same order also records that the Court had perused the earlier service reports qua the defendants and these reports clearly indicated that they had been served. Noticing no appearance from their side and since, Mr.



Asghar Khan, learned counsel who was, admittedly, representing them in a criminal complaint filed under Section 138 of Negotiable Instruments Act, 1881, had sought his discharge, the Court proceeded against them *ex-parte*.

6. Such defendants (petitioners herein) moved application under Order IX Rule 7 CPC, praying therein, that *ex-parte* order may be set aside.

7. Learned Trial Court has dismissed the above said application and this is how the defendants have filed the present petition under Article 227 of the Constitution of India.

8. When asked, Mr. Akshit Gadhok, learned counsel for the petitioners could not provide any satisfactory and plausible answer as to on what basis, Mr. Asghar Khan, learned counsel had appeared before the said court of learned ADJ. Even assuming for a moment that he was representing them in a Criminal Court but his appearance before the Civil Court must have been with some specific and tacit instructions coming from the petitioners only and not on his own.

9. In order to substantiate their contentions, the petitioners should have also annexed affidavit from Mr. Asghar Khan, clearly specifying the reasons of his appearance before the Court. This was imperative if he was not instructed so by them. By logical inference, it has to be assumed that Mr. Asghar Khan had appeared before the Court of learned ADJ-02 based on specific instructions coming from the side of the defendants only.

10. Learned Trial Court has taken into consideration all the facts in an appropriate manner and observed as under:-

“Perusal of Ordersheet dated 18.09.2021 shows that Sh. Asghar Khan, Advocate had appeared through VC for Defendants no. 1 and 2 and submitted that he will file memo of appearance during the course of the day and vakalatnama within one week. Thereafter on 29.09.2021, proxy counsel Ms. Arti Gupta for Sh.Asghar Khan filed an application on behalf of



Advocate Sh. Asghar Khan for putting wrong appearance in the present case. Perusal of Order dated 04.04.2022 shows that proxy counsel for the plaintiff informed the court that Sh. Asghar Khan is appearing for the Defendants in the criminal complaint case no. 4621/2017 titled as 'Sonal Jain v. Ajay Kumar Rastogi' and in view thereof, court notice was issued to Sh. Asghar Khan, Advocate. Thereafter, on 09.11.2022, Sh. Asghar Khan, Advocate appeared through VC and stated that due to mistake, he appeared for the Defendants no. 1 and 2 on 18.09.2021 and that he is not representing them in the instant matter. He further stated that he is representing both the Defendants in the criminal case and that he has moved an application on 23.09.2021 forwarding his plea that he appeared by mistake for Defendants. My Ld. Predecessor vide Order dated 09.11.2022 allowed the application of Sh. Asghar Khan and after perusing the report status 04.03.2022 and 05.03.2022 over process qua defendants ordered to proceed ex-parte against the Defendants.

Order 9 Rule 7 CPC reads as under:-

"Whether the Court has adjourned the hearing of the suit ex parte, and the defendant at or before such hearing, appears and assigns good cause for his previous non appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance. "

The process server report dated 04.03.2022 and 05.03.2022 shows that Defendants were served. The appearance of Sh. Asghar Khan, Advocate on 18.09.2021 for Defendants, who is also the counsel for Defendants in the criminal matter, clearly show that Defendants have the knowledge about the present proceedings and had deliberately chose not to appear and to file written statement.

Admittedly, Sh. Asghar Khan, Advocate is counsel for the Defendants in the criminal matter. Defendants explained in their application that they learned about the pendency of the present proceedings only on the previous date in criminal matter, however, they have failed to give any plausible explanation to the fact that how counsel Sh. Asghar Khan appeared in this matter without knowledge/instructions of the Defendants. As such, Defendants have failed to assign any good cause for their previous non appearance and had deliberately avoided to appear before the court in this matter.

The application sans any ground and deserves dismissal. Hence, dismissed with costs of Rs.5,000/- to be deposited by the Defendants with BAR COUNCIL OF DELHI INDIGENT & DISABLED LAWYERS A/C No. 010104000183451IFSC Code : IBKL0000010 at IDBIBANKSirifort Branch, New Delhi."

11. In view of the above, it is quite obvious that the defendants are



themselves to be blamed for their miseries. They took the things for granted and despite knowing fully well that a civil suit for recovery had been filed against them, they did not choose to contest the same in any manner whatsoever. Their counsel did appear before the learned Trial Court which is suggestive of the fact that they had full knowledge and information about the pendency of suit in question.

12. Since no endeavour was made to participate in the proceedings, the learned Trial Court was fully justified in dismissing the application moved under Order IX Rule 7 CPC.

13. Finding no merit or substance in the present petition, the same is dismissed.

(MANOJ JAIN)
JUDGE

JULY 15, 2024/sw