



2024:DHC:9289



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

% ***Judgment delivered on: 29.11.2024.***

+ **CM(M) 3920/2024**

JAGDISH KUMAR & ORS.Petitioners

Through: Ms. Pallavi Awasthi, Mr. Akash
Vajpai, Mr. Deepak Sood and
Mr. Ayush Jain, Advs.

versus

STATE & ORS.Respondents

Through: Ms. Avni Singh, Panel Counsel
(GNCTD) with Mr. Rushikanta,
Adv. for R-1.
Mr. Aakash Sehrawat, Adv. for
R-2

CORAM:
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T (Oral)

CM APPL. 69148/2024 (exemption)

Allowed, subject to all just exceptions.

The application stands disposed of.

**CM(M) 3920/2024, CM APPL. 69147/2024 (stay) CM APPL.
69149/2024 (delay in re-filing)**

1. The petitioners impugn the order dated 21.03.2024, whereby the

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application under Order IX Rule 7 of Code of Civil Procedure, 1908 ['CPC'] was dismissed subject to costs of Rs. 10,000/- on the ground that there was delay in filing the application and the application was without any merits.

2. Learned counsel appearing for the petitioners has submitted that under the Limitation Act, 1908, no period is prescribed for filing the application for setting aside the ex parte order. It has been submitted that non-appearance of counsel on the date of hearing was neither intentional nor deliberate. It is further submitted that petitioner No. 2 is a senior citizen aged about 79 years and is suffering from health issues due to which he was not in a position to appear in Court. Similarly, respondent No. 4 is also a senior citizen, living in a remote village of Haryana and owing to his health, was unable to travel for long duration. As regards, petitioner No. 3, it has been submitted that he is a practicing doctor in Gurugram, Haryana and due to exigencies of his work, he could not appear and had instructed his counsel to appear.

3. It has also been submitted that the main counsel, Mr. Y.S. Narula was unwell on 05.04.2024 and had to undergo haemorrhoidectomy with fissurectomy surgery on 20.04.2024, due to which he remained in ICU till 22.04.2024, whereafter although he was relieved from the hospital, but was advised strict bed rest for 20 days. It is submitted that it took about a month for the counsel to recover from illness and resume work, due to which reason the application could not be filed prior to this date.

4. The learned counsel for respondents submits that the impugned

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order is sustainable in law, and therefore, may not be interfered with. He submits that there is no reason much less a justifiable reason for interfering with the impugned order and there is no material irregularity or illegality committed by the Trial Court.

5. With regard to the argument that there is no period of limitation prescribed for filing the application for setting aside the ex parte order, the learned counsel for petitioners has placed reliance on the decision of this Court in **Delhi Development Authority vs. Shanti Devi and Ors.** [MANU/DE/0347/1981], where this Court held as under:-

“(3) Under the Limitation Act no period is prescribed for filing an application for setting aside the order proceeding ex parte. Under rule 7 of Order 9 of the Code the defendant is allowed to file an application at or before the next date of hearing and if he assigns good cause for his non-appearance on the previous date of hearing the court may set aside the order proceeding ex parte. The application by the petitioner-defendant under Order 9 rule 7 was made on the next date of hearing i.e. 16th August, 1979. Thus it is clear that the defendant-petitioner filed the application in accordance with Order 9 rule 7 of the Code. It must Therefore be held that the application was filed in accordance with law. There is no rule that an application under Order 9 Rule 7 is to be filed within 30 days from the date of the order proceeding ex parte. The next question is whether there was good cause for the absence of the petitioner-defendant on 30th April, 1979 before the trial Court. Counsel for the DDA Mr. K.P. Sharma filed his own affidavit that on 30th Apr., 1979 he was busy in his personal matter and therefore he could not attend the Court at the time when the suit was called by the Court. He further states that he reached the Court at 10.55 A.M. and came to know that the ex parte proceedings have been ordered against the petitioner-defendant. There is good cause for the absence of the counsel on 30-4-1979. The order dated 30th Apr., 1979 proceeding ex parte against the petitioner defendant is therefore set aside and the petitioner-defendant is allowed to appear and contest the suit. The petitioner may now file the written statement on the next date of hearing before the trial Court. The petitioner is directed to appear before the trial Court on 13th Oct. 1981. No order as to costs.”

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Signature Not Verified

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By: SUNITA KUMARI
Signing Date: 30.11.2024
12:29:08



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6. A perusal of record reveals that on 29.01.2024, no one appeared on behalf of respondent No. 4 and accordingly he was proceeded ex parte and the case was adjourned to 21.03.2024 for awaiting the service report of respondent Nos. 2 and 3. However, at about 11:43 AM, one Sushant Kumar, Advocate, appeared on behalf of respondent Nos. 2 to 4 and filed memo of parties and undertook to file *vakalatnama* on or before the next date i.e. 21.03.2024.

7. On 21.03.2024, following order was passed:-

“Present: Mr Akash Sehrawat, Ld.counsel for petitioner
Mr Honey, Ld. proxy counsel for Mr Sushant
Sehrawat main counsel for respondent Nos. 2,3 & 4

ORDER
21.03.2024

1. It is 12.10 pm. Despite pass over neither the respondents nor the counsel for respondents are present. No *vakalatnama* is filed till date on behalf of respondents. Statutory period for filing of WS/ reply has already been lapsed. Accordingly, respondents are proceeded ex parte.

2. Ld. counsel for the petitioner submits that he has no objection to the valuation report filed by the concerned SDM.

3. List this matter for PEon 03.07.2024. Petitioner is directed to file the affidavit of evidence of witnesses through efilng portal.

(Richa Gusain Solanki)
ADJ -02, South West
Dwarka Courts, Delhi
21.03.2024

At this stage(01.08 p.m) Mr Vikrant Y.S. Narula (through VC) and Mr Sushant Kumar , Ld.counsel for respondent Nos. 2, 3 and 4 has appeared.

They have been apprised of the next date of hearing and purpose fixed.

List this matter for purpose already fixed on **03.07.2024**.

(Richa Gusain Solanki)
ADJ -02, South West
Dwarka Courts, Delhi
21.03.2024”

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8. As is evident from the aforesaid order, the learned Trial Court had proceeded respondent Nos. 2 to 4 as ex parte despite the presence of proxy counsel on behalf of counsel for respondent Nos. 2 to 4.

9. The case was later preponed to 20.05.2024 and on that particular date, learned counsel for respondent Nos. 2 to 4 submitted before the Court that she would be filing the application for setting aside the ex parte order. The case was then adjourned to 03.07.2024.

10. In the interregnum, the application was filed under Order IX Rule 7 CPC, which came to be dismissed by the Trial Court vide impugned order dated 29.08.2024.

11. Defendant can be proceeded ex parte under Order IX Rule 7 CPC only if he does not appear despite service of summons.

12. The order of the Trial Court dated 21.03.2024 clearly reveals that the proxy counsel on behalf of counsel for respondent Nos. 2 to 4 was present even at the time of first call of the case, and therefore, there was no occasion to proceed them ex parte. The order further reveals that even the main counsel appeared on their behalf at 01:08 PM. Under the circumstances when the defendants were represented through counsel in Court, no order to proceed them ex parte could have been passed.

13. Even otherwise, the Court is of the considered view that the application under Order IX Rule 7 CPC should be considered more liberally so as to ensure that the lis between the parties is decided on merits rather than on technicalities. The Supreme Court in the case of **Collector Land Acquisition, Anantnag & Anr. vs. MST. Katiji &**



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Ors. [MANU/SC/04/60/1987] has laid down that such applications ought to be construed liberally and parties must be permitted to contest their case on merits.

14. No doubt, it is correct that due to petitioner having been proceeded ex parte, certain delay has occurred in the case filed by the respondents, but then for such delay, the respondents can be suitably compensated with costs.

15. In that view of the matter, the impugned order dated 29.08.2024 passed by the learned Trial Court is set aside subject to petitioners paying to the respondents a cost of Rs. 20,000/- on or before the next date listed before the Trial Court.

16. Once the cost is paid, on the date fixed, as directed, the petitioner would be deemed to have joined the proceedings on or from the date when they were proceeded ex parte by the Trial Court.

17. The petition is accordingly disposed of

RAVINDER DUDEJA, J.

NOVEMBER 29, 2024/vp

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