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

Date of Decision: 14.05.2025

+ C.R.P. 24/2021 & CM APPL. 8448/2021

ANKUSH KUMAR PRAJAPATI

.....Petitioner

Through: Mr. Sushant Mukund, Advocate with
Petitioner in person.

versus

JAMSHED ALAM & ORS.

.....Respondents

Through: Mr. Bipin Kumar and Mr. Suresh
Chandra Sharma, Advocates.

CORAM:

HON'BLE MS. JUSTICE TARA VITASTA GANJU

TARA VITASTA GANJU, J.: (Oral)

1. The present Petition has been filed under Section 115 of the Code of Civil Procedure, 1908 [hereinafter referred to as "CPC"] seeking to challenge the order dated 21.12.2019 passed by the learned Additional District Judge-03 (East), Karkardooma Courts, Delhi [hereinafter referred to as "Impugned Order"]. By the Impugned Order, an Application under Order IX Rule 13 read with Section 151, CPC was decided by the learned Trial Court.
2. A Coordinate Bench of this Court by an order dated 18.11.2021 directed that the proceedings before the learned Trial Court shall remain stayed. The matter has continued as is since then.
3. Briefly, the facts are that the Petitioner had filed a suit for recovery in



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the sum of Rs.125,44,487/- along with pendente lite and future interest against the Respondents under Order XXXVII, CPC.

3.1 The suit was based on an Agreement to Sell dated 02.05.2014 [hereinafter referred to as “Agreement”] which was executed between the Petitioner and the Respondent No.1 in respect of property bearing No. C-12/160 (Block No. C-12 Plot No.160), Yamuna Vihar, Residential Scheme, Illaqa Shahdara, Delhi-110053 [hereinafter referred to as “subject property”]. In terms of the Agreement, the Respondent No.1 agreed to sell the subject property to the Petitioner for a sale consideration of Rs.52,60,000/-. An advance of Rs.40,00,000/- was paid by the Petitioner and subsequently, balance of Rs.12,60,000/- was to be given by the Petitioner after one year once the sale deed *qua* the subject property got registered.

3.2 The Respondent No.1 failed to perform his obligations under the Agreement despite the extension of time granted to him. It is the case of the Petitioner that since the market value of the property was Rs.1,64,96,000/-, Rs.125,44,487/- was due to the Petitioner.

3.3 A deed of settlement dated 26.04.2016 was also executed between the parties [hereinafter referred to as the “Settlement Agreement”]. In terms of the Settlement Agreement, post-dated cheques were given to the Petitioner by the Respondent. These cheques were returned as dishonoured upon presentation leading to the filing of a Petition under Section 138 of the Negotiable Instruments Act, 1881 [hereinafter referred to as “NI Act”].

3.4 Subsequently, a suit filed under Order XXXVII, CPC was filed based on the dishonoured cheques issued by the Respondents.



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3.5 Since there was no appearance on behalf of the Respondents before the learned Trial Court despite service, by an order dated 03.04.2018 the Respondents were proceeded with *ex-parte*. The Petitioner led *ex-parte* evidence on 23.04.2019.

3.6 As stated above, by the judgment dated 23.04.2019, the suit of the Petitioner was decreed in the sum of Rs.42,84,040/- along with interest @18% p.a. The decree sheet was also drawn up for the aforesaid amount. Subsequently, an Application under Order IX Rule 13 read with Section 151, CPC was filed by the Respondents for setting aside the *ex-parte* judgment and decree. The challenge in the present Petition is to the decision on this Application filed by the Respondents.

4. By the Impugned Order, the learned Trial Court has recalled the judgment and decree and has directed that subject to the deposit of Rs.15 lacs within two months from today, the Respondents shall be permitted to file a written statement and contest the suit.

5. Learned Counsel for the Petitioner submits that although the Impugned Order suffers from an infirmity since the suit was filed on 05.09.2017 as a summary suit, the Application was filed by the Respondents under the provisions of Order IX Rule 13, CPC which is applicable for a suit other than a summary suit. The Petitioner should have applied for leave to contest in terms of the provisions of Order XXXVII Rule 4, CPC.

5.1 In addition, it is contended that the Impugned Order was passed without taking into consideration the fact that several notices were sent for service of the Respondents despite which they did not appear before the Court before the *ex-parte* judgment was passed.



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5.2 Learned Counsel for the Petitioner further submits that the Impugned Order directs the deposit of Rs.15 lacs only when the amount that was due as per the Impugned Order to the Petitioner was Rs.42,84,040/- along with interest.

6. Learned Counsel for the Respondents submits that the contentions of the Petitioner that the matter should have been dealt with as a summary suit under provisions of Order XXXVII, CPC are without merit. Although, initially a summary suit was filed on 05.09.2017 under Order XXXVII, CPC for recovery of Rs.1,25,44,487/- with interest, the Defendants were proceeded with *ex-parte* on 03.04.2018 and *ex-parte* evidence was led by the Petitioner/Plaintiff on 23.04.2019 which led to the passing of a decree in favour of the Petitioner/Plaintiff on 23.04.2019 of Rs.42,84,040/- along with interest @18% to be recovered from the Respondents. Learned Counsel for the Respondents submits that since the decree was an *ex-parte* decree, it was requisite that the Respondents filed an Application under Order IX Rule 13, CPC and not under Order XXXVII of the CPC.

6.1 In addition, it is contended by learned Counsel for the Respondents that there is no infirmity in the Impugned Order so far as that it directs the deposit of Rs.15 lacs by the Respondents. It is submitted that since the Respondents had already paid Rs.25 lacs to the Petitioner by RTGS, NEFT and cash, the learned Trial Court has directed that the suit be contested subject to the deposit of Rs.15 lacs.

7. The challenge in the present Petition is to an order passed in an Application under Order IX Rule 13, CPC for setting aside the *ex-parte* judgment and decree dated 23.04.2019. The grounds that were taken by the



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Respondents before the learned Trial Court to set aside the *ex-parte* judgment were that the Respondents were not aware of the proceeding filed earlier and they came to know much later that there is an *ex-parte* judgment that has been passed against them.

7.1 A perusal of the plaint shows that the plaint was filed under Order XXXVII, CPC. However, the Impugned Judgment in permitting the Respondents to contest the suit by paying a sum of Rs.15 lacs has in essence granted the Petitioner conditional leave to defend the suit which has been made subject to deposit of Rs.15 lacs.

8. By the Impugned Order, the learned Trial Court has dealt with the plea taken by the Petitioner that summons were repeatedly sent to the Respondents by the Court. It has found that the details of the service/refusal of Court summons were not complete. The learned Trial Court has further given a finding that it is always appropriate that the matter be decided on merits after hearing both the sides. The learned Trial Court has also given a finding that the bona fides of the Respondents are apparent in view of the fact that they say that they are liable only to pay Rs.15 lacs which they are willing to deposit before the Court to enable them to contest the case. It is apposite to extract Paragraphs 6 and 7 of the Impugned Order in this behalf which are set out below:

*“6. Having heard the submissions and perused the record, this Court is of the view **that the application under consideration ought to be allowed and the ex parte judgment/decreed dt. 23.04.2019 ought to be recalled.** It is no doubt correct that summons had been repeatedly sent to the defendants by the Court. **The record reflects that the process server on one occasion met a nephew of the defendants who did not take the process on the plea that it is only the defendant who would take the same.** On another occasion, **a lady namely Raes***



stated that she is the sister of the defendants and did not take the process on the plea that it is only the defendants who would take the same. On yet another occasion, a person namely Abhishek stated that it is only the defendants who would take the process. And then on 27.02.2018 one Seema did not take the process as the defendants were out of station and then the service was done by the mode of affixation. The returned postal envelopes does not state as to who it was who had refused to accept the process. It does very often happen in case of persons who are not too educated that they do not really comprehend as to the consequence of not taking the Court summons. It also happens that they do not note down the details of the Court summons and in the absence of such details they cannot apprise the defendants about the Court process and/or their details. It is always fit and appropriate that matter are decided on their merits after hearing both the sides.

7. The bonafides of the defendants are apparent from the fact that the defendants stated to the Court that according to them, they were liable to pay only Rs. 15 lacs and they were ready to deposit/pay the same if the Court so directed. Bonafides of the defendants are also apparent from the fact that they had been appearing in the complaint case under section 138, NI Act.”

[Emphasis Supplied]

9. Learned Counsel for the Petitioner has contended that the suit was filed for the recovery of Rs.1,25,44,487/- lacs, however the Court has passed the *ex-parte* judgment and decree dated 23.04.2019 in the sum of Rs.42,84,040/-. The decree was admittedly passed by the learned Trial Court in favour of the Petitioners awarding the sum of Rs.42,84,040/-. The Impugned Order reflects that no finding has been given by the learned Trial Court with respect to Rs.25 lacs that have been stated to have been paid by the Respondents to the Petitioner.

10. Given the lapse of time and in the interest of justice, it would be expedient that the Petitioner is also permitted to agitate its contentions afresh. The challenge in the present Petition is not to the judgment and



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decree dated 23.04.2019 but to the Impugned Order dated 21.12.2019 passed by the learned Trial Court in the Application which has set aside the *ex-parte* judgment and decree.

11. Given that the decree has already been recalled by the Impugned Order, this Court deems it apposite to direct that the learned Trial Court shall examine the matter on the averment that Rs.25 lacs has already been paid by the Respondents to the Petitioner afresh.

12. The Petition is accordingly partly allowed.

13. The parties will appear before the learned Trial Court on 05.06.2025.

14. The learned Trial Court shall examine the contentions of both the parties *qua* the amount of Rs.25 lacs which has stated to have been paid and pass an appropriate order in accordance with law.

15. It is clarified that this Court has not examined the matter on merits and the rights and contentions of both the parties are left open to be agitated before the learned Trial Court.

16. The Petition is disposed of in the foregoing terms. The pending Application stands closed.

17. The parties shall act based on a digitally signed copy of the order.

TARA VITASTA GANJU, J

MAY 14, 2025/pa/ ha

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