



2025:DHC:2737-DB



\$~59

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO (COMM) 81/2025, CM APPL. 16739/2025 & CM APPL. 16740/2025**

M/S SWIKRITI TRAVELSAppellant
Through: Mr. Chirag Madan, Ms. Ravleen Sabharwal, Mr. Rahul Agarwal and Mr. Ronit Bose, Advs.

versus

M/S MINI POCKET OPC PVT. LTD.Respondent
Through: Mrs. Vasundhara Nagrath and Mr. Shaurya Katoch, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MR. JUSTICE AJAY DIGPAUL

JUDGMENT (ORAL)
17.04.2025

%

C. HARI SHANKAR, J.

1. This is an appeal assailing the order dated 12 February 2025 passed by the learned District Judge (Commercial Court) in CS DJ 1511/18¹.

2. *Vide* order dated 25 July 2023, the learned Commercial Court proceeded *ex parte* against the appellant, as the appellant had remained absent on four earlier dates of hearing. Thereafter, the suit itself was decreed *ex parte* against the appellant on 10 October 2023.

¹ **M/s Mini Pocket OPC Pvt Ltd v M/s Swikriti Travels**



3. The appellant moved an application under Order IX Rule 13 of the Code of Civil Procedure, 1908², for setting aside the *ex parte* judgment and decree.

4. By the impugned order dated 12 February 2025, the learned Commercial Court has allowed the said application, subject, however, to deposit, by the appellant, of the entire decretal amount of ₹ 38 lakhs in the form of a fixed deposit receipt in favour of the Court within four weeks from the date of the order.

5. The only reasoning for this direction, as contained in the impugned order, if any, may be said to be contained in the following paragraphs:

“Equity demands that parties to litigation are given a fair opportunity to present their case. The principles of natural justice emphasize that no party should be condemned unheard. In the present matter, while the defendant was proceeded ex-parte, the defendant was unable to appear before the Court to cross-examine the witness due to miscommunication from the side of counsel for defendant.

While the counsel for plaintiff argued against setting aside the decree, it is essential to balance the interests of both parties. Setting aside an ex-parte decree should not cause undue hardship to the plaintiff, and the defendant should not derive any undue advantage from the delay.

In light of the above, the application under Order IX Rule 13 CPC is allowed, subject to the condition that the defendant deposits the decretal amount of Rs. 38,00,000/- (Rupees Thirty Eight Lakhs only) in the form of a Fixed Deposit Receipt (FDR) in favor of the Court within four weeks from the date of this order.

² “CPC” hereinafter



This condition ensures that the plaintiff's rights are safeguarded while allowing the defendant to contest the matter on merits."

6. Before the learned Commercial Court, learned Counsel for the appellant had submitted that the previous counsel, who was appearing for the appellant had not brought, to his notice, the proceedings in the matter, which was what occasioned the four incidents of non-appearance. As such, it was sought to be contended that non-appearance was not deliberate or intentional.

7. From a reading of the extracted paragraphs from the impugned order in para 5 *supra*, it appears that the learned Commercial Court accepted the contention of the appellant that the appellant was unable to appear before the Court to cross-examine the witness owing to miscommunication by Counsel.

8. As such, the ground for non-appearance, as adduced by the appellant, appears to have found favour with the learned Commercial Court, at least *prima facie*.

9. The appellant has approached this Court, challenging the impugned order, to the extent it directs the appellant to deposit the entire decretal amount of ₹ 38 lakhs as a condition for allowing of the Order IX Rule 13 application filed by the appellant.

10. The impugned order has not been challenged by the respondent. In other words, it is not open to the respondent to contend before this Court that the appellant's application under Order IX Rule 13 should



not have been allowed.

11. The only issue that remains for consideration is, therefore, whether the direction for deposit of the entire decretal amount as imposed by the learned Commercial Court as a condition for allowing the Order IX Rule 13 application is or is not justified.

12. We have heard Mr. Chirag Madan, learned Counsel for the appellant and Mrs. Vasundhara Nagrath, learned Counsel for the respondent at some length.

13. Mr. Madan places reliance on the judgment of the Supreme Court in *Tea Auction Ltd v Grace Hill Tea Industry*³, to contend that the direction for deposit of the entire decretal amount, as a condition for allowing the appellant's application under Order IX Rule 13 was excessive and unjustified. He has drawn our attention to the facts which were before the Supreme Court in *Tea Auction* which stand thus recorded in paras 3 to 5 of the said decision:

“3. The plaintiff is the appellant before us. It filed a suit on the original side of the Calcutta High Court claiming a decree for a sum of Rs 37,26,498 with interest against the respondents. Leave under clause 12 of the Letters Patent of the said Court was also obtained. An application was filed for recording a decree under Order 12 Rule 6 of the Code of Civil Procedure on 23-5-2002. On the said application, notice of motion was to be served upon the defendant-respondents. The notice was returnable on 12-6-2002. On the said notice, nobody had appeared on behalf of Defendant 1. A direction for filing of affidavit in opposition was issued upon the plaintiff's application. Allegedly the said order was communicated to Respondent 1 by registered post. The matter was again listed on

³ (2006) 12 SCC 104



15-7-2002. On that date nobody appeared on behalf of Defendant 1. A judgment and decree, upon admission for a sum of Rs 37,26,498 along with interest, was passed against Defendant 1.

4. Defendant 2 was a tea broker of Defendant 1. It was impleaded as the guarantor of Defendant 1. No decree, however, was passed against it. An appeal was preferred by the appellant-plaintiff thereagainst as no decree had been passed against Defendant 2. The said appeal was dismissed. Defendant-Respondent 1, thereafter, filed an application for recalling the said ex parte decree, inter alia, contending that they came to know about the institution of the said suit only when a memorandum of appeal together with a copy of the stay petition was served upon them in August 2002.

5. In terms of an order dated 7-12-2004 a learned Single Judge found the said application to be thoroughly mischievous and devoid of any merit but still a direction for recalling the decree was passed on condition that the respondent furnishes a security of Rs 37 lakhs either in the form of bank guarantee or in cash within a period of three months therefrom.”

14. Thereafter, the Supreme Court has examined the law relating to Order IX Rule 13 of the CPC and the power of courts to impose conditions for allowing applications filed under the said provision. We may reproduce, to advantage, paras 13 to 24 of the said decision thus:

“13. In *Ramesh v Ratnakar Bank Ltd*⁴, however, this Court, while directing that the ex parte decree be set aside, also directed deposit of a further sum of Rs 5 lakhs over and above the amount of Rs 7 lakhs directed by the Court on an earlier occasion. No law has been, however, laid down therein.

14. In *Vijay Kumar Madan v R.N. Gupta Technical Education Society*⁵ this Court deprecated the practice of imposing an undue condition and putting the defendant on onerous terms, stating:

⁴ (2006) 12 SCC 111

⁵ (2002) 5 SCC 30



“7. Power in the court to impose costs and to put the defendant-applicant on terms is spelled out from the expression ‘upon such terms as the court directs as to costs or otherwise’. It is settled with the decision of this Court in *Arjun Singh v Mohindra Kumar*⁶ that on an adjourned hearing, in spite of the court having proceeded ex parte earlier the defendant is entitled to appear and participate in the subsequent proceedings as of right. An application under Rule 7 is required to be made only if the defendant wishes the proceedings to be reflected back and reopen the proceedings from the date wherefrom they became ex parte so as to convert the ex parte hearings into bi-parte. While exercising power of putting the defendant on terms under Rule 7 the court cannot pass an order which would have the effect of placing the defendant in a situation more worse off than what he would have been in if he had not applied under Rule 7. So also the conditions for taking benefit of the order should not be such as would have the effect of decreeing the suit itself. Similarly, the court may not in the garb of exercising power of placing upon terms make an order which probably the court may not have made in the suit itself. As pointed out in *Arjun Singh* the purpose of Rule 7 in its essence is to ensure the orderly conduct of the proceedings by penalising improper dilatoriness calculated merely to prolong the litigation.”

However, the interpretation of the expression “payment into court” did not directly fall for consideration in those cases.

15. Order 9 Rule 13 CPC did not undergo any amendment in the year 1976. The High Courts, for a long time, had been interpreting the said provision as conferring power upon the courts to issue certain directions which need not be confined to costs or otherwise. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when the decree was passed, but also on other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to put the defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith. But, it would not be correct to hold that no error has been committed by the Division

⁶ AIR 1964 SC 993



Bench in holding that the learned Single Judge did not possess such power. The learned Single Judge exercised his discretionary jurisdiction keeping in view that the matter had been disposed of in fact finally at the interim stage at the back of the defendant and it was in that view of the matter a chance was given to it to defend the suit, but, then the learned Single Judge was not correct to direct securing of the entire sum of Rs 37 lakhs in the form of bank guarantee or deposit the sum in cash. The condition imposed should have been reasonable. What would be reasonable terms would depend upon the facts and circumstances of each case.

16. In *Karumuri Surayya v Thadepalli Pushpavalli Thayaramma*⁷ a learned Single Judge of the Madras High Court stated the law in the following terms:

“It seems to me that the wording ‘upon such terms as to’ in the rule should be read as applying not only to costs but to ‘payment into court or otherwise as it thinks fit’ as well. I do not think that the punctuation referred to above in the rule in any way lends support to the contention of the advocate for the petitioner. It looks to me that the rule does not restrict the power of the Court to impose conditions for setting aside an *ex parte* decree to payment of costs only. The wording of the rule is comprehensive enough to include conditions as to payment into Court of decretal amount or such other conditions as the Court thinks fit. Ordinarily, the Court will not impose onerous conditions upon the defendant, such as the payment into Court of the whole or part of the decretal amount or as to furnishing of security therefor, etc. The conditions as to deposit of decretal amount or such similar terms are imposed only under special circumstances. It is one thing to say that it is either inequitable or unjust to put the defendant to such onerous terms, but it is quite a different thing to say that the Court has no jurisdiction at all to impose such terms under any circumstances.”

17. In *Somalal Nathalal Mistri v Vasant Investment Corpn. Ltd.*⁸ it was held:

“The next question is whether the condition which has been imposed by the court below is a reasonable condition. The expression ‘such terms as to costs, payment into court or otherwise as it thinks fit’ suggests that the matter is one of

⁷ AIR 1950 Mad 618

⁸ ILR 1954 Bom 371



discretion, but the discretion is to be exercised in a judicial manner. The condition to be imposed, therefore, upon a defendant should be reasonable and not oppressive. What condition should be imposed in a particular case must depend upon the facts of each case. In a particular case the court may come to the conclusion that the defendant should pay into court the entire amount. In another case the court may come to the conclusion that it will suffice if the defendant is ordered to pay a portion of the decretal amount, and in a third case it is conceivable that the court may come to the conclusion that the ends of justice will be met if the defendant is made to pay the amount of costs only. The true principle seems to me to be that while the court has got power to impose conditions upon a defendant including the condition of the payment of the entire amount of the decree, the conditions to be imposed should be reasonable and should not be oppressive or at least should not be conditions which will result in the defendant not being able to defend the suit.”

18. In *B. Padmavathi Rai v Parvathiamma*⁹ Shetty, J., as the learned Judge then was, opined:

“The question herein is, whether the Court, while setting aside the ex parte decree under Order 9 Rule 13, is competent to impose such conditions apart from the direction to pay costs. The scope of Order 9 Rule 13, was considered in *Shyam Lal Sahai v Ram Narain Lal Seth*¹⁰ in which Miller, Chief Justice, observed:

‘The Court may, first of all, impose conditions as to the payment of costs, it may, secondly, impose conditions as to the payment into Court and, in my opinion, this covers the payment into Court of the decretal amount or some portion thereof or payment into Court of the costs. ...’

I respectfully agree with the above view. The Court is competent to ask the defendant to pay a portion of the decretal amount or of the costs while setting aside the ex parte decree, but such conditions should not be unreasonable or illegal.

In the instant case, I feel that the circumstances amply

⁹ AIR 1976 Kant 97

¹⁰ AIR 1920 Pat 660



justify a direction to the defendant to deposit the admitted portion of the suit claim. The defendant does not dispute her liability to pay the balance of unpaid purchase money with 5½ per cent interest from 3-6-1970. All that she prayed in the reply-notice dated 15-5-1970 was that she might be given two years' time for that payment.”

19. The expression “or otherwise” is also required to be construed widely.

20. In *Packwood v Union-Castle Mail Steamship Co. Ltd.*¹¹ it was observed:

“But the clause went on ‘or otherwise,’ and he thought that meant ‘in any other way’, and that the clause did apply to the negligence of the butcher in allowing the dog to go loose and be lost.”

21. In *Kavalappara Kottarathil Kochuni v State of Madras*¹² this Court opined:

“On the basis of this rule, it is contended, that the right or the custom mentioned in the clause is a distinct genus and the words ‘or otherwise’ must be confined to things analogous to right or custom such as lost grant, immemorial user, etc. It appears to us that the word ‘otherwise’ in the context only means ‘whatever may be the origin of the receipt of maintenance’. One of the objects of the legislation is to bypass the decrees of courts and the Privy Council observed that the receipt of maintenance might even be out of bounty. It is most likely that a word of the widest amplitude was used to cover even acts of charity and bounty. If that be so, under the impugned Act even a payment of maintenance out of charity would destroy the character of an admitted sthanam which *ex facie* is expropriatory and unreasonable.”

22. In *Union of India v Om Prakash*¹³ it is observed:

“The words ‘or is otherwise invalid’ in clause (c) of Section 30 are wide enough to cover all forms of invalidity including invalidity of the reference.”

¹¹ (1903) 20 Times LR 59

¹² AIR 1960 SC 1080

¹³ (1976) 4 SCC 32



23. While setting aside a decree, conditions can be imposed but such conditions should not be unreasonable or harshly excessive.”

24. Keeping in view the peculiar facts and circumstances, we are of the opinion that interest of justice would be subserved if Respondent 1 herein is directed to furnish security to the extent of Rs 5 lakhs. Such security should be furnished to the satisfaction of the learned Single Judge. The security, other than the deposit of the amount in cash, should be furnished within 12 weeks from the date. The appellant-plaintiff would be entitled to press his application for passing a decree on admission. Defendant-Respondent 1 would also be entitled to file his objection as to why a decree under Order 12 Rule 6 shall not be passed. Such a cause, if not already filed, must be filed within 8 weeks from date.

15. It is clear, from a reading of the aforesaid paragraphs, that, let alone the entire decretal amount, the prevailing is that a direction for deposit of even a part of the decretal amount may constitute, in a given case, an excessive condition, for allowing an application under Order IX Rule 13 of the CPC. In the judgment of the High Court of Madras in *Karumuri Surayya v Thadepalli Pushpavalli Thayaramma*, which has been impliedly approved by the Supreme Court, the Court has specifically held that any direction for deposit, as a condition for allowing an application under Order IX Rule 13, has to be in special circumstances. The other decisions to which reference is contained in the judgment in *Tea Auction* also indicate that, if the Court deems it necessary to direct a deposit for allowing an application under Order IX Rule 13, the circumstances which have weighed with the Court in directing such deposit should be specifically spelt out in the order.

16. From a reading of the facts which were before the Supreme Court in *Tea Auction*, as set out in paras 3 to 5 of the decision



2025:DHC:2737-DB



extracted *supra*, we do not find that the appellant before us in the present case is any worse off, on facts, than the appellant in ***Tea Auction***. In that case, too, there were repeated defaults, despite service of notice. Nonetheless, the Supreme Court has not deemed it appropriate for the Order IX Rule 13 Court to have directed deposit of the decretal amount as a condition for allowing the application.

17. While in that case, the Supreme Court itself deemed it appropriate to reduce the amount, in the facts of the present case, as the impugned order is completely devoid of any reasons which have weighed with the Court in directing deposit as it has, we deem it appropriate to set aside the impugned order and remand the matter to the learned Commercial Court for reconsidering the aspect of the conditions, if any, to be imposed for allowing the Order IX Rule 13 application of the appellant.

18. We make it clear that it shall not be open to the learned Commercial Court to reject the application. The learned Commercial Court would only reconsider its direction for deposit of the entire decretal amount.

19. In the event that the learned Commercial Court feels it appropriate to direct deposit as a condition for allowing Order IX Rule 13 application, the prevailing consideration in that regard would be clearly spelt out in the order keeping in mind the law laid down by the Supreme Court in ***Tea Auction***.



2025:DHC:2737-DB



20. The appeal stands allowed to the aforesaid extent.
21. In order to expedite matters, both sides are directed to appear before the learned Commercial Court on 30 April 2025.
22. We make it clear that we have not expressed any opinion on the conditions which could be imposed on the appellant if at all for allowing the Order IX Rule 13 application. However, we reiterate that the learned Commercial Court would keep in mind the law laid down in *Tea Auction* before taking a view in that matter.
23. The execution proceedings, if any, which have been filed for execution of the impugned judgment and decree shall, therefore, stand adjourned awaiting the outcome of the *de novo* proceedings.

C. HARI SHANKAR, J.

AJAY DIGPAUL, J.

APRIL 17, 2025

ar/ssc

Click here to check corrigendum, if any