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

% *Date of Decision : 06.05.2025*

\+ **FAO (COMM) 120/2024**

M/S SHIVAM PLASTIC .....Appellant
Through: Mr. P.C. Sharma, Mr. Manish Kumar Sharma & Mr. Vatsal Sharma, Advocates

versus

M/S SUBHASH MANUFACTURING HOUSE .....Respondent
Through: Ms. Sarika Goel, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE TEJAS KARIA

VIBHU BAKHRU, J. (*ORAL*)

CM No.35978/2024(condonation of delay in filing the appeal)

1. For the reasons stated in the application, the delay of 20 days in filing the above captioned appeal is condoned.

2. The application stands disposed of.

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3. The appellant has filed the present appeal under Order XLIII of the Code of Civil Procedure, 1908 [**CPC**] read with Section 13 of the Commercial Courts Act, 2015 [**CC Act**] impugning the order dated

06.02.2024 [**impugned order**] passed by the learned Commercial Court in Misc DJ/127/2023 in CS (COMM) No. 353/2021 captioned *M/s Subhash Manufacturing House v. M/s Shivam Plastic*. By the impugned order, the learned Commercial Court dismissed the application filed by the appellant [**defendant**] under Order IX Rule 13 of the CPC.

4. The aforesaid suit was instituted by the respondent [**plaintiff**] for recovery of a sum of ₹21,65,363/-, along with *pendente lite* and future interest from the defendant. The learned Commercial Court proceeded *ex parte* against the defendant and decreed the suit in favour of the plaintiff in terms of the judgment dated 24.01.2022.

5. The defendant moved an application under Order IX Rule 13 of the CPC seeking to set aside the *ex parte* judgment and decree dated 24.01.2022; however, the same was dismissed by the learned Commercial Court by the impugned order.

PREFATORY FACTS

6. The plaintiff is an individual and carries on the business under the name and style of his sole proprietorship concern named M/s Subhash Manufacturing House. The plaintiff is engaged in manufacturing of different kinds of plastic goods.

7. The defendant is also an individual and carrying on its business under the name and style of a sole proprietorship concern named M/s Shivam Plastic.

8. The plaintiff claimed that it had, in the ordinary course of business,

sold PVC modules and machinery to the defendant at an agreed consideration. The plaintiff accordingly raised invoices for a total consideration of ₹21,68,840/- (Invoice No. SMH/I7-18/001 for a sum of ₹13,57,000/- and Invoice No. SMH/I7-18/002 for a sum of ₹8,11,840/-). The defendant made the advance payment of ₹9.00 Lacs on 15.01.2018 and the goods in question were delivered by the plaintiff to the defendant at its godown at Tri Nagar, Delhi. The defendant had transported the same through a transporter engaged by it. The plaintiff claimed that the defendant had assured that the plaintiff would pay the balance amount of ₹12,68,840/- within the period of thirty days, but failed to perform the payment obligations. The plaintiff further claimed that the defendant was, thus, liable to pay the said amount of ₹12,68,840/- along with interest at the rate of 21 percent per annum.

9. In the given circumstances, the plaintiff had initiated the pre-institutional mediation proceedings before the West District Legal Services Authority on 10.03.2021. Notices for the same were issued to the defendant on 01.04.2021 and 22.04.2021. However, the mediation was a non-starter and a report to this effect was issued by the West District Legal Services Authority on 09.07.2021. Thereafter, on 25.08.2021, the plaintiff instituted the aforesaid suit before the learned Commercial Court.

10. The plaintiff claimed that the defendant was served with the summons personally as well as through electronic mode (WhatsApp on his mobile phone) on 23.09.2021, however, the defendant neither appeared before the learned Commercial Court nor filed any written statement. Accordingly, the learned Commercial Court proceeded *ex parte* against the defendant and

thereafter, delivered the judgment dated 24.01.2022 accepting the plaintiff's claim and decreed the aforesaid suit in favour of the plaintiff for the sum of ₹12,68,840/- as well as interest quantified at ₹8,96,783/-. Further, the Court also decreed the plaintiff's claim for *pendente lite* and future interest at the rate of 21% per annum from the date of institution of suit till realisation of the amount. Additionally, the learned Commercial Court also awarded ₹22,000/- as Advocate's fee, actual costs and pre-institution mediation charges.

11. It is the defendant's case that he was unable to appear before the learned Commercial Court on account of prolonged illness and medical treatment of his father. He admitted that he had received the summons physically and through WhatsApp; however, states that at the material time his father, who aged 71 years, was suffering from high fever and weight loss, which did not subside from normal medicines. He was then placed under the care of one Dr. Bhardwaj on 08.10.2021 and had to undergo a number of tests. He was also taken to Fortis Memorial Research Institute, Gurugram on 11.10.2021 for conducting further tests and it was revealed that he was suffering from cancer in the left kidney.

12. The defendant filed a detailed account of the steps taken for tests and treatment of his father. The application indicates that mutiple tests were conducted on the father of the defendant on several dates and he was also admitted to Medanta Medicity Hospital, Gurugram on 06.01.2022. He subsequently underwent surgery on 08.02.2022 at Artemis Hospital Gurugram. Although there was improvement in his condition, but he expired on 11.11.2022. The defendant claimed that he was carrying on the business

as a sole proprietor and there was no one to look after his father. Therefore, he was completely preoccupied in taking care of his father and ensuring that he received the necessary medical treatment during the said period.

13. The learned Commercial Court rejected the defendant's application by the impugned order, as the court did not find any sufficient justification for setting aside the *ex parte* judgment and decree. The learned Commercial Court observed that even if it is presumed that the defendant was unable to appear and pursue his case due to his father's illness, there was no material on record to justify his absence before the West District Legal Services Authority during the pre-institution mediation proceedings, or before the learned Commercial Court prior to 12.10.2021. The learned Commercial Court noted that, as per the defendant's own averments, his father was diagnosed with kidney cancer on 12.10.2021 and passed away on 11.11.2022 but no complaint was filed by the defendant against his advocate for alleged negligence in handling the matter and the application under Order IX Rule 13 of the CPC was moved only in January 2023.

14. The learned Commercial Court held that the defendant had been grossly negligent and failed to demonstrate sufficient cause for non-appearance thus, denied to set aside the *ex parte* decree.

15. The present appeal was listed before this Court on 01.07.2024. On that date, the appellant/defendant submitted that to show his *bonafide*, he would deposit ₹13.00 Lacs with the Registry of this Court within the period of six weeks. The said amount has already been deposited with the Registry of this Court. Having regard to the statement and the stand taken by the

appellant, this Court issued the notice to the plaintiff/respondent.

16. During the course of hearing, the learned counsel for the appellant states that the appellant is will deposit the entire decretal amount with interest, however, seeks further period of four months for doing so. He submits although the appellant does not have wherewithal to deposit the balance decretal amount, but he would arrange the same within the aforesaid amount and would not default in depositing the decretal balance amount with the Registry of this Court within the aforesaid period.

17. The learned counsel for the appellant earnestly contended that the appellant ought to have been given an opportunity to be heard on the disputes between the parties.

18. Given the mitigating circumstances, as set out by the defendant in the application under Section IX Rule 13 of the CPC, we consider it apposite to allow the present appeal, albeit subject to the appellant filing an undertaking before this court, in the form of an affidavit, within the period of two weeks from date, to the effect that the appellant would deposit the balance decretal amount along with interest and costs with the Registry of this Court within the period of four months from date.

19. Subject to the appellant furnishing the undertaking as aforesaid and depositing the balance decretal amount with the Registry of this Court, the impugned order and the judgment dated 24.01.2022 is set aside. The matter stands restored before the learned Commercial Court at the position as obtaining on 24.01.2022.

20. The parties shall appear before the learned Commercial Court/learned Successor Court on 29.05.2025 for directions regarding further proceedings in accordance with law.

21. We clarify that the disbursal of the amounts deposited by the appellant with the Registry of this Court shall be subject to the orders that may be passed the learned Commercial Court or learned Executing Court.

22. Needless to state, in case the appellant fails to comply with the aforesaid directions regarding furnishing of the undertaking or depositing the balance decretal amount with the Registry of this Court within the aforesaid timeframe, the impugned order shall stand revived. And, the judgment and decree shall be enforced in accordance with law.

23. The appeal is disposed of in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

TEJAS KARIA, J

MAY 06, 2025
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Click here to check corrigendum, if any