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

CS(OS) 130/2020

Reserved on : 15.04.2021

Date of Decision : 13.05.2021

GIRISH MITTAL ..... Plaintiff

Through: Mr. R.M. Sinha, Mr. Prateek Mohan Sinha and Ms. Nandini Harsh, Advocates

versus

PRATEEK MADHAN AND ORS. ..... Defendants

Through: Mr. Gaurav Duggal, Advocate

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI
(VIA VIDEO CONFERENCING)

J U D G M E N T

I.A. 7268/2020 (Under Order IX Rule 7 read with Order XXXVII Rule 2(3) read with Rule 3(7) and Section 151 CPC by the Defendants)

1. The present application has been filed under Order IX Rule 7 read with Order XXXVII Rule 2(3) read with Rule 3(7) and Section 151 CPC seeking recall of the order dated 31.07.2020 (hereinafter referred to as the 'impugned order') whereby the defendants were proceeded *ex-parte*.

2. The defendants have sought recall of the impugned order primarily on the ground that the defendants were never served with the summons in the suit for the reason that at the relevant time, the defendants were not staying at the address mentioned in the memo of parties.

3. Learned counsel for the defendants submits that the present application has been filed within limitation.

4. It is claimed that although the defendants are the owners of the property bearing No. *E-108, Malcha Marg, New Delhi* (hereinafter referred to as the 'suit property'), since April, 2018, the defendants were residing at *13, South Drive, DLF Chhatarpur, New Delhi-110074* (hereinafter referred to as the 'Chhatarpur Property').

5. In support of the claim, the defendants have placed on record two lease deeds executed between defendant No.1 (lessee) and *'Mohinder Singh & Company'* (lessor) with respect to the Chhatarpur Property; Special Power of Attorney dated 17.08.2020 executed by defendant No.1 in favour of his father (defendant No.2); and the medical records of defendant No.3. It is stated that the defendants continue to reside at the Chhatarpur property even though after March, 2020, no fresh lease deed was executed on account of COVID-19 pandemic.

6. Additionally, it has been submitted that on a complaint being filed by the plaintiff against the defendants before the Economic Offence Wing, Delhi Police, New Delhi (EOW), the defendants joined the enquiry and submitted their reply dated 11.06.2019 wherein the address of the Chhatarpur property was mentioned.

7. Learned counsel for the defendants submitted that while passing the impugned order, the Court relied on the affidavit of service filed by the plaintiff wherein service was shown to be effected through e-mail, courier, speed post and *dasti*. It is submitted that vide order dated 26.06.2020, despite service being shown to be effected through e-mail, the Court directed issuance of fresh summons through all modes including *dasti* and

speed post. While the speed post tracking report showed that the doors were locked, the courier tracking report mentioned that the courier was returned back to the party i.e., the plaintiff.

8. Insofar as *dasti* service is concerned, it was submitted that in the affidavit of service filed by the plaintiff, it was stated that he had visited the suit property where the security guard did not allow him and his manager to enter the house. Also, the defendants did not come out to receive the *dasti* summons. When the security guard refused to receive the summons, the plaintiff left the summons along with the pleadings and the documents at the gate of the suit property.

9. Learned counsel for the defendants submitted that the *dasti* service shown to be effected ought not to be relied upon as the service was sought to effected at an address where the defendants were not residing and also because the summons along with a copy of the plaint and the documents ought not to have been left at the gate of the suit property but rather affixed.

10. Learned counsel for the defendants submitted that the defendants' not residing at the suit property, where the service was sought to be effected, was a 'sufficient cause' under Order XXXVII Rule 3(7) CPC and thus prayed that the application be allowed.

11. In support of his submission, learned counsel for the defendants has relied on the decisions in Media Coverage Pvt. Ltd. *v.* Harish Nagewala & Ors. reported as **167 (2010) DLT 161**, Kulvinder Singh & Another *v.* State Bank of India reported as **2009 (107) DRJ 301**, Amitav Chaudhuri *v.* National Research Development Corporation reported as **222 (2015) DLT 368** and Dev Bhushan *v.* Pradeep Kumar reported as **2017 (166) DRJ 204.**

12. The application was opposed by learned counsel for the plaintiff.

13. Learned counsel for the plaintiff referred in detail to the affidavit of service. He emphasised on the advance notice of the suit which was stated to be served on the defendants at the e-mail address 'lalit2627@gmail.com'. The aforesaid e-mail was also mentioned in the memo of parties and the summons in the suit were also served on the said e-mail address in pursuance to the order dated 22.05.2020.

14. Learned counsel for the plaintiff has referred to paragraph 9 of the application wherein the defendants had admitted the aforesaid e-mail account. Reliance was also placed on the communications sent by the Kotak Mahindra Bank through e-mails to the defendants at the aforementioned email address.

15. In so far as the service of summons effected through *dasti* service is concerned, learned counsel for the plaintiff submitted that the same was effected on the same address of the defendants which was mentioned in the Agreement to Sell dated 06.06.2017; extension letters dated 06.11.2017 and 07.12.2017 as well as the receipts dated 11.08.2017, 20.05.2018 and 31.05.2018 wherein, the defendants have shown themselves to be residents of the suit property i.e., the address at which the *dasti* service was effected. He also referred to a public notice stated to be issued in 'The Times of India' on 10.07.2018 with respect to the suit property.

16. It was also submitted that, by way of abundant caution, the plaintiff had also sent a copy of the summons and the plaint at the official address of the company of defendant No.2 i.e., *'Skyland Builders Private Limited'* at *B-26-27, Community Centre, Janakpuri, New Delhi-110058* after obtaining the said address from the official website of the Registrar of Companies, Government of India.

17. Lastly, it was submitted that the defence taken by the defendants in the present application was an afterthought and ought to be disbelieved.

18. I have heard learned counsels for the parties and have also gone through the case records.

19. The present suit is a summary suit filed under Order XXXVII CPC seeking recovery of Rs.17.25 crores with interest, which are stated to be paid by the plaintiff to the defendants as part-sale consideration for the purchase of the suit property.

20. A perusal of the order dated 26.06.2020 would show that although the Court noted that the summons in the suit were stated to be served on the e-mail ID of the defendants i.e., lalit2627@gmail.com i.e., the email address provided in the memo of parties but preferred to issue fresh summons in the suit through all modes including *dasti* and speed post.

21. The plaintiff filed an 'Affidavit of service' stating that the plaintiff along with his Manager had visited the suit property to effect *dasti* service of summons, where the defendants refused to come outside and the summons along with the plaint and the documents were left at the gate of the suit property.

22. The Predecessor Bench, after going through the 'Affidavit of service' came to the conclusion that the same amounted to refusal by the defendants and further observed that the defendants were deemed to have been served. Although the Court further directed that the defendants be proceeded *ex-parte* and the plaintiff was directed to file the evidence by way of affidavit and the matter was directed to be listed before the learned Joint Registrar for recording of the evidence, it appears that learned counsel for the plaintiff failed to bring it to the notice of the Court that the suit was, in fact, a

summary suit filed under Order XXXVII CPC where, on the defendants' non-appearance and failure to file the 'memo of appearance' in the requisite time, the procedure prescribed under Order XXXVII CPC was to be followed and the judgment was to be passed.

23. The impugned order to the aforesaid extent where the defendants were proceeded *ex-parte* and the plaintiff was directed to file the evidence by way of affidavit, being contrary to the procedure established under Order XXXVII CPC, is recalled.

24. It is seen that the defendants, in order to substantiate their claim that on the date of filing of the suit and issuance of summons, they were residing at the 'Chhatarpur property' and not at the suit property, placed reliance on the following set of documents: -

(i) Special Power of Attorney dated 17.08.2020 executed by defendant No.1 in favour of defendant No.2.

(ii) Lease Deeds dated 01.04.2018 and 01.04.2019.

(iii) Copy of the medical records of defendant No.3.

(iv) Reply dated 11.06.2019 filed before the EOW.

25. So far as the medical records of defendant No.3 are concerned, they do not indicate the residential address of the patient and as such, are of no help to the defendants. So far as the Special Power of Attorney is concerned, the same is dated 17.08.2020 i.e., after passing of the impugned order. During the course of arguments, reliance was placed on a reply stated to be filed by the defendants before EOW however, a copy of the reply was not placed on the records of this case.

26. Coming to the two lease deeds stated to be executed in favour of defendant No.1 with respect to the 'Chhatarpur property', it is seen that the

first lease deed was executed for the period from 01.04.2018 to 31.03.2019 and the second lease deed for the period from 01.04.2019 to 31.03.2020. The defendant No.1 is shown as the lessee. The defendants have categorically stated that even after 31.03.2020, they continued to reside at the aforesaid property however, no formal extension of lease could be executed on account of COVID-19 pandemic. It has been submitted that the defendants till date, continue to reside at the aforesaid property and had also sworn an affidavit in support of their application.

27. Rule 3(7) of Order XXXVII CPC provides that for 'sufficient cause' shown by the defendant, the Court has the discretion to condone the delay in the defendant's entering an appearance or applying for leave to defend. In Parimal *v.* Veena reported as **(2011) 3 SCC 545**, the expression "sufficient cause" was interpreted by Supreme Court as under:

> *"13. "Sufficient cause" is an expression which has been used in a large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised*

judiciously. (Vide Ramial v. Rewa Coalfields Ltd. [AIR 1962 SC 361], Lonand Grampanchayat v. Ramgiri Gosavi[AIR 1968 SC 222], Surinder Singh Sibia v. Vijay Kumar Sood [(1992) 1 SCC 70] and Oriental Aroma Chemical Industries Ltd. v. Gujarat Industrial Development Corpn. [(2010) 5 SCC 459].)

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15. While deciding whether there is sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide State of Bihar v. Kameshwar Prasad Singh [(2000) 9 SCC 94], Madanlal v. Shyamlal [(2002) 1 SCC 535], Davinder Pal Sehgal v. Partap Steel Rolling Mills (P) Ltd. [(2002) 3 SCC 156], Ram Nath Saov. Gobardhan Sao [(2002) 3 SCC 195], Kaushalya Devi v. Prem Chand [(2005) 10 SCC 127], Srei International Finance Ltd. v. Fairgrowth Financial Services Ltd. [(2005) 13 SCC 95] and Reena Sadh v. Aniana Enterprises [(2008) 12 SCC 589].)

16. In order to determine the application under Order 9 Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straitjacket formula of universal application."

28. Recently, the Supreme Court in A. Murugesan *v.* Jamuna Rani reported as **(2019) 20 SCC 803** affirmed its earlier view in G.P. Srivastava *v.* R.K. Raizada and Others reported as **(2000) 3 SCC 54**, which is reproduced

as under:

> *"7. Under Order 9 Rule 13 CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex parte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard-and-fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed for hearing when ex pate proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits."*

29. In Kulvinder Singh (Supra), while condoning the delay and setting aside *ex-parte* decree passed by the Trial Court, this Court relied upon the following observations of the Supreme Court in Collector, Land Acquisition,

Anantnag and Another *v.* Mst. Katiji and Others reported as **AIR 1987 SC 1353**:

> *"3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits '. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-*
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> *1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
>
> *2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*
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> *3. "Every day 's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.*
>
> *4. When substantial justice and technical consideration are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

30. The suit was filed during the period of nationwide lockdown imposed by the Government of India on account of COVID-19 pandemic, on account of which, the Court permitted the plaintiff to serve the *dasti* summons and also through speed post. The summons was returned with the remark that the 'door was locked'. The Court had believed the averments made in the 'Affidavit of service' filed by the plaintiff.

31. As noted above, the defendants have placed on record the duly executed copies of the lease deeds for the period from 01.04.2018 to 31.03.2020 although no lease deed has been placed on record with respect to the period after 01.04.2020 but it has been categorically stated that the defendants continued to reside at the aforesaid property. The present application is filed within limitation and is also supported by the affidavit of defendant No.2 mentioning the current residential address as that of the Chhatarpur property.

32. In a suit filed under Order XXXVII CPC, the procedure outlined is summary in nature. The defendants would lose a valuable right to defend the suit if they are deemed to be served in the facts narrated above.

33. As noted in Kulvinder Singh (Supra), the oldest principle of civil law is that creditor must seek out the debtor and therefore, it was imperative for

the plaintiff to give the correct address of the defendants. The present suit being a summary suit, should not be thrown out where the defendants have been able to *prima facie* show that they were not served with the summons in the suit.

34. Consequently, for the reasons noted above, the present application is allowed and the order dated 31.07.2020 whereby the defendants were presumed to be served by *dasti* service, is recalled.

35. The application stands disposed of in the above terms.

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1. In view of the order passed above, learned counsel for the plaintiff is directed to serve the defendants a complete set of the plaint with documents within seven days from the passing of the order.

2. List on 03.08.2021.

(MANOJ KUMAR OHRI)
JUDGE

MAY 13, 2021
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Click here to check corrigendum, if any