

(2019) 01 DEL CK 0297

In the Delhi High Court

Case No : Civil Suits (OS) 1979 Of 2011, Miscellaneous Application No.
3420-3422 Of 2018, 8138 Of 2018

Pranesh Gupta & Anr

APPELLANT

Vs

Jagdish Bansilal Khurana

RESPONDENT

Date of Decision : 08-01-2019

Acts Referred:

Negotiable Instruments Act, 1881 — Section 138
Code Of Civil Procedure, 1908 — Order 9 Rule 13, Order 5 Rule 17
Delhi High Court (Original Side) Rules, 1967 — Rule 14, 15

Citation : (2019) 173 DRJ 661

Hon'ble Judges : J.R. Midha, J

Bench : Single Bench

Advocate : Bheem Sain Jain, Tanmaya Mehta, Sneha Iyer

Judgement

1. The plaintiffs instituted this suit for recovery of Rs.9,93,27,786.68 against the defendant in which the summons were issued to the defendant on 29 th August, 2011. On 08th February, 2012, Mr.Kunal Duggal, Advocate appeared on behalf of the defendant. However, defendant's counsel did not appear thereafter, whereupon the Court issued fresh summons. The defendant was served by publication in Lok Satta newspaper, Mumbai edition on 02nd May, 2013. The defendant was proceeded ex parte on 18th November, 2013 and an ex parte decree was passed against the defendant on 23rd May, 2014.

2. On 23rd November, 2017, the defendant filed I.A.3420/2018 under Order IX Rule 13 of the Code of Civil Procedure for setting aside of the ex parte decree along with I.A.3421/2018 for condonation of delay of 475 days in seeking restoration and I.A.3422/2018 for condonation of delay of 75 days in re-filing the application for restoration.

3. Vide order dated 17th July, 2018, this Court issued notice on the aforesaid three applications and directed the defendant to disclose his defence on merits on an affidavit and file all original relevant documents relating to this case within

his power and possession. The defendant has filed an affidavit dated 24th July, 2018 and disclosed his defence on merits to which the plaintiffs have filed their response.

4. The defendant is seeking setting aside of the ex parte decree on the ground that the defendant was never personally served with the summons and he was not aware of these proceedings till 31st March, 2017. According to the defendant, the publication in a local Marathi newspaper, Lok Satta, is not a proper service as the defendant does not subscribe to the newspaper, Lok Satta and neither writes nor speaks Marathi. It is further submitted that the plaintiff had deliberately avoided serving the defendant and instead preferred the application for substituted service. The order dated 12th March, 2013 allowing the substituted service is in contravention of Order V Rule 17 of the Code of Civil Procedure and Chapter XXI Rules 14 and 15 of Delhi High Court Rules. The defendant has also raised the plea of illness from various ailments in his application. The defendant is seeking condonation of delay of 475 days in filing the restoration application on the ground that he was not served and was not aware of these proceedings till 31st March, 2017. The defendant has also raised the plea of medical ailments in the application for condonation of delay. The defendant is seeking condonation of delay of 75 days in re-filing the application on the ground of illness and that the defendant was travelling out of India.

5. Learned counsel for the defendant urged at the time of the hearing that the defendant was not duly served with the summons and therefore, the ex parte decree is liable to be set aside. With respect to the delay in seeking restoration, it is submitted that the defendant was suffering from various ailments for which he was admitted in hospital on various dates. Reliance is placed on R.K. Sharma v. Ashok Nagar Welfare Association & Co., 2001 (57) DRJ 722 (DB), Smt. Renu Sharma v. Titan Industries Ltd., AIR 2007 Del 151 and Neerja Realtors Private Limited. V. Janglu (Dead) Through Legal Representative, (2018) 2 SCC 649.

6. Learned counsel for the plaintiffs urged at the time of the hearing that the defendant's counsel appeared before this Court on 08th February, 2012. It is further submitted that the dasti summons were duly served on the defendant's counsel, Mr.Kunal Duggal on 21st November, 2012 before the learned Metropolitan Magistrate which is recorded in the order dated 21st November, 2012. It is not disputed that the plaintiffs served dasti summons on the defendant's counsel, Mr. Kunal Duggal in proceedings under Section 138 of the Negotiable Instruments Act on 21st November, 2012 and the defendant's counsel informed the defendant about the proceedings. It is submitted that the defendant was well aware of these proceedings and the defendant cross-examined the plaintiff before the learned Metropolitan Magistrate with respect to these proceedings. It is further submitted that the defendant was also served with publication of summons in Lok Satta newspaper, Mumbai edition on 02nd May, 2013 and the publication notices sent to the defendant were refused by him on the addresses given by him in proceedings under Section 138 of the

Negotiable Instruments Act. With respect to the plea of medical illness raised by the defendant, it is submitted that the defendant appeared before the Court of Metropolitan Magistrate at Delhi on 25th June, 2012, 13th March, 2013, 21st June, 2013, 09th July, 2013 and 10th July, 2013 and before Mumbai High Court in execution proceedings on 10th March, 2017 and 31st March, 2017. It is submitted that false claim has been raised by the defendant that the defendant was not aware of these proceedings. Without prejudice, it is submitted that even if there is any irregularity in the service of summons, the second proviso of the Order IX Rule 13 of the Code of Civil Procedure provides that an ex parte decree cannot be set aside on this ground if this Court is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear before this Court. Reliance is placed on *Parimal v. Veena @ Bharti*, 2011 (3) SCC 545, *Sunil Poddar v. Union Bank of India*, 2008 (2) SCC 326 and *Ramrameshwari Devi v. Nirmala Devi*, 2011 (8) SCC 249.

7. Learned counsel for the defendant submits that Mr.Kunal Duggal, Advocate was representing the defendant in proceedings under Section 138 of the Negotiable Instruments Act and the plaintiff did not engage him for these proceedings.

8. It is a matter of record that Mr.Kunal Duggal, Advocate appeared on behalf of the defendant before this Court on 08th February, 2012. Vide order dated 21st August, 2012, this Court permitted the plaintiffs to serve the dasti summons on the defendant in proceedings under Section 138 of the Negotiable Instruments Act in pursuance to which the plaintiffs served the dasti summons on the defendant's counsel, Mr.Kunal Duggal on 21st November, 2012. Relevant portion of the order dated 21st November, 2012 is reproduced hereunder:

"Order dt.19.11.2012 of the Ld. Joint Registrar High Court of Delhi placed on record by the complainant, wherein the complainant is directed to serve the summons issued to the accused in CS(OS) 1979/2011.

Summons served in accordance with the said order."

9. The defendant has not disputed that the dasti summons were duly served on his counsel, Mr.Kunal Duggal on 21st November, 2012 and he was duly informed by his counsel about these proceedings. This Court is satisfied that the defendant was well aware of these proceedings. The defendant has raised a false claim before this Court that he was not well aware of these proceedings till 31st March, 2017. The second proviso to Order IX Rule 13 of the Code of Civil Procedure provides that any irregularity on the service of summons on the defendant shall not be a ground for setting aside an ex parte decree if this Court is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

The second proviso of the Order IX Rule 13 is reproduced hereunder:

"Provided further that no Court shall set aside a decree passed ex parte merely

on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim."

10. In *Sunil Poddar v. Union Bank of India*, 2008 (2) SCC 326, the Supreme Court interpreted the proviso to Order IX Rule 13 of the Code of Civil Procedure as under :

"19. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code"

11. In *Sweety Gupta v. Neety Gupta*, 2016 SCC Online Del 5668, the Division Bench of this Court held that the second Proviso to Order IX Rule 13 of the Code of Civil Procedure makes no difference as to whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit and, (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. If the answer to the aforesaid two posers are found in the affirmative, there can be no rescinding of an ex-parte decree even if it is proved that the summons were not duly served. What is of importance now is that the Court is required to be convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared to the claim of the plaintiff. Relevant portion of the judgment is reproduced hereunder:

"12. Thus under the amended provision it makes no difference as to whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. If the answer to the aforesaid two posers are found in the affirmative, there can be no rescinding of an ex-parte decree even if it is proved that the summons were not duly served. What is of importance now is that the Court is required to be convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared to the claim of the plaintiff."

12. This Court is satisfied that the defendant had full knowledge of these proceedings and could have appeared and answered the claim of the plaintiff. No case for setting aside of the ex parte decree is made out. The defendant has also

failed to show sufficient cause for condonation of delay of 475 days in filing and 75 days in re-filing the application under Order IX Rule 13 of the Code of Civil Procedure. The defendant has raised the plea of medical illness. However, it is not disputed that the defendant appeared before the learned Metropolitan Magistrate on 25th June, 2012, 13th March, 2013, 21st June, 2013, 09th July, 2013 and 10th July, 2013. No case for condonation of delay in filing as well as re-filing of the application under Order IX Rule 13 of the Code of Civil Procedure is also made out.

13. For the aforesaid reasons, all the three applications are dismissed.

14. Pending application is disposed of.

15. Copy of this judgment be given dasti to counsel for the parties under the signature of the Court Master.