



\$~8 & 9 (common order)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ FAO(OS) 26/2023 & CM APPL. 9103/2023, CM APPL. 43636/2023
+ FAO(OS) 27/2023 & CM APPL. 9602/2023, CM APPL. 43633/2023

DAYA KISHAN GOEL
CHIRAG GOEL

..... Appellants

Through: Ms.Anusuya Salwan, Ms.Sonika
Singh, Mr.Bankim Garg, Mr.Rachit
Wadhwa, Advocates.

versus

RAMESH CHANDER GOEL

..... Respondent

Through: Mr.P.D.Gupta, Senior Advocate with
Mr.Abhishek Gupta, Advocate.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

ORDER

% **07.12.2023**

1. The appellants herein are aggrieved of the orders dated 23.01.2023 and dated 27.01.2023 passed by the learned single Judge dismissing the applications under Order IX Rule 13 CPC read with Section 151CPC for setting aside the ex parte judgment dated 11.11.2022. It is submitted by the learned counsel for the appellant the suit was at the stage of cross-examination of the appellant/defendant. In the suit the defendant was being examined as *DWI*. Admittedly the country has to face pandemic of COVID-19 and there were lockdowns followed by circulars issued by this Court stating the cross-examination would be taken up only in *ex-parte* and *uncontested* matters. Those circulars were extended from time to time. The appellant/*DWI* was in touch with his counsel who informed him whenever presence of appellant is required, he would be informed.

2. It is argued, on 26.09.2022 he was proceeded ex-parte and on the



same date the judgment was reserved and on 11.11.2022 an application under Order IX Rule 13 CPC read with Section 151 CPC was filed but the same was dismissed vide orders dated 23.01.2023 and 27.01.2023. It is alleged the appellant had showed sufficient cause for his absence when the matter was called and approached this Court immediately within the statutory time. It is stated the absence of the appellant was not intentional and the dismissal of application would result in miscarriage of justice.

3. It is argued the appellant is inclined to compensate the respondent with cost, if the matter is decided in a time bound manner with an undertaking by the appellant he would not take unnecessary adjournments. It is argued the appellant has suffered money decree without putting forth his case and would be ruined in case the decrees are allowed to stand, hence these appeals.

4. The learned counsel for the appellants has referred to Annexure-A7 viz. an order dated 01.05.2009 which directed the CS(OS)1239/2008 and CS(OS)1240/2008 be consolidated and be tried together. Then she referred to an order dated 16.04.2019 which shows the *DW1* was being examined and the learned counsel for the respondent objected to the exhibition of some documents and took some time to point out some other documents. The matter was listed again on 02.08.2019 for cross-examination of *DW1*. Thereafter the matter was adjourned and in the meanwhile due to COVID-19 pandemic, circulars were issued *qua* the evidence to be recorded only in *ex-parte* and *uncontested* matters through video conferencing. Thereafter on some dates none was present on behalf plaintiff and on some dates none appeared on behalf of defendant. Ultimately on 08.08.2022, the learned Joint Registrar (Judicial) in CS(OS) No.1240/2008 had recorded since the



evidence of defendant is closed in CS(OS)1239/2008, the matter be placed before the learned single Judge for further directions on 20.09.2022.

5. On 26.09.2022, the order was passed and the defendant was proceeded ex-parte in CS(OS)1240/2008 also and it was kept for arguments. The arguments were heard and on 11.11.2022 the ex-parte judgment was passed in both suits. Thereafter applications under Order IX Rule 13 CPC were moved but were also dismissed vide the impugned orders.

6. We have perused the entire record. Admittedly, on 05.10.2020, DW1 was absent and also he failed to file receipt for payment of cost. Similarly on 02.02.2021, 01.09.2021, 12.11.2021 and 19.04.2022 same orders were passed noting the absence of appellant and non payment of cost. Ultimately on 08.08.2022, the learned Joint Registrar noted there has been *no appearance on behalf of the appellant* despite repeated calls and *not even the receipt of cost has been filed*. The Court noted the matter was listed for the evidence of the appellant since 07.04.2015 and thereafter number of opportunities were granted and the cost was even not deposited and no one is appearing on behalf of the appellant since 16.04.2019, hence the evidence of the defendant was closed in CS(OS)1239/2008.

7. On 26.09.2022 the Court confirmed the closure of the appellant's evidence in both the suits and proceeded appellant ex-parte. The arguments were heard and the judgment was reserved. On 11.11.2022 the ex-parte judgment was pronounced in the money suit and the suits were decreed. Later applications under Order 9 Rule 13 CPC were also dismissed.

8. We have perused the impugned order dated 27.01.2023 which is as under:



“32. This Court has perused the documents as well as the reply filed by the plaintiff to the application. The main issue involved in the present application is “whether the applicant has made out sufficient cause for setting aside ex-parte decree dated 11th November, 2022 under Order IX Rule 13 of the Code of Civil Procedure, 1908.

33. In view of the discussion and foregoing paragraphs, there is no dispute that the applicant was duly served. Thereafter, he appeared through his advocate and filed the written statement. The Court has framed the issues and thereafter the plaintiff filed his affidavit of evidence and examined his witnesses. The matter was adjourned from time to time, the applicant as well as his advocate failed to attend the court proceedings thereafter. The reasons given by the applicant in the application about his **health** as well as **non-information from the erstwhile counsel** about the date fixed by the court are very difficult to accept. This Court finds force in the arguments of learned senior counsel appearing on behalf of non-applicant. In the day and age of virtually operating Courts and independent e-filing, every proceeding is being uploaded by the Registry of the Court on its **website** and the applicant, being an educated person, could get the information from the website.

34. The other reasons given by the applicant that his wife and father were not keeping well and he also had severe back ache, therefore, could not attend the court proceedings on several dates which were fixed by the Joint Registrar as well as by the Court, are also not sufficiently established to show that the ex-parte decree deserves to be set aside. The ailments or diseases as mentioned in the application by the applicant, do not necessitate the patient to take bed rest for a long time. During the arguments, learned counsel for applicant has **failed to produce any medical certificate** to reasonably establish that due to those ailments, the applicant was not able to attend the court proceedings.

35. The order dated 8th August, 2022 passed by the learned Joint Registrar cannot be challenged in the instant proceedings of the Order IX Rule 13 as the same not maintainable as per the Delhi High Court (Original Side) Rules, 2018. The said order can only be challenged by way of a Chamber Appeal.

36. Bare reading of the order and the decree passed by the predecessor of this Court as well as other documents, which are referred to by the applicant during the arguments, show that the predecessor of this Court has considered entire material on record and thereafter, passed the ex-parte decree on 11th November, 2022.

37. The applicant has not been able to show any sufficient cause for setting aside the ex-parte decree passed against him.

38. In view of the above facts and circumstances, this Court does not find any substance in the instant application.

39. Accordingly, the instant application, being bereft of any merit, is dismissed.”



9. The impugned order is passed purely on facts. During the course of arguments, the learned counsel for the appellant has not been able to show any illegality in the said order. It has been the contention of the learned counsel for the appellant that throughout his counsel never told him about the dates in the suits and his family members and he himself were ailing but *admittedly* in a criminal trial in the learned Session's Court at Rohtak, Haryana in case titled as *Daya Kishan vs. State of Haryana CRA82/2017* on 01.04.2022 the appellant appeared in person. The order dated 01.04.2022 passed by learned Sessions' Court, Rohtak, Haryana, is annexed at Page 227 of the paper book which belies the claim of the appellant that because of aforesaid ailing health of himself or his family members he was indisposed. Admittedly the appellant did not produce medical certificates.

10. The learned single Judge had rightly noted the appellant could have joined the proceedings even through video conferencing or at least had made a request in this regard. Nothing of this sort was done. Thus there is no cogent reason to upset reasoned order(s) passed by the learned single Judge, hence we find no merit in both the appeals. Accordingly, both the appeals are dismissed. Pending application(s), if any, also stand disposed of.

YOGESH KHANNA, J.

TUSHAR RAO GEDELA, J.

DECEMBER 07, 2023

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