REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4960 OF 2009
(Arising out of SLP (C) No.8599 of 2006)

M/s. John Impex (Pvt.) Ltd. & Anr. … Appellants

Versus

Athul Kapur & Ors. … Respondents

J U D G M E N T

S.B. Sinha, J.

1. Leave granted.

2. Defendant in the suit is before us aggrieved by and dissatisfied with a judgment and order dated 12.01.2006 passed by a learned Single Judge of the High Court, Delhi in FAO No.50 of 2005 whereby and whereunder an appeal preferred by him under Section 104 read with Order XLIII Rule 1(d) of the Code of Civil Procedure was dismissed.

3. The relationship between the parties hereto was landlord and tenant. Respondents-landlord filed a suit for eviction of the appellant from the suit premises. A prayer for recovery of arrears of rent was also made. The said suit was filed in the Original Side of the Delhi High Court. Appellant, indisputably, appeared before the Delhi High Court. Evidences had been adduced in the matter. The suit was listed for final hearing on 23.10.2003. The said suit, however, consequent upon issuance of a notification enhancing the pecuniary jurisdiction of the District Courts, was transferred to the Court of Additional District Judge, Delhi. On 13.2.2004, the learned Additional District Judge, Delhi passed the following order :

> "Present. None.
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> Fresh suit received by transfer. It be checked and registered. Issue Court Notice to parties and their counsels for 15.7.2004"

4. Appellants contend that no summon was, in fact, issued as directed by the learned Additional District Judge nor the same was served upon them. It, however, stands admitted that respondents had also filed an interlocutory application on 8.3.2004 purported to be in terms of Order XXXVIII, Rule 5, Order XXXIX, Rule 1 and Section 151 of the Code of Civil Procedure.

5. Notice of motion on the said application was issued for service on the defendant. The said notice was undisputedly served upon the appellants.

They, however, contend that they were not conversant with the Hindi language and, thus, were not aware of the contents thereof. The said interlocutory application came up before the Court on 15.7.2004 on which date, the court passed the following order :

> "15.7.2004 Proxy Cl of Plaintiff. Court Notice issued to deft No.1. Received after due service called repeatedly. It is 11.00 AM. Be called at 12.30 PM. There are two defts in all.
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> 15.7.2004 Pr. : Sh. Anil Airi, Adv. For the plff. Plff. Is also present in person. It is 11.45 AM. Case has been called repeatedly. The deft. No.1 is absent despite service of the Courtnotice. Ld.Cl. for plff. Submits that deft. No.2 has already been given up on 14.7.95."

The said suit was, therefore, taken up for ex parte hearing and upon consideration of the materials brought on record by the plaintiff-respondent, the suit was decreed. The appellants filed an application for setting aside the said ex perte decree which by reason of an order dated 14.1.2005 was dismissed, opining :

> "The argument of counsel for the JD/applicant could of the suit had been served on the JD/applicant, therefore, the JD/applicant could not have been proceeded ex parte in the main suit. I do not agree with him. Had I preponed the date of hearing and issued notice of the applicant to the JD/applicant for any date before 15.7.2004, the matter would have been different and in that case, the absence of the JD/applicant on the date fixed

> would have resulted in proceeding ex parte against him so far as the application is concerned. However, in the present case, the notice of the applicant had been issued to the JD/applicant for 15.7.2004 on which the suit was to be taken up. Here, I would like to further add that the application filed by the plaintiff the notice of which had been served on the JD/applicant, contained each and every fact stating from the various dates and fact that the suit had lie in the mouth of the JD/applicant to Say that since, the court notice was not issued for 15.7.2004, therefore, even after served of the application moved by the plaintiff which was served on the JD/applicant for 15.7.2004, it (defendant) should not have been proceeded ex parte. The applicant u/o 9 Rule 13 CPC is meritless and is dismissed. Consequently, application u/s 144 CPC is also dismissed. Filed be Consigned to record room."

6. An appeal preferred thereagainst has been dismissed by the High Court by reason of the impugned judgment, stating :

> "From the record of the Trial Court it is apparent that this notice for the next date of hearing fixed before the Trial Court on 15th July, 2004 was duly received and served upon the appellant on 18th March, 2004. There is also a registered A.D. acknowledgement card which shows that this notice for hearing fixed on 15th July, 2004 was duly served upon the appellant on 20th March, 2004. A bare perusal of the copy of the said notice available on the Court shows that the suit number and the name of the parties has been mentioned. The said notice did not anywhere indicate that the notice has been issued only on an application. The appellant has admitted service of this notice and has not disputed service of notice. The appellant has himself also enclosed copy of the notice

> received by one of its Directors at page 34 of the paper book filed in this Court. In any case the plea taken by the appellant is hyper technical. The second proviso under Order IX Rule 13 of Code makes it clear that an ex parte judgment or decree passed by the court is not liable to be set aside merely on the ground of irregularity in service if the party had notice of the date of hearing and had sufficient time to appear. It is clear from the notices and it is not a case of the appellant that it did have sufficient time to appear before the Trial Court or that he was not aware of the next date of hearing. Date of hearing is mentioned in the notice and the notice was served almost four months before the next date of hearing.
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> The judgment of the Supreme Court in the case of Sushil Kumar (supra) relied upon by the learned counsel for the appellant does not in any manner support the contention of the appellant. In the said judgment, the Supreme Court has noticed distraction between knowledge of mere "pendency of suit" and knowledge about the 'date of hearing'. In the present case, as is clear from the facts stated above, the appellant was aware and lied notice of the 'date of hearing' i.e. 15th July, 2004. Rather than supporting the case of the appellant, the said judgment supports the impugned order."

7. Mr. Anoop G. Choudhary, learned senior counsel appearing on behalf of the appellant, would contend that the learned Trial Judge as also the High Court committed a serious error in passing the impugned judgments in so far as they failed to take into consideration that the records of the case categorically establish that the appellants had never been served with any

notice of transfer of the suit or the fact that the suit was placed for hearing on 15.7.2004.

8. Mr. Devendra Singh, learned counsel appearing on behalf of the respondent, on the other hand, urged that the suit for eviction having been filed in the year 1993 and the respondents having already obtained possession pursuant to the decree passed by the learned Trial Judge, this Court should not exercise its discretionary jurisdiction under Article 136 of the Constitution of India.

9. The basic fact of the matter is not in dispute. The appellants were tenants. A suit for eviction was filed by the respondent before the original side of the Delhi High Court on 27th March, 1993 which was marked as Suit No.767 of 1993. The appellants in their written statement took the plea of their right to continue in the suit premises as statutory tenants.

The parties adduced evidences in support of their respective case. The matter was posted for final argument. It is, at this stage, the suit was transferred. The fact that the suits had been transferred from the Original Side of the Delhi High Court to the Court of Additional District Judge was known to all the litigants. The appellants, indisputably, had not made any endeavour to find out the date on which the suit was likely to be taken up for hearing.

10. We would proceed on the basis that Mr. Choudhary is correct in his submission that notice of transfer of the suit had not been served but, as indicated hereinbefore, the parties are at *ad idem* that the respondents also filed interlocutory application under Order 38 Rule 5 and Order 39 Rule 1 of the Code of Civil Procedure which had indeed been served. It is also not in dispute that 15.7.2004 was the date fixed for hearing of both, the interlocutory applicantion as also the suit.

11. No sufficient or cogent reason has been assigned by the appellants as to why despite receipt of the notice, they did not appear before the Court of the learned Additional District Judge, Delhi. The plea taken before us that the appellants were not conversant with the Hindi language cannot be accepted. A copy of the summons produced before us shows that it was both in Hindi as well as in English language. We, therefore, fail to appreciate as to why such an incorrect stand had been taken by the appellants.

It is furthermore not disputed before us that a finding of fact had been arrived at by the learned Additional District Judge that having regard to the quantum of rent being above Rs.6,500/- per month, the provisions of the Delhi Rent Control Act will have no application. It had further been found that the tenancy in respect of the premises had legally been determined.

12. Order IX Rule 13 of the Code of Civil Procedure provides for setting aside ex parte decree passed against the defendants. The Court, in terms of the aforementioned provision, is entitled to exercise its jurisdiction subject to its being satisfied that :

1. the summons was not duly served; or

2. he was prevented by any sufficient cause from appearing when the suit was called on for hearing.

The second proviso appended thereto which was inserted by Act 104 of 1976 reads as under :

> "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 plaintiffs claim."

13. The suit was transferred in the year 2004. It appears that even before the Delhi High Court, an application filed under Order IX Rule 9 was dismissed with costs. An appeal preferred thereagainst was also dismissed. The High Court by order dated 27.5.2003 directed the appellant to pay arrears of 'Use and Occupation' charges at the rate of Rs.24,000/- per month. The said order was not complied with. The appellants furthermore

did not appear in the suit with effect from 23.4.2002. Respondents filed an application praying for a direction upon the appellants to deposit the 'Use and Occupation' charges and on their failure to comply therewith to strike off the defence. An application was also filed by the respondent to direct the appellants to make payment of rent. Copies of the said applications were served upon the appellants. But despite the same, the appellants did not appear before the Court.

14. The learned counsel appearing on behalf of the respondents, therefore, in our opinion correctly contended that the sole aim of the appellants was to delay the disposal of the suit. The respondents, in terms of the order passed by the Delhi High Court directing the appellants to deposit the charges for occupying the tenanted premises, became entitled to receive a sum of Rs.24,00,000/- (Rupees twenty four lacs).

15. The articles stored in the premises had been put on auction. The appellants even did not take part in the auction proceedings. Indisputably possession of the premises in question had been delivered to the respondent. Pursuant to the decree passed, a partition has been effected amongst the co-sharers and the property in question has been physically divided.

In a situation of this nature, we are of the opinion that the appellant is not entitled to any relief. We may noltice that this Court in Sunil Poddar & Ors. v. Union Bank of India [(2008) 2 SCC 326], held as under :

> "14. It was further stated that summonses were issued to the appellants at the addresses at which they were earlier served. In fact, according to the respondent Bank, it was the same address which was given by the appellants themselves before both the Tribunals and before the High Court. But with a view to deprive the Bank of the legitimate dues and to delay the proceedings initiated against them, they did not appear before DRT. Though it was not necessary for the Bank to serve the appellants once again, they made a prayer to the Tribunal to get the summonses published in a newspaper which was done and in *Nav Bharat Times*, Bombay as well as *Nav Bharat Times*, Raipur summonses were published. *Nav Bharat Times* is having very wide circulation at both the places i.e. Bombay as well as at Raipur. It was, therefore, not open to the appellants to contend that they were not subscribing and/or reading a Hindi newspaper by producing a bill from a newspaper agent. Such a bill can be obtained from any vendor. No reliance can be placed on such evidence. Moreover, an extremely important fact which weighed with both the Tribunals as well as with the High Court was that in an application under Section 22(2)(*g*) of the Act for setting aside ex parte order passed by DRT, the appellants have suppressed material and extremely important fact that they had appeared before the civil court and had filed written statement. The application proceeded on the footing as if the appellants were never aware of any proceedings initiated against them by the plaintiff Bank. DRT was, therefore, wholly right in dismissing the application and the said order was correctly confirmed by DRAT and

> by the High Court. No case can be said to have been made out by the appellants to interfere with those orders and the appeal deserves to be dismissed.
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> 15. Having heard the learned counsel for the parties, in our opinion, the appellants have not made out any ground on the basis of which the order passed by DRT, confirmed by DRAT and by the High Court can be set aside. From the record, it is clearly established that the suit was instituted by the plaintiff Bank as early as in August 1993. The appellants who were Defendants 7 to 9 were aware of the proceedings before the civil court. They appeared before the court, engaged an advocate and filed a written statement. They raised preliminary objections as also objections on merits. They filed applications requesting the court to raise certain issues and try them as preliminary issues. It was, therefore, obligatory on their part to appear before DRT, Jabalpur when the matter was transferred under the Act. The appellants, however, failed to do so. We are not impressed by the argument of the learned counsel for the appellants that they were not aware of the proceedings before DRT and summonses could not be said to have been duly served. As is clear, summonses were issued earlier and on the same address, summonses were sought to be served again after the case was transferred to DRT. There is substance in the submission of the learned counsel for the respondent Bank that the appellants had avoided service of summons as they wanted to delay the proceedings."

16. Furthermore, it appears that the appellant had taken an incorrect stand in support of their case that the Managing Director of the appellant was ill at

the relevant time. No such plea had been taken before the learned Trial Judge.

17. For the aforementioned reasons, there is no merit in the appeal. It is dismissed accordingly with costs. Counsel's fee assessed at Rs.10,000/-.

…….J.
[S.B. Sinha]

..……..…J.
[Cyriac Joseph]

New Delhi;
July 31 , 2009.