

Lt Foods Limited vs Saraswati Trading Company on 25 January, 2023

Author: C.Hari Shankar

Bench: C. Hari Shankar

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+ IN THE HIGH COURT OF DELHI AT NEW DELHI
CS(COMM) 413/2021 & I.A. 1516/2023, I.A. 1517/2023
LT FOODS LIMITED
Through: Mr. R.Abh
versus
SARASWATI TRADING COMPANY Defendant
Through: Mr. Vikram Singh Baid and Mr.
Adarsh Tripathi, Advs. for Mr. Neeraj
Lalwani, Adv.
CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
ORDER

% 25.01.2023 I.A. 1516/2023 in CS(COMM) 413/2021

1. This is an application filed by the defendant under Order IX Rule 131 of the Code of Civil Procedure 1908 (CPC), to set aside the judgment and decree dated 11th November 2022, which was passed ex- parte.

2. Mr. R. Abhishek, learned Counsel for the plaintiff, submits that

13. Setting aside decree ex parte against defendant. - In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

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. Explanation.--Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.

By:KAMLA RAWAT Signing Date:27.01.2023 11:17:50 this application is not maintainable under Order IX Rule 13 of the CPC on the grounds cited in the application. He does not seek to file any response to the application, and submits that he would argue the matter as it involves a pure question of law.

3. Mr. Vikram Singh Baid, learned Counsel for defendant invokes the opening part of Order IX Rule 13 of the CPC to contend that summons in this case were not properly served on the defendant and that, therefore, the judgment and decree dated 11th November 2022 is liable to be set aside.

4. A perusal of the orders passed in this case reveals that

(i) on 7th September 2021, summons were directed to be issued in CS (Comm) 413/2021,

(ii) on 24th November 2021, this Court noted that service could not be effected on the defendant through speed post due to "insufficient address" and also recorded the plaintiff's request to file an application for substituted service,

(iii) in the next order dated 15th February 2022, while noting the request of learned Counsel for the plaintiff for filing of an application for substituted service, it was nonetheless observed, in paras 3 to 5 of the said order, thus:

"3. It is not in dispute that Court Commissioner/ Local Commissioner was appointed and he had visited the premises of defendant. Thus, it is deemed that service is affected upon the defendant, however, despite that none has appeared on behalf of said defendant. In the interest of justice, adverse orders are deferred for today.

4. Renotify on 25.04.2022.

5. It is made clear that if the defendant is not represented before this Court on the next date of hearing, this Court shall proceed in the matter in its absence."

(iv) on the next date of hearing, i.e., 25th April 2022, the court noted the earlier order dated 15th February 2022, which deemed service on the defendant to have been taken place, as well as the note of caution that if the defendant remained unrepresented the Court would proceed in his absence and

(v) consequently, on the said date, this Court proceeded to pass judgment and decree against the defendant, who remained unrepresented.

5. Apropos Mr. Baid's submission that service in this case was not properly effected on the defendant, Mr. Abhishek, learned Counsel for the plaintiff, draws attention to the aforesaid orders and submits that, as the order passed by this Court on 7th September 2021 was personally served on the defendant by the Local Commissioner, service was deemed to have been effected.

6. Mr. Baid contends, per contra, that service through the Local Commissioner is not one of the modes of services envisaged by the CPC.

7. The second proviso to Order IX Rule 13 specifically proscribes a court from setting aside an ex parte decree merely because there is irregularity in the service of summons, if the 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.

8. On the attention of Mr. Baid's being drawn to this provision, he seeks some time to cite authorities which may be in his favour.

9. Accordingly, re-notify on 30th January 2023.

C.HARI SHANKAR, J JANUARY 25, 2023 dsn