

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

Date of Reserve: 21<sup>st</sup> January, 2010  
Date of Order: January 29, 2010

**CM (M) No. 1020/2009**

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**29.01.2010**

**Shri Vern Kumar Datt & Anr.**

**... Petitioners**

Through: Mr. Sunil Malhotra, Advocate &  
Ms. Sonali, Advocate

Versus

**Shri Aditya Datt & Anr.**

**... Respondents**

Through: Mr. Vijay Kumar Gupta, Advocate

**JUSTICE SHIV NARAYAN DHINGRA**

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

**JUDGMENT**

By this petition under Article 227 of the Constitution of India the petitioners have assailed an order passed by the learned ADJ on 26<sup>th</sup> August, 2009 whereby he allowed an application under Order 9 Rule 13 CPC made by the respondent and set aside the ex parte decree. It is submitted by the petitioners that respondent no.1 was duly served through substituted service but respondent no.1 did not appear despite service and respondent no.2, who was also served, appeared before the trial Court but did not file WS and ultimately his defence was struck off. The petitioners adduced evidence in respect of the case and the petitioners' witnesses were cross examined by Counsel for respondent no.2 and ultimately Court of Shri N.K.Kaushik ADJ on 7.4.2008 decreed the suit of the petitioners. Despite the decree passed by the trial court, issuing an injunction against respondent no.1, respondent no.1 illegally went ahead with sale of the property. He appointed Praveen Chopra as his attorney and Praveen Chopra sold the suit property to Rajiv Bahl. Rajiv Bahl had further sold property to Judge Chawla, who is respondent no.2 herein. Respondent no.2 had earlier been restrained from buying the common portion of the property but despite restraint order, respondent no.2 illegally went ahead with the sale and ultimately got the property transferred to himself. It is stated that respondents no.1 & 2 were hand in glove with each other and an application under Order 9 Rule 13 CPC was filed by the respondent no.1 & 2 in conspiracy with

each other, for setting the ex parte decree against respondent no.1 passed on 7<sup>th</sup> August, 2004. The plea taken by respondent no.1 that he learnt about passing of the decree from the Writ Petition filed by the petitioner against respondents and MCD regarding unauthorized construction was a false plea. The other plea taken by the respondent for not being able to inspect the record due to advocates' strike was also a false plea. The application itself was hopelessly barred by time and was a mala fide exercise since both the respondents were very well aware of the proceedings pending before the Court of Shri N.K.Kaushik, ADJ. There was no document to show as to why the Counsel for the respondent could not inspect the file. It is also submitted that no advocate was prevented from inspecting the Court record during strike. It is submitted that the trial Court went wrong in allowing the application under Order 9 Rule 13 CPC and failed to appreciate the collusion between respondents no.1 & 2 and the fact that the respondent no.1 had been dealing and transacting in the property on one hand and evading appearance before the trial Court on the other.

2. In response to this petition it is submitted by the respondent that the respondent was never served in the suit. The allegations are that the petitioner deliberately did not make attempt to serve respondent no.1. Respondent no.1 was real brother of petitioner and the record would show that despite order of registered cover, no registered cover was filed. Ordinary summons had also not gone to the respondent no.1. Under these circumstances, respondent no.1 could not have appeared before the Court to contest the claim of the petitioner. A prayer is made that the petition be dismissed.

3. Order 9 Rule 13 CPC reads as under:

**13. Setting aside decree ex parte against defendants.** – 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 the ex parte decree.]

4. It is apparent that Order 9 Rule 13 CPC envisages that the party making application under Order 9 Rule 13 CPC had no knowledge of the suit in which decree was passed, no service was effected or there was some reasonable ground due to which the respondent could not appear in the Court which resulted into his being proceeded ex parte and an ex parte decree being passed. The Court can set aside the ex parte decree if the Court is satisfied with the reasons given by the defendant about his non appearance on the date fixed.

5. In the present case, the trial Court considered the record and found that the process server and process fee filed by the plaintiffs clearly showed that plaintiffs had not taken sufficient steps to serve the applicant/respondent no.1. No registered AD cover was filed neither UPC was sent by the plaintiff of the suit to defendant no.1. The process server had not even gone to the house of defendant to serve the summons. The plaintiff had not taken steps despite order dated 20.12.2002 of the Court whereby the Court had directed the plaintiffs to file process fee and registered A.D.Covers. The plaintiffs had not filed registered covers as ordered and by-passed the ordinary process of service of the applicant through post. The summons were sent through ordinary process at an address where defendant no.1 was not living. Process server had given his report that the premises was locked and no one was living there and defendant no.1 had shifted from this place. The trial Court also came to the conclusion that the address of defendant no.1 as given by the plaintiff was wrong though the correct address was available with the plaintiff and the plaintiff filed this correct address in the Writ Petition where defendant no.1 was served. He observed that this itself was sufficient ground for setting aside the ex parte decree. The issue of delay was decided by the trial Court in favour of the applicant in view of the strike of advocates.

6. Perusal of record shows that registered AD covers were not sent to the defendant no.1. After the report was given by the process server that premises was locked and no one was living there, the plaintiff did not file correct address of defendant no.1 which apparently was known to the plaintiff. Defendant no.1 was got served through substituted service by publication of notice in “Veer Arjun” and “The Statesman”.

7. In view of the fact that the trial Court had analyzed the factual situation in the light of the documents available on record and came to a conclusion that there was sufficient cause for setting aside the decree and allowed application under Order 9 Rule 13 CPC, it would not be appropriate for this Court, in exercise of its jurisdiction under Article 227, to substitute its own opinion about the service of defendant no.1 and to come to a contradictory conclusion. Under Article 227, this Court does not act as a Court of appeal. This court has only to ensure that the procedure followed by the trial Court was as per law and the trial Court did not out step its jurisdiction. I, therefore consider that there is no ground to interfere with the orders of the trial court. The petition is hereby dismissed.

**January 29, 2010**

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**SHIV NARAYAN DHINGRA, J.**