

**IN THE COURT OF SH. DEEPANKER MOHAN
DISTRICT JUDGE-04, SHAHDARA DISTRICT,
KARKARDOOMA COURTS, DELHI.**

CS 2138/2016

IN THE MATTER OF:-

NEAL JAY WADHWA AND ORS ... PLAINTIFF

VERSUS

MOHINDER WADHWA AND ORS ... DEFENDANTS

**26.04.2025
AT 10:40 AM**

ORDER

1. By way of this order, this Court shall dispose of the applications (1) application under Order IX Rule 13 r/w Section 151 CPC filed by defendant No.1 and 2 on 06.03.2024 and (2) application under Order IX Rule 13 r/w Section 151 CPC filed by defendant No.3 and 4 on 07.07.2023.

2. Arguments on both the applications were heard on 08.01.2025.

3. During the pendency of the aforesaid applications and present suit, defendant No.1 has expired on 05.12.2024, however, all his legal heirs are already on record i.e. defendant No.2 to 4, therefore, application under Order XXII Rule 2 and 4 r/w Section 151 CPC was

allowed and disposed of.

4. The defendant No.1 and 2 in their application under Order IX Rule 13 r/w Section 151 CPC has prayed for setting aside the ex-parte judgment and decree dated 16.03.2022 passed by the Ld. Predecessor of this Court vide which the suit of the plaintiff was partly decreed and also setting aside the order dated 24.08.2021 vide which they were proceeded ex-parte. The defendant No.1 and 2 have taken the ground that they have never entered their appearance in the present suit because they have never been served with the summons of the present suit. It is further stated in the application that the applicants/defendant No.1 and 2 were not even aware about the institution and pendency of the present case till June, 2023. It is further stated that in the month of June, 2023, defendant No.2 informed defendant No.1 as well as defendant No.3 and 4 about the execution petition filed for execution of the judgment and decree dated 16.03.2022 (Ex.No.19/2023). It is further stated that in the month of June, 2021 defendant No.1 was hospitalized as he had suffered a minor stroke. It is further submitted that defendant No.1 again suffered a stroke in the month of February, 2023. It is further submitted that defendant No.1 had taken treatment from Jain Hospital, Max Hospital and IIT Hospital and was not in a state to appear before this Court. It is further submitted that defendant No.2 being the wife was completely involved in the care of her husband. It is further submitted that after the stroke in February, 2023, defendant

No.1 was completely bed ridden and dependent on defendant No.2. It is further stated that due to the medical condition of defendant No.1, defendant No.1 and 2 could not appear before this Court when the order dated 24.08.2021 and judgment dated 16.03.2022 was passed. It is further submitted that non-appearance of defendant No.1 and 2 was unintentional and not deliberate.

5. The defendant No.3 and 4 pleaded in their application under Order IX Rule 13 r/w Section 151 CPC that defendant No.4 is an ordinary resident of Kolkata, West Bengal because of his job. It is further stated that summons of the present suit was never served upon them and they were unaware about the institution and pendency of the present litigation till June, 2023. It is further pleaded that in the month of June, 2023, defendant No.2 (their mother) informed them about the pendency of execution petition filed for execution of judgment and decree dated 16.03.2022. It is further stated that defendant No.1 (father of defendant No.2 and 3) was appearing through Counsel in the present suit and he has actively suppressed and concealed the factum of institution of the present suit from applicants/defendant No.3 and 4. It is further stated that applicants could not enter their appearance and plead their case in the present matter because they were never served. It is further stated that vide judgment dated 16.03.2022 the application under Order XII Rule 6 CPC was allowed considering the written statement of defendant No.1 and 2; reply of defendant No.1 and 2 to the application under

Order XII Rule 6 CPC and statement made by defendant No.1 recorded in order dated 20.03.2019. It is further stated that any admission made by defendant No.1 may not be allowed to prejudice the applicants' interest in the suit property. The judgment and decree dated 16.03.2022 and order dated 24.08.2021 are the result of defendant No.1's active concealment and suppression of the institution and pendency of present litigation from applicant/defendant No.3 and 4, therefore, the same is liable to be set aside. Ld. Counsel for defendants in support of their arguments have relied upon the following judgments: (i) *Bhivchandra Shankar More Vs. Balu Gangaram More and Ors. (2019) 6 SCC 387*; (ii) *G.P. Srivatava Vs. R.K. Raizada and Ors, (2000) 3 SCC 54*; (iii) *Sesh Nath Singh and Anr. Vs. Baidyabati Sheoraphuli Co-operative Bank Limited and Anr. (2021) 7 SCC 313*; (iv) *Kanak Chandra Boro and Ors Vs. M/s Kankaria Tea Company and Ors. AIR 1993 Gau 94*; and (v) *Nimesh Dilipbhai Brahmbhatt Vs. Hitesh Jayantilal Patel (R/Special Civil Application No.6547 of 2020 before Hon'ble Gujarat High Court at Ahmedabad)*.

6. Replies to the aforesaid applications were filed on 01.06.2024 and 15.05.2024 respectively. The plaintiff has specifically denied all the averments of the aforesaid applications. It is further argued that the averments of the application filed by defendant No.1 and 2 are false. It is further submitted that the written statement of defendant No.1 and 2 is already on record, which was allowed subject to costs

of Rs.1,000/- imposed vide order dated 16.11.2016, therefore, the contention that they have never put their appearance in the present matter is false and untrue. It is further argued that defendants were aware about the pendency of the litigation and they were actively participating in the proceedings of the present suit. It is further argued that on 07.09.2016, Ld. Counsel appearing for defendants submitted that defendant No.3 and 4 do not want to file their written statements. It is further argued that after filing the reply to the application under Order XII Rule 6 CPC, defendants stopped appearing in the present proceedings since 17.08.2020 and consequently on 24.08.2021 defendants were proceeded ex-parte. It is further argued that even thereafter none has appeared on behalf of defendants to address arguments on the application under Order XII Rule 6 CPC and consequently on 16.03.2022, the application under Order XII Rule 6 CPC was allowed and the suit of the plaintiff was partly decreed. It is further submitted that even thereafter, defendants never appeared before this Court till the application under Order IX Rule 13 CPC has been filed on behalf of defendant No.3 and 4 on 07.07.2023. It is further argued that defendants are making false, dishonest and fraudulent averments in the pleadings of their applications. It is further argued that defendants were well aware about the proceedings of the present suit. It is further argued that defendants deliberately stopped appearing in the present matter and now they are taking false plea to linger on the proceedings of the

present suit. It is further argued that the aforesaid applications are a gross misuse of process of law, therefore, the same are liable to be dismissed with heavy costs.

7. File perused.

8. The provision of Order IX rule 13 CPC allows the aggrieved defendant to apply to have an ex-parte decree set aside and the court will only set aside the decree if the defendant has a satisfactory reason or if the summons were not served properly upon him. While dealing with the application, the Court has to satisfy itself (a) Whether the summons have not been duly served? or (b) Whether the applicant has been prevented by sufficient cause from appearing? Under this rule the court should be flexible and liberal.

9. The Hon'ble Supreme Court of India in “*Parimal v. Veena*”, AIR 2011 SC 1150, held that the meaning of the word ‘sufficient’ is ‘adequate’ or ‘enough’, in as much as may be necessary to answer the purpose intended. Therefore, word ‘sufficient’ embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, ‘sufficient cause’ means that the party had not acted in a negligent manner or there was a bona fides on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been

‘not acting diligently’ or ‘remaining inactive’. However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. Every good cause is sufficient cause and must offer an explanation for non-appearance. The only difference between a ‘good cause’ and ‘sufficient cause’ is that the requirement of a good cause is complied with on a lesser degree of proof than that of a ‘sufficient cause’. While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. In order to determine the application under order IX rule 13 CPC, the test has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a Straitjacket formula of universal application.

10. Record reflects that defendant no.2 was served through self and all other defendant No.1, 3 and 4 have been duly served through

defendant No.2 on 09.06.2016. Admittedly, defendant No.2 is the wife of defendant No.1 and mother of defendant No.3 and 4. The provision of Order V rule 15 CPC provides that where in any suit the defendant has absent from his residence at the time when service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons of his behalf, service may be made on any adult member of the family, whether male or female who is residing with him.

11. As per the provision of Order V Rule 15 of the Code of Civil Procedure, 1908, Defendant no.1, 3 and 4 had being duly served with the summons of the present suit. The service of summons upon defendants is also reflected in the order dated 10.06.2016 and 03.08.2016. It is pertinent to mention that on 03.08.2016, three separate vakalatnamas' on behalf of defendant No.1, 2 and 3 and memo of appearance on behalf of defendant No.4 were filed. Written statement was also filed on behalf of defendant No.1 and 2 along with documents on 07.09.2016 which was taken on record vide order dated 16.11.2016 subject to payment of costs of Rs.1,000/-. It is worthwhile to mention here that on 07.09.2016, Ld. Counsels for defendants have made the submissions that the defendant No.3 and 4 do not want to file their written statements in the present matter.

12. Record further reveals that defendants were regularly

represented either through their Counsel or through defendant No.1 till 22.01.2020. Defendant No.1 and 2 have also filed reply to the application under Order XII Rule 6 CPC. It is noted that on 20.03.2019 defendant No.1 made a submission before the Ld. Predecessor of this Court that he along with defendant No.2 is ready to handover the vacant and peaceful possession of the first floor of the property in question to the plaintiffs provided one of the plaintiffs appears in the Court to receive the same. It is further note-worthy to mention here that on 08.01.2025, Ld. Counsel appearing for defendant No.2 to 4 have submitted that defendant No.2 to 4 have no objection, if plaintiffs want to reside and enjoy the first floor of the suit property for their own and personal use. However, defendant No.2 to 4 have denied to handover the possession and keys of the first floor of the suit property to attorney holder of plaintiffs namely Sh. Surender Dhamija.

13. As per the admitted facts, the entire suit property was owned by late Sh. Jaswant Rai Wadhwa, grand-father of plaintiffs and defendant No.3 and 4 and father of defendant No.1. Late Sh. Jaswant Rai Wadhwa was having two sons namely Sh. Vinod Kumar Wadhwa (father of plaintiffs) and Sh. Mohinder Wadhwa (deceased defendant No.1). Late Sh. Jaswant Rai Wadhwa during his lifetime had executed a Will dated 07.06.1995. The relevant contents of the will dated 07/06/1995 is reproduced herewith for facilitation:-

“

Will

This is the last Will and Testament of me, Jaswant Rai Wadhwa S/o Shri (Late) D.R. Wadhwa aged 73 years resident of 29, Vigyan Lok, Delhi-110092. I hereby cancel/ revoke all previous wills & codicil executed by me, if any, and declare this to be my last & final Will.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

I own and posses:-

- 1. House no.29, Vigyan Lok, Delhi-110092 where I am presently residing. I am sublessee of plot no.29 of the said property being members of C.S.I.R. Employee Co-operative House Building Society Ltd., Vigyan Lok, Delhi-110092.*

2. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

3. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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I wish & desire that after my death (my wife having already expired on 2.2.93) my two sons Shri Vinod Kumar Wadhwa aged 49 years and his wife Smt. Veena Wadhwa aged 45 years and Shri Mohinder Wadhwa aged 46 years and his wife Smt. Rajni Wadhwa aged 45 years shall be for their lifetime the 'custodian of my property No.1 House no.29, Vigyan Lok, Delhi-110092 and effects thereof. They shall maintain it & enjoy the benefits accruing out of this property & pay the necessary taxes and all bills etc. relating to this property. They shall not be entitled to dispose of this property in any manner either by sale, power of attorney, will or by mortgaging the same in any manner whatsoever. They will also not be entitled to

raise loan against this property.

My sons possess the following family:

- 1. Shri. Gagan Wadhwa S/o Shri Mohinder Wadhwa aged 18 years,*
- 2. Shri Rahul Wadhwa S/o Shri Mohinder Wadhwa aged 16 years,*
- 3. Ms. Teena Wadhwa D/o Shri Vinod Kumar Wadhwa aged 10 years,*
- 4. Neal Wadhwa S/o Vinod Kumar Wadhwa aged 5 years.*

These families shall have full right to live in this property i.e. 1 & 2 on the ground floor and 3 & 4 on 1st floor.

After the death of my sons & their wives I hereby give leave, devise and bequeath my grand sons and grand daughter mentioned of pre page for their use & benefit, absolutely and forever my property 29, Vigyan Lok, Delhi-110092 as follows:-

(a) Ground Floor 29, Vigyan Lok, Delhi-110092:-

- (i) Shri Gagan Wadhwa son of Shri Mohinder Wadhwa aged 18 years.***
- (ii) Shri Rahul Wadhwa son of Shri Mohinder Wadhwa aged 16 years.***

(b) First Floor 29, Vigyan Lok, Delhi-110092:-

- (i) Miss Teena Wadhwa D/o Shri Vinod Kumar Wadhwa aged 10 years.***
- (ii) Sri Neel Wadhwa S/o Shri Vinod Kumar Wadhwa aged***

5 years.

With all belongings, fittings, fixtures etc. and accordingly declare them to sole beneficiary and universal legate of my this will in regard to ground floor and first floor as mentioned above in equal shares.

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14. As per Will dated 07.06.1995, plaintiffs being the children of Sh. Vinod Kumar Wadhwa are entitled to use the first floor of the suit property absolutely and defendant No.3 and 4 (children of defendant No.1 and 2) are entitled to use the ground floor of the suit property absolutely. They shall have full rights in the afore-said floors respectively after demises of their parents.

15. The Ld. Predecessor of this Court has passed the judgment dated 16.03.2022 after considering the averments of written statement; reply to the application under Order XII Rule 6 CPC filed by defendant No.1 and 2; statement of defendant No.1 given on 20.03.2019; Will dated 07/06/1995 of Late Sh. Jaswant Rai Wadhwa and considering the factual matrix and admissions made by the defendant No.1 and 2. The Ld. Predecessor of this Court has dealt with the contentions of defendants while passing the judgment and decree dated 16.03.2022. It cannot be said that the findings of Ld. Predecessor of this Court was unilaterally, arbitrary and without

discussing the averments/pleadings of the case of defendants.

16. The averments of defendants made in their afore-said applications that they were not served with the summons of the suit, are contrary to the record. The summons of the present suit was duly received by defendant no.2 on her behalf as well as on behalf of defendant no.1, 3 and 4. The service of summons upon defendants is as per law. The written statement to the plaint and reply to the application under Order XII Rule 6 of the Code of Civil Procedure, 1908 have also been filed on behalf of defendant no.1 and 2. The defendant no.3 and 4 have not filed their written statement despite service, however, they were duly represented through their Counsel as well as through defendant no.1.

17. The defendant no.3 and 4 have not filed any complaint against defendant no.1 and 2 about the concealment of service of summons and pendency of the present suit. Once the service of summons has been duly affected upon defendants on 09.06.2016 then defendant no.3 and 4 cannot be allowed to aver that they were not served and defendant no.1 has concealed about the factum of institution and pendency of the present suit particularly when defendant no.3 and 4 have not made any complaint against defendant no.1 and 2 in support of their averments; vakalatnama & memorandum of appearance on their behalf were filed and already on record; they were duly represented through their Counsel and defendant no.1; and no

complaint has been filed by defendant no.3 and 4 against Sh. Sunny Arora, Advocate for representing them and for giving statement that defendant no.3 and 4 do not want to file written statement in the present suit. It is noted that three separate vakalatnamas on behalf of defendants no.1 to 3 and memorandum of appearance on behalf of defendant no.4 were filed by one Counsel Sh. Sunny Arora, who also represented all the defendants regularly. It is note-worthy to mention here that it is also not the case of defendants that they have not authorized Sh. Sunny Arora, Advocate to appear and represent them in the present suit. Moreover, no explanation has been given by the defendants about non-appearance of their Counsel Sh. Sunny Arora, Advocate after 04/07/2018 and 22/01/2020. The defendants have also not filed any complaint against their previous Counsel Sh. Sunny Arora for not appearing on their behalf despite his engagement by them. It is also not the case of defendants that they have asked Mr. Sunny Arora, Advocate to stop appearing in the present proceedings on their behalf after 04/07/2018 or 22/01/2020.

18. It is also noted that even the afore-said applications have been filed by all the defendants through one Counsel. It is not the case of defendants that they have no cordial relations with each other and they were residing separately. The defendant no.4 has also not averred that he is not in speaking terms with his parents and defendant no.3. It is pertinent to mention here that defendant no.4 has also not produced any documentary evidence which can show that he

was residing at Kolkatta, West Bengal and not in Delhi since 2016 till 16/03/2022. It is further note-worthy to mention here that defendants have also not filed separate applications under Section 5 of the Limitation Act, 1963 seeking condonation of delay in filing the afore-said applications by mentioning sufficient cause which prevented them from filing the afore-said applications within limitation.

19. The relief under Order IX Rule 13 CPC is a discretionary and the applicant who approaches for such reliefs must come with full disclosure of facts, bonafidely and with clean hands. The defendants No.1 to 4 have wrongly and falsely pleaded that they were never been served in the present suit, however, record reflects that defendants were duly served and they have also taken part in the proceedings of the present suit. The applications have not been filed bonafidely by the defendants disclosing true and correct facts and good cause which prevented them from appearing before this Court after 20.01.2020 and, therefore, defendants are not entitled for the reliefs prayed in the applications being meritless. The judgments relied upon by Ld. Counsel for defendants are based on different facts and circumstances, therefore, the same would not be useful for the defendants.

20. Considering the facts and circumstance of the case and above observations, this Court is of the view that the afore-said applications are gross abuse of process of law; meritless; defendants have failed to

show the good cause which can compel this Court to set-aside the judgment and decree dated 16/03/2022 and Order dated 24/08/2021 passed by the Ld. Predecessor of this Court; and the same have been filed in order to protract the proceedings of the present suit **and therefore, the present applications are hereby dismissed being without merits.** However, it is made clear that the defendants No.2 to 4 shall be having their right to take part in the proceedings and also to cross-examine the plaintiffs' witnesses during trial.

21. Applications are accordingly dismissed and disposed off.

22. Plaintiff is directed to file evidence affidavits of all his witnesses within 21 days from today with an advance copy to defendant.

23. Put up for Plaintiff evidence on 12.06.2025.

Announced in the open Court.

**(Deepanker Mohan)
District Judge-04
Shahdara District/KKD Courts/Delhi
26.04.2025**