

11.07.2025

Present: Sh. Sourabh Balwani, Ld. Counsel for plaintiff.
Sh. Shivam Jaska, Ld. Counsel for defendant No. 1 (through VC).
Defendant No. 2 in person.
Defendant No. 2 already proceeded *ex parte* vide order dated 08.04.2025.

1. Reply to application under Order VII Rule 11 CPC filed on behalf of plaintiff with advance copy to the defendant No. 2. Evidence by way of affidavit filed on behalf of plaintiff with advance copy to the defendants.
2. Perusal of record reveals that application under Order IX Rule 7 CPC as filed on behalf of defendant no. 2 as well as application seeking permission for recording of evidence of PW-1 via video conferencing in terms of High Court of Delhi Rules for Video Conferencing for Courts 2021 is pending for disposal.
3. Ld. Counsel for defendant No. 1 submits that he is not inclined to file any reply to pending application for evidence and he will straightway argue the same. Ld. counsel for defendant No. 1 further submits that, although he has no objection if evidence be recorded through VC but since plaintiff is seeking recording of evidence through his residence located in Minnesota, USA, he has strong apprehension qua proceedings. At this stage, Ld. counsel for plaintiff relied upon the Judgment passed by Hon'ble Punjab and Haryana High Court in *Kulvir Ram@ Mati Vs. State of Punjab and Anr.* (Neutral citation No:=2024:PHHC:133035. However, Ld. Counsel for defendant No. 2 seeks adjournment to go through the same. In view thereof, remaining arguments shall be heard on NDOH.

4. Further, by way of present application under Order IX Rule 7 CPC defendant No. 2 is seeking set aside of *ex parte* order dated 08.04.2025 ((hereinafter referred as impugned order). Contention of Ld. Counsel for defendant No. 2 is two-fold. *Firstly*, defendant No. 2 is a layman and not aware about the Court proceedings and first time appeared before this Court on 04.12.2024 but inadvertently noted next date of hearing as 03.05.2025. Thus, due to wrong recording of next date of hearing defendant No. 2 could not appeared on impugned date and proceeded *ex parte*. *Secondly*, defendant No. 2 has a meritorious defence to the suit and in case impugned order is not set aside, defendant No. 2 would suffer irreparable lose and injury and grave injustice would be caused. Defendant No. 2 also submits that in case of sufficient cause and bona fide mistake Court should exercise its discretion under Order IX Rule 7 liberally so that justice could be secured. Lastly, it is submitted that non-appearance of defendant No. 2 is bona fide and unintentional hence impugned order may be set aside and defendant No. 2 may be permitted to file WS and join the proceedings.

5. *Per contra*, Ld. Counsel for plaintiff vehemently opposed present application. It is submitted that, the present proceedings are second round of litigation as *ex parte* decree was earlier passed in favour of plaintiff but same was challenged by defendant No. 1 under Order IX Rule 13 CPC and consequently, set aside by this court vide order dated 20.11.2023. It is further submitted that, initially defendant No. 2 could not be served via ordinary mode hence, served via publication but despite service he failed to appear and proceeded *ex parte* vide order dated 11.03.2019 by Ld. Predecessor of this court. It is further submitted that, while setting aside *ex parte* Judgment this court was of the view that defendant No. 2 is a necessary party and thus, for proper adjudication of dispute, set aside the Judgment against defendant No 2 as well. It is further submitted that, it's not a case of bona fide mistake or non-awareness of defendant No. 2 about present proceedings as he

is a real brother of defendant No. 1 and well aware about present suit since its inception. It is further submitted, although defendant No. 2 was duly served via E-mail on 28.08.2024 but for precautionary reason and in the interest of justice, plaintiff was directed to be serve defendant no. 2 via affixation and publication as well vide order dated 14.10.2024 and same was duly complied. It is further submitted that on 04.12.2024 defendant No. 2 appeared in person and confirmed his email id as rajavaneet@gmail.com and whatsapp @ 9810060879 i.e. same Email ID upon which he was earlier served by the plaintiff's counsel. It is further submitted despite service of complete paper book at multiple occasions defendant No. 2 requested for hard copy of paper book at his residence which was duly served on 20.12.2024. Lastly, it is submitted that defendant No. 2 has no reason for seeking set aside of *ex parte* proceedings hence, present application may be dismissed with heavy cost.

6. In rebuttal, Ld. Counsel for defendant No 2 submits that although defendant No. 1 is real brother of him but he was not in talking terms. However, in reply to rebuttal Ld. Counsel for plaintiff submits that defendants are in hands in gloves.

7. Submission heard. Record Perused.

8. This Court carefully gone through the submissions made by the parties as well as the material placed on record. Brief facts, which are imperative to adjudicate present application are succinctly recapitulated as follows:

a) Briefly stated, present suit for recovery was initially *ex parte* decreed in favour of plaintiff against defendant No.1 vide *ex parte* Judgment/decreed dated 02.04.2019 but, same was set aside by this Court under Order IX Rule 13 CPC vide order dated 20.11.2023 and main suit was restored at its original number.

After restoration of the present suit, various Court notices were issued to defendant No. 2 but same could not be served by process server though it was served via E-mail by the counsel for plaintiff. Finally, defendant no. 2 served via publication on 29.10.2024 and entered into appearance on 04.12.2024.

- b) Perusal of record reveals that, on 04.12.2024, defendant No. 2 appeared in person and sought time to engage the lawyer and also requested for service of complete paper book and same was duly served by plaintiff on 20.12.2024.
- c) Record further reveals that, defendant failed to appear on 2 consecutive dates of hearing and proceeded *ex parte* vide order dated 08.04.2025.

9. It is settled that if it is proved that, the summons was duly served, the Court may make an order that suit be heard *ex parte* and where the Court has adjourned the hearing of the suit *ex parte* and thereafter defendant appears and assigns good cause of his previous non appearance, he may upon such terms as the court directs as to the cost or otherwise be heard in answer to the suit as if he has appeared on the date fixed for his appearance.

10. In present application defendant No. 2 cited ‘wrong recording of date of hearing’ as good cause for his non appearance. It is submitted that on 04.12.2024 defendant No. 2 duly appeared but mis noted NDOH as 03.05.2025 but, this Court does not find any merit in the submissions made on behalf of defendant No. 2 for two reasons as *firstly*, on 04.12.2024 defendant No. 2 sought time to engage the lawyer but, perusal of record reveals that defendant No. 2 engaged present counsel only on 22.05.2025. No plausible explanation given by defendant No. 2 for not engaging suitable lawyer for 6 months. Plea of ‘wrong recording of date of hearing’ is not accompanied with any material. Defendant No. 2 can’t be stated to unaware of legal proceedings. Even otherwise, it cannot be taken as excuse under law. *Secondly*, it is settled law that “*Vigilantibus non dormientibus jura subveniunt*” i.e.

law helps grow who are vigilant rather than those who are negligent and failed to pursue legal proceedings. Defendant No. 2 was earlier served via publication on 02.10.2018 than on 26.10.2024 and 29.10.2024. Even otherwise as per affidavit of service complete paper book was served upon him via email on Rajavaneet@gmail.com and said email ID duly confirmed by him on 04.12.2024. But, defendant No. 2 kept on requesting of soft copy or hard copy of complete paper book and failed to put forth his defence.

11. Thus, considering overall facts and circumstances as well as submission made by the parties, this court is not inclined to set aside *ex parte* proceeding. Hence, present application stands dismissed.

(SHILPI M JAIN)
DJ-05 (SW)/Dwarka Courts
New Delhi: 11.07.2025