

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

+ RFA(OS) 38/2007

GHANSHYAM DASS AGGARWAL Appellant
Through Mr. R.K. Sharma, Advocate

Versus

SUMAN JAIN Respondent
Through Mr. Vineet Bhagat, Advocate

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE MANMOHAN

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the digest?

J U D G M E N T

MUKUL MUDGAL, J (Oral)

CM Appl. No. 8041/2007 (for condonaton of delay)

1. For the reasons recorded in para nos. 2, 3 & 4 of the application, it is evident that the Appellant was not aware of the dimissal of the suit and consequently the delay has to be condoned.

2. In view of above, the present application is allowed. Accordingly the application stands disposed of.

RFA (OS) No. 38/2007

1. This appeal challenges the order dated 21st March, 2005 passed by learned Single Judge whereby the suit filed by the Appellant/Plaintiff was

dismissed. The primary reason for the dismissal of the suit can be found in the following words of learned Single Judge :-

“.....Prayer made in the application is that evidence of the plaintiff should be directed to be closed. I see no reason why the plaintiff has not appeared in respect of advance copy being served. Since the plaintiff has not filed affidavit in examination in chief within the period granted by this court, application is allowed. Evidence of the plaintiff is closed.

CS(OS) No. 1407/1999

Onus to establish that the plaintiff was ready and willing to perform his part of his contract was on the plaintiff. Since evidence of the plaintiff is closed, said issue has to be decided against the Plaintiff.

Suit is for specific performance. Readiness and willingness to perform his obligation under the contract to be proved is a sine qua non to grant relief.

Suit is accordingly dismissed”

(emphasis supplied)

2. The Plaintiff/Appellant herein has averred in the present proceedings as follows:-

“6. That the advance copy of the said application was served upon one Shri Santosh Kumar, and after service it was filed on 4.3.2005. Thereafter this application was returned by the Registry that as so many days have left so fresh advance copy is to be served. Second time the copy of said application was served upon one Shri Rajesh, who first wrote date to be 15.3.2005 and subsequently there is over-writing and this has been converted to be 16.3.2005 and it was refilled on 16.3.2005 and it was listed before the Hon'ble Court on 21.3.2005 and on this date, the Court dismissed the suit of the plaintiff/appellant

holding that inspite of service of advance copy, nobody has appeared on behalf of the plaintiff and as such the suit is dismissed and suit was dismissed on merits. The learned Single Judge did not notice that there is no actual service of advance copy on the plaintiff/appellant or upon his counsel Mr. Ravi Gupta and moreover the application being listed after five days and in normal course the Hon'ble Court ought to have served a court notice upon the plaintiff or upon his counsel."

3. Learned Counsel for Appellant has stated that he was not aware of the dismissal of the suit as the application was never served upon him.

4. The aforesaid plea of Appellant in para no. 6, reproduced hereinabove, has not been denied by the Respondent. Consequently, we are of the view that as a copy of the application was never served upon the Appellant, the dismissal of his suit was not justified for his non appearance and the appeal deserves to be allowed.

5. However, we have noted the fact that the Appellant had not filed its evidence within a period of four weeks from 2nd April, 2003, when the issues were framed and Appellant was directed to file affidavits of his witnesses by way of examination-in-chief. The Respondent has rightly contended that the said delay is on account of the Appellant only. In view of the abovesaid facts and circumstances that the advance copy of the application was never served on the Appellant and in the interest of justice, we hereby set aside the impugned order dated 21st March, 2005 of learned Single Judge. However, Appellant is directed to file his affidavit in examination-in-chief not later than 10th October, 2008, subject to payment of costs of Rs. 25,000/- payable to learned Counsel for Respondent on or before the said date.

7. Any default in compliance of the directions would lead to restoration of the impugned order passed by learned Single Judge.

8. Accordingly, the present appeal stands disposed of.

9. Parties to appear before learned Single Judge on 4th November, 2008, subject to direction of the Judge In-charge, Original Side.

MUKUL MUDGAL, J

MANMOHAN, J

SEPTEMBER 09, 2008
rn