

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

+ FAO 319/2011

% Date of Decision: October 19, 2012

GULSHAN KUMAR Appellant
Through : Mr.Satish Kumar, Advocate

versus

BABY SACHDEV @ REETA SACHDEV Respondent
Through : Ms.Isha Khanna, Advocate

CORAM:
HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.

1. By way of this appeal under Order XLIII Rule 1(c) read with section 151 of CPC, a challenge has been made to the impugned order dated 4th April, 2011 by which application of the appellant under Order IX Rule 9 read with section 151 CPC for restoration of suit which was dismissed for non appearance, has been dismissed.

2. Briefly the facts relevant for disposal of the present appeal are as under:-

Appellant herein i.e., plaintiff before the learned trial court had filed a suit for recovery of Rs.4,50,000/- against respondent/defendant. The summons of the suit were served on the respondent/defendant. Along with the suit, an application under Order 39 Rule 1 and 2 CPC was also moved. Pleadings were completed on 3.8.2006. On 28th April, 2008, suit was dismissed for non prosecution. Subsequently an application under Order IX Rule 9 read with section 151 CPC was moved for setting aside the order dated 28th April, 2008. Vide order dated 13th February, 2009, the application under Order IX Rule 9 read with section 151 CPC was allowed and suit was restored to its original number subject to cost of Rs.1000/-. Thereafter the case was listed on 19.5.2009 for admission/denial of documents. However, the suit was again dismissed on that date due to non appearance of appellant. It is alleged that counsel for the appellant did not inform the appellant about the listing of the case on 19.5.2009, as a result of which he could not appear before the court. It is alleged that the counsel for appellant had been ensuring that he was handling the matter. On 1st July, 2010, appellant's counsel informed that suit was listed in the court of learned ADJ at Karkardooma, Delhi. Appellant/plaintiff went to the said court but could not find the case there. Again he contacted his counsel on phone but counsel did not respond to his telephone. Thereafter, appellant engaged another counsel who verified the status from court record and informed him that case has already been dismissed in default on 19.5.2009. The new counsel inspected the court record and obtained certified copy of the order and thereafter moved an application under Order IX Rule 9 read with section 151 CPC for

restoration of the suit. It is alleged that appellant has also filed a complaint against the previous counsel with the Bar Council of Delhi stating the misconduct of his previous counsel.

3. Notice of the aforesaid application was issued to the respondent/defendant who had appeared there and sought time for filing reply. Thereafter, respondent/defendant did not file reply and was proceeded ex parte vide order dated 3.1.2011. The aforesaid application of the appellant/plaintiff was dismissed by the learned trial court vide impugned order dated 4.4.2011. Aggrieved with the same, present appeal is filed.

4. Learned counsel for the appellant has argued that appellant had been diligently pursuing his case. Non appearance by the appellant on 19.5.2009 was neither deliberate nor intentional. It is submitted that appellant had been regularly following up the matter with his counsel who had been giving various dates to him. It is contended that counsel for appellant did not inform him about the date fixed in the matter i.e., 19.5.2009 due to which there in non appearance on behalf of the appellant/plaintiff on the said date. It is stated that when enquiries were made by the appellant/plaintiff, it was revealed that matter has already been dismissed for non appearance. Appellant filed an application for restoration of the suit within 30 days of getting the knowledge about dismissal of the suit. It is contended that appellant should not suffer due to lapse on the part of his counsel. It is further submitted that appellant was in regular touch with his previous counsel. Learned counsel has contended that there is no fault of

appellant and the suit was dismissed due to aforesaid reasons. In support of his contention, learned counsel for appellant has referred to the judgment of the Supreme Court in Rafiq and anr vs. Munshilal and Anr: AIR 1981 SC 1400.

5. On the other hand, learned counsel appearing for the respondent has contended that appellant was not pursuing his case in a diligent manner. It is contended that non appearance was deliberate and appellant wants to delay the matter and is harassing the respondent.

6. I have heard learned counsel for the parties and perused the material on record.

7. The stand of the appellant/plaintiff is that due to fault of his previous counsel in not informing the appellant about the date of hearing, the case was dismissed in default. The appellant has given the detail reasoning as to how he came to know about the dismissal of the case. The application under Order IX Rule 9 read with section 151 CPC was supported with the affidavit of the appellant. No reply to the said application has been filed by the respondent/defendant before the trial court. The application is also supported with complaint made by appellant against his previous counsel with the Delhi Bar Council along with fee receipt of Rs.300/- dated 16.8.2010. There is no reason to disbelieve the affidavit of appellant specially when there is no rebuttal by respondent to the said affidavit. In Rafiq and anr Vs. Munshilal and anr (supra), it has been held that parties should not suffer due to the lapse on the part of his counsel.

8. The suit filed by the appellant is for recovery of Rs.4,50,000/- and the requisite court fee was also paid by the appellant/plaintiff at the time of filing of the suit. The pleadings have already been completed and the case is at the stage of admission/denial of documents. The record shows that in between, there were mediation proceedings and both the parties were appearing in the mediation also. There is nothing on record to show that there was any deliberate attempt on the part of appellant/plaintiff for non appearing in the matter or that the appellant is trying to delay the outcome of the case, as is alleged. The appellant/plaintiff will not gain anything by the delay, as is alleged.

9. The reasons given by the appellant in the application cannot said to be false or an afterthought. It is settled law that the word “sufficient cause” should receive liberal construction so as to advance substantial justice when no negligence or inaction or want of bonafide is imputed to a party. In the present case, the affidavit of the appellant supported with application under Order IX Rule 9 read with section 151 CPC does not show that there was any negligence on his part. Application is moved within 30 days after coming to know that suit has been dismissed for non appearance. For the delay caused in the matter, respondent/defendant can be compensated with costs. Further the ends of justice would be met if the matter is heard and decided on merits.

In view of the above discussion, the impugned order is set aside and the application of the appellant under Order IX Rule 9 CPC is allowed, subject to payment of costs of Rs.15000/- to be paid by the

appellant/plaintiff to the respondent/defendant. The delay in filing the same is also condoned. The suit is restored to its original number. Costs be paid within four weeks.

Appeal stands allowed accordingly.

Parties to appear before the Id.trial court on 7.11.2012.

Trial court record be sent back forthwith.

CM 4436/2012(under Order 1 Rule 10 CPC)

In view of the order passed in the appeal, no order is required on this application. The same stands disposed of accordingly.

VEENA BIRBAL, J

October 19 , 2012

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