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

+ **FAO(OS) 484/2015**

**SANJEEV BHAGI**

..... Appellant

Through: Mr Pradeep K. Bakshi and Mr Puneet Khurana

versus

**PUSHPA KAPRI**

..... Respondent

Through: None

**CORAM:**

**HON'BLE MR. JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR. JUSTICE SANJEEV SACHDEVA**

**ORDER**

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**07.09.2015**

**CM No. 19057/2014 (condonation of delay)**

The delay is condoned.

The application stands disposed of.

**FAO(OS) 484/2015 and CM No. 20091/2014**

Notice of this appeal has been served on the respondent, however, nobody appears on behalf of the respondent. The respondent was also being proceeded ex-parte before the learned Single Judge. The appellant is aggrieved by the orders dated 05.08.2014 and 02.09.2014. The appellant's suit had been dismissed in default because of non-appearance on behalf of the appellant / plaintiff when the matter was called out on that date i.e., 05.08.2014. Thereafter, the appellant / plaintiff filed an application under Order IX Rule 9 CPC being I.A. No. 16699/2014 seeking a recall of the order dated 05.08.2014. That application has been dismissed by the learned Single Judge by virtue of the impugned order dated 02.09.2014. The learned counsel for the appellant pointed out that

on 21.07.2014 when the matter was listed before the Joint Registrar, the learned counsel for the plaintiff was actually present although his appearance has not been indicated. In fact the next date fixed in the matter, according to the learned counsel, was 22.08.2014 for fresh service on the appellant's / plaintiff's application under Order VI Rule 17 CPC for amendment of the plaint and as a consequence of that on that very date, that is, on 21.07.2014, the appellant / plaintiff filed the process fee. This fact stands confirmed from the record of the case. It is submitted that because of these circumstances, there was no appearance on behalf of the plaintiff on 05.08.2014 and consequently, the application under Order IX Rule 9 CPC ought to have been allowed and the suit ought to have been restored.

We have seen the order dated 21.07.2014 passed by the Joint Registrar which only notes that:- "this is a fit case to close the right of plaintiff to lead evidence" and that the matter be listed before court for further directions on 05.08.2014. We have already indicated above that, according to the learned counsel for plaintiff, the date actually fixed was 22.08.2014 and not 05.08.2014 and that too for the service of the defendant on an application under Order VI Rule 17 CPC seeking amendment of the plaint. Be that as it may, the fact of the matter is that on 21.07.2014, the Joint Registrar had only noted that it was a fit case to close the right of the plaintiff to lead evidence. There was no order with regard to the right of the plaintiff to lead evidence having been closed.

Unfortunately, the order dated 05.08.2014, which was obviously passed in the absence of the appellant / plaintiff, records that on 21.07.2014, the right to file evidence of the plaintiff had been closed.

In any event, the circumstance which prevented the appellant / plaintiff from appearing on 05.08.2014 has been explained above.

We may also point out that the learned Single Judge while disposing of the application under Order IX Rule 9 CPC had also taken in account the earlier alleged non-appearances on the part of the plaintiff on 16.01.2014, 29.01.2014, 19.02.2014, 26.02.2014 and 21.07.2014. We find from the record that the appellant / plaintiff had appeared on 26.02.2014. We have also indicated above that the learned counsel for the appellant / plaintiff had also appeared on 21.07.2014. In any event, the learned Single Judge ought to have only examined the cause for non-appearance on 05.08.2014 and not on earlier dates. This is so because the suit was dismissed on the ground of non-appearance on behalf of the plaintiff on 05.08.2014 alone.

For all these reasons, we are of the view that the application under Order IX Rule 9 CPC ought to have been allowed. Consequently, we set aside the impugned order dated 02.09.2014 and as also the order dated 05.08.2014 and restore the suit to its original number. The suit shall proceed from the stage it was left off as obtaining on 21.07.2014. The matter shall now be placed before the learned Single Judge on 21.09.2015.

The appeal stands allowed as above.

**BADAR DURREZ AHMED, J**

**SEPTEMBER 07, 2015**  
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**SANJEEV SACHDEVA, J**