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HIGH COURT OF DELHI AT NEW DELHI

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F.A.O. NO.217/2009

Decided on: 28th March, 2016

SURINDER KUMAR DHALL

..... Appellant

Through: Mr. S.D. Dixit, Advocate

versus

OM PRAKASH DHALL & ORS.

..... Respondents

Through: Mr. Bharat Deepak, Adv., with
Mr. Tarun Kapoor, Adv. for R-1
and LRs (i), (ii) & (iii) of R-2.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (Oral)

1. This is an appeal filed by the appellant against the order dated 08.06.2009 by virtue of which the application of the appellant under Order 9 Rules 4 and 9 read with Section 151 CPC was dismissed on the ground that no cogent explanation was given by the appellant for his absence.

2. Briefly stated that facts of the case are that the appellant/plaintiff and respondent No.1/defendant No.1 are real brothers. Both of them are settled in Canada. A suit for specific performance of agreement to sell, declaration, possession and permanent injunction was filed in respect of

property bearing No. K-9, WZ-120, Gali No.6, Shiv Nagar, New Delhi-110 in the year 2000 by the appellant through his attorney against his brother claiming that the suit property was agreed to be sold by respondent no.1 to the appellant for a sum of 10,000/- Canadian Dollars. The aforesaid amount in terms of prevailing conversion rate at that point of time when it was agreed to be paid came to the sum of Rs.3 lacs in Indian currency. It was alleged that subsequent thereto respondent No.1 wanted to wriggle out of the agreement to sell and consequently the appellant was constrained to file the suit for specific performance, etc. The said suit was dismissed in default on 20.01.2006 on account of non-prosecution. An application for restoration was filed by appellant in the month of February, 2006 under Order IX Rule 9 CPC for restoration of the suit. The ground on which restoration was sought was the non-availability of the counsel as well as attorney of the appellant. This application was dismissed for non-prosecution on 07.01.2008. A fresh application under Order IX Rules 4 and 9 read with Section 151 CPC was filed for restoration of the application seeking restoration of the main suit which was also dismissed vide order dated 08.06.2009 which is assailed in the present appeal.

3. The sum and substance of the application seeking restoration of the restoration application was that the counsel for the appellant could not appear before the trial Court on 07.01.2008 on account of the fact that he was busy in another matter in Patiala House Courts, Delhi. The learned trial Court did not consider the explanation furnished by the appellant as

'sufficient cause' and accordingly dismissed the application. Now the present appeal has been filed.

4. I have heard the learned counsel for the appellant. I have also gone through the record.

5. At the outset, it must be stated that law aids the vigilant and not the indolent. The law is not there to condone the delay or the inaction on the part of the party in not pursuing the remedy timely. This is the reason why the pendency in the trial Court is increasing by leaps and bounds in as much as parties after filing of the suit do not take interest in the prosecution of the matter. It is this reason which has led the Court to dismiss the matter in default on 20.01.2006 as the counsel did not appear. The application for restoration of suit was also dismissed on 07.01.2008 wherein the explanation which has been furnished by the counsel for the appellant for non-appearance before the trial Court was that he was busy in another matter in Patiala House Court but as observed in the impugned order no case diary was filed to substantiate this statement. On an earlier occasion also when suit was dismissed in default on 07.01.2004 and an application for restoration of suit was filed, it was said that on said date the counsel could not appear as he had lost his mobile phone in the court premises and he was searching for the same.

6. I had requisitioned the trial Court record and seen for myself. The suit has been filed through one Mr. B.L. Chawla, an attorney. Prior to the dismissal of the suit also the date for recording of petitioner's evidence was fixed, on that date also nobody had appeared on behalf of the petitioner/appellant despite the fact that the learned trial Court Judge was

over indulgent and kept waiting for the party post-lunch so that the evidence could be recorded. But, this entire exercise had gone waste as neither the witness nor the appellant appeared for the purpose of recording of their statement. Consequently, the suit was dismissed for non-prosecution. A perusal of the order sheets speaks volumes that the appellant has chosen not to examine himself as a witness for proving his case. The necessary result of this is that two brothers who are cosily settled in Canada are fighting a court battle in India through attorney. There is no seriousness on the part of the appellant to prosecute the remedy. Had there been one, he would have certainly ensured that the entire exercise of seeking restoration, etc. be complied with within time which has not been done. Moreover, in the meantime, property has already changed hands.

7. In view of the aforesaid discussion and the other relevant evidence on record, I am of the opinion that in case suit is restored it would amount to gross abuse of the process of law. The reason for this is that not only there is lack of seriousness on the part of the appellant but also the fact that the appellant did not testify before the court despite several opportunities having been given to him and closed his evidence.

8. For the reasons mentioned above, I am of the view that the present appeal is totally misconceived and accordingly the same is dismissed.

V.K. SHALI,J.

MARCH, 28, 2016

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