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

+ **FAO(OS) 244/2016 & CM 29548/2016**

KUSHAL K RANA

..... Appellant

Through : Mr B. S. Maan with Mr Vishal Maan

versus

PHOOL KUNWAR

..... Respondent

Through : Mr Babu Lal with Mr Kuljeevan Sidharth

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

ORDER

% **06.12.2016**

This appeal is directed against the order dated 11.07.2016 which was passed by a learned Single Judge of this Court in IA 7788/2016 filed by the respondent/defendant under Order 9 Rule 7 of the Code of Civil Procedure, 1908, seeking the setting aside of the *ex parte* proceedings against the said respondent/defendant.

Earlier, by an order dated 04.08.2015, a learned Single Judge of this Court had noted that the process server's report dated 03.08.2015 was available on record, which indicated that the wife of the defendant/respondent, namely, Mrs Rajwanti had refused to accept the summons and the notice on behalf of her husband giving the reason that he was not available. Based on that report, the learned Single Judge directed that the defendant/respondent be proceeded *ex parte* and also directed that *ex parte* evidence by way of affidavit be filed within eight

weeks from that date. The matter was, thereafter, to be listed before the Joint Registrar.

From the impugned order, it appears that the learned counsel for the appellant/plaintiff was not present on 11.07.2016 when the said IA 7788/2016 (under Order 9 Rule 7 CPC) came up for hearing. According to the learned counsel for the appellant, since no 'Notice of Motion' had been filed by the defendant/respondent, the appellant was not aware that the matter would be listed on 11.07.2016.

Be that as it may, the main point that has been urged by the learned counsel for the appellant is that in paragraph 2 of the impugned order, it has been recorded that the plaintiff had not filed any affidavit by way of evidence of his witnesses till that date (i.e. 11.07.2016). However, the learned counsel for the appellant drew our attention to the order dated 29.10.2015, wherein it was clearly recorded that the appellant had filed the affidavit of evidence and PW1 had also been examined and discharged. The list of witnesses had also been filed.

From this, it is evident that the statement made in paragraph 2 of the impugned order is contrary to the record. It appears to us that the impugned order has been influenced by what is recorded in paragraph 2 thereof, which is factually incorrect.

In these circumstances, we feel that the impugned order ought to be set aside and the matter be remitted to the learned Single Judge for a decision on merits. Consequently, IA 7788/2016, which has been filed by the

defendant/respondent, is restored to the file of the learned Single Judge, who shall hear the parties and pass an order on merits. In the first instance, the said application be listed before the learned Single Judge on 14.12.2016.

The appeal is allowed as above.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

DECEMBER 06, 2016
SR