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

Date of Decision: August 11, 2016

+ **FAO 376/2014 & C.M.No. 19319/2014 & C.M.No. 3895/2015**

LAXMI NARAYAN & ORS. Appellants

Through: Mr. Raman Duggal, Advocate with
Ms. Aayusi Gupta, Advocate

versus

KAMAL GARG & ANR. Respondents

Through: Mr. Siddharth Aggarwal, Advocate

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT
ORAL

1. Vide order of 24th December, 2011, the counter claim of respondent-defendant was dismissed as abated.

2. The said order was challenged by way of FAO 180/2012. It is a matter of record that after notice was issued in FAO 180/2012, counsel for respondents-defendants (*who was appellant there*) on instructions had withdrawn FAO 180/2012. It is so evident from the perusal of order of 17th April, 2016 in FAO 180/2012. It is a matter of record that respondents-defendants' application for review of the same very order of 24th December, 2012 was pending in the trial court when FAO 180/2012 was withdrawn by respondent-defendants herein.

3. In this appeal, the order impugned is of 17th October, 2014 vide which respondents-defendants' review application has been allowed and their counter claim has been revived for hearing.

4. During the course of hearing, a preliminary objection is raised by learned counsel for respondents regarding all the appellants not signing the appeal and the *vakalatnama*/ Power of Attorney. Learned counsel for appellants submits that the two legal heirs of late *Shri Laxmi Narayan* are very much alive and they can sign the appeal and *vakalatnama*/ Power of Attorney and they have not done so under the *bona fide* belief that appeal by their mother- *Smt. Gayatri Devi* is competent on their behalf.

5. The challenge to the impugned order in this appeal is on the ground that while withdrawing FAO 180/2012, respondents herein had not sought permission to pursue the review application and that order of 17th April, 2015 in FAO 180/2012, had attained finality and so, it was not reviewable by the trial court. To submit so, reliance is placed by learned counsel for appellant upon decision in *Rakesh Bhatia & ors. Vs. Pramod Sharma & ors.* 2009 (112) DRJ 143. Further reliance is placed upon Supreme Court decision in *M/S Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh* AIR 1964 SC 1372 to submit that before application for review is finally decided, the appeal itself has been disposed of and so, the jurisdiction of the court hearing the review petition comes to an end.

6. Learned counsel for appellant also relies upon a Supreme Court decision in *Saruja Transport Service Vs. State Transport Appellate Tribunal* AIR 1987 SC 88 as also a Full Bench decision of Punjab &

Haryana High Court in *Teja Singh Vs. Union Territory of Chandigarh & ors.* AIR 1982 Punjab & Haryana 169 to submit that once a petition on the same cause of action has been withdrawn, then second petition on the same cause of action would not lie. Reliance is also placed by counsel for appellants upon decision in *Hari Singh Vs. Smt. S. Seth* AIR 1996 Delhi 21 to submit that entertaining of a review petition after dismissal of the appeal in *limini* is impermissible.

7. To controvert the aforesaid stand of learned counsel for appellant, counsel for respondents relies upon a Supreme Court decision in *Commissioner of Income Tax, Calcutta Vs. B.N. Bhattacharjee & anr.* AIR 1979 SC 1725 to submit that an appeal withdrawn is an appeal *non est*. To distinguish the decision in *Rakesh Bhatia (supra)*, it is submitted that in the said case, the appeal was withdrawn after some arguments. To reiterate that an appeal withdrawn must be treated as if it had never been preferred, reliance is placed upon decision in *Thakur Singh Vs. Dinanath Sah* AIR 1937 Patna 528. Learned counsel for respondents also relies upon decision in *Kunhayammed & ors. Vs. State of Kerala & anr.* AIR 2000 SC 2587 to submit that when an appeal is dismissed, the aggrieved party is not deprived of any statutory right of review, as there is no merger. To submit that an appeal withdrawn must be treated as if it was never presented, reliance is placed upon decision in *Ram Prasad & anr. Vs. Asa Ram & ors.* 43 ILR (Allahabad Series) 288. To submit that doctrine of merger applies only in a case where higher forum decides an appeal or revision on merits and when an appeal or revision is dismissed on the ground of delay, without going into the merits of the case, the

doctrine of merger would not apply, reliance is placed upon decision in *State of Kerala & anr. Vs. Kondottyparamban Moosa & ors.* (2008) 8 SCC 65. Nothing else was urged by either side.

8. After having heard learned counsel for the parties at length and on perusal of the impugned order, the material on record and the decisions cited, this Court finds that the preliminary objection of appeal and *vakalatnama*/ Power of Attorney being not signed by all the contesting parties, is a curable defect and it would not render this appeal *per se* incompetent and so, on this ground, this appeal cannot be thrown out, as learned counsel for appellants has undertaken that the remaining two legal heirs shall file their *vakalatnama*/ Power of Attorney in support of this petition within a week.

9. Let it be so done.

10. So far as merits of this case are concerned, there is no challenge to the impugned order which allows the review application of the respondents. On a technicality, impugned order is sought to be negated. The technicality is that respondents' earlier appeal FAO 180/2012 was withdrawn without any liberty to pursue the review application. Admittedly, the review application was filed prior to filing of the appeal. Needless to say, in such a situation, the appeal by itself was not maintainable, as the review petition was pending. Taking this vital aspect into consideration, this Court finds that it will not be fair to set the impugned order at naught merely because liberty was not given. Infact, no liberty was required to be taken for the reason that it was a incompetent appeal.

11. Reliance placed by appellants' counsel upon Full Bench decision of Punjab & Haryana High Court in *Teja Singh (supra)* is of no avail for the reason that the case was not of a review petition vis-à-vis a statutory appeal. It was a case of successive petitions.

12. Apex Court in *Kondottyparamban Moosa (supra)* has reiterated the settled position that an order which is on merits would be a bar to initiate fresh proceedings on the same cause of action. It needs no reiteration that no fresh cause of action was undertaken after the withdrawal of the appeal. Undisputedly, the review application was already pending. In such a situation, reliance placed by appellant's counsel on the various decisions, as noted hereinabove, are of no avail.

13. In the aforesaid view of the matter, finding no substance in this appeal, it is dismissed while leaving the parties to bear their own costs. Pending application are accordingly dismissed.

(SUNIL GAUR)
JUDGE

AUGUST 11, 2016

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