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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ RFA No.364/2016 & CM No.20370/2016 (for condonation of 72 days
delay in re-filing the appeal).
MOHD HASAN Appellant
Through: Mr. Pradeep Chaudhary, Adv.

Versus

FAROOQ @ FAKHRUDDIN Respondent
Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **25.05.2016**

CM No.20369/2016 (for exemption).

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

**RFA No.364/2016 & CM No.20370/2016 (for condonation of 72 days
delay in re-filing the appeal).**

3. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 1st October, 2015 of the Court of the Additional District Judge (ADJ)-01, North East, Karkardooma Courts, Delhi of dismissal of Civil Suit No.182/2013 filed by the appellant/plaintiff for recovery of Rs.5,77,046/- from the respondent/defendant.

4. Though the appeal is listed for the first time today and ordinarily first appeals are to be considered and decided after issuing notice thereof and/or requisitioning the trial court record but need to follow the said procedure is not felt since the suit of the appellant/plaintiff has been dismissed for the reason of the appellant/plaintiff inspite of onus of proving the issues framed being on him having failed to lead any evidence. The counsel for the appellant/plaintiff has been heard.

5. The impugned judgment records and it is not disputed that after framing of issues on 28th October, 2014 the suit was listed for evidence of the appellant/plaintiff on 17th December, 2014, 5th February, 2015, 17th March, 2015 and 15th April, 2015 but the appellant/plaintiff neither filed any affidavit by way of evidence of any witness nor furnished advance copy thereof to the counsel for the respondent/defendant as had been directed and also failed to pay the cost imposed on two of the dates on the appellant/plaintiff for not leading evidence. In the said scenario, the learned ADJ vide order dated 15th April, 2015 closed the evidence of the appellant/plaintiff and posted the matter on 13th July, 2015 for hearing final arguments.

6. The appellant/plaintiff even then remained in a slumber for nearly three months and only on 10th July, 2015 i.e. barely three days before the matter was listed for final arguments, filed an application for setting aside of the order dated 15th April, 2015 closing the evidence of the appellant/plaintiff.

7. The learned ADJ vide order dated 13th July, 2015 on the said application though noticed (i) that no explanation had been given by the appellant/plaintiff as to why the appellant/plaintiff himself also had not turned up on two dates; (ii) that the affidavit of evidence which was presented on that date was attested on 5th February, 2015 but was still not filed; (iii) that the application itself was belated and had been filed after a delay of about three months; and (iv) that the appellant/plaintiff even on 13th July, 2015 was not ready to pay the previous cost imposed on him, but still, for the reason that the appellant/plaintiff not suffer owing to the lapses on the part of his counsel and taking a sympathetic view allowed the application subject to further costs of Rs.5,000/- by the appellant/plaintiff; it was clarified that the appellant/plaintiff was to pay total costs of Rs.8,000/- i.e. Rs.5,000/- imposed on that date and Rs.3,000/- towards previous costs

on the next date of hearing i.e. 17th August, 2015 and further cautioned that payment of the said cost shall be a pre-condition for grant of one opportunity to the appellant/plaintiff to complete his evidence.

8. I may record that the order dated 13th July, 2015, besides the presence of the counsel for the appellant/plaintiff, also records the presence of the appellant/plaintiff in person.

9. On 17th August, 2015 when the suit was called out, appellant/plaintiff appeared in person and sought passover on the ground of his counsel being not present. Qua the costs, he stated that the costs had been handed over to his counsel who will be paying the same. The learned ADJ accordingly posted the matter for 1130 hours. The counsel for the appellant/plaintiff did not appear at 1130 hours also and on request of the appellant/plaintiff that his counsel will reach the Court within two minutes and despite the protest of the respondent/defendant, the matter was posted at 1140 hours. At 1140 hours also the counsel for the appellant/plaintiff was not available and cost was also not paid. The appellant/plaintiff stated that as per his understanding with his Advocate, his Advocate was to bear all expenses also of the litigation and hence he was not willing to pay the costs. The learned

ADJ accordingly again closed the evidence of appellant/plaintiff and posted the matter on 23rd September, 2015 for arguments. At 1235 hours the counsel for the appellant/plaintiff appeared along with appellant/plaintiff and mentioned the matter and disputed that the appellant/plaintiff had paid the costs to him or that there was any understanding as claimed by appellant/plaintiff and also withdrew from the case.

10. On 23rd September, 2015 none appeared for appellant/plaintiff despite passover and the learned ADJ after hearing counsel for respondent/defendant reserved judgment and finally vide impugned judgment and decree dated 1st October, 2015 dismissed the suit.

11. I may in this regard notice that this appeal is also accompanied with an application for condonation of delay of 72 days in re-filing thereof and no cause for the said delay is pleaded save for stating that the counsel for the appellant/plaintiff collected the paper book with objections, after initial filing late and when re-filed, upon it being pointed out that there was a delay of 72 days in re-filing, applied for condonation.

12. In the Memorandum of Appeal, the failure to lead evidence is attributed to the fault of the Advocates for the appellant/plaintiff. However the Advocate who has drafted the appeal and is appearing today, is the third Advocate engaged by the appellant/plaintiff. While making the application for re-call of the order closing the evidence and which application was allowed on 13th July, 2015, the Advocate appearing till then was blamed. Thereafter on 17th August, 2015, the second Advocate who had made the application which was allowed on 13th July, 2015 was blamed. Now the third Advocate who has preferred this appeal is blaming the earlier two Advocates.

13. It is quite evident that the appellant/plaintiff has been given abundant/sufficient opportunity to lead his evidence. Merely by putting a blame on the Advocate, the default in pursuing suits cannot be overlooked. Though the counsel for the appellant/plaintiff states that a complaint was made to the Disciplinary Committee of the Bar Council of Delhi against the second Advocate but the said complaint is pleaded to have been sent by Registered Post-AD on 9th November, 2015 and the counsel is unable to state the status of the said complaint. It is quite obvious that no attempt has

been made to pursue the complaint and the complaint is stated to have been filed only for the purposes of the present appeal. It is not the case of the appellant/plaintiff that for the monies including towards costs which he had paid to the Advocate, he has taken any step for recovery thereof from the Advocate.

14. The Advocate though a professional is an agent of a litigant and a litigant, for default of his agent, cannot make his opposite party suffer. Though in earlier times when the litigants were illiterate and without any means, the Courts were liberal in condoning defaults for which their Advocates were blamed but the same cannot be said to be true as of today in the capital city of Delhi.

15. The appellant/plaintiff was himself present before the Court at least on 13th July, 2015 and 17th August, 2015 and once betrayed by the first Advocate ought to have been wiser and cannot for such repeated mistakes keep the respondent, who is a family member of the appellant/plaintiff, embroiled in litigation; rather it appears that the whole purpose of filing the present suit was as a counterblast to some other dispute which appears to be pending between the parties.

16. This Court in *Harinder Singh Vs. Kuldeep Singh* MANU/DE/2080/2010 (SLP(C) 34049/2010 preferred whereagainst was dismissed in limine on 13th December, 2010) held that putting of the blame on the advocate is necessarily not a sufficient cause and the conduct of the parties who has engaged the advocate also has to be seen i.e. whether the litigant has pursued his case diligently or the conduct and approach was so callous that it amounted to negligence. It was further held that a litigant who has not acted bona fide cannot take shelter under the garb that his counsel did not advise him properly. In the present case the negligence of the appellant/plaintiff is writ large. The appellant/plaintiff if not personally present on the four days when evidence was not led, thereafter was fully in the know and is found to have not acted diligently. Even after the evidence was closed on 17th August, 2015, no steps towards redressal were taken though the suit was listed next on 23rd September, 2015 for arguments. On 23rd September, 2015 the appellant/plaintiff did not even choose to appear leading to the judgment and decree dated 1st October, 2015 of dismissal of the suit and the appeal whereagainst also has been filed belatedly and is being pursued negligently.

17. A Division Bench of this Court in *Satya Pal Wadhera Vs. UOI* MANU/DE/0590/2013 relying upon the *Salil Dutta Vs. T.M. & M.C. Private Ltd.* (1993) 2 SCC 185 also held that there cannot be absolute immunity by putting the entire blame on the counsel.

18. Another Division Bench in *State Vs. Wajid* MANU/DE/0437/2015 held that the advocate is the agent of the party and his acts are the acts of the principal i.e. the party who engaged him and that though in certain situations the court may in the interest of justice set aside a dismissal order or an ex parte decree notwithstanding the negligence or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. It was held that such an absolute rule would make the working of the system extremely difficult. I have also in *Mohit Vs. Ram Pyari* MANU/DE/0288/2016 in the same vein held that a litigant having chosen the advocate is bound by what he does on behalf of the litigant and cannot renege therefrom.

19. Once it is found that the learned ADJ had given sufficient opportunity and the order of closure of evidence and dismissal of suit is

justified, interference by this Court would send a contra signal to the District Judiciary which is repeatedly asked to limit the number of adjournments and to expedite disposal of cases.

20. No merit is found in the appeal.

Dismissed.

I refrain from imposing any costs.

RAJIV SAHAI ENDLAW, J.

MAY 25, 2016

‘pp’..