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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RSA No. 449/2015

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4th August, 2016

SHRI RAJINDER KUMAR

....Appellant

Through: Mr. Sonal Sinha, Advocate.

versus

SHRI KISHAN LAL & OTHERS

..... Respondents

Through: Ms. Eti Solanki, proxy counsel for Ms.
Nidhi Banga, Advocate for R-1 and 3.
Ms. Puja Kalra, Adv. for R-2.
Mr. Prateek Kohli, Adv. for R-4.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. In this Regular Second Appeal filed under section 100 of code of civil procedure, 1908, an adjournment is sought on behalf of the respondent nos. 1 and 3. Firstly, it was stated that Ms. Nidhi Banga, Advocate who has to argue the case is down with viral fever, and therefore, the case should be adjourned. No other reason was given for seeking adjournment, however when vakalatnama is seen on behalf of respondent nos. 1 and 3, it is found that besides Ms. Nidhi Banga, Advocate, Mr. Prabhjit Jauhar, Advocate is also found to be a counsel in this case for respondent nos. 1 and 3. When this aspect

was brought to the notice of the proxy counsel who is seeking adjournment, then it is mentioned at that stage that Mr. Prabhjit Jauhar, Advocate is out of station. Counsel for the appellant very vehemently opposes the adjournment because adjournment was prayed on account of illness of the counsel for respondent nos. 1 and 3 also on 25.2.2016. Considering that there is only a limited issue to be decided in the present appeal and as will be seen hereinafter, and on account of the strong opposition to the adjournment, I have refused to grant adjournment because if one of the main counsel knows that appeal is listed and yet he chooses to remain out of station he would do so at his own risk and cost.

2. A very limited issue is urged in this Regular Second Appeal that the first appellate court without hearing the arguments in the first appeal dismissed the first appeal, although, only the application for condonation of delay of 128 days was argued and heard on 6.4.2015, and it was only this application under Section 5 of the Limitation Act, 1963 which was fixed for Orders on 8.4.2015, but, the first appellate court not only decided the application for condonation of delay by allowing the same but decided the first appeal itself without hearing arguments on merits of the appeal which were to be addressed by the appellant. It is argued that in spite of this fact being brought to the notice of the first appellate court by filing a review application,

the first appellate court has dismissed the review application on 29.9.2015 without squarely touching upon this issue that no arguments on merits in the appeal were addressed on behalf of the appellant and for that matter even on behalf of the respondents in the first appeal. The Orders dated 6.4.2015 and 29.9.2015 read as under:-

Order dated 6.4.2015

“RCA No.75/14

06.04.2015

Present: Appellant with counsel Sh. S.K.Singh.

Sh. D.R.Jain Ld. counsel for the respondents

Ms. Kavita Kapil Ld. counsel for the respondent No.4.

Arguments on the application U/s 5 of the Limitation Act heard.

Be put up on 08.04.2015 for orders.”

Order dated 29.9.2015

“1. By this order, I shall decide the application of revision u/s 114 CPC r.w.o. 47 of CPC for review of the judgment and decree dt. 08.04.15 filed by the applicant/appellant whereby it has stated that the argument on the appeal was heard on 06.04.15 only on the application for condonation of delay and matter was put up for orders on the said application on 08.04.15 and the said date when counsel for the appellant went to inquire about the order then he was told that the same is still awaited and no date was given and this situation continued till 18.04.15 and on the said date the counsel for the appellant was told that the appeal has been dismissed and the counsel for the appellant shocked and surprised to know that his appeal was dismissed inasmuch as no arguments was heard by this court on the appeal and the argument was only heard on the application for condonation of delay. And the court was remained under mistaken impression that the appeal had also been argued but in fact it was not argued and by way of the present application it is prayed that to allow the present application and review the judgment/decreed dt. 08.04.15 passed by this court and hear the appellant on merits before taking decision on his appeal.

2. That upon notice of this application Ld. counsel for the respondent has straightway argued and submitted that the review application is not maintainable and the same may kindly be dismissed.

3. Having heard the arguments advanced by the Ld. counsel for the parties and after gone through the contents of the revisions petition as well as the record,

this court is of the considered view that the application is without any merit and is unsustainable in the eyes of law inasmuch as, as per the para No.4 of the order on the appeal passed by this court the application U/s 5 of the Limitation Act was allowed and the delay to file the present appeal was condoned and the court has decided the appeal on merit.

4. The argument of Ld. counsel for the applicant is that the case was fixed for order for 08.04.15 and when he inquired on the said date when he was told that the next date is 18.04.15 and on the said date it was told to the counsel for the appellant that his appeal was dismissed. This argument is immaterial inasmuch as, as per the record and the order passed by this court, the appeal of the applicant was dismissed on merit vide order dt. 08.04.2015 and question does not arise to review the order on appeal of dt. 08.04.15 and if the applicant has any grievance of the order of dismissal of appeal then he ought to have prefer Regular Second Appeal in the Hon'ble High Court of Delhi. The review application is without any merit, hence dismissed.”

3. A reading of the Order dated 6.4.2015 shows that arguments were only heard on the application under Section 5 of the Limitation Act and for which orders were to be pronounced on 8.4.2015, but on 8.4.2015, the first appellate court without any reason seems to have decided the first appeal itself on merits without arguments being addressed by either of the parties on the first appeal inasmuch as on 6.4.2015 only arguments on the application under Section 5 of the Limitation Act of the appellant were heard as is clear from the Order dated 6.4.2015.

4. Reference to the Order passed in the review petition on 29.9.2015, which has been reproduced above, also shows that the first appellate court does not state that arguments were heard on merits of both the parties, and by confusing language the issue of arguments on merits not having been addressed by the parties in the first appeal, has been brushed under the carpet.

5. It is therefore clear that the first appellate court has committed a complete illegality and perversity in disposing of the first appeal without arguments having been addressed by either of the parties, and more so by the appellant who had filed the first appeal.

6. In view of the above discussion, this appeal is allowed by setting aside the Judgment of the First Appellate Court dated 8.4.2015 and the Order passed in the review petition dated 29.9.2015, and the first appellate court is now directed to hear arguments on merits on the first appeal and dispose of the same in accordance with law.

7. The appeal is allowed and the parties are directed to appear before the District and Sessions Judge, North, Rohini Courts, Delhi on 1st September, 2016, and the District and Sessions Judge will mark the first appeal for disposal to a competent court in accordance with law.

AUGUST 04, 2016
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VALMIKI J. MEHTA, J