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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: May 2, 2017

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CM(M) No.195/2015

ICICI BANK LTD

..... Petitioner

Through: Mr.Punit K.Bhalla, Advocate

versus

M GOPINATH

..... Respondent

Through: None

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

CM(M) 195/2015

1. The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India by impugning the order dated 6th January, 2015 whereby the application filed by the petitioner/ICICI Bank Limited under Section 151 CPC seeking restoration of the application under Order IX Rule 9 CPC, which was dismissed on 6th September, 2013, has been dismissed.

2. Notice of the petition was sent to the respondent. However, the respondent remains unserved.

3. Learned counsel for the petitioner submits that respondent is an employee of Airport Authority of India and very much traceable.

4. Perusal of the record shows that on 4th February, 2016, Mr.M.K.Ghosh, counsel for Airport Authority of India has appeared before this Court and filed the certificate issued by Airport Authority of India

certifying that there is no official with the name of M.Gopinath in the record of Airport Authority of India.

5. In view of the above there is no purpose in further sending notice to Airport Authority of India and burden it further.

6. Learned counsel for the petitioner, Mr.Punit K.Bhalla submits that application seeking restoration of the application under Order IX Rule 9 CPC has been dismissed by learned trial Court despite the fact that the non-appearance was due to wrong noting of the date by the Court. Learned counsel for the petitioner has relied upon decision of the Hon'ble Supreme Court reported as '*Ashutosh Gaur Vs. New Delhi Municipal Council & Anr.*', *Civil Appeal No.315/2009* wherein it was observed that the non-appearance of the advocate for the petitioner cannot be treated as an intentional act.

7. Perusal of the record shows that Civil Suit No.195/2013 was filed for recovery of ₹34,933.97 under Order XXXVII CPC.

8. Unconditional leave to defend was granted in the above noted case on 15th February, 2013 with direction to file the written statement within 30 days from the date of the order. **The suit was dismissed in default and the reason given for non-appearance by plaintiff's counsel is that instead of noting 3rd April, 2013 as date of hearing, learned counsel for the petitioner/plaintiff noted the date of hearing as 3rd July, 2013. On enquiry it was revealed that the matter was dismissed in default on 31st May, 2013.**

9. Thereafter the application seeking restoration of the suit was filed which was supported with the affidavit of Sh.Ankit Aggarwal, Advocate. The affidavit was sworn by Sh.Ankit Aggarwal, Advocate as an associate of the office of M/s Hemant Gupta & Associates. The restoration application was not accompanied by either copy or the diary or the affidavit of the

counsel who appeared on 15th February, 2013 and wrongly noted the date of hearing as 3rd July, 2013 instead of 3rd April, 2013.

10. The application under Order IX Rule 9 CPC was dismissed in default for restoration of which the application under Section 151 CPC was filed pleading the following grounds for restoration:-

(i) The application under Order IX Rule 9 CPC was filed on 11th July, 2013 which was listed on 15th July, 2013 and thereafter notice of the application was issued returnable for 22nd August, 2013.

(ii) On 22nd August, 2013, Sh.Jatin Dhawan, Advocate was instructed to appear in the matter but he was held up in traffic jam and could not reach on time. On enquiry from the Court staff he came to know that the matter was listed for 6th November, 2013.

(iii) On 6th November, 2013 when the counsel appeared it was revealed that the matter has already been dismissed on 6th September, 2013 itself. Again due to wrong noting of the date the application under Section 151 CPC was dismissed in default.

11. Thus, repeatedly, wrong noting of the date has been taken as a ground for dismissal of the suit as well dismissal of the application under Order IX Rule 9 CPC.

12. The learned trial Court dismissed the application under Section 151 CPC for the following reasons:-

'06.01.2015

Present: Sh.Hemant Gupta, ld. Counsel for plaintiff.

Heard on the application u/s 151 CPC for restoration of the application u/o 9 rule 9 CPC dismissed on 06.09.2013.

In the present application, it is submitted by the plaintiff company that non-appearance of the counsel for plaintiff on 06.09.2013 was due to the reason that instead of 06.09.2013, counsel for the plaintiff noted down in his case dairy, the date

as 06.11.2013. However, it is seen that along with the instant application no photocopy of the case diary of counsel for the plaintiff has been filed. Therefore, what ld. Counsel for the plaintiff is stating in the present application cannot be believed. The plea of noting down of wrong date of hearing is being used rather must be said misused in each and every case of such like position. The plea of ld. Counsel for plaintiff is also false on the face of it that prior to 06.09.013, none had appeared on behalf of the plaintiff then how come the plaintiff counsel noted down wrong date of hearing.

It is felt by this Court that there should come an end to such practice. No plausible, convincing and/or believable reason assigned by the counsel for plaintiff for restoration of the application u/o 9 Rule 9 PC which has been dismissed on 06.09.2013. Consequently, this application is also dismissed. It is very much pertinent to mention herein that neither with his application nor with earlier dismissed application u/o 9 Rule 9 CPC, there is no fresh vakalatnama executed by plaintiff company in favour of counsel for plaintiff and it seems that proceedings after dismissal of the original suit are going on without there being any notice to the concerned officials of the plaintiff company that their suit has been dismissed more than years ago.

Therefore, let copy of this order be also sent to CEO concerned of the plaintiff company to look into the matter as to how the miscellaneous application particularly the applications after dismissal of the original suit are being conducted by their penal Advocates without execution of fresh vakalatnama.

File be consigned to Record Room.

*Sd/-
CJ-12/Central/THC
Delhi/06.01.2015”*

13. The proceedings dated 22nd August, 2013 when Sh. Jatin Dhawan, Advocate reached late in the Court, have not been placed along with this

petition. It was only on that date the question of noting of date of hearing as 6th November, 2013 instead of 6th September, 2013 could have arisen. In the ordinary course, the next date of hearing could have been noted by inspecting the Trial Court Record and noting the proceedings of the date when the application was dismissed in default. This has not been done in this case nor it is mentioned in the application under Section 151 CPC as to which Court staff (by giving designation) informed the wrong date of hearing and why record was not inspected.

14. In the instant case, the application under Order IX Rule 9 CPC seeking restoration of the suit was filed on 11th July, 2013 which was listed for hearing on 15th July, 2013. Thereafter notice of the said application was issued to the non-applicant/defendant for the date of hearing 22nd August, 2013.

15. The explanation for non-appearance of counsel for ICICI Bank and the circumstances in which the application under Order IX Rule 9 CPC was dismissed for non-appearance are given in paras 6 and 7 of the application under Section 151 CPC as under:-

'6. That on 22.08.2013 Sh.Jatin Dhawan, Advocate, appearing counsel for the plaintiff, was duly instructed to appear before this Hon'ble Court to make submissions on behalf of the plaintiff. The said counsel started from his home to appear before the Hon'ble Court on 22.08.2013, but got delayed because of heavy traffic on the road and could not reach the Hon'ble Court on time. On enquiry from the Court staff, the counsel came to know that the matter was taken up before the time he could reach the Court and is not listed for hearing on 06.11.2013.

7. That the next date as 06.11.2013 was duly entered in the Court diary of the counsel for the plaintiff. However, when the counsel for the plaintiff appeared before this Hon'ble Court on 06.11.2013, he could not find the present matter in the cause

list. On going through the cause lists of this Hon'ble Court, it transpired that the matter was actually listed on 06.09.13 (instead of 06.11.13) and the application was dismissed in default on 06.09.13 itself.'

16. In para 8 of the application, it has been pleaded that due to wrong noting of the date in the Court diary by the counsel for plaintiff-bank, the application was dismissed in default which is a human error and not an intentional or deliberate act.

17. In the instant case, it has been pleaded that on 22nd August, 2013 the date was inquired by the counsel Mr.Jatin Dhawan, Advocate from the Court Staff. The counsel was also supposed to inquire about the purpose for which the next date of hearing was fixed. In the application, nowhere it is pleaded that any inspection was carried out by learned counsel for the plaintiff-bank to ascertain (i) whether the non-applicant/defendant had been served for the date of hearing 22nd August, 2013, (ii) if not served, then what was the report and what direction has been given by the Court in respect of service of defendant, (iii) if fresh service has been ordered, then to take necessary steps by filing process fee for service of notice of the restoration application on the defendant. Had the counsel inspected the record, not only the necessary steps for service would have been taken, the mistake, if any, in noting the date of hearing would have also come to the notice. The conduct of the plaintiff-bank, as noted in the various proceedings by the learned Trial Court when the suit was dismissed in default, the application under Order IX Rule 9 CPC was dismissed in default reflect about the manner in which ICICI Bank despite having authorised representative had conducted this case.

18. The learned Trial Court has rightly exercised the discretion by dismissing the application under Section 151 CPC thereby declining to restore the application under Order IX Rule 9 CPC.

19. Reliance placed on Ashutosh Gaur vs. New Delhi Municipal Council & Anr. (Supra) by learned counsel for the petitioner is of no help to the petitioner for the above reasons.

20. There is no illegality or perversity in the order dated 6th January, 2015 which calls for any interference by this Court in exercise of power under Article 227 of the Constitution of India.

21. The petition is dismissed.

CM No.4363/2015

Dismissed as infructuous.

MAY 02, 2017
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PRATIBHA RANI, J.

