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

+ **FAO(OS) 4/2016**

BHANWAR LAL Appellant
Through **Mr.Kamal Kant Jha, Adv.**

versus

SOMVEER TOMAR & ANR Respondents
Through **Mr.Mukesh Kr.Sharma, Adv.**

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

% **11.08.2017**

CM No.347/2016 (condonation of delay)

This is an application for condonation of delay of 26 days in filing the appeal. The reason given is that the appellant had earlier filed an application under Order IX Rule 4 of Code of Civil Procedure, 1908 which was dismissed. The appellant was advised to file application for restoration and for this reason there has been some delay in filing of the appeal. Further, the appellant had to obtain certified copies of two impugned orders dated 09.09.2015 and 28.10.2015.

In spite of opportunity granted, the respondents have not filed reply to the said application.

For the reason stated in the application, the delay in filing the appeal is condoned. The application is allowed. No costs.

FAO (OS) 4/2016 & CM No.348/2016 (stay)

The present intra-court appeal impugns the order dated 09.09.2015 by which suit CS(OS) 2382/2013 filed by the appellant has been dismissed for non-prosecution. The respondents are the defendant in the said suit.

The aforesaid suit has been filed by the appellant for specific performance relying upon the documents filed. Appellant relies upon General Power of Attorney executed by the second respondent in favour of respondent No.1. It is asserted that the appellant has paid Rs.28 lacs to the first respondent. It is noticed that the second respondent before us, has expired. Proceeding and suit against him has abated. The appellant has given up his claim against respondent No.2.

Order sheet reveal that suit was dismissed for default due to absence of counsel on the first date on 02.12.2013. However, suit was restored vide order dated 17.12.2013 and notices were issued. Ex-parte interim injunction order was granted, restraining the respondents from creating third party interest in respect of the suit property. The appellant had filed process fee for service through Regd. A.D. as well as through normal mode. As per service report received, the second respondent was unserved and the report had indicated that he had expired. The first respondent was unserved with the report that he had left without address.

Thereafter, there were four defaults by the appellant as process fee was not filed. However, one of the order dated 04.09.2014 records that appellant had stated that the first respondent was residing at the same address and had requested for *dasti* notice.

Learned counsel for the appellant has stated that appellant had tried to ascertain the correct address of the first respondent and that the first

respondent was in fact residing at the address mentioned in the plaint/memo of parties. It is noticed that the first respondent, has been served at the same address and has entered appearance through Mr. M.K.Sharma, Advocate.

Keeping in view of the aforesaid position, we are inclined to allow the present appeal and restore the suit to its original number, subject to the condition that the appellant will pay a cost of Rs.25,000/- to Delhi High Court Legal Service Authority. The said cost will be deposited within three weeks from today. In case the costs are not paid, the appeal would be treated as dismissed.

We clarify that we are not reviving the interim order. However, application filed by the appellant for interim injunction will be taken and decided as per merits by the learned Single Judge. We make no comments on merits.

Parties will appear before learned Single Judge on 11th September, 2017.

The appeal stands disposed of.

SANJIV KHANNA, J.

NAVIN CHAWLA, J.

AUGUST 11, 2017/vp