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

% *Date of Judgment: 06th July, 2018*

+ **FAO(OS).106/2018 & CMs.APPL 26166-26168/2018**

SUSHMA

..... Appellant

Through **Mr. S.K. Anand and Mr. D.V.
Sharma, Advocates**

versus

GAMESH MATHUR & OTHERS.

..... Respondents

Through **Mr. Anand Yadav and Ms. Anita
Tomar, Advocates for respondents
no.1 to 3.**

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. The appellant, being defendant no.3 in the suit, has assailed the order dated 12.03.2018 passed by the learned Single Judge by which an application filed by the appellant, being IA.3326/2018 under Order IX Rule 13 of the Code of Civil Procedure, has been dismissed.
2. The respondents no.1 to 3, being the plaintiffs in the suit, had filed a suit for specific performance seeking a decree of specific performance of an Agreement to Sell dated 24.12.2010. The appellant herein, was arrayed as defendant no.3 in the suit. As despite service, the written statement was not filed, the right to file the written statement was closed on 15.01.2013, which order has attained finality. The impugned order reveals that after the respondents no.1 to 3 had filed affidavits by

way of evidence, the appellant herein cross-examined all the witnesses of the plaintiffs in the suit. The plaintiffs closed their evidence on 18.05.2016 and the suit was listed before the Court on 03.08.2016 and 15.11.2016 for final arguments, on which dates the counsel for the defendant no.3, the appellant herein had appeared. The suit thereafter came up for hearing on 09.08.2017. We are informed that the matter was shown regularly in the category of '*Final Hearing Matters*', but was taken up for hearing on 09.08.2017 when the counsel for the appellant herein did not appear. The matter was taken up thereafter on 10.08.2017 when final arguments were heard, judgment was reserved and an ex parte judgment was pronounced on 03.01.2018.

3. Learned counsel appearing on behalf of the appellant submits that the appellant had acted in a diligent manner and had engaged the services of one Shri Ashok Chikra, Advocate. However, despite paying his fees, he did not prepare and file the written statement despite the same having been signed by the appellant. It is further contended that the said counsel had stopped appearing in the matter and the matter was being looked after by his associate counsels. Learned counsel submits that to meet the end of justice the appellant should have been granted an opportunity to address the arguments in the matter by the learned Single Judge.
4. Mr. Anand Yadav, learned counsel appearing on behalf of respondents no.1 to 3, caveator has entered appearance in the matter. Mr. Yadav submits that the learned Single Judge has extracted in para 7 of the order the entire sequence of events which would show that the appellant did not diligently pursue the present case. He submits that

the suit was instituted in the year 2011. Since an ex parte injunction was not granted in favour of the plaintiffs, the plaintiffs were forced to file an FAO. Respondents no.1 to 3 were also directed by the Court to deposit the sale consideration, however, the respondents had withdrawn the FAO subsequently.

5. We have heard the learned counsels for the parties.
6. We deem it appropriate to reproduce paragraphs 7 to 10 of the order of the learned Single Judge dated 12.03.2018 for the reason that it recounts the sequence of events post filing of the suit, which are as under:

“7. Moreover, a perusal of the order sheet in the suit shows (i) that the suit came up first before this Court on 6th May, 2011, when though summons of the suit were ordered to be issued, ex parte relief sought, denied; (ii) that the plaintiffs preferred FAO(OS) 263/2011 against the denial of ex parte relief and which appeal was entertained and notice thereof issued and subject to the plaintiffs depositing the balance sale consideration, the three defendants/ respondents restrained from creating any third party interest or parting with possession of the property, subject matter of Agreement to Sell; (iii) that per order dated 15th July, 2011 in the suit, the defendants No.1 and 2 refused service and were deemed to have been served and since none appeared on their behalf, they were proceeded against ex-parte; that Mr. Priyank Sharma, Advocate appeared for defendant No. 3 and took time for filing written statement and the parties were directed to maintain status quo with respect to the property; (iv) the order dated 19th September, 2011 in the suit records the presence of Mr. Ashok Chikara, Advocate counsel for defendant No. 3 and on whose request the matter was adjourned for filing written statement of the defendant No.3; (v) that the plaintiffs, on 15th September, 2011, withdrew the appeal; (vi) that on 23rd November, 2011

an application under Order XXIII Rule 3 of the CPC by the plaintiffs on the one hand and defendants No. 1 and 2 on the other hand was taken up and the suit, insofar as against the defendants No.1 and 2, was decreed in terms of the compromise arrived at and ordered to continue against the defendant No. 3 only; (vii) on 25th January, 2012, Mr. Satender, Advocate appeared for defendant No. 3; no written statement had been filed and the said Mr. Satender, Advocate also expressed inability to admit/deny the documents and sought adjournment; (viii) the order dated 12th March, 2012 records the presence of Mr. Ashok Chikara, Advocate for defendant No. 3; he stated that the written statement had been filed in the Registry on 21st January, 2012 along with an application for condonation of delay; (ix) that the position remained the same on 29th August, 2012; (x) that on 15th January, 2013, Mr. Jaspreet Singh, Advocate appeared for defendant No.3 and since the written statement was not found on record, the right of the defendant No. 3 to file written statement was closed; (xi) thereafter also, Mr. Jaspreet Singh, Advocate having Enrolment No.D-875/2017 continued to appear for defendant No.3; (xii) that vide order dated 2nd August, 2013, the plaintiffs were relegated to lead ex parte evidence; (xiii) that the plaintiffs thereafter examined as many as nine witnesses who were all cross-examined by Mr. Jaspreet Singh, Advocate for the defendant No. 3, so much so that when the right of defendant No.3 to crossexamine PW8 and PW9 was closed on 11th December, 2015, on request of Mr. Jaspreet Singh, Advocate, another opportunity was given vide order dated 18th January, 2016; (xiv) that the plaintiffs closed their evidence on 18th May, 2016 and the suit was listed before Court on 3rd August, 2016 and on 15th November, 2016 for hearing final arguments and on both of which dates Mr. Jaspreet Singh, Advocate appeared for defendant No.3.

8. It was in the aforesaid circumstances, that on 9th August, 2017 when Mr. Jaspreet Singh, Advocate did not appear,

adverse orders against the defendant No.3 were deferred and on 10th August, 2017 final arguments were heard and judgment reserved and ex parte judgment pronounced on 3rd January, 2018.

9. Needless to state that defendant No. 3 in the application has concealed that she had not filed the written statement or that she had cross-examined the witnesses of the plaintiffs. There is not a whisper in the application about Mr. Jaspreet Singh, Advocate.
 10. A perusal of the Part-II(B) file shows Mr. Manish Pathak and Mr. Jaspreet Singh, Advocates to have filed Vakalatnama dated 26th July, 2013 on behalf of the defendant No. 3. The counsel for the defendant No.3 on enquiry states that Mr. Jaspreet Singh, Advocate, prior to filing his Vakalatnama, was an associate of Shri Ashok Chikara, Advocate. On enquiry as to on what basis it is stated that Mr. Jaspreet Singh was an associate of Mr. Ashok Chikara, Advocate, it is stated that it is so because the defendant No. 3 had engaged Mr. Ashok Chikara, Advocate.”
7. Reading of the aforesaid paragraphs of the impugned order would show that even after the receipt of summons in the suit, repeated opportunities were granted to the appellants to file the written statement since 2011 onwards. However, no written statement was filed. By an order dated 15.01.2013, the right to file written statement was closed, which order has attained finality. It may also be noted that the appellant did not even admit/deny the documents, however, the appellant admitted the Agreement to Sell, the Notice and the Receipt of Notice. The learned Single Judge has also observed that when the right of the appellant to cross-examine PWs8 and 9 was closed on 11.12.2015, at the request of Shri Jaspreet Singh, Advocate,

another opportunity was granted vide order dated 18.01.2016. The learned Single Judge has also noticed that the counsel for the defendant no.3, appellant herein continued to appear in the matter and cross-examined all the witnesses. The learned Single Judge has also noted that the plaintiffs closed their evidence on 18.05.2016 and the suit was listed before the Court on 03.08.2016 and 15.11.2016 for final argument when Mr. Jaspreet Singh appeared for defendant no.3. Thus, the stand taken before us today that one Shri Ashok Chikra, Advocate was appointed who did not prepare the written statement in the matter is not borne out from the record.

8. We find that sufficient opportunity was granted to the appellant in this matter and the absence has not been satisfactorily explained. We find that there is no infirmity in the order dated 12.03.2018 passed by the learned Single Judge, by which the application under Order IX Rule 13 of the Code of Civil Procedure stands dismissed.
9. Consequently, the present appeal and all the applications are dismissed.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

JULY 06, 2018

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