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

+ **FAO(OS) 128/2018**

GOPAL VERMA

..... Appellant

Through: Mr. Udyan Srivastava and Mr. Jatin
Kumar, Advs.

versus

LALIT VERMA & ORS

..... Respondents

Through: Mr. S.S. Lingwal, Adv. for R1 and
R3.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

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05.10.2018

CM. NO. 33527/2018 (for delay)

This is an application filed by the applicant / appellant seeking 66 days delay filing the appeal.

For the reasons stated in the application, delay of 66 days in filing the appeal is condoned.

Application stands disposed of.

FAO(OS) 128/2018

1. This appeal has been filed by the appellant challenging the order dated 23rd April, 2018 whereby the application of the appellant being IA No. 5497/2018 under Order IX Rule 13 CPC for setting aside the ex-parte order

dated 24th November, 2017 was dismissed.

2. The facts as noted from the record are that a Suit being CS(OS) 435/2016 was filed by the respondent no.1 herein for partition of property bearing no. E-73, Mansarovar Garden, Delhi – 110015. The said property belonged to one Kishori Lal Verma, who executed a Will dated 23rd April, 2012 bequeathing the suit property. Kishori Lal Verma, expired on 4th January, 2014 leaving behind the appellant and respondents as his legal representatives. The suit was contested by respondent no. 1 and 3 only, i.e., Lalit Verma and Neelam Verma. In their written statements they have not denied the execution of Will dated 23rd April, 2012 by Late Kishori Lal Verma. The Genuineness of the Will has not been suspected. As per the registered Will, the shares in the suit property are as under:

- (i) 10% share in favour of defendant Nos. 2 and 3 each.
- (ii) 40% share in favour of plaintiff and defendant No.1 (the appellant) each.

3. A preliminary decree was passed in the Suit on 23rd October, 2017. In the said order, the learned Single Judge has directed the parties to suggest ways and means as to how the partition can be effected. But thereafter, the Suit was listed on 24th November, 2017. The learned Single Judge disposed

of the Suit by drawing of a final decree. The learned Single Judge also noted that as per Section 8 of the Partition Act, 1893, an order of sale is deemed to be a decree within the meaning of Section 2 of CPC. It was also observed that after drawing of the final decree, any of the parties can thereafter seek execution of the final decree for sale of the Suit property bearing E-73, Mansarovar Garden, New Delhi – 110015.

4. Learned counsel for the appellant would submit that when the order dated 24th November, 2017 was passed, there was no representation on behalf of the respondents. According to him, the appellant herein initially challenged the said order before the Coordinate Bench of this Court in FAO(OS) 12/2018, which was dismissed as withdrawn on 26th February, 2018 with liberty to approach the learned Single Judge. He submits that the appellant filed an application under Order IX Rule 13 read with Section 151 CPC for setting aside the ex-parte decree. He submits that in the said application the appellant in paras 3 to 7 has stated as under: -

“3. The Advocate on behalf of the Defendant No.1 had assured the Defendant No.1 that he would appear before this Hon’ble Court on 24.11.2017 but failed to do so. The said Advocate also informed the Defendant No.1 that he need not come for the hearing. A copy of the call details received by Defendant No.1 from his Advocate is appended hereto and marked as Annexure -A.

4. *However, the Advocate on behalf of the Defendant no.1 failed to appear before this Hon'ble Court on 24.11.2017 and an order was passed for passing the final decree and for sale of the Suit property.*

5. *Aggrieved of the order dated 24.11.2017, the Defendant No.1 preferred an Appeal before the Division Bench who granted the Defendant No.1 liberty to approach this Hon'ble Court in accordance with law vide order dated 26.02.2018, a copy of which is appended hereto and marked as ANNEXURE-B.*

6. *Accordingly, the present application is being moved before this Hon'ble Court.*

7. *The Defendant No.1 most respectfully submits that there is sufficient cause for the non-appearance of the Defendant No.1 on 24.11.2017 and as such was not in a position to assist this Hon'ble Court. Despite due assurance by the Advocate on behalf of the Defendant NO.1 that he would appear before this Hon'ble Court, he failed to do so and did not intimate his failure to appear to the Defendant No.1. Further, the Advocate on behalf of the Defendant No.1 categorically told the Defendant NO.1 that he need not appear. Only subsequently did the Defendant No.1 learn of the order passed by this Hon'ble Court."*

He states, the learned Single Judge without adverting to the aforesaid grounds pleaded in the application under Order IX Rule 13 read with Section 151 CPC has dismissed the application vide the impugned order dated 23rd April, 2018 which according to him is clearly illegal and untenable, as, the appellant has shown sufficient reasons for his non-

appearance and his counsel's.

5. We are unable to agree with the submission made by the counsel for the appellant for the reasons (1) that no explanation has been given in the application for non-appearance at all and, (2) on a specific query to him as to whether any communication has been sent to the Advocate, who had to appear for the appellant before the learned Single Judge on 24th November, 2017 asking him why he did not appear before the court on 24th November, 2017, the answer is, that the appellant did make a Telephone Call in that regard by drawing our attention to Page 60 of the Appeal record which is a call detail record showing the mobile number of the Advocate. Mere making of a call to the Advocate would not show that the appellant had actually asked the Advocate the reasons about his non-appearance on 24th November, 2017. In the absence of any written communication from the appellant to the Advocate, the averments made in Para 3 to 7 of the application being IA No. 5497/2018 have no relevance. That apart, the learned Single Judge has also considered the nature of property, which according to him cannot be partitioned by metes and bounds as there is only a ground floor which is constructed and as per the existing FAR, four floors and basement can be constructed in the Suit property and also the shares of

the parties cannot be completely given in terms of preliminary decree dated 24th October, 2017 without selling the property. We agree with the conclusion of the Ld. Single Judge. In fact, the during the submissions, the learned Counsel for the appellant has accepted the shares as worked out in the Will by stating the appellant has no dispute on the same. Further, we are informed, the execution proceedings are pending between the parties.

The appeal is dismissed.

CM No. 33525/2018 (for stay)

Dismissed as infructuous.

CHIEF JUSTICE

V. KAMESWAR RAO, J

OCTOBER 05, 2018/jg