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

Date of decision: 18th May, 2018

+ **RFA 963/2016**

AKUMS DRUGS & PHARMACEUTICALS LTD Appellant

Through: Mr. Arvind Kumar Jha, Advocate (M-9868112390).

versus

KENOSIS CARE PVT LTD Respondent

Through: Ms. Ratna Aggarwal & Mr. Gaurav Bhardwaj, Proxy counsel (M-8449374090).

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present appeal arises out of impugned judgment and order dated 6th June, 2016 by which the suit filed by the Appellant/Plaintiff (*hereinafter, 'Plaintiff'*) was dismissed. A perusal of the impugned order reveals that the dismissal of the suit was primarily on the ground of non-production of evidence on behalf of the Plaintiff.

2. The Trial Court records that the matter was called at 12.00 noon on 6th June 2016 and none was present on behalf of the Plaintiff and no witness was also present. The Trial Court thereafter records that sufficient opportunity was given to the Plaintiff for leading its evidence but since there was no witness present on 6th June 2016, the Plaintiff's evidence was closed. Immediately after closing the Plaintiff's evidence, the Defendant's

evidence was also closed and the Trial court proceeded to pass judgment around 1.15 in the afternoon on the same day.

3. As recorded on 19th March, 2018 in the present appeal, a perusal of the Trial Court order dated 9th December, 2015 shows that the affidavits of three witnesses, namely, Sh. Vikas Mudgal, Sh. Allen Das and Sh. Vibhanshu Awasti were on record. It is the case of the Plaintiff that the authorized representative of the Plaintiff was present in court on 6th June 2016 at 10 am but was told that the matter would be taken around 12 noon. He attended to another matter in the same premises of Rohini court, and reached the court only at 12.45 pm by which time, he was informed that orders have been passed. Post lunch, when he came back to check the status, he was informed that the suit was dismissed.

4. An application for recall of the said order was also filed on 10th June, 2016, however, the same was withdrawn as the Plaintiff was under the impression that the suit was dismissed for non-prosecution. However, thereafter the Plaintiff/Appellant approached this Court.

5. A perusal of the Trial Court record reveals that the issues were framed in this matter on 24th November, 2014 and the matter was pending in mediation for some time. On 9th December, 2015, the Trial Court records as under:

“None for defendant by this time despite several calls given since morning.

List of witnesses along with evidence affidavits of three PWs namely Sh. Vikas Mudgal, Sh. Allen Dass and Sh. Vibhanshu Awasti filed today on behalf of plaintiff with extra set of the same to other side.

Now to come up for recording evidence of

plaintiff side on the basis of these affidavits on 04.04.2016 in the morning session.”

6. The record of the Trial Court further reveals that the Plaintiff has filed a number of original documents in support of its case. In the application for recall of order dated 6th June, 2016, it is categorically averred that the authorized representative of the Plaintiff, namely, Mr. Vikas Mudgal, Assistant Manager (Legal) had reached the court at 10.00 am but was informed that the matter has been fixed for 12.00 noon. Thereafter, the authorized representative went to attend to another matter before Ms. Meenu Kaushik, Metropolitan Magistrate. There was a settlement negotiationa in the said case listed before the said MM. By the time he reached back to appear in this court at 12.50 pm, he was informed that the orders have been passed and at 2.00 pm he was informed that the suit had already been dismissed. The AR left the court premises under the impression that the suit is only dismissed for non-prosecution. It was only much later, after moving the application under Order IX Rule 4, that the Plaintiff was informed that the suit had been dismissed and a decree has also been passed.

7. A perusal of the order of the impugned order of the Trial Court reveals that after issues were framed on 24th November, 2014, mediation proceedings were going on till 28th September, 2015. On 9th December, 2015, affidavits of three witnesses were filed and on 6th June, 2016, the above events transpired. A perusal of the impugned order also reveals that the suit has been dismissed on merits and not merely for non-prosecution.

8. The evidence of three witnesses, being on record, this Court is of the view that an opportunity ought to be granted to the Plaintiff to lead its

evidence in the matter. The suit was instituted in July'2013 and the order sheet of the trial court does not reveal any undue delays caused by the Plaintiff. After issues were framed on 24th November 2014, the matter was adjourned on three occasions for mediation. However, when mediation failed, the Plaintiff immediately filed the affidavits of three witnesses. Thereafter there was only one date of 4th April 2016, when there was no appearance. On the next date itself i.e., on 6th June 2016, the suit was dismissed by the impugned order. The Plaintiff having conducted itself with reasonable diligence, the suit could not have been dismissed, that too on merits, by simply holding that there is no evidence on behalf of the Plaintiff, when three affidavits had been filed.

9. A ld. Division Bench of this Court has held in ***Una Co-operative Group Housing Society Ltd. v. Ravindra Brothers (2007) 142 DLT 774*** as under:

“4.....Dismissal of a suit on merits in the absence of the plaintiff is not an option with the Court under Order 9 Rule 8 of the Code of the Civil Procedure unless the defendant has admitted either in whole or part the claim made in the suit, which was not the position in the instant case. So also the Court may decide the matter on merits under Order 17 Rule 2 only in case substantial part of the evidence had already been recorded. That is evident from the reading of the Explanation to Rule 2 of Order 17 of the CPC. The position is no different in relation to appeals, which too can be dismissed only in default under Order 41 Rule 17 and not on merits. Explanation to Rule 17 of Order 41 makes that position amply clear. We need not dwell any further on the legal proposition that a Court cannot dismiss a suit or an appeal on merits in the absence of the plaintiff or appellant except in situations

covered by Order 9 Rule 8 and Order 17 Rule 2 of the CPC.....”

10. The suit, under these circumstances, could have been at best dismissed for non-prosecution and not on merits. Either way, considering that there are three affidavits on record, this Court is of the opinion that an opportunity ought to be given to the Plaintiff to adduce evidence.

11. Accordingly, the impugned judgment is liable to be set aside.

12. The counsel for the Plaintiff submits that the affidavits of the three witnesses are already on record, however, Mr. Vivek Mudgal has left the employment of the Plaintiff. Accordingly, he would like to replace the affidavit of Sh. Vikas Mudgal. Let a fresh affidavit of the Authorised Representative of the Plaintiff in place of Mr. Vikas Mudgal's affidavit be filed within six weeks.

13. The Plaintiff shall produce its witnesses before the Trial Court on the date/s fixed by the Trial Court for cross-examination. No adjournment shall be granted. After the closure of the Plaintiff's evidence, the Defendants shall be permitted to lead their evidence and the suit would finally be heard expeditiously, in accordance with law.

14. The impugned judgment is set aside. Appeal is allowed in the above terms. Original Trial court record be sent back.

15. List before Trial Court on 3rd July, 2018.

PRATHIBA M. SINGH
JUDGE

MAY 18, 2018

Rahul