

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

% Date of decision: 12th November, 2018.

+ FAO(OS) 165/2018, CM Nos. 46745-46746/2018

LILU KUMAR

..... Appellant

Through: Mr. Sudhir Nandrajog, Sr. Adv. with
Ms. Mercy Hussain, Adv.

versus

DEVYANI MUNGALI & ORS

..... Respondents

Through: None.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM. No. 46745/2018 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

FAO(OS) 165/2018

1. The present appeal has been filed by the appellant challenging the order dated 25th September, 2018 in IA No. 12903/2018 in CS(OS) No. 3646/2014 passed by the learned Single Judge whereby the learned Single Judge has dismissed the said IA seeking recall of order dated 17th October, 2016 whereby the application being IA No. 8108/2016 for restoration of the Suit was dismissed.

2. It is the submission of Mr. Sudhir Nandrajog, learned Sr. Counsel appearing for the appellant that the learned Single Judge has erred in ignoring the fact that the fault of a counsel / Advocate who has been assigned to prosecute the claim of the appellant cannot be directly or indirectly be assigned to her / her son. According to him, the appellant was totally kept in dark by her counsel Mr. R.S. Sharma, whose Vakalatnama was on record and he intentionally, deliberately and miserably failed to prosecute the IA 8108/2016 and did not even communicate to the appellant the status and fate of the said IA. He submits that the learned Single Judge has also not followed the correct procedure while dealing with IA 12903/2018 that the said IA had to be dealt with and decided and then only in the event the occasion so arose, the reply to the restoration application could have been perused and relied upon by the learned Single Judge. In other words, it is his submission that the there was no occasion for the learned Single Judge to consider the reply of the contesting respondents to the restoration application bearing IA. No. 8108/2016 without being restored.

3. It is his submission that even the reply to the restoration application being IA. No. 8108/2016 contains wrong facts given by

the present respondent nos. 3 and 4, which were not even part of their written statement in the main suit and if the same had to be relied upon, the appellant must have been given an opportunity to rebut the same. The said opportunity could not have been availed of by the appellant because the restoration application was dismissed in default before it could be decided. So, there was no occasion for the appellant to place her rejoinder. He submits that even the finding of the learned Single Judge that the appellant was getting proper legal advice regarding litigation from her son at home is not correct. According to him, even though the appellant's son is an Advocate by profession, he is not the legal advisor to the appellant. He was not the counsel for the appellant in the suit in question, from which the present appeal arises. The appellant has her own lawyer, from whom she is seeking advice. That apart, it is his submission that the learned Single Judge has wrongly relied upon earlier litigations claimed and alleged by the respondent nos. 3 and 4, in which admittedly, the present appellant was never a party. Hence, the orders passed in the same and / or, the fate of the same is neither against the appellant nor binding on her. Even the finding that the said litigations have been engineered by the appellant and her son is without any basis. In the last, he submits that the learned Single

Judge did not consider the conduct of the erstwhile lawyer Mr. R.S. Sharma, who was not justified in not prosecuting the main claim of the appellant in CS(OS) 3546/2016 and also IA 8108/2016 and keeping the appellant in dark. He also challenges the cost that has been imposed by the learned Single Judge vide the impugned order.

4. Having considered the submissions made by Mr. Nandrajog, we note that learned Single Judge in Para 3 has noted that Mr. Mohit Kumar, son of the appellant, who is a lawyer had appeared for the appellant on the first date in the Suit and sought an adjournment. She also noted that the adjournments have been sought on various dates. It was only after noting that on 17th May, 2016, when none appeared for the plaintiff, that on the next date of hearing, i.e., on 25th May, 2016, the Suit was dismissed in default. The IA 8108/2016 seeking restoration of the Suit, was listed before the court on 17th October, 2016, when none appeared for the plaintiff, the learned Single Judge dismissed the said application also.

5. There is a finding of fact of the learned Single Judge about the number of litigations initiated by the defendant no.2. Even though, Mr. Nandrajog has contested the litigations alleged to have

been filed by the appellant / defendant no.2 but we note, the learned Single Judge in the impugned order observed that when learned Sr. Counsel for the defendants pointed out the litigations to the court, the plaintiff did not dispute the fact that the same were filed and the orders as contained therein were in fact passed. Learned Single Judge also observed that even Mr. Shrey Chathly, Adv. who was retained by the appellant for inspecting the case file and to ascertain the status after the dismissal of IA had appeared for Mr. R.S. Sharma, Adv. on 30th May, 2015. In other words, the impression that was sought to be given that Mr. Chathly has been engaged for the purpose of filing an application for recall was a false plea.

6. During the course of his submissions Mr. Nandrajog had put the blame on the counsel Mr. R.S. Sharma. We say nothing on that. In substance, the learned Single Judge has primarily rejected the application by highlighting the conduct of the plaintiff / defendant no.2 and his counsel for not prosecuting the Suit with alacrity and an attempt was being made to drag the litigation which led to the dismissal of the Suit initially for non-prosecution and thereafter the application for restoration of the Suit. In totality of facts, we are of the view that the learned Single Judge is justified in rejecting the

application being IA 12903/2018 for recall of order dated 17th October, 2016 whereby the application being IA 8108/2016 for restoration of suit was dismissed.

The appeal is dismissed.

CM. No. 46746/2018 (for Stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

CHIEF JUSTICE

NOVEMBER 12, 2018/jg

सत्यमेव जयते