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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(OS) 202/2019, IA No.5322/2019 (u/S 151 CPC) & IA**
No.5323/2019 (u/O XXXIX R-1&2 CPC).
HARJEET KAUR BAWEJA @ DR. RANI PHLAPHONGPHANICH
..... Plaintiff

Through: None.

Versus

RAVINDER PAL SINGH BAWEJA & ORS. Defendants
Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER
% 11.04.2019

1. On the first call as the first item in the supplementary list, a pass over was sought on behalf of the counsel for the plaintiff.
2. On pass over none appears for the plaintiff.
3. Considering that the suit had been got listed for today and was listed as the first item on the Board, the counsel for the plaintiff should have appeared on first call or at least on pass over.
4. Dismissed in default.

RAJIV SAHAI ENDLAW, J.

APRIL 11, 2019
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5. At this stage, Mr. Maninder Singh the counsel for the plaintiff has appeared and on his request the suit is restored to the original position.

6. The plaintiff has instituted this suit (i) for declaration that the *ex parte* preliminary decree dated 20th November, 2017 of partition in CS(OS) No.1188/2009 is illegal, null and void on account of having been obtained by the defendants no.1 and 2 by playing fraud upon the plaintiff; and, (ii) for permanent injunction restraining the defendants no.1 and 2 from creating any third party rights in property no. B-18, Bazar Marg, Rajinder Nagar, New Delhi.

7. The plaintiff was admittedly a defendant in CS(OS)No.1188/2009, preliminary decree for partition wherein is sought to be set aside.

8. The Registry of this Court put an objection as to the maintainability of the suit.

9. However the counsel for the plaintiff by referring to ***Indian Bank vs. M/s. Satyam Fibres (India) Pvt. Ltd.*** (1996) 5 SCC 550, ***Manmohan Singh Dhaliwal vs. Gurbax Singh Arora*** 2001 SCC OnLine Del 1213 and ***Anil Kumar vs. Seema Thakur and Ors.*** 2010 SCC OnLine Del 106 insisted that the suit be listed subject to office objection and the suit has been so listed.

10. I have enquired from the counsel for the plaintiff that the decree, setting aside of which is being sought, being in a suit in which the plaintiff was a defendant and which suit the plaintiff was contesting though ultimately proceeded *ex parte*, whether not the appropriate remedy, if any, of the plaintiff is under Order IX Rule 13 of the CPC and not by way of an independent suit.

11. The counsel for the plaintiff states that Order IX Rule 13 of the CPC is not attracted because the plaintiff, as defendant in CS(OS) No.1188/2009

had withdrawn her defence to the suit on the representations made by the defendants 1 and 2 and though filed an application under Order IX Rule 13 of the CPC, on the defendants no. 1 and 2 again misrepresenting to the plaintiff, withdrew the said application.

12. As far as I have been able to decipher from the pleadings of the plaintiff, the plaintiff had not withdrawn her defence to CS(OS)1188/2009 and had only instructed her Advocate to stop appearing in the said suit. Also, in my opinion, Order IX Rule 13 of the CPC is not confined to inadvertent non-appearance but applies to non-appearance in the suit, for all reasons and which would cover the reasons as cited by the counsel for the plaintiff.

13. The counsel for the plaintiff, at this stage, withdraws the suit with liberty to apply under Order IX Rule 13 of the CPC.

14. I have enquired from the counsel for the plaintiff as to how a second application under Order IX Rule 13 of the CPC would lie after withdrawing the earlier application.

15. The counsel for the plaintiff now states that the plaintiff had never applied under Order IX Rule 13 of the CPC and had applied for setting aside of the order proceeding *ex parte* against the defendants in the suit.

16. Dismissed as withdrawn with liberty in accordance with law to apply under Order IX Rule 13 of the CPC.

Dasti.

RAJIV SAHAI ENDLAW, J.

APRIL 11, 2019

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