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

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Date of Judgment: 26.04.2019

+ **FAO 182/2019 and C.M. Appl. No.19235-37/2019**

JITENDER KUMAR SETHI & ANR Appellants

Through: Mr. Abhimanyu & Mr. Ashwani
Kumar, Advocates

versus

GUATAM SALUJA Respondent

Through: Dr. (Maj.) J.C. Vashishta, Mr. Madan
Lal & Ms. Yashika Sood, Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

CAVEAT No. 433/2019

1. Since the respondent has entered appearance, the caveat stands discharged.

CM APPL. 19236/2019 (for exemption)

2. Exemption allowed, subject to all just exceptions.

The application stands disposed of.

CM APPL. 19237/2019 (for delay)

3. This is an application seeking condonation of delay of 182 days in filing the appeal.

4. For the reasons stated in the application and no objection given by learned counsel for the respondent, the delay of 182 days in filing the appeal is condoned.

C.M. stands disposed of.

FAO 182/2019 & CM APPL. 19235/2019 (for stay)

5. The present appeal under Order 43 Rule 1 Code of Civil Procedure, 1908 ('CPC') has been filed by the appellants against the order dated 5.9.2018 passed by the learned trial court whereby the application on behalf of the appellants, who were defendants in the suit, under Order 9 Rule 13 CPC for setting aside the *ex-parte* order dated 13.5.2013 and *ex-parte* decree dated 15.11.2017, was dismissed.

6. The brief and necessary facts for the disposal of the appeal are that the respondent herein, who was the plaintiff in the suit, had filed a suit for specific performance and permanent injunction against the defendants (appellants herein) being CS(OS) No. 2751/2012. Summons of the suit were received by the appellants in December, 2012. It is the case of the appellants that on receipt of the summons, a counsel had been engaged by them, who after receiving the plaint and the documents prepared the reply and called the appellants to sign the same along with *vakalatnama*. The said reply and the *vakalatnama* were signed by the appellants and they also

attended the court proceedings on 11.2.2013. It is claimed that when the appellant no. 1 met the counsel in the last week of January, 2013 he was informed by the counsel that the reply and the *vakalatnama* had been filed in the first week of January, 2013. It is further claimed that when the appellants came to this Court on 11.2.2013 to attend the hearing, they were asked to make an entry pass which was made available to them only at 11:30 a.m. and by this time the matter had been attended by counsel and the counsel informed them that the matter had been adjourned to 2.5.2013. It is pleaded that before 2.5.2013, the appellants had approached their counsel, who informed them that they were not required to attend the matter personally and he would take care of the case with due diligence. From time to time they were informed of the dates on which the matter was being adjourned. On 5.4.2016 the appellants received a notice from Dwarka Courts directing them to appear on 6.4.2016. On inquiry from the counsel, they were informed that due to pecuniary jurisdiction the matter had been transferred to Dwarka Courts and that the counsel would no longer be in a position to attend the hearing at Dwarka Courts. The appellants then appeared in the Court on 6.4.2016 and the next date given was 25.5.2016. The counsel was informed of the said date and he now assured that he would

attend the proceedings. On 25.5.2016, the counsel informed the appellants that the case had been adjourned to 3.8.2016 and that he will not be available on the said date. The appellants appeared on 3.8.2016 and the next date given was 21.9.2016. Thereafter, the case was adjourned from time to time and on some dates the appellants appeared while on the other dates their counsel appeared. On 12.1.2018, the appellants were informed by the counsel that the next date fixed in the matter was 20.2.2018. However, on 18.1.2018, appellant no.2 received a notice from the trial court along with certain documents for his presence on the date fixed i.e. 6.4.2018. On 20.2.2018, when the appellants reached the Court they could not find their case in the cause list. The appellants showed the notice and the documents to another Advocate who was present in the court premises. After perusing the same, he informed them that a decree had been passed against the appellants and the execution had been filed by the decree holder.

7. On 23.2.2018, the appellants engaged a new counsel who inspected the court record and found that neither the reply nor the *vakalatnama* had been filed and no counsel had appeared in the matter except on one date when a proxy counsel had appeared. The right to file the written statement had been closed way back on 2.5.2013; the appellants had been proceeded

ex-parte on 13.5.2013 and an *ex-parte* decree had been passed on 15.11.2017.

8. Shocked by this revelation, it is pleaded that the appellants through the new counsel filed an application under Order 9 Rule 13 CPC read with Section 151 CPC for setting aside the *ex-parte* order dated 13.5.2013 and the *ex-parte* decree dated 15.11.2017. The said application was dismissed by the trial court vide order dated 5.9.2018.

9. It is this order dated 5.9.2018 dismissing the application under Order 9 Rule 13 CPC, which is subject matter of challenge in the present appeal.

10. Learned counsel for the appellants submits that the *ex-parte* order and the decree have been passed because of the negligence on the part of the previous counsel and dereliction of his professional ethics and duty, as even after receiving fees from the appellants he did not take steps to defend them. He contends that the trial court should have allowed the application to demonstrate substantial justice without letting technicalities come in their way. It is submitted that even on merits the appellants had a good case as the Agreement to Sell was executed on 12.9.2011 between the plaintiff and the mother of appellant no. 1 and mother-in-law of appellant no. 2, and a sum of Rs.3,50,000/- was received by the appellant no. 1. However, the

same was cancelled mutually between the parties vide a General Power of Attorney for cancellation of the agreement and the earnest money was returned. After cancellation of the agreement the other party had no right, title and interest in the said property in question.

11. I have heard learned counsel for the appellants and perused the impugned judgment as well as the documents on record.

12. The trial court has recorded in the impugned order that after the matter was transferred to the trial court from this Court, notices were issued to the parties. Pursuant to the notices, appellant no. 1 had appeared in person for himself as well as on behalf of appellant no.2, who is his wife, on 6.4.2016. In the order dated 6.4.2016 itself, it was specifically recorded that both the defendants had been proceeded *ex-parte* by the High Court on 13.5.2013. Even thereafter appellant no. 1 had appeared in the trial court on 3.8.2016, 24.11.2016, 15.2.2017 and 26.4.2017 as recorded by the trial court. The trial court therefore observed that the defendants in the suit were very well aware about the pendency of the suit and *ex-parte* order and the only inference that could be drawn from the proceedings was that they had conveniently and deliberately chosen to avoid the proceedings and have now moved the application at this stage for getting the *ex-parte* order dated

13.5.2013 set aside with *malafide* intent. It is also observed that the application under Order 9 Rule 13 CPC was an abuse of process of law and has been filed only to deny the plaintiff, the fruits of the decree passed in his favour. The trial court has also observed that in order to get the relief from the Court, the entire blame has been put by the defendants on the counsel alleging professional misconduct, though no complaint whatsoever has been made against him before the Bar Council of Delhi. The trial court found no reason to grant relief to a person who in its perception, deliberately chose to stay away from the proceedings and came back to the Court belatedly, seeking to set the clock back to Stage-I.

13. In my view, there is no error in the judgment of the trial court impugned before me. As rightly observed by the trial court, when the appellant no. 1 had appeared for himself and for his wife on 6.4.2016, he very well knew, from a perusal of the order sheet, that they had been proceeded *ex-parte* three years ago by the High Court. Though, appellant no. 1 appeared on four dates thereafter, no steps were taken to get the *ex-parte* order set aside. Since the appellant had been appearing himself, it was absolutely inappropriate for him to have put the blame on the counsel for not diligently pursuing the matter. Assuming for a moment, for the sake of

arguments, that counsel was not appearing in the matter, there was nothing stopping the appellants from engaging another counsel in 2016 itself instead of waiting to do the same, after the execution had been filed. The trial court is thus right in its observations that the application has been made now, only after the execution has been filed so as to deny to the plaintiff, the fruits of the decree passed in his favour. A party, who chooses to be negligent in defending himself/herself cannot be given a premium by permitting him to take the clock back so as to prejudice the other side, who has vigilantly prosecuted its case. The appellants have not been able to make out a case before me to point out any infirmity in the order of the trial court.

14. On a pointing query to learned counsel for the appellants as to whether any complaint was made against the previous counsel to the Bar Council of Delhi, the learned counsel pointed out that a complaint has been filed against the previous counsel and the same is on record of this Court.

15. Learned counsel has drawn the attention of this Court to the complaint filed by against the previous counsel at page 106 of the paper book. A perusal of the complaint shows that the said complaint was filed only on 22.3.2019. The impugned judgment dismissing the application under Order 9 Rule 13 CPC was passed on 5.9.2018. It is obvious that the said complaint

has only been filed after the impugned judgment was passed and is an obvious act on the part of the appellant to make out a ground for filing the appeal against the impugned judgment. The said complaint can be of no avail to the appellants.

16. In my view, there is no infirmity in the order of the learned trial court. There is no merit in the appeal and the same is hereby dismissed. No order as to costs.

17. At this stage, learned counsel for the appellants submits that the appellants may be given liberty to pursue other remedies that are available to him in law. As prayed, liberty is granted to the appellants to pursue whatever remedies that may be available to them in accordance with law.

JYOTI SINGH, J

APRIL 26, 2019

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