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

% *Date of Judgment: 14th February, 2019*

+ **FAO(OS) (COMM) 307/2018, C.M.Nos.53558-53559/2018**
NITISH KUMAR Appellant

Through: Mr.Ranjit Kumar and Mr.P.D.Gupta,
Senior Advocates with Mr.Abhinav
Mukerji, Ms.Bihu Sharma and
Mr.Abhishek Gupta, Advocates

versus

ATUL KUMAR SINGH & ORS. Respondents

Through: Mr.Atul Kumar Singh, Respondent
no.1 in person.
Mr.Akhilesh Kumar Pandey,
Advocate for respondents no.2 to 4.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

C.M.53559/2018 (delay)

1. The present application has been filed by the applicant/appellant seeking condonation of delay of 10 days in filing the present appeal.
2. There is no opposition to the prayer made in the application. Accordingly, the delay of 10 days in filing the present appeal is condoned.
3. The application stands disposed of.

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4. Challenge in this appeal is to order dated 08.10.2018 passed in I.A. 3333/2018 filed by plaintiff (respondent no.1 herein) & I.A.4210/2018

filed by defendant no.1 (appellant herein) and order dated 04.12.2018 passed in I.A.16560/2018 filed by defendant no.1 (appellant herein). Some necessary facts, which are required to be noticed for disposal of this appeal, are that during the pendency of a suit being CS (COMM) 258/2018 filed by respondent no.1, an application i.e. I.A.3333/2018 was filed to examine defendant no.1 (plaintiff herein) as a witness of the plaintiff. The following order came to be passed by the learned Single Judge on 08.10.2018:

“I.As. 3333/2018 & 4210/2018

1. In I.A. 3333/2018, the plaintiff is seeking summons to be issued to defendant No.1 to examine him as a witness.
2. In I.A. 4210/2018, defendant No.1 is seeking permission to examine defendant no.1 by video conferencing.
3. The plaintiff present in person submits that the defendant no.1 be directed to appear in person and he be examined on oath instead of video conferencing.
4. This Court is of the view that defendant No.1 be examined as a witness by video conferencing according to Video Conferencing Guidelines issued by the High Court of Delhi.
5. The Registrar (IT) is appointed as Co-ordinator at the Court point and the Registrar (IT), Patna High Court, shall be the coordinator at the remote end.
6. Defendant No.1 will bear the cost for the preparation of certified copies to be sent to the Co-ordinator at the remote end to facilitate recording of evidence as per the Guidelines framed by the Delhi High Court.
7. List before the Joint Registrar for fixing the date of video conferencing of defendant No.1 on 31st October, 2018.
8. Both the applications are disposed of.

O.A. 63/2018 & I.A. 7795/2018

9. List for hearing on 16th January, 2019.

10. It is clarified that the recording of the evidence shall continue notwithstanding the pendency of this appeal. After the evidence of defendant No.1, other witnesses of plaintiff shall be examined.

11. Copy of this order be given dasti to counsels for the parties under signatures of the Court Master.”

5. Subsequently, an application being I.A.16560/2018 was filed by the defendant no.1 (appellant herein) for recall of the order dated 08.10.2018 which was dismissed. Mr.Ranjit Kumar, learned Senior Counsel appearing for the appellant, submits that while allowing I.A.3333/2018, learned Single Judge did not give any reasons nor noted the contentions of defendant no.1 (appellant herein) nor reference was made to the objections raised in the reply filed to this application. It is submitted that when I.A.16560/2018 was filed, reference was made to I.A.4210/2018 in the order observing that in fact, the defendant no.1 had sought a direction not to appear in the witness box but instead his evidence be recorded via video conferencing. Mr.Ranjit Kumar submits that both these issues are distinct and separate and could not have been linked to reach an adverse conclusion against the appellant herein.
6. The respondent no.1 (plaintiff in the suit) who appears in person in the matter, submits that when the matter was listed on 08.10.2018, there was no opposition to the prayer made in I.A.3333/2018, which is evident upon reading of the said order. He further submits that every effort has been made by the appellant to delay the proceedings, which have been instituted by him and the filing of the present appeal is yet another attempt to delay the matter further. Respondent no.1 has relied

on para 14 of the order passed by the learned Single Judge on 04.12.2018, which we reproduce below:

“14. Learned counsel for the defendant No.1 submits that I.A.4210/2018 was filed by defendant No.1 for recording his evidence via video conferencing. This submission is rejected as the occasion for defendants’ evidence has not yet arisen. Admittedly, the case is at the stage of recording of the evidence of the plaintiff who had filed I.A.3333/2018 for directing defendant No.1 to appear personally before this Court whereas defendant No.1 did not want to appear in person and wanted his evidence to be recorded via video conferencing.”

7. We have heard learned senior counsels appearing for the appellants and respondent no.1, who has appeared in person.
8. Reading of the order dated 08.10.2018 would show that the same is bereft of any reason as to why I.A.3333/2018 has been allowed. Although respondent no.1 has submitted that since there was no opposition to the prayer made in this application, it was not necessary to give reasons, we do not find any such observation made in the impugned order. On the contrary, Mr.Ranjit Kumar has drawn out attention to the reply filed wherein the prayer made in the application has been strongly opposed. As far as observations of the learned Single Judge contained in paragraph 14 of the order dated 04.12.2018 is concerned, in our view, the same does not amount to any admission on the part of the appellant herein. The appellant in terms of his reply has opposed the relief claimed in I.A.3333/2018. Additionally, Mr.Ranjit Kumar submits that it would be open for respondent no.1 to cross-examine defendant no.1, which would be the proper course and not to call him as his witness. Taking into consideration that the order

dated 08.10.2018, which is the parent order, does not disclose any reason for allowing the prayer made in I.A.3333/2018, with the consent of the parties, we set aside the order dated 08.10.2018 and 04.12.2018 and remand the matter back to the learned Single Judge with a request to the learned Single Judge to hear I.A.3333/2018 afresh after giving an opportunity of hearing to both the parties. Prayer made in I.A.4210/2018 may be considered at the appropriate stage.

9. With these directions, the appeal and C.M.53558/2018 are disposed of.
10. List the matter before the learned Single Judge on 11.03.2019.

G.S.SISTANI, J.

JYOTI SINGH, J.

FEBRUARY 14, 2019

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