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

% Judgment delivered on: 23.05.2023

+ CM(M) 876/2023

SMT.LAXMI DEVI

..... Petitioner

versus

SANJIV KAUSHIK & ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Hem C. Vashisht and Ms. Kiran Kumari, Advocates.

For the Respondents : None.

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J. (ORAL)

[The proceeding has been conducted through Hybrid mode]

CM APPL. 27684/2023 (for exemption)

1. Exemption is allowed, subject to all just exceptions.
2. The application stands disposed of.

CM(M) 876/2023 & CM APPL. 27683/2023 (for stay)

3. Petitioner challenges the order dated 23.03.2023 in MISC DJ 755/2022 titled as "*Sanjiv Kaushik vs. Laxmi Devi*" whereby an application under Order IX Rule 9 of the CPC, 1908 seeking restoration of the counter claims, which was dismissed for default on 13.10.2022,

was dismissed.

4. Learned counsel submits that the matter was last listed, before the impugned order was passed, on 28.09.2022, when the son of the petitioner had approached the learned Trial Court and was given to understand that the matter was next listed on 24.11.2022.

5. Learned counsel submits that apparently, it was an error either of the Court staff or possibly of the son of the petitioner, who noted the next date of hearing as 24.11.2022 instead of 13.10.2022.

6. Learned counsel submits that it is only on 30.10.2022 when the son of the petitioner met the respondent/ plaintiff, he was informed by the respondent/ plaintiff that the matter was now fixed for evidence. On that basis, learned counsel submits that the counsel for the petitioner had inspected the Court file on 07.11.2022 when it was gathered from the court record that the counter claim was dismissed in default on 13.10.2022.

7. Learned counsel submits that immediately thereafter the petitioner filed the application under Order IX Rule 9 CPC, giving the reasons as to on what grounds the petitioner did not appear, which led to the impugned order being passed.

8. Learned counsel on query by this Court had produced the original Court diary of the counsel to show that indeed the entry on 28.09.2022 of the case, on which the next date of the hearing was noted as 24.11.2022.

9. However, on a query, learned counsel further submits that the diary and photocopy was not placed before the learned Trial Court along with the application under Order IX Rule 9 of the CPC, 1908.

10. Since the learned Trial Court did not have the benefit of the aforesaid documents, this Court is of the considered opinion that the petitioner can be given an opportunity to place the same on record for the consideration of the learned Trial Court in that regard.

11. The petition is disposed of with a direction to the petitioner to place on record of the learned Trial Court, the copies of the relevant pages of the court diary within two days from today.

12. It has been given to understand that the matter is listed before the learned Trial Court on 07.06.2023.

13. The learned Trial Court is requested to first consider the application under Order IX Rule 9 of the CPC along with the documents now sought to be placed on record of the learned Trial Court and pass a fresh order on that basis, after issuing notice to the respondent/ plaintiff.

14. The aforesaid petition along with pending applicaiton is disposed of with no order as to costs.

TUSHAR RAO GEDELA, J.

MAY 23, 2023/nd