



2024:DHC:4784



* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 21.03.2024
Judgment pronounced on: 27.06.2024

+ FAO 175/2022

VIJAY KUMAR

..... Appellant

Through: Mr. Suhail Shah, Adv.

Versus

KAUSHALYA DEVI & ANR.

..... Respondents

Through: Mr. Gopal Sharma, Adv. for R-1 & 2.
Mr. Alok Kumar Saxena, Adv. for R-3.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. Facts in crux being, the appellant on 04.09.2015 filed a suit before the learned Additional District Judge, North West, Rohini Courts, Delhi ("Trial Court") for partition and permanent injunction along with an application for permanent injunction under Order XXXIX Rule 1 & 2 of Code of Civil Procedure, 1908 (hereinafter referred as 'CPC') against the respondents seeking inter alia, to restrain them from interfering with the suit property i.e. House No. 52, Block F-3, Sultanpuri, Delhi admeasuring 22.5 sq yards. The aforesaid suit was registered as Civil Suit bearing no. 213/2015 titled as "*Vijay Kumar vs Kaushalaya Devi & Ors.*"

2. Appellant herein is the son of Late Sh. Murari Lal and his first wife Smt. Vidhya Devi. It is stated that appellant's mother left Late Sh. Murari



Lal right after appellant's birth and he has no knowledge of her whereabouts for the past 45 years and is presumed to be not alive under law.

3. Thereafter, Late. Sh. Murari Lal married Smt. Kaushalya Devi, the respondent no. 1 and had a son and a daughter out of his second marriage namely Manoj Kumar being the respondent no. 3 and Smt. Meera Devi i.e. respondent no. 3.

4. It is stated that late Sh. Murari Lal was the owner of the suit property which was allotted to him by the Delhi Development Authority ("DDA") under resettlement scheme in the year 1975-76. On 01.11.2023, late Sh. Murari Lal died intestate leaving behind the parties before this court as legal heirs. Disputes arose between the parties, appellant contends that respondents are harassing him in order to claim the suit property for themselves, thus the suit before the learned Trial Court was filed by him.

5. Subsequent thereto, summons were issued on 04.09.2015 and were received by the respondents on 09.09.2015. Thereafter, the respondents on 29.01.2016, to contest the suit had filed their written statements before the learned Trial Court. Appellant also moved an application under Order XI Rule 12 & 14 read with section 151 CPC for discovery and production of certain documents. Respondents filed the reply to the said application. However, since the appellant did not appear before the learned Trial Court on 02.08.2018 and as the last opportunity was already granted to argue on the said application and to pay the cost imposed earlier, thus in view of this the learned Trial Court dismissed in-default the partition suit.

6. In July, 2019, the Appellant engaged a new counsel in order to pursue the present matter before the learned Trial Court and had moved an application under Order IX Rule 9 read with Section 151 CPC on



12.07.2019. Later on, the Appellant also filed an appropriate application for condonation of delay of 313 days in filing the said application. Thereafter, the reply to the said application was filed by the respondents

7. In the meanwhile, on account of Covid-19 Pandemic, no fruitful proceedings took place in the matter till 24.05.2021 and the learned Trial Court vide the impugned order dated 30.11.2021 dismissed the application of the appellant under Order IX Rule 9 read with 151 CPC.

8. The learned counsel for the appellant submitted that the learned Trial Court erred in passing the impugned order in as much as it did not afford an opportunity to the appellant to present its case. Moreover, it did not issue any court notice before dismissing the suit in default. On a mere absence of a single day, the suit had been dismissed in-default, which is unreasonable.

9. It was submitted that the appellant had lastly appeared before the learned Trial Court on 30.08.2017 and thereafter, the learned counsel attended the court proceedings in the matter. The learned Trial Court failed to consider the conduct of the previous counsel as mentioned in the order dated 18.07.2019 and 22.08.2019, that even after the notice was issued to the previous counsel, he neither appeared nor any person on his behalf appeared before the learned Trial Court for advancing any arguments whatsoever.

10. Learned counsel submitted that the learned Trial Court also did not consider that the appellant was injured on 15.02.2018 and had been advised to take bed rest for 2.5 months. Till May, 2018, the appellant could not walk properly. He further contended that the appellant had always been in touch with the erstwhile counsel however, he assured the appellant that the settlement talks were going on and there was no requirement of his appearance before the learned Trial Court. Thereafter, the appellant engaged



a new counsel who informed him that the suit was dismissed in default, accordingly, an application under Order IX Rule 9 CPC was moved by the new counsel before the learned Trial Court.

11. Concluding submissions, the appellant submitted that grave injury and irreparable loss will be caused to the appellant if the impugned order is not set aside.

12. Refuting the contentions of the appellant, the learned counsel for the respondents submitted that the appellant failed to satisfy the learned Trial Court as to his non-appearance before it on the date of hearing of application and when his counsel had appeared, the cost was imposed on him vide order dated 16.04.2018 for delaying the proceedings. Notably, thereafter the appellant stopped attending the proceedings and the learned Trial Court therefore passed a detailed order discussing all the facts and circumstances of the case as well as the conduct of the appellant on the basis of which his application was dismissed vide the impugned order.

13. Learned counsel for the respondents further submitted that the learned Trial Court has passed a reasoned order inasmuch as it considered all the factual and legal aspects and passed the order on 02.08.2018 dismissing the suit in-default. Thereafter, the appellant moved an application under Order IX Rule 9 CPC for restoration of the plaint, to which reply was also filed by the respondents. As, Covid-19 Pandemic had ensued, hence the arguments on the said application could not be heard and the respondents also did not appear due to this. Arguments were heard on 30.11.2021 and learned Trial Court also considered the application under Section 5 of the Limitation Act seeking condonation of delay of 313 days in filing the said application, to which the appellant failed to justify the delay caused and without any



supporting document, the learned trial court dismissed the application vide the impugned order.

14. I have heard the rival submissions on behalf of the parties and perused the record and impugned order.

15. Noticeably, the appellant had filed a suit for partition and other reliefs seeking permanent injunction against the respondents on 04.09.2015. The suit has been contested by the respondents by filing the written statement. Pertinently, the appellant has been diligently pursuing his suit either by appearing himself or through his counsel before the learned Trial Court. Further, he was appearing till 16.04.2018, however, on the said date of hearing, a fresh counsel had appeared on behalf of the appellant and had filed his memo of appearance and requested for adjournment to file his fresh Vakalatnama and to make submissions on the application moved on behalf of the appellant under Order XI Rule 12 CPC. However, the learned Trial Court after noting that the matter was pending for disposal of application since March 2017 and for settlement of issues, allowed the adjournment subject to cost of Rs.5,000/- and further gave a last opportunity to the appellant for disposal of the application. The matter was postponed for 02.08.2018 and on the said date of hearing, due to non-appearance on behalf of the appellant, the suit was dismissed in default.

16. The appellant has mainly contended that he could not appear to contest his case personally as on 15.02.2018, he fell in a sewer manhole and his left leg got fractured for which cast/slab/plaster was put from thigh to foot till 24.05.2018, when it was removed. It is also the contention of the appellant that in the meanwhile, he had been in contact with his counsel who assured him that the matter was postponed for disposal of the application



and also for settlement, further there was no need for his appearance till the application is allowed. Subsequently, the appellant visited the suit property and was surprised to see that the respondents were constructing the suit property, being suspicious, the appellant called his advocate who stopped picking up the calls of the appellant and even avoided to meet him. It is also the contention of the appellant that finally on 10.07.2019 that he engaged a new counsel and on inspection of the court record, it was found that his suit has been dismissed in default and he moved an application on 12.07.2019.

17. The medical documents placed on record by the appellant commensurate with the averments in the application that petitioner had suffered fracture of his left leg which was plastered and the PTV cast was removed after four months on 24.05.2018. It is not disputed that the appellant has not taken any steps to take any action against his erstwhile advocate, in case he deceived him by not appearing on his behalf to pursue his matter and by falsely assuring him that the matter was regularly being followed by the advocate.

18. It is also true that by engaging an advocate, a party cannot be absolved of his duty to diligently pursue its case. In the absence of any complaint against the erstwhile advocate, a possibility cannot be ruled out with respect to a growing tenancy amongst the litigants to blame their advocate for adverse orders being passed against them and to establish that appropriate instructions were issued to such an advocate.

19. However, the facts are peculiar in the present case, thus, having considered the facts and circumstances of the present case, as well as the submissions made on behalf of the parties, specifically the fact that since 15.02.2018 to 24.05.2018, the appellant was under medical treatment due to



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fracture of his left leg and was thus dependant on the advice of his counsel and in the interest of justice, the petition is allowed subject to cost of Rs. 30,000/- to be paid by the appellant to the respondent on the next date of hearing before the learned Trial Court.

20. The parties are to appear before the learned Trial Court on 15.07.2024 consequently the appeal stands allowed.

SHALINDER KAUR, J.

JUNE 27, 2024
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