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

+ **RSA 84/2023**

BHAWNA KHANNA

.....Appellant

Through: Ms. Aakanksha Kaul, Mr. Aman
Sahani, Ms. Rhea Borkotoky and Ms.
Ashima Chopra Advocates

versus

SMT SUDHA KHANNA AND ORS

.....Respondents

Through: Mr. Manoj Kumar Yadav, Advocate

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER

14.02.2025

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The present regular second appeal has been filed challenging the impugned judgment and decree dated 07.03.2022 in RCA No. 104/2019 titled '*Bhawna Khanna Vs. Sudha Khanna & Ors.*' whereby the learned First Appellate Court had dismissed the First Appeal filed on behalf of the appellant upholding the dismissal for non-prosecution of the suit by the learned ACJ/CCJ/ARC, Dwarka Courts vide order dated 23.07.2019.

The facts in brief are that the appellant/plaintiff filed a suit seeking declaration, permanent and mandatory injunction, and rendition of accounts. The parties to the suit—the appellant/plaintiff and the respondents/defendants—are closely related as daughter, mother, siblings, and brother-in-law. The suit was instituted on 07.07.2014 and during the pendency of the suit, the learned trial court vide order dated 23.07.2019 passed the following orders:-



“CS SCJ 74/2014 25723/16

GHAWNA KHANNA VS. SUDHA KHANNA ORS

23.07.2019

*Present: None for plaintiff
Sh. Mohar Singh, counsel for defendants.
Be a waited for appearance of plaintiff.
Put up again at 11.30 AM*

(Arun Kumar Garg)

ACJ/CCJ/ARC

Dwarka Courts/23.07.2019

Called Again

*Present: Plaintiff in person
Sh. Mohar Singh, counsel for defendants*

Matter was fixed for payment of cost and for entire PE as last and final opportunity, however, plaintiff has neither paid the cost nor ready for her cross examination on the pretext that she is not feeling well. An application for waiver of cost has been moved by the plaintiff, however, considering the fact that plaintiff even today has refused to get herself cross examine despite the fact that the present case pertains to the year 2014, n my considered opinion, no grounds are made out for waiver of cost and for further adjournment in the present case. Application of plaintiff for waiver of cost is dismissed and even her suit for declaration, permanent injunction, mandatory injunction and rendition of accounts stands dismissed in default for non prosecution.

With disposal of the present suit, all pending applications have become infructuous and the same are accordingly disposed off. Interim order/stay, if any, stands vacated.

File be consigned to record room after due compliance.

(Arun Kumar Garg)

ACJ/CCJ/ARC

Dwarka Courts/23.07.2019”

Aggrieved thereby, the appellant filed an appeal and the learned Appellate Court while dismissing the appeal *inter alia* held as under:-

“6 The manner in which plaintiff has conducted herself



during the trial evidently leads to only one conclusion that she is misusing the process of law. Considering that the matter involves family, courts have referred the matter to mediation, where on several occasions the plaintiff did not appear and the mediation proceedings failed. She has availed as many as 11 opportunities for leading her evidence, without even having filed a list of witnesses. It is noticed that the trial court, vide order dated 31.05.20 19 had imposed costs of Rs.3,000/- on the plaintiff and afforded her last & final opportunities for entire plaintiff's evidence. On the adjourned date, plaintiff did not appear for the entire day and also did not pay the costs or get witnesses examined. Thereby leaving the court with no other alternative but to pass the order of dismissal in default and for non-prosecution. Sh.Mohar Singh, counsel for the respondents has rightly relied upon Order 17 Rule 1 CPC, which stipulates that a party can enjoy not more than three adjournments at one stage. Appellant/plaintiff having already been afforded more than sufficient opportunities, did not pursue the matter diligently and the trial court, thus, rightly dismissed the suit for non-prosecution and also for her non-appearance.”

The Court considers that both the learned trial court and learned First Appellant Court have fallen into error and have misdirected themselves in reading Order XVII Rule 2 and 3 CPC.

Order XVII Rule 2 and 3 (b) CPC provides as under:-

“2. Procedure if parties fail to appear on day fixed.—Where, on any day to which the hearing of the suit is adjourned it is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit. 1 [Explanation.—Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.]”



3. Court may proceed notwithstanding either party fails to produce evidence, etc.—Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed 2 [the Court may, notwithstanding such default, (a) if the parties are present, proceed to decide the suit forthwith; or (b) if the parties are, or any of them is, absent, proceed under rule 2]

A bare reading of the above provisions makes it clear that Order XVII Rules 2 and 3 CPC govern situations where a party fails to proceed with the matter despite being granted time.

In the present case, the impugned order dated 23.07.2019 was passed when the parties were present. The learned Trial Court had noted that the plaintiff was not ready for cross-examination. In these circumstances, the proper course of action for the learned Trial Court was to invoke Order XVII Rule 3 CPC instead of dismissing the suit for non-prosecution. Rule 3(a) explicitly mandates that if the parties are present, the Court must proceed with the suit forthwith. Instead of following this mandatory requirement, the learned Trial Court dismissed the suit and the learned First Appellate Court also erred by dismissing the appeal against the order dated 23.07.2024.

In light of the above, the impugned orders dated 23.07.2019 and 07.03.2022 are unsustainable in the eyes of law and are accordingly set aside. The matter is remanded back to the learned Trial Court with a direction to adjudicate the suit in accordance with law.



The parties are directed to appear before learned Principal District & Sessions Judge, Dwarka Courts, Delhi on 03.03.2025. The learned Principal District & Sessions Judge shall assign the case to the Court of competent jurisdiction for trial in accordance with the law from the stage where it was dismissed on 23.07.2019.

The plaintiff shall in all circumstances, complete her evidence within 03 dates except in exceptional circumstances.

Accordingly, the present appeal stands disposed of.

DINESH KUMAR SHARMA, J

FEBRUARY 14, 2025

N/SMG