

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CIVIL PROCEDURE

FAO No. 148 OF 2007

Date of Decision : December 03, 2008

Smt. Mumtaz Thakur and Ors.
Through : Mr. Sachin Midha,
Advocate

....Appellants

Versus

Smt. Swarna Thakur and Ors.
Through : Mr. V. B. Andley, Sr. Advocate
with Mr. Rajinder Mathur and
Ms. Anu Narayan, Advocates

....Respondent.

SUDERSHAN KUMAR MISRA, J. : (Oral)

1. On 25th February, 2004, learned Additional District Judge dismissed the suit of the appellant for non-prosecution. On 4th April, 2007, plaintiff's application under Order 9 Rule 9 CPC seeking restoration of the suit was also dismissed. Dissatisfied, the plaintiff/appellant has instituted the instant appeal.

2. It is the appellants' case that the suit was initially filed by them on 11.9.1998 before this Court, and later on, the case was transferred to the learned Addl. District Judge at Tis Hazari Courts due to the change in the pecuniary jurisdiction of the court. Admittedly, the matter was listed on 6.11.2003 before the learned Addl. District Judge, when it came to be adjourned to 9.12.2003. It is the appellants' case that on 9.12.2003, the Presiding Officer was on leave and the matter was adjourned to 14.1.2004, but proxy counsel for the appellants had noted the date as 25.3.2004 instead.

It is further contended by the appellants that it is only on 25.3.2004 that they discovered that the suit had been taken up on 14.1.2004 and ultimately dismissed for non-prosecution on 25.2.2004

3. Perusal of the Trial Court record shows that on 9.12.2003, the Presiding Officer was on leave and the matter was adjourned to 14.1.2004 for admission/denial of documents and framing of issues. On 14.1.2004, issues were framed in the appellants' absence and the matter was adjourned to 25.2.2004, for the plaintiffs' evidence. On 25.2.2004, there was no appearance on behalf of the plaintiff. Learned Addl. District Judge recorded that he had, "called the matter many times since morning but none has appeared on behalf of the plaintiff. It seems that the plaintiff is not interested in prosecuting the case." Consequently, the suit was therefore, dismissed in default of appearance and for want of prosecution.

4. In the impugned order declining restoration, the learned Addl. District Judge has noted that as per the case of the plaintiffs/appellants, on 9.12.2003, learned proxy counsel for the plaintiff noted the next date of hearing as 25.3.2004. However, there is nothing on record to show that on 9.12.2003 learned proxy counsel for the plaintiffs had in fact appeared. It was also noted that it is not the case of the plaintiffs/appellants that learned proxy counsel for the plaintiffs/appellants appeared after adjournment of the case on 9.12.2003. On this, learned Addl. District Judge concluded that the contents of the application are not supported by the record and that, therefore, no sufficient cause has been shown for non-appearance of the plaintiffs/ appellants on 25.2.2004

5. Admittedly, the suit property is a valuable property. The appellants claim to have purchased the suit property in December 1998 and undisputedly, till at least 6.11.2003, the matter was pursued with reasonable diligence by them both before the High Court and again before the learned Addl. District Judge. Pleadings were also completed. It is only on 9.12.2003, when the Presiding Officer happened to be on leave, that the matter seems to have been derailed as far as the appellants/plaintiffs are concerned. It is obvious that since the Presiding Officer was on leave, and nothing substantial was likely to happen on that date, plaintiffs' counsel may have requested another advocate to go and enquire about the date which had been fixed by the court. It is no doubt true that no copy of the case diary of either the proxy counsel, or of the counsel herself, has been annexed to the application for restoration. The application has been dismissed merely on the short ground

that the appearance of the proxy counsel has not been noted by the reader while fixing the next date of hearing and, therefore, the case put up by the plaintiffs that her proxy counsel appeared on 9.12.2003 and noted the wrong date is not made out. In support of their application for restoration, the plaintiffs/ appellants had also annexed an affidavit of Sh. B. A. Hashmi, Advocate, confirming the fact that he had appeared on 6.11.2003 on behalf of Ms. Shubhangi Tuli, Advocate and had noted the wrong date.

6. In *State of Punjab Vs. Harjit Singh*, (2007) 146 PLR 474, where the Court was hearing a revision petition against an order passed by the District Judge, whereby an appeal filed against the order of the Trial Court dismissing an application for restoration of the suit, was dismissed, the Court was pleased to restore the suit since it felt that, "it would be in the interest of justice if the suit is restored so that the parties are able to get decision on merits." It further held that, "The absence of the plaintiff cannot be said to be on account of any lack of bona fide, may be the plaintiff was not vigilant enough to prosecute the suit as may be required." In the instant case also, keeping in view the fact that the suit has been prosecuted diligently till that date, I do not see any reason that may have persuaded the plaintiffs/appellants to avoid prosecuting the matter further on 9.12.2003. No benefit is shown to have accrued to the appellants by not appearing on that date.

7. Learned counsel for the respondent has also objected to the maintainability of this appeal. According to him, the appellants' suit came to be dismissed by the learned Additional District Judge in the exercise of powers under Order 17 Rule 2 of the Code of Civil Procedure, 1908, and since no appeal is provided for under Order 43 from an order passed under Order 17 Rule 2 CPC, therefore, the present appeal is not maintainable. I do not agree. As mentioned in Order 17, the Court was obliged to proceed to dispose of the matter in any of the modes provided under Order 9, and consequently, the application moved by the plaintiffs/appellants under Order 9 Rule 9 CPC for restoration of the suit was maintainable before the learned Addl. District Judge. It was open to that court to consider the application under Order 9 Rule 9 CPC and to dispose it of in accordance with law. The instant appeal against an order dismissing an application under Order 9 Rule 9 CPC is in fact maintainable before this Court under Order 43 Rule 1 CPC.

8. I feel that the interests of justice would be met by setting aside the impugned order and restoring the suit, while at the same time, compensating

the respondents/defendants with costs and by directing expeditious disposal of the suit. Consequently, the impugned orders passed on 25.2.2004 and 4.4.2007 are set aside, subject to payment of costs of Rs.35,000/-. The appellants/plaintiffs are directed to file their list of witnesses as well as the affidavits of their witnesses within four weeks and the trial be completed preferably within six months from today.

9. The parties to appear before the court of Learned District Judge on 10.12.2008, who may then assign the matter to the appropriate court.

10. Trial Court record be returned forthwith. Costs to be paid before 10.12.2008.

11. The appeal stands disposed of. All pending applications also stand disposed of.

Sd/-

Sudershan Kumar Misra, J.