

\$~4

- * **IN THE HIGH COURT OF DELHI AT NEW DELHI**
- + FAO(OS) 14/2018 & CM Nos. 2961/2018 (for stay) and 12273/2018 (for direction)

SUSHIL KUMAR MEHTA Appellant
Through: Mr.Naresh Thanai, Adv. with
Mr.J.P.Singh, Ms.Khushboo Singh,
Advs.

versus

LT GEN L M MISHRA Respondent
Through: Mr.Jayant K.Mehta, Adv. with
Ms.Madhavi Khare, Ms.Drishti
Harpalani, Advs.

CORAM:

**HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO**

**O R D E R
28.02.2019**

FAO(OS) 14/2018

1. This intra-Court appeal has been filed by the appellant, challenging the order dated November 24, 2017 passed in IA No. 10119/2017 in CS (OS) 2491/2010, seeking restoration of IA No. 589/2014, which is an application under Order 9 Rule 13 of the CPC. Suffice it to state, that a suit filed by the respondent, for recovery of Rs. 1,51,61,000/- jointly and severally from two defendants impleaded therein, was decreed against the appellant herein vide judgment and decree dated May 19, 2011, with cost

and pendente lite interest and future interest @ 6% per annum. The appellant herein filed an IA No. 589/2014 under Order 9 Rule 13 of the CPC on March 18, 2016, and the same was dismissed in default and for non-prosecution on account of absence of the appellant or his counsel. The appellant filed IA No. 10119/2017 for restoration of IA 589/2014. The learned Single Judge dismissed the application by noting the fact that the application was filed after 457 days' delay. The reasons given by the learned Single Judge are in paragraphs 11 to 20 of the aforesaid order, which we reproduced as under:

11. The only argument of the counsel for the defendant is that the Advocate engaged by the defendant to pursue the application under Order IX Rule 13 of the CPC defaulted and the defendant should not be penalised therefor and that the defendant is a cancer patient. It is stated that the medical records of the defendant have been filed with the application.

12. The Advocate who had filed and who was pursuing the application under Order IX Rule 13 of the CPC on behalf of the defendant is a regularly practising Advocate of this Court.

13. I have enquired from the counsel now appearing for the defendant/applicant whether he had personally enquired from the said Advocate as to the reason for his having not appeared.

14. The answer is in the negative.

15. Needless to state that neither any communication with the said grievance was made to the Advocate nor any other action

taken against the Advocate. In fact it is not even pleaded that the defendant performed his obligation as to fee etc. vis-a-vis the said Advocate and no document of payment of fee has been filed.

16. The Advocate is an agent of the litigant and the Advocate, if has violated the terms of his engagement with the litigant, has to be proceeded against and the litigant, for the default of his Advocate who is his agent, cannot prejudice the opposite party. That is what is happening in the present case. In spite of the decree having been passed more than six years ago, it is still to be executed. The defendant has kept the plaintiff embroiled in these proceedings for the last six years and which cannot be permitted.

17. It is also not that on engaging an Advocate, the responsibility of the litigant comes to an end. It has to be remembered that the proceedings in the suit and/or an application under Order IX Rule 13 of the CPC entail disputed questions of fact and adjudication whereof requires leading evidence. The same requires continuous presence and interaction of the client with the Advocate. If the client stops contacting the Advocate and/or stops giving necessary instructions and is not paying the agreed fee, the Advocate cannot be expected to single handedly go on with the proceedings and do everything on his own.

18. The application of the defendant is totally bereft of any particulars in this respect even.

19. As far as the argument of the ailment/illness of the defendant is concerned, I have enquired from the counsel for the defendant whether defendant is without any family members and is residing alone. The answer is in the negative and it is stated that the defendant is residing with his family comprising of his sons. The ailment/illness, if any, of the defendant cannot again be an excuse to prejudice the plaintiff when the defendant and his family members otherwise

continue to go about their life as usual. Even if for any reason the defendant was unable to personally pursue the matter, his sons or any other family member could have done so on his behalf. The decree will be executed from the assets of the judgment debtor and which in the event of the unfortunate demise of the judgement debtor will be inherited by his family members. The said family members thus had no reason to not come to the aid of the judgment debtor and assist him in defending the suit or in pursuing the application under Order IX Rule 13 CPC.

20. Thus, no ground for condonation of delay in applying for restoration of the application under Order IX Rule 13 of the CPC is made out.”

2. It is the submission of Mr. Thanai, learned counsel for the appellant that the appellant having engaged a counsel, it was expected of him to keep the appellant informed on the development of the case, which he has not done. According to him, the appellant being a layman and not conversant with the nuance of the law and procedure, having engaged an advocate, expects that the said advocate would diligently prosecute the case on his behalf. In case of default on the part of the appellant or any grievance on the part of the appellant, many litigants lodge complaints. Non-communication or not taking action against the advocate, who failed to appear before the Court, should not be detriment to the appellant herein. In any case, the IA No. 10119/2017 was only for the restoration of the application, which was

dismissed in default, and would not cause prejudice to the respondent herein, as the application under Order 9 Rule 13 of the CPC was still to be considered. According to him, it is the case of the appellant in the application under Order 9 Rule 13 of the CPC that the appellant has not been served in the Suit. The reliance placed on the signature on the summon issued by the Court in the suit, purported to be the signature of the appellant, is totally denied. In other words, it is his submission that the said signature is not of the appellant. In fact, he has drawn our attention to the application under Order 9 Rule 13 of the CPC to contend that a specific plea in that regard has been taken. That apart, it is the case of the appellant that he has been suffering from Lung cancer and he is in continuous treatment with the All India Institute of Medical Sciences, which aspect has not been appreciated by the learned Single Judge inasmuch as on account of ailing health, it was not possible for him to attend the court proceedings. He states that an opportunity must be given to the appellant to put forth his case as pleaded in the application under Order 9 Rule 13 of the CPC.

3. On the other hand, Mr. Jayant K. Mehta, learned counsel appearing for the respondent would submit that the case set up by the appellant is totally a false one; the plea that he was suffering from an ailment, may be true but the

fact remains that the appellant have been pursuing many cases in the Courts. It is his submission that, if he can pursue those cases, there was no reason for him to be present in this Court on the date when the matter was dismissed in default. He submits that the appellant has defrauded many people by taking money on false pretext that he is the owner of the plot of land. In other words, he is an habitual offender and no sympathy should be shown to him by the Court. That apart, he states that the plea of the appellant that he has not been served with the summons in the suit, on March 9, 2011, is an incorrect one. According to him, there are signatures on the summon and in support of the service, an affidavit was filed on behalf of the respondent herein. That apart, he states, even assuming, that summons were not served, even on a reading of order passed on September 5, 2013 in Crl. L.P.No. 473/2011, it is clear that he had the knowledge of decree dated September 5, 2013. Further, application under Order 9 Rule 13 of the CPC was filed after the expiry of 30 days from September 5, 2013 and is barred by the limitation. He justifies the order of the learned Single Judge inasmuch he could not put the blame on the advocate. He states, that if the advocate was at fault, he should have written to the said advocate, eliciting the reasons for his non-appearance which admittedly he has not done.

Further, he states that the decree which has been passed against the appellant, is a decree on merits as it was passed after taking into consideration the evidence adduced by the respondent and the decree was passed only in the absence of the appellant.

4. Having heard the learned counsel for the parties, the present appeal is primarily against the order passed by the learned Single Judge in IA No. 10119/2017, seeking restoration of the IA 589/2014, which is an application under Order 9 Rule 13 of the CPC. We had called for the record of the suit. We find, the date on which IA 589/2014 was dismissed in default, there was no appearance for the appellant and also even in the hearing before that date i.e. December 17, 2015. In other words, because of non-appearance of the appellant on two continuous occasions, the Court had dismissed the application being IA 589/2014. It is a conceded position that the application for restoration was filed after a delay of 457 days. The learned Single Judge has also noted that no communication was made by the appellant with the advocate, who according to the appellant, was at fault. What is relevant in this case is that, it is the case of the appellant that he has suffered a decree, without summons having been served upon him. If this plea is correct, then a decree against him could not be passed without he being noticed on the

Suit. In view of such a stand taken by the appellant, this Court is of the view, that, to balance the equities, the present appeal should be allowed and the impugned order need to be set aside with a pre-condition that IA No.589/2014 shall be heard only if the appellant deposits 50% of the decretal amount computed as on date, within four weeks from today with the Registrar General of this Court. On such deposit, the IA 589/2014 is restored. The same shall be listed before the learned Single Judge on April 2, 2019 when the application shall be heard. On the deposit of the amount, as directed by us, above, the Registrar General shall keep the amount in a FDR with periodical renewals. We also make it clear that the deposit of the amount by the appellant in this Court shall be subject to further orders to be passed by the learned Single Judge in IA No. 589/2014.

5. The appeal is disposed of.

CM Nos. 2961/2018 (for stay) and 12273/2018 (for direction)

In view of the order passed in the appeal, the present applications are dismissed as infructuous.

CHIEF JUSTICE

V. KAMESWAR RAO, J

FEBRUARY 28, 2019/akb