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

% *Reserved on: December 16, 2021*

Pronounced on: January 03, 2022

+ **CS (OS) 441/2020**

VIJAY KUMAR NAGPAL Plaintiff

Through: Ms. Nandini Sahni, Advocate

Versus

PARVEEN KUMAR NAGPAL Defendant

Through: Mr. Pradeep Kumar, Advocate

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

ORDER

I.A.15069/2021 (under Section 151 CPC)

1. Present application has been filed by the applicant/plaintiff under Section 151 of Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') for recalling of order dated 28.10.2021 and consequently, to restore the suit to its original number as well as to restore the interim order dated 21.12.2020 passed by this Court.

2. It is averred in the present application that the present suit came up for hearing before this Court on 21.12.2020 and on the said date, summons were issued to defendant and an interim order was passed directing the parties to

maintain status-quo as to the title and possession of the suit property and the matter was directed to be listed before learned Joint Registrar on 22.01.2021 for completion of pleadings and admission/denial of documents as well as before Court on 12.04.2021. On 22.01.2021 and 06.04.2021, the matter was listed before learned Joint Registrar which was attended to by the counsel for the plaintiff. Thereafter, the matter was listed before this Court on 12.04.2021 and the same was adjourned to 09.07.2021. In the mean time, counsel for the plaintiff had filed replication on 22.03.2021 vide filing No.306172.

3. Learned counsel for plaintiff submitted that on 09.07.2021 this Court was not functioning due to Covid-19 situation and the matter was adjourned to 26.08.2021 by *en bloc* date. It is further submitted that the learned counsel for plaintiff was under impression that on 26.08.2021, the present matter shall be adjourned by *en bloc* date to 12.10.2021 and had noted the said date in her court diary. However, the matter was taken up on 26.08.2021 through video conferencing and the same was adjourned to 28.10.2021. In fact the learned counsel for the plaintiff, on 12.04.2021, had orally informed this Court that no separate rejoinder is being filed to the reply filed by the defendant to I.A. No.12366/2020 and the replication filed by the plaintiff

may be treated as rejoinder to the said reply as well. Thereafter, as per order dated 26.08.2021, the matter was directed to be listed on 28.10.2021 by this Court. However, as the counsel for the plaintiff had noted *en bloc* date 10.12.2021 given for all matters listed on 26.08.2021, therefore, she did not appear in the matter on 28.10.2021 due to wrong noting of the date. Learned counsel for the plaintiff further submitted that in fact, on the said date, i.e. 28.10.2021, she was appearing in District Court Gurugram, Haryana in another matter and, therefore, she was held-up there in the said matter till after-noon. True copies of the relevant pages of the court diary of the counsel for the plaintiff as well as true copy of order dated 28.10.2021 passed by learned ADJ District Court Gurugram, Haryana have already been filed before this Court.

4. Learned counsel for plaintiff further submitted that the valuable interest of plaintiff in the suit property will suffer irreparable loss, in case the order dated 28.10.2021 is not set-aside and the present suit is not restored to its original number. As already stated above, the non-appearance of learned counsel for the plaintiff on 26.08.2021 as well as on 28.10.2021 was due to bonafide mistake and the same was not intentional. Plaintiff came to know about the dismissal of present suit from family members on

11.11.2021 since the family members are living together in the suit property and thereafter, the present application was filed by the plaintiff.

5. To strengthen her arguments, learned counsel for applicant/plaintiff has relied upon the case of *Nitish Arora vs. State of Delhi* 2007 (141) DLT 21 and *Gotham Entertainment Group LLC & Ors. Vs. Diamond Comics Pvt. Ltd.* 2009 SCC OnLine Del 4009. Hence, restoration of suit is prayed for to advance the cause of justice.

6. On the other hand, learned counsel for non-applicant/defendant submitted that the plaintiff has invoked the inherent jurisdiction of this Court provided under Section 151 CPC for claiming the said relief, however, it is well settled that where specific provision exists in CPC for a relief, the inherent jurisdiction cannot be invoked. Accordingly, the application which has been filed under Section 151 CPC for restoration of present suit is not maintainable and the same is liable to be dismissed.

7. Learned counsel for defendant further submitted that even otherwise and without prejudice to the above, no cause what to talk of sufficient cause has been shown by the plaintiff for his non-appearance on 26.08.2021 as well as on 28.10.2021 and for his non-prosecution of the case. Plaintiff has taken the plea that on 09.07.2021, this Court was not functioning due to

Covid-19 situation, which is factually incorrect. In fact a number of cases were heard by this Court on that day. However in the present case, the matter was adjourned to 26.08.2021. Further, the plaintiff has taken the plea that the counsel for the plaintiff was under the impression that on 26.08.2021, the matter would be adjourned by *en bloc* date to 12.10.2021 which is absolutely a false and concocted story put forward by learned counsel for plaintiff to mislead this Court. It is also submitted that no affidavit has been filed by learned counsel for the plaintiff in this regard along-with the application. Even otherwise also learned counsel for plaintiff is a senior counsel practicing before this Court and is very much aware that the present suit is of the year 2020 (being filed in December, 2020) and a number of hearings had already taken place and the suit has not been adjourned as per *en bloc* dates on any previous dates. Rather the matter was heard through video conference on all the previous hearings.

8. Learned counsel for defendant further submitted that now a days, even messages (SMS messages) regarding the listing of matters are being sent by the Delhi High Court's concerned branches / listing Branch to the concerned counsels who have filed the suits / petitions etc. Thus, it cannot be believed by any stretch of imagination that the plaintiff was not aware of

the listing of present suit on 26.08.2021 as well as on 28.10.2021. Further, it has not been disputed by the plaintiff that on 09.07.2021, the matter was adjourned to 26.08.2021. Thus, the plaintiff ought to have attended the matter on the said date. The matter was shown in the cause list of 26.08.2021 and there were no remarks about any adjournment by *en bloc* dates. Therefore, the entire story put forward by learned counsel for plaintiff is false and concocted with aim to mislead this Court and to drag on the litigation which is frivolous to cause harassment to the defendant.

9. To strengthen his arguments, learned counsel for defendant has relied upon the case of *Mahboob Ali vs. Suresh Kumar Dixit* decided on 16.03.2015 by the High Court of Judicature at Allahabad, Lucknow Bench.

10. Heard learned counsel for parties and perused the judgments relied upon.

11. Regarding the objection raised by the learned counsel for defendant that the present application is filed under Section 151 CPC instead of under Order IX of CPC. However, under Section 151 of CPC, this Court has inherent power to consider an application wherein a wrong provision is mentioned. It cannot be an obstacle for granting the relief as made out from the contents of the application as held in *Gotham Entertainment (supra)*.

12. It is trite that quoting a wrong statutory provision does not create a bar and stand in the way of considering the application, as held in *Nitish Arora (supra)*. Thus, on this aspect, this Court is not convinced by the contention of learned counsel for defendant.

13. Undisputedly, the applicant/plaintiff filed the present suit for partition in which he is claiming 60% share in the suit property and recovery of Rs.86,50,000/- with interest thereon, which is subject matter of trial. However, at this stage, the claim cannot be considered as false and based on concocted story.

14. It is also not in dispute that interim order dated 21.12.2020 was passed in favour of plaintiff, thus, no such plaintiff would like to face dismissal of suit and interim order. During the present situation, matters are being adjourned *en bloc* and some matters could not be taken up due to technical glitch on the part of parties appearing through video conferencing.

15. The plaintiff was not represented on 26.08.2021 as well as on 28.10.2021, therefore, the present suit was dismissed in default. However, on 28.10.2021, the learned counsel for plaintiff attended a case before learned ADJ, District Court Gurugram, Haryana and copy of order passed in the said case is attached with the present application, due to which learned

counsel for plaintiff could not appear before this Court on 28.10.2021. In my opinion, the non-appearance on behalf of plaintiff before this Court on the said was not intentional but due to the reasons mentioned above.

16. In view of above and in the interest of justice, I hereby recall order dated 28.10.2021 and consequently, direct the Registry to restore the present suit and pending application, if any, to its original number and position subject to deposit of a cost of Rs.15,000/- by plaintiff and out of which, Rs.10,000/- shall be deposited in favour of defendant and Rs.5,000/- in favour of Delhi High Court Legal Services Committee within two weeks and receipts thereof be placed on record.

17. Consequent to above, interim order dated 21.12.2020 is also restored and shall remain in force till further orders.

18. Accordingly, the application is allowed and disposed of.

CS (OS) 441/2020 & I.A. 12366/2020 (under Order XXXIX Rules 1 & 2 r/w Section 151 CPC)

19. List on 28.02.2022 for directions.

**(SURESH KUMAR KAIT)
JUDGE**

JANUARY 3, 2022
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