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Nirmal Tower Building Occupants Welfare Society (R Vs. Nirmal Tower Building Pvt Ltd and anr

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Court : Delhi

Decided On : Feb-26-2014

Judge : Badar Durrez Ahmed

Appellant : Nirmal Tower Building Occupants Welfare Society (R

Respondent : Nirmal Tower Building Pvt Ltd and anr

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment delivered on:

26. 02.2014 FAO(OS) 111/2014 NIRMAL TOWER BUILDING OCCUPANTS WELFARE SOCIETY (REGD.) Appellant versus NIRMAL TOWER BUILDING PVT LTD & ANR Respondents Advocates who appeared in this case: For the Appellant : Mr Sudhanshu Batra, Sr. Advocate with Mr Anshuj Dhingra, Mr Anubhav Mehrotra and Mr Shailendra Singh. For the Respondents : Dr Manmohan Sharma and Mr Anurag Pratap. CORAM: HON'BLE MR JUSTICE BADAR DURREZ AHMED, ACTING CHIEF JUSTICE HON'BLE MR JUSTICE SIDDHARTH MRIDUL

JUDGMENT

BADAR DURREZ AHMED, ACJ (ORAL) CAV2062014 The learned counsel for the caveator/respondent is present. The caveat stands discharged. FAO(OS)

111/2014 and CMs 3778-3780/2014 1. The present appeal has been filed against the order dated 29.01.2014 passed by a learned Single Judge of this court whereby the appellants suit [CS(OS) No.40/2005]. has been dismissed for non-prosecution. Along with the suit the interim order dated 13.01.2005 was vacated and also the pending applications were treated as having become infructuous and as such were dismissed. The learned Single Judge has also directed that no application for restoration be entertained without the plaintiff depositing a sum of Rs.1 lakh with the Delhi High Court Legal Services Committee by way of costs. While dismissing the suit for non-prosecution the learned Single Judge placed reliance on Order XVII Rules 2 and 3 of the Code of Civil Procedure, 1908.

2. At this juncture it would be relevant to set out the provisions of the said Rules 2 and 3 of Order XVII CPC which read 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, 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. 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, the Court may, notwithstanding such default, (a) if the parties are present, proceed to decide the suit forthwith, or (b) 3. if the parties are, or any of them is, absent, proceed under rule 2.

A plain reading of Order XVII Rule 2 CPC would indicate that it would apply, in the first instance, only if parties fail to appear on the day fixed for hearing of the suit. In the present case, on 29.01.2014, when the matter was taken up by the learned Single Judge, only IAs were listed for hearing whereas the suit itself was to be

taken up for hearing before the Joint Registrar for the plaintiffs evidence. This would be evident from the order sheet of the Joint Registrar and in particular the order passed on 12.09.2013 which reads as under:

12.09.2013 Present: Mr Anubhav Mehrotra, Advocate for the Plaintiff Mr Anurag Pratap, Advocate for the Defendant CS(OS) 40/2005 No witness of the plaintiff is present nor summoned. Despite last opportunity granted on 30.01.2013, no chief affidavit has been filed on behalf of the plaintiff. Further opportunity is strongly opposed by learned counsel for the defendant. Learned counsel for the plaintiff explains that they are trying to obtain photographs which would be crucial even at this belated stage. I have also been taken through the order dated 08.08.2013 of the Honble Single Judge. In the interest of justice, subject to the cost of Rs 5,000/which shall be paid by the Plaintiff to the Defendant within for weeks, last and final opportunity is granted to the Plaintiff to file the evidence affidavit of their witnesses within four weeks. Re-list for plaintiffs evidence on 19.02.2014. September 12, 2013 4. Sd/Sh.GIRISH KATHPALIA (DHJS) Joint Registrar From the above extract it is evident that the plaintiff/appellant was directed to pay costs of Rs.5,000/- to the defendant and a last and final opportunity was granted to the plaintiff to file the evidence affidavit of its witnesses within four weeks. The matter was to be listed before the Joint Registrar on 19.02.2014 for the plaintiffs evidence. But, prior to that, by virtue of the impugned order, the learned Single Judge dismissed the suit for non-prosecution. On that date, i.e., 29.01.2014 only the applications filed by the plaintiff being IA Nos.377/2009, 10122/2012, 16381/2012 and 12499/2013 were listed for hearing. The defendants application being IA No.18566/2012 was also listed for hearing. This would be evident from the order dated 08.08.2013 passed by the learned Single Judge wherein all the said IAs were directed to be listed before court on 12.12.2013. On that date, the learned Single Judge was on leave and, therefore, the matter was renotified for 29.01.2014. It is on 29.01.2014 that the impugned order came to be passed whereby the suit was dismissed for non-prosecution.

5. As pointed out above, Order XVII Rule 2 CPC would not by itself apply inasmuch as the parties were present before the learned Single Judge on 29.01.2014. Insofar as Rule 3 of Order XVII CPC is concerned that would also

have no application because the time granted to the plaintiff to produce its evidence had not expired inasmuch as the date fixed before the Joint Registrar was 19.02.2014. Therefore, it cannot be said that the plaintiff had failed to produce his evidence by the date on which the suit was listed, i.e., 19.02.2014. Furthermore, we note that Order XVII Rule 3 gives two options to the court whenever there is default on the part of a party. Those two options are:- (a) if the parties are present, the court can proceed to decide the suit forthwith; and (b) if the parties are, or any of them is, absent, to proceed under Rule 2. The impugned order is an order of dismissal of the suit for non-prosecution. In other words the learned Single Judge did not proceed to decide the suit forthwith and, therefore, did not adopt option (a). On the other hand, the learned Single Judge dismissed the suit for nonprosecution. In other words, he decided to proceed under Rule 2 and, therefore, adopted option (b). But, that option was available to the learned Single Judge only if the parties or any of them was absent. This was also predicated on the premise that the suit ought to have been listed on that date for hearing. Since none of the conditions stipulated in Rule 3 applied, in our view, the learned Single Judge ought not to have dismissed the suit for nonprosecution. Insofar as the question of payment of costs of Rs.5,000/- is concerned as indicated in the Joint Registrars order dated 12.09.2013, the learned counsel for the appellant has paid the costs of Rs.5,000/- to the learned counsel for the defendant in court today.

6. The impugned order is set aside. The suit stands restored and so too the applications which had been disposed of on account of the suit being dismissed for non-prosecution. The parties shall appear before the learned Single Judge for consideration of the said IAs on 10.03.2014 in the first instance. Insofar as the affidavit by way of evidence is concerned, the appellant/plaintiff is given one opportunity to file the same within one week from today. For this purpose the suit shall be listed before the Joint Registrar on 06.03.2014. The appeal stands allowed as above. All the pending applications also stand disposed of. BADAR DURREZ AHMED, ACJ SIDDHARTH MRIDUL, J FEBRUARY26 2014 mk