

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

%

Date of decision: 28th October, 2013

+

RFA 447/2013 & CM No.14622/2013 (for stay).

SATPAL BUGGAL

..... Appellant

Through: Ms. Anita Kapoor, Adv.

versus

GURSHARAN BUGGAL

..... Respondent

Through: Mr. S.C. Singhal, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree (dated 25th April, 2013 of the Court of the Addl. District Judge-06, West District, Tis Hazari Courts in Civil Suit No.729/2012 filed by the respondent/plaintiff) for recovery of possession of immovable property and for recovery of *mesne* profits/damages for use and occupation from the appellant.

2. The said suit was filed by the respondent/plaintiff pleading:-

(a). that her husband Shri Subhash Buggal was the owner of the following two properties:-

(i). Property No.29-A, *ad measuring* 75 sq. yds. and comprising of three rooms situated in the colony of Om

Vihar, Uttam Nagar in Khasra No.789 and 790 of the Revenue Estate of Village Nawada, Delhi.

(ii). Shops No.6&7 built on land measuring 16 ft. x 30 ft. being part of plot No.18 of Khasra No.951 in the area of Village Navada, now known as Gulab Bagh, Block-C, Uttam Nagar, New Delhi.

- (b). that the husband of the respondent/plaintiff died on 5th November, 1997, whereafter the aforesaid properties were mutated in the Municipal records in the name of the respondent/plaintiff and the respondent/plaintiff was assessed to and paying Property Tax thereof;
- (c). that the respondent/plaintiff and her husband have been living in United Kingdom;
- (d). that the appellant/defendant is the brother of the deceased husband of the respondent/plaintiff and lives in India and was looking after the aforesaid properties;
- (e). that the appellant/defendant illegally and unlawfully represented himself to be the owner of shop No.7 aforesaid and in February, 2001 received Rs.50,000/- as *bayana* for sale

thereof to one Shri Rajender Pal; the respondent/plaintiff on coming to know thereof had to settle with the said purchaser and to pay back the said amount of Rs.50,000/- with penalty; and,

- (f). that the respondent/plaintiff came to India and visited the aforesaid properties on 5th October, 2011 and asked the appellant/defendant to vacate and handover possession thereof but which the appellant/defendant refused; a legal notice got issued to the appellant/defendant also did not serve any purpose,

accordingly, the suit for possession and for recovery of *mesne* profits/damages for use and occupation was filed.

3. Summons of the suit and notice of the application for interim relief were served on the appellant/defendant on 1st December, 2011. The appellant/defendant appeared before the learned Addl. District Judge on 12th January, 2012; even though 30 days for filing written statement had by then expired, the learned Addl. District Judge, observing that the time for filing written statement had not expired till then adjourned the suit to 14th February, 2012.

4. On 14th February, 2012 the appellant/defendant again appeared and sought adjournment. The learned Addl. District Judge finding that the appellant/defendant had been served with the summons of the suit on 1st December, 2011 and further finding that nearly 74 days had lapsed therefrom, did not find any ground for adjournment and struck off the defence of the appellant/defendant and vide interim order restrained the appellant/defendant from creating any third party interest in the properties and listed the suit next on 27th September, 2012 for the evidence of the respondent/plaintiff.

5. Though the suit was so adjourned for more than six months but the appellant/defendant did not take any steps i.e. neither challenged the order striking off his defence nor filed any application before the learned Addl. District Judge.

6. The respondent/plaintiff filed her affidavit by way of evidence on 27th September, 2012. The counsel for the appellant/defendant also appeared on that date and filed his *Vakalatnama*; still neither any application for setting aside of the order striking off of the defence was filed nor was the written statement filed. The learned Addl. District Judge adjourned the suit to 17th

December, 2012 for tendering of the affidavits by way of evidence of the respondent/plaintiff.

7. The suit was on 17th December, 2012 adjourned to 5th March, 2013. Still neither any application nor written statement was filed. The respondent/plaintiff on that date tendered her affidavit by way of examination-in-chief into evidence and even though there was no defence of the appellant/defendant but was allowed to be cross examined by the counsel for the appellant/defendant. The suit was adjourned to 17th April, 2013 for final arguments.

8. Still no steps were taken by the appellant/defendant. On 17th April, 2013 the counsel for the respondent/plaintiff addressed arguments and the suit was adjourned for pronouncement on 25th April, 2013.

9. On 25th April, 2013 the counsel for the appellant/defendant addressed arguments and vide judgment pronounced on the same day the suit of the respondent/plaintiff was decreed for recovery of possession of the two properties aforesaid as well as for recovery of *mesne* profits.

10. The appellant/defendant still did not act promptly and this appeal came up first before this Court only on 17th September, 2013 i.e. after nearly five months of the impugned judgment. Upon enquiry from the counsel for

the appellant/defendant as to what was wrong with the judgment and decree on the basis of the *ex parte* pleadings and evidence of the respondent/plaintiff, the counsel for the appellant/defendant sought adjournment. The appeal was thus adjourned to 23rd September, 2013 when further adjournment was sought by the counsel for the appellant/defendant.

11. On 1st October, 2013 the counsel for the appellant/defendant informed that the appellant/defendant had preferred CM(M) No.1044/2013 in this Court against the order of striking off of the defence of the appellant/defendant in the suit and which had been dismissed vide order dated 1st October, 2013. Notice of this appeal was issued and the Trial Court record requisitioned and subject to the appellant/defendant maintaining *status quo* possession, execution was stayed.

12. Though the notice issued to the respondent/plaintiff remains unserved but the counsel for the respondent/plaintiff has appeared and the counsels have been heard and the Trial Court record perused.

13. The counsel for the appellant/defendant has argued that the defence of the appellant/defendant was struck off for non-filing of written statement; that the law provides a maximum period of 90 days for filing the written statement and the defence could not have been struck off within the said

period of 90 days. Reliance is placed on *Rani Kusum Vs. Kanchan Devi* VI (2005) SLT 281.

14. No merit is found in the aforesaid contention and the judgment cited by the counsel for the appellant/defendant not found applicable to the facts of the present case. In the present suit, as aforesaid, though the appellant/defendant was served with the summons of the suit on 1st December, 2011 and appeared before the learned Addl. District Judge on 12th January, 2012 but did not file any written statement. By 14th February, 2012, as aforesaid, approximately 74 days had passed since the service of summons of the suit on the appellant/defendant. The appellant/defendant had also not filed any application for extension of time. Though, undoubtedly Order 8 Rule 1 provides that a defendant may be allowed to file the written statement beyond 30 days and not later than 90 days from the date of the service of the summons but for reasons to be recorded in writing. In the present case the appellant/defendant did not give any reasons whatsoever for having not been able to file the written statement inspite of nearly 74 days having elapsed since service of the summons of the suit on him. The reason for the amendment of the year 2002 to the CPC for introducing the time frame aforesaid for filing of the written statement cannot be lost sight of.

The said amendment was necessitated owing to inordinate delays in filing the written statement. If inspite of the said legislative amendment it were to be held that even in the absence of any explanation by the defendant for not filing the written statement within 30 days, the Court has no power to proceed against the defendant for not filing the written statement within 30 days prescribed therefor, the same would tantamount to inspite of non-explanation by the defendant of the cause for not filing the written statement within 30 days, the time for filing the written statement standing extended to 90 days, doing a great disservice to the legislative amendment.

15. The facts of the present case are gross. It is not as if the learned Addl. District Judge immediately after striking off of the defence of the appellant/defendant on 14th February, 2012 decreed the suit. The learned Addl. District Judge adjourned the suit by more than six months. The appellant/defendant could have within the said time made an application or filed the written statement as had happened in ***Rani Kusum*** supra. Reference in this regard may be made to ***Sada Ram Vs. DDA*** AIR 1974 Delhi 35, to ***Arya Orphanage Vs. Bimla Devi*** 118 (2005) DLT 152 and ***Harbans Singh Vs. Jasbir Singh*** MANU/PH/0645/2002 holding applications for re-calling the order striking off of the defence and permitting filing of the written

statement to be maintainable before the same Court. Even after 27th September, 2012, the suit remained pending for another approximately six months till 25th April 2013 and during which time the appellant/defendant though continued to participate in the suit but did not file the written statement. I may also mention that this Court in ***Gujrat Co-operative Oil Seeds Growers Federation Vs. Smt. Ramesh Kanta Jain*** AIR 1994 Delhi 367 (DB) and in ***International Airport Authority of India Vs. Arvind Khanna*** 59 (1995) DLT 223 (DB) has held the judgment in such a case to be an *ex-parte* one, and Order 9 Rule 13 of the CPC to be applicable. No such application also was filed.

16. Even otherwise, I am of the opinion that the appellant/defendant in this appeal cannot make grievance with respect to the order striking off his defence. The appellant/defendant, as aforesaid, took separate remedy by way of CM(M) No.1044/2013 against the said order and which already stands dismissed. Though undoubtedly the Bench dismissing the said petition has observed that it was not inclined to interfere with the order striking off defence when the decree had been passed, but that, to my mind, would not make any difference. When one Bench of this Court has already found no

merit in the challenge to the order striking off of the defence, no different view can be taken in this proceeding.

17. The scope of this appeal is thus limited to whether the decree could not have been passed in the face of the pleadings and evidence, even though *ex parte*, of the respondent/plaintiff.

18. On the aforesaid aspect, the counsel for the appellant/defendant has raised only two contentions. Firstly, it is contended that the respondent/plaintiff did not place on record the original documents of title to the two shops in her favour and thus no decree for the relief of recovery of possession at least of the shops could have been passed. Secondly, it is contended that the husband of the respondent/plaintiff had transferred the properties to the appellant/defendant.

19. As far as the first of the aforesaid arguments is concerned, the respondent/plaintiff in her affidavit by way of examination-in-chief deposed that the original documents of title of the two shops had been lost and proved the copies thereof as Ex.PW1/7 to Ex.PW1/10. The learned Addl. District Judge, when the said affidavit was tendered into evidence, finding the said documents to be photocopies, instead of exhibiting the same, put marks on the same. The appellant/defendant as aforesaid had cross examined

the respondent/plaintiff. In the said cross examination, a suggestion was given that the said shops were purchased from the sale consideration of a family property and which was denied by the respondent/plaintiff. A further suggestion was given that the said shops were in possession of one Ms. Veena and that she was the owner of the said shops. It is worth mentioning that the said Ms. Veena had applied in the suit for impleadment pleading that the husband of the respondent/plaintiff had sold the said shops to her; the said Ms. Veena is none other than the wife of another brother of husband of the respondent/plaintiff. However the said Ms. Veena chose not to pursue the said application for impleadment which was dismissed by the learned Addl. District Judge.

20. It would thus be seen that the non-filing of the original documents of title in favour of the husband of the respondent/plaintiff is immaterial in as much as the appellant/defendant by suggesting to the respondent/plaintiff in cross examination that the said shops were purchased with sale consideration of a family property and by suggesting ownership of Ms. Veena who had claimed to have acquired the property from the husband of the respondent/plaintiff, has admitted the ownership of the husband of the respondent/plaintiff of the said property.

21. As far as the second argument of the counsel for the appellant/defendant, of the husband of the respondent/plaintiff having sold the property to the appellant/defendant is concerned, the counsel for the appellant/defendant on enquiry states that there is no document of sale but there is a Will of the husband of the respondent/plaintiff in favour of the appellant/defendant.

22. Though such argument by way of defence which has been struck off cannot be considered but to satisfy the judicial conscience I have still enquired from the counsel for the appellant/defendant whether the said Will has been set up at any time since the year 1997 when the husband of the respondent/plaintiff died.

23. The counsel for the appellant/defendant is forced to admit that the same was not set up or filed at any place.

24. The counsel for the respondent/plaintiff, again to satisfy the judicial conscience of this Court, has invited attention to a letter dated 4th October, 2010 sent by the appellant/defendant to the respondent/plaintiff in his own handwriting and proved before the Trial Court as Ex.PW1/17

and where no such case is set up and which letter is written treating the respondent/plaintiff as the owner of the properties.

25. The counsel for the appellant/defendant has no explanation therefor.

26. The counsel for the appellant/defendant has also argued that the husband of the respondent/plaintiff, besides the respondent/plaintiff has left other heirs also and the respondent/plaintiff alone as heir of her husband could not have filed the suit for recovery of possession of the properties belonging to her husband.

27. Again, though it is a matter of defence which stands struck off and thus cannot be considered, but the position in law as succinctly summarized by the Full Bench of Patna High Court in *Sharfuddin Vs. Bibi Khatija* AIR 1988 Pat. 58 is that a suit for recovery of possession against an unauthorized occupant/trespasser can be filed by one of the owners /co-sharers also, without the necessity of bringing the other co-owners either as co-plaintiff or defendants.

28. There is thus no merit in the appeal which is dismissed. The appeal having been disposed of expeditiously, no order as to costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

OCTOBER 28, 2013

pp