

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

Date of decision: 25th September, 2013

+ **RFA 722/2010**

DAVINDER NATH LOHTIA

..... Appellant

Through: Mr. Gaurav Malhotra and Ms.
Gaganpreet Chawla, Advocates.

Versus

JAGJIT SINGH BAJAJ & ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This first appeal under Section 96 of the Civil Procedure Code (CPC), 1908 seeks setting aside of the judgment and decree dated 9th September, 2010 of the Court of Additional District Judge (ADJ) (17, Central), Delhi in Suit No.241/2009.

2. Notice of the appeal was issued. The appellant failed to serve the respondents No.4, 8 & 9 inspite of repeated opportunities. None appeared on behalf of the appellant on 27th July, 2012 and on 17th August, 2012. In the circumstances, the appeal was dismissed in default. Application for restoration was filed by the appellant and which was allowed vide order dated 4th July, 2013, subject to payment of costs to the Delhi High Court Bar

Association Lawyer's Social Security and Welfare Fund, which is stated to have been deposited, and the matter posted for today for service of the respondents No.8 & 9. The respondents No.8 & 9 remain unserved with the report of both of them being not available at the address given by the appellant. On the last date i.e. 4th July, 2013, it was made clear that if the appellant does not serve the respondents No.8 & 9, the appeal insofar as against them shall be dismissed for non-prosecution.

3. As such it was enquired from the counsel for the appellant today as to why the appeal insofar as the respondents No.8 & 9, be not dismissed for non-prosecution. The counsel for the appellant appearing in the morning sought adjournment stating that she was not the 'main counsel'. In the circumstances, the matter was passed over till post lunch to enable the 'main counsel' to appear.

4. Mr. Gaurav Malhotra, Advocate for the appellant appears.

5. In the interregnum aforesaid, while going through the file, it was realized that the suit from which this appeal arises was filed by the respondent No.1 Sh. Jagjit Singh Bajaj against the respondent No.2 Sh. Virender Khatri, the respondents No.4 to 9 and the appellant, for declaration with respect to his rights in property No.66 admeasuring 640 sq. yds.,

Banarsi Dass Estate, Civil Lines, Delhi and for mandatory and permanent injunctions. The appellant, who is informed to have been the defendant No.2 in the suit, the counsel states had filed a written statement pleading, (i) that the respondent No.4 Sh. Anil Aggarwal and the respondent No.9 Sh. Ankur Aggarwal had approached the appellant for loan of Rs.15 lakhs and which the appellant had agreed to give on the security of the Sale Deed of the aforesaid property executed by the respondent No.4 Sh. Anil Aggarwal in favour of the respondent No.9 Sh. Ankur Aggarwal and on the security of possession of a portion of the said property till repayment of the said loan; (ii) that though in pursuance to the said loan against mortgage with possession, the appellant was put into possession of a portion of the property but was dispossessed therefrom by the respondent No.2 Sh. Virender Khatri and proceedings under Section 145 of the Criminal Procedure Code were instituted and thereafter the suit aforesaid was filed by the respondent No.1 Sh. Jagjit Singh Bajaj claiming rights in the property.

6. The suit, from which this appeal arises, was referred to mediation. The counsel for the appellant states that the appellant did not come to know of mediation. In the mediation, a Settlement Agreement in the form of Memorandum of Understanding dated 4th September, 2010 was signed

between the respondent No.1 Sh. Jagjit Singh Bajaj (plaintiff in the suit) and respondent No.2 Sh. Virender Khatri (defendant No.1 in the suit) wherein Sh. Virender Khatri *inter alia* admitted the rights of respondent No.1 Sh. Jagjit Singh Bajaj in the said property. Upon the said Settlement Agreement coming before the Court of the ADJ before whom the suit was pending, the counsel for the plaintiff therein Sh. Jagjit Singh Bajaj withdrew the suit insofar as against the defendants other than the respondent No.2 Sh. Virender Khatri i.e. against the respondents No.3 to 9 and the appellant herein and the suit was decreed as per the compromise aforesaid between the respondent No.1 and the respondent No.2.

7. It has as such been enquired from the counsel for the appellant as to what can be the grievance of the appellant against the decree, which insofar as the appellant is concerned, is, of withdrawal of the suit against the appellant.

8. The counsel for the appellant states that the suit could not have been compromised between the respondent No.1/plaintiff and the respondent No.2/defendant No.1 without the consent of the other defendants i.e. the respondents No.3 to 9 and the appellant herein. However, upon being asked to show as to which provision of law bars such a compromise between the

plaintiff and one of the defendants, especially when the suit insofar as against the other defendants is being sought to be withdrawn, he is unable to show any.

9. In my opinion, there is no bar to such a compromise particularly when the rights of the appellant/defendant No.2 are not affected thereby.

10. Though the counsel for the appellant has faintly stated that the respondent No.1/plaintiff, by the decree aforesaid, has been declared as the owner of the property but I do not find any such decree of declaration to have been passed by the learned ADJ. The decree passed, is as per the compromise between the respondent No.1/plaintiff and the respondent No.2/defendant No.1 and which is not found to affect the rights of the appellant/defendant No.2.

11. Even otherwise, the rights claimed by the appellant in the property are only as a mortgagee and not as an *owner*. The said rights as a mortgagee remain unaffected in law by any dealing of the property inasmuch as a mortgage attaches itself to the property, in whomever's hands the property may be or passes. Upon it being pointed out to the counsel for the appellant that by wrongly pursuing this appeal for the last three years, he may have made other claims against the respondents No.4 & 9 alleged to be

mortgagors of the appellant, the counsel for the appellant states that the appellant has in fact filed a suit for recovery of money against the respondent No.9 Sh. Ankur Aggarwal.

12. The suit could have been filed by the respondent No.1 only against the respondent No.2 Sh. Virender Khatri even behind the back of the appellant. Merely because the appellant was impleaded as a party to the suit, would not disable the respondents No.1 & 2 from compromising the suit amongst themselves, when the suit insofar as against the appellant was withdrawn and the compromise was not made binding on the appellant.

13. The appeal is therefore thoroughly misconceived and is dismissed. Though the appellant has taken sufficient time of the Court in pursuing a misconceived appeal, I refrain from imposing any costs on the appellant.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 25, 2013
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