

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

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Date of decision: 30th July, 2013

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RFA 65/2013 & CM No.1718/2013 (for stay).

BASANTI BOSE

..... Appellant

Through: Ms. Anisha Upadhyay, Adv.

versus

S.K.BOSE

..... Respondent

Through: Mr. Arjun Mitra, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The Trial Court record has been received.
2. Though the appeal has not been formally admitted for hearing as yet but considering the nature of the controversy, with the consent of the counsels the appeal has been finally heard.
3. The appeal impugns the judgment and decree dated 14th September, 2012 of the Court of Addl. District Judge-03, South District, Saket Courts, New Delhi of dismissal of suit No.185/2010 filed by the appellant/plaintiff for the reason of the appellant/plaintiff, inspite of onus of the main issue being on her having not led any evidence inspite of several opportunities.
4. Thus the scope of the present appeal is confined to whether the learned Addl. District Judge was justified in so closing the evidence of the appellant/plaintiff.

5. A perusal of the Trial Court record shows that the suit from which this appeal arises was filed by the appellant/plaintiff for possession of ground floor of property No.B-296, Chittaranjan Park, New Delhi and for recovery of *mesne* profits @ 15,000/- per month and for injunction restraining the respondent/defendant from dealing with the said property. Issues were framed in the suit on 14th November, 2011 and the suit posted for evidence of the appellant/plaintiff on 17th December, 2011, 21st January, 2012 and 28th January, 2012. The appellant/plaintiff was directed to provide advance copy of the affidavits by way of examination-in-chief and list of witnesses to the respondent/defendant at least three weeks before the first of the said dates.

6. Neither was any list of witnesses filed nor any affidavits by way of examination-in-chief filed or tendered. Accordingly when the suit was listed on 17th December, 2011 it was adjourned to 21st January, 2012 subject to costs of Rs.2,000/-.

7. Though the counsel for the appellant/plaintiff has argued that the affidavits were not filed owing to mediation which had then been commenced in a criminal complaint filed by the respondent/defendant against the appellant/plaintiff but a perusal of the order dated 17th December, 2011 does not show the said ground to have been taken at the contemporaneous time.

8. No list of witnesses or affidavits by way of examination-in-chief were filed by 21st January, 2012 also. On that date adjournment was sought on behalf of the appellant/plaintiff on the ground that an application for

clubbing the suit from which this appeal arises with a suit filed by the respondent/defendant against the appellant/plaintiff with respect to the same property was intended to be filed.

9. On enquiry, it is informed that the other suit has been filed by the respondent/defendant against the appellant/plaintiff for cancellation of the Sale Deed of the said ground floor executed by the respondent/defendant in favour of the appellant/plaintiff and the said suit was subsequently transferred to the Court of the Addl. District Judge before which the suit from this appeal arises was pending.

10. Be that as it may, the learned Addl. District Judge on 21st January, 2012 adjourned the matter to the next scheduled date of 28th January, 2012. On that date also the position remained the same; even the costs of ₹2,000/- imposed earlier had not been paid. The suit was thereafter adjourned to 21st February, 2012 and 30th March, 2012 for further proceedings.

11. On 30th March, 2012 again the suit was posted for appellant/plaintiff's evidence on 18th May, 2012 and 19th May, 2012 subject to providing advance copies of the affidavits by way of examination-in-chief, list of witnesses and payment of costs of ₹2,000/- at least 15 days before the date fixed.

12. Neither of the said conditions was complied with; however on 18th May, 2012 costs of ₹2,000/- was paid and the suit adjourned to the next scheduled date of 19th May, 2012. On 19th May, 2012 though no steps towards leading evidence had been taken but an application under Order 39

Rule 2A of the CPC was filed. Yet another opportunity was given to the appellant/plaintiff to file list of witnesses and affidavits by way of examination-in-chief and the suit posted for appellant/plaintiff's evidence on 21st July, 2012. The appellant/plaintiff having remained in default, another opportunity subject to payment of cost of ₹5,000/- was given and the suit posted for 14th September, 2012.

13. On 14th September, 2012 since the appellant/plaintiff was still in default and even the cost of ₹5,000/- had not been paid, the learned Addl. District Judge vide a detailed order noticing all the aforesaid, closed the evidence of the appellant/plaintiff and resultantly vide judgment of the same date dismissed the suit.

14. The counsel for the appellant/plaintiff has cited the reasons, of old age of the appellant/plaintiff and ill health of her husband and the negligence of the counsel. However the counsel for the respondent/defendant is correct in contending that the conduct of the appellant/plaintiff has been of negligence throughout.

15. I find the learned Addl. District Judge to have given sufficient opportunity to the appellant/plaintiff and to have for cogent reasons closed the evidence of the appellant/plaintiff. The Supreme Court has been directing the Trial Courts to not grant adjournments liberally and a proposal for imposition of fine on the Trial Court Judges personally for granting repeated adjournments is being mooted. Recently in ***Gurnaib Singh Vs. State of Punjab*** MANU/SC/0576/2013, though in the context of criminal trials, it was held that a Trial Judge cannot be a mute spectator to the trial

being controlled by the parties for it is his primary duty to monitor the trial. In the light thereof, this Court cannot find fault with the reasoning given by the learned Addl. District Judge.

16. However what persuades me to still grant an opportunity to the appellant/plaintiff is the nature of the suit from which this appeal arises. The suit is with respect to a valuable immovable property. Not only so, I am of the view that the respondent/defendant will not suffer as much prejudice inspite of the delay and negligence aforesaid of the appellant/plaintiff since the other suit filed by the respondent/defendant is informed to be still pending consideration. Rather the two suits I am told were ordered to be tried together. It is thus felt that the claim of the appellant/plaintiff in her suit be also adjudicated while adjudicating the claim of the respondent/defendant in the suit filed by him against the appellant/plaintiff.

17. Thus the impugned judgment of dismissal of the suit is set aside but subject to the following conditions:-

- (a). The appellant/plaintiff shall within two weeks of today pay costs of this appeal of ₹50,000/- together with earlier costs of ₹5,000/- aforesaid to the counsel for the respondent/defendant.
- (b). The appellant/plaintiff shall hereafter not commit even a single default at any stage in the suit and if the appellant/plaintiff does so, the learned Addl. District Judge shall be entitled to pass appropriate order in that regard.

(c). The appellant/plaintiff filing the list of witnesses within two weeks and filing the affidavits by way of examination-in-chief of all the said witnesses excepting official witnesses required to be summoned within the said time of two weeks.

18. It is made clear that if any of the aforesaid conditions is not met/satisfied, the appeal shall be deemed to be dismissed.

19. The appeal is allowed on aforesaid terms.

20. The suit filed by the respondent/defendant against the appellant/plaintiff is stated to be listed on 29th October, 2013. The parties to appear before the Trial Court on the said date in this suit as well. The Trial Court record which was requisitioned to this Court, be returned forthwith.

RAJIV SAHAI ENDLAW, J

JULY 30, 2013

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