

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

+ **FAO 280/2008 & RFA 267/2008**

% 16th May, 2014

1. **FAO No. 280/2008**

LALITA KHURANA Appellant

Through: None

Versus

HARISH KUMAR KHURANA & ORS. Respondents

Through: Mr. Ali Mirza, Mr. Kulish Tanwar,
Advocates.

2. **RFA No. 267/2008**

LALITA KHURANA Appellant

Through: None

Versus

HARISH KUMAR KHURANA & ORS. Respondents

Through: Mr. Ali Mirza, Mr. Kulish Tanwar,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. On 8.5.2014 though this Court was not inclined to grant an adjournment, yet on the request of the counsel for the appellant this case was

listed for today, making it clear at the same time that no further adjournment

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shall be granted. Today, in my opinion, as a strategy on behalf of the appellant, one Mr. Sanjay Kumar, who claims to be a relative of the appellant appears and says that the appellant wants to change her counsel, and therefore, an adjournment is sought. There is however no application by the counsel for the appellant to seek discharge and nor is the counsel personally present for seeking discharge. Learned counsel for the respondents on the other hand very vehemently opposes the adjournment, and accordingly, I decline the request for adjournment. I have heard the counsel for the respondents, perused the record and am proceeding to decide these appeals. It is also noted here that FAO No. 280/2008 & RFA No. 267/2008 are connected appeals. FAO No. 280/2008 is filed against the impugned judgment dated 10.3.2008 dismissing the application under Order 9 Rule 13 CPC filed by the appellant for setting aside the judgment and decree dated 13.7.2007. RFA No. 267/2008 is filed against the ex parte judgment and decree dated 13.7.2007 by which the suit filed by the respondents/plaintiffs was decreed under Order 8 (10) CPC.

2. Let us first turn to the facts of the case. Disputes pertain to the property bearing no. 31/25, West Patel Nagar, New Delhi and which property was owned by the father of the respondents/plaintiffs, one Sh.

Khem Chand Khurana. In favour of Sh. Khem Chand Khurana, the government had executed a lease deed of the suit property, and consequently, there is no doubt as held by the trial court that the deceased Sh. Khem Chand Khurana was the owner of the suit property and after his death the respondents/plaintiffs became owners of the suit property. The subject suit for possession was filed against the appellant/defendant, and who is the widow of late Sh. Ashok Kumar Khurana who was the son of late Sh. Khem Chand Khurana. Possession was sought from the appellant/defendant of one room, open space, kitchen, latrine and bath room as shown in red in the site plan filed with the plaint. Respondents/plaintiffs pleaded that Sh. Ashok Kumar Khurana committed suicide in the year 1994 on account of matrimonial disputes. Sh. Ashok Kumar Khurana being a son was allowed by late Sh. Khem Chand Khurana to occupy the portion which is presently in possession of the appellant/defendant. Since the appellant/defendant failed to vacate the suit property she was served with the legal notice dated 14.10.1997 to vacate the suit property. The appellant in response alleged that the suit property was ancestral property and claimed 1/5th share in the same. Trial court also notes that there were disputes between the appellant and late Sh. Khem Chand Khurana during the latter's life time.

3. Appellant/defendant appeared in the suit but failed to contest the same. Appellant/defendant was served for 17.5.2007 and she personally appeared in the court on 18.5.2007. Case was adjourned for filing of the written statement and the reply to the injunction application, but, on the date fixed neither the appellant/defendant nor any authorised advocate on her behalf appeared and consequently the court below in exercise of powers under Order 8 Rule 10 CPC though has decreed the suit for possession it has however declined the relief of damages as claimed by the respondents/plaintiffs. The court below notices that the appellant/defendant instead of filing her written statement, sought to file an affidavit along with documents claiming that she had sold her 1/5th right for the same property to one Smt. Aditi Madan and which could not be done till the appellant/defendant proved that she in fact had a right in the suit property. The court below has also referred to the registered Will dated 16.5.1996 executed by late Sh. Khem Chand Khurana in favour of the respondents/plaintiffs. Late Sh. Khem Chand Khurana had various litigations with the appellant during his life time and consequently the appellant/daughter-in-law was disinherited. The trial court therefore found the present to be a fit case for exercise of powers under Order 8 Rule 10 CPC and accordingly the suit was decreed and to which I completely agree.

4. I note that if the appellant has sold rights in the disputed property by means of agreement to sell dated 1.5.2007, then it is not understood that how is she still continuing to litigate and the so called purchaser Smt. Aditi Madan has not contested the case by getting herself substituted for the appellant. In my opinion, the object of the appellant in this regard is basically to complicate the matter and delay and defeat the rights of the respondents/plaintiffs with respect to entitlement of possession of the portions which are with the appellant in the suit property bearing no. 31/25, West Patel Nagar, New Delhi.

5. So far as the issue of whether appellant/defendant has shown sufficient cause for setting aside the ex parte judgment and decree for which an application was moved under Order 9 Rule 13 CPC is concerned, the court below has held that there is no sufficient cause and this is so stated in paras 6, 6 (repeated) and 7 of the impugned order dated 10.3.2008:

“6. A perusal of the record shows that summons for settlement of issues were served on the defendant on 17.5.07 for 18.5.07. she had also appeared in the Court on 18.5.07 and her signatures on the order sheet were taken by my Id. predecessor. Therefore, it is not a case of non-service of the defendant. On 18.5.07 she sought adjournment to engage a counsel. Considering her prayer, the case was adjourned by my Id. Predecessor to 5.7.07 for filing the written statement and reply. In the meantime she was restrained from creating any third party interest in the property. On 5.7.2007 Shri V P.Gulati, Adv. Appeared for the

defendant but neither the Vakalatnama nor any written statement was filed. No application was filed but a Passover was prayed which was allowed and at second call application for grant of further time was moved on behalf of the defendant to file written statement as on that date also it was submitted that the defendant has engaged the counsel recently but filed the Memo of Appearance and, therefore, further time was required for filing Vakalatnama and written statement and on written request the case was once again adjourned for filing written statement and reply on 13.7.07. Interim order was to continue.

6. However, on 13.7.07 neither Vakalatnama nor written statement was filed but one proxy counsel appeared on behalf of the defendant who filed affidavit alongwith photocopies of some documents and stated that senior counsel was out of station and documents be taken on record. The documents were allowed to be taken on record. But Id. Counsel for the respondent/DH submitted that since no written was filed on behalf of the defendant the defence of the defendant be struck off and she be proceeded ex parte. The case was kept pending but thereafter there was no response from the defendant either at 1.05 PM. or at 2.20 P.M. Therefore, the defendant was proceeded ex parte. Id. Counsel for the plaintiff, however, submitted that the documents filed on behalf of the defendant cannot be considered in view of Section 54 of the Transfer of Property Act. The sale deed was not complete by merely executing the agreement to sell and otherwise also the documents appear to be forged and cannot be relied. Id. Counsel for the plaintiff submitted that the plaintiff was entitled to for a decree under Order 8 Rule 10 CPC and after hearing the submissions and going through material on record. The suit was decreed vide judgment and decree dated 13.7.2007.

7. As per provisions of Order 8 Rule 1 CPC, after service of summons the defendant is required to file the written statement within 30 days from the date of service but no written statement was filed by the defendants. Adjournments were granted to the defendant upto 13.7.07 but till that day no Vakalatnama was filed on behalf of the defendant and the defendant also failed to

file written statement despite repeated opportunities and on 13.7.07 no authorized person was present on behalf of the defendant. From the date of service upto 13.7.07 a period of two months and 26 days had expired but defendant had failed to file written statement and reply. Since, no authorized person was present on behalf of the defendant on 13.7.2007 the defendant was liable to be proceeded ex parte and the plaintiff was also entitled for decree under Order 8 Rule 10 CPC which was granted in favour of the plaintiff. The applicant, has not made any complaint against previous counsel, nor she had disclosed who had applied for certified copy and who had collected the certified copies of judgment and decree for her and, therefore, there appears no bonafide on behalf of the applicant. The record also shows that the application for supply of certified copies was applied on behalf of the applicant/defendant on 8.8.07 and the certified copies were ready for collection on 10.8.07 but were collected on behalf of the defendant only on 20.8.07 due to reason best known to the defendant or her counsel, and even thereafter the application has been moved on 14.09.2007 beyond the prescribed period of limitation of 30 days. It cannot be said that the applicant was not aware of the proceedings. She has failed to disclose any sufficient cause which prevented her from appearing in the Court. No reason has been given why the written statement and reply was not filed despite repeated opportunities and in my considered view the defendant had knowledge of the date yet she did not intentionally appear in the Court on 13.7.2007 when the judgment and decree was passed. The authorities relied by DH/plaintiff are fully applicable. Application has no merit, the same is accordingly dismissed. Case file be consigned to R.R.”

6. I completely agree with the conclusions given in the aforesaid paras as per which the trial court has dismissed the application under Order 9 Rule 13 CPC inasmuch as the appellant/defendant was admittedly served on 17.5.2007 for 18.5.2007 and she personally appeared on 18.5.2007 and
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sought an adjournment to engage a counsel. Time for this was granted and the case was fixed for 5.7.2007 and on which date Sh. V.P. Gulati, Advocate appeared, but did not file the written statement and did not even file his Vakalatnama. Case was therefore adjourned to 13.7.2007 but even on 13.7.2007 neither any written statement nor any Vakalatnama was filed. The case was firstly kept pending upto 1.05 P.M. and thereafter after lunch at 2.20 P.M the appellant/defendant was proceeded ex parte. Trial court also notes that appellant/defendant was always aware of the case, and therefore, the application under Order 9 Rule 13 CPC which has been moved on 14.9.2007 much beyond the prescribed period of limitation of 30 days from the 13.7.2007, is time barred.

7. In view of the above, I do not find any merit in any of the appeals and the trial court has rightly decreed the suit under Order 8 Rule 10 CPC and the application under Order 9 Rule 13 CPC inasmuch as actually appellant/defendant is resorting to strategies to delay and defeat the case of the respondents. The implementation of strategies by the appellant has continued even before this Court not only directly but also through counsels because the counsels in fact appeared on 8.5.2014 and sought for an adjournment which was granted for today making it clear that no further

adjournment shall be granted in view of the facts of the present case, but in spite of the same, no Advocate appears for the appellant although no discharge is sought by the existing Advocate who was hence bound to appear in the appeals.

8. In view of the above, the appeals are dismissed, leaving the parties to bear their own costs.

MAY 16, 2014
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VALMIKI J. MEHTA, J