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

+ **Date of Decision: 24.09.2015**

% **RSA 166/2014**

SHRI KALLU MAL

..... Appellant

Through: Mr. Pallav Saxena & Mr. Kamal
Kishore, Advocates.

versus

SHRI BABU RAM & ORS

..... Respondents

Through: Mr. K.K. Malhotra & Mr. Tarun
Kumar, Advocate for respondent
No.1.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

C.M. No.11282/2014

1. By this application, the appellant seeks leave to dispense of the service of respondents No.2 to 11 on the ground that they have no interest in the proceedings, and the respondent No.1, who is in possession of the *Chabutara* in question in front of Shop No.451, Khari Baoli, Delhi, was the only contesting party before the First Appellate Court.
2. Without prejudice to the rights & contentions of the respondents No.2 to 11, their service is dispensed with. It is made clear that their rights shall not be affected on account of pendency of this matter.
3. The application stands disposed of.

C.M. No.11281/2014

4. By this application, the appellant seeks condonation of 2249 days delay in filing the present second appeal.

5. The present second appeal has been preferred to assail the judgment and decree dated 29.03.2008 passed by the learned Additional District Judge, Karkardooma Courts, Delhi in RCA No.01/2007 titled *Kallu Mal Vs. Rameshwar Dayal through LRs*.

6. The case of the appellant is that the appellant had filed the suit in question, i.e. Suit No.419/1977 to seek the reliefs of mandatory and prohibitory injunction against Sh. Rameshwar Dayal. The said suit had been preferred on the premise that the appellant/ plaintiff was a tenant in premises bearing Municipal Nos. 449, 450, 451 & 452 situated at Khari Baoli, Delhi since more than 50 years ago. In fact, the premises was taken on rent by the predecessor-in-interest of the appellant/ plaintiff and the said tenancy devolved upon the plaintiff. The plaintiff has stated that he is carrying on business under the name and style of *Chiranjilal Peshimal* in the shop No.450 and under the name and style of *Daulat Ram Jhammanlal* in Shop No.449. Shop No.452 is in possession of *Rajaram Madanlal* – a firm, inducted by Lala Jhamman Lal in or about 1947.

7. The plaintiff stated that there is a *Chabutara* – 9 feet wide covered with tin shed in front of premises No.449 to 452. This *Chabutara* belongs to the Municipal Corporation of Delhi (MCD). The plaintiff stated that he had been paying *Tehbazari* to the Corporation for the said *Chabutara*. The plaintiff also claimed that every shop in Khari Baoli has such a *Chabutara* in its front, which is in possession of the persons carrying on business in the

said shop. The *Chabutara* in front of premises No.449-452 was stated to be measuring 9 feet × 22 feet 2 inches. The plaintiff stated that the portion of the *Chabutara* lying in front of premises No.449-450 is used by the respective firms carrying on business in the said shop and the remaining portion of the *Chabutara* lying in front of the staircase leading to premises bearing No.451 (which is on the first floor) is used as passage to the said premises.

8. The original defendant was stated to be a relative of one Lala Bholanath, who was one of the partners of the firm *Chiranjilal Peshimal*. The plaintiff averred that the defendant had recently occupied the portion of the open *Chabutara* lying in front of Shop premises bearing Nos.450-451 and started his business of *Gur, Shakkar and Bhura*, etc. without the consent of the plaintiff. The plaintiff stated that the defendant with a view to encroach upon the open *Chabutara* had fixed a shutter on the portion in front of the premises No.451 and to raise a wall so as to completely enclose the portion in front of the premises No.451, Khari Baoli, Delhi. The plaintiff stated that the defendant had no right or interest in the *Chabutara* in question, which was claimed to be in possession of the plaintiff on the basis of *Tehbazari* rights.

9. The reliefs sought in the suit were as follows:

- “a) That a decree for Mandatory injunction be passed against the defendants directing him to remove his goods from chabutra in front of the premises No.450-451 and also to remove the shutter fixed by him as on the said portion,*
- b) A decree for permanent injunction be passed against the defendant restraining him from encroaching upon any portion of the chabutra lying in front of the portion No.449-451 Khari*

Baoli, Delhi, and from raising any construction of any nature on the said chabutra”

10. The defendant Rameshwar Dayal contested the suit claiming *Tehbazari* rights on the *Chabutara* opposite Shop No.451, who also stated that he has been carrying on the business since 1947. The matter went to trial.

11. The Trial Court dismissed the suit vide judgment dated 16.07.1985. Since the plaintiff claimed to have been in possession and also stated that the defendant had come in unauthorized occupation of the *Chabutara*, while deciding issues No.3 & 4, namely whether the plaintiff is entitled to mandatory as well as perpetual injunction; and whether the suit is not maintainable as claimed by the defendant, the Trial Court held that the plaintiff should have filed a suit for possession and not for injunction. Such a suit would not lie against a trespasser. The Trial Court also returned a finding that the defendant was doing his business on the *Chabutara* since 1949. The statement made by the plaintiff himself during the course of trial on 26.09.1978 was contradictory to the plea taken by him in paragraph 9.

12. While dealing with issue No.1, namely whether the plaintiff was entitled to the *Chabutara*, the Trial Court held that the defendant had also placed on record the receipts Exhibits D-1, D-2 and D-3, which showed that he was depositing *Tehbazari* in respect of *Chabutara* in front of Shop Nos.449-450 from 01.07.1976 to 03.12.1977. The plaintiff had also admitted in his cross-examination that the defendant had been doing his business since childhood. The Trial Court, *inter alia*, observed as follows:

“In view of the admission of the pltf. in his cross examination, as mentioned above, and in view of the latest document filed by

deft., it is clear that deft. is in possession of the suit premises. Admittedly the chhabutra belongs to MCD to whom tehbazari is paid by respective persons, though chhabutra falls in front of shop of pltf. yet the possession of the same cannot be given when the defendant is in possession of chhabutra for the last several years. In the plaint the pltf. has stated in para No.6 that deft. recently occupied the chhabutra without his consent but in his cross examination he has stated that deft. is in possession of chhabutra since childhood.”

13. Thus, the plaintiff’s suit was dismissed.

14. The plaintiff preferred the first appeal, which too was dismissed by the First Appellate Court vide judgment dated 29.03.2008. It is this judgment and decree, which is sought to be assailed in the present second appeal.

15. The case of the appellant is that after the First Appellate Court dismissed the appeal, in view of the finding recorded by the two Courts that the correct relief for the plaintiff to claim was that of possession – and not of mandatory and prohibitory injunction, the plaintiff/ appellant preferred a fresh suit on 23.05.2008 without any delay. However, this suit has been dismissed by the Trial Court on 26.02.2014 on the premise that the relief of possession is barred by Order II Rule 2 – the said relief not having been claimed at the time of filing of the first suit, namely Suit No.419/1977.

16. The appellant submits that he was misled into filing the suit for possession, as the suit for prohibitory and mandatory injunction was the correct remedy availed of by the appellant. In these circumstances, the appellant wishes to pursue his further remedy of a second appeal to assail the appellate judgment and decree dated 29.03.2008.

17. Learned counsel submits that the intention of the appellant has never

been to give up his rights and remedies. The appellant has been pursuing his remedy on the basis of legal advice, firstly, by filing the suit for prohibitory and mandatory injunction, and thereafter, preferring the first appeal against the dismissal of the said suit on 16.07.1985. Only after the first appeal was dismissed on 29.03.2008, the plaintiff, on legal advice, filed a fresh suit. However, on its dismissal as barred under Order II Rule 2 CPC, the plaintiff has been advised that the correct remedy is to prefer the present second appeal to assail the first appellate judgment and decree dated 29.03.2008.

18. Learned counsel for the appellant has submitted that the remedy of possession was not the correct remedy for the plaintiff to pursue, because the plaintiff has no title over the *Chabutara*. It was merely a license granted by the MCD as the MCD is the owner of the *Chabutara*. Thus, the relief of possession could not have been claimed, under any circumstances.

19. Learned counsel submits that the real grievance of the appellant was that the respondent – who may have held *Tehbazari* rights in respect of the *Chabutara* opposite premises No.451, has encroached on the *Chabutara* such that the ingress and egress of the appellant to his first floor premises bearing No.451 through the staircase is obstructed and the plaintiff/appellant is entitled to protection of his easementary rights. Learned counsel submits that the said wrong of obstruction of the easementary rights is a continuing wrong.

20. On the other hand, learned counsel for the respondent submits that the plaintiff/ appellant based the first suit on a wrong premise, namely that he was in possession of the *Chabutara* as *Tehbazari* holder. It was also based on the wrong premise that Sh. Rameshwar Dayal had encroached upon the

Chabutara only some time before the filing of the suit when, in fact, he was holding *Tehbazari* rights in the *Chabutara* opposite premises No.451 and he was running his business since 1949.

21. Learned counsel further submits that even after the dismissal of the second appeal on 26.06.2014, the appellant waited for over three months to prefer the present second appeal with the present application. Learned counsel submits that mere receipt of a wrong legal advice with regard to an appropriate remedy to be preferred cannot be a reason to seek condonation of delay.

22. It cannot be said that there was no reason for the appellant to prefer the second suit being Suit No.1809/2008 in the year 2008. Since two Courts had held that the plaintiff should have sought the relief of possession and not a mandatory & prohibitory injunction in view of the frame of the suit, the plaintiff appears to have acted bona fide in filing the second suit, as aforesaid, instead of preferring the present second appeal. The plea of the appellant that only upon dismissal of the second suit on 26.02.2014, the appellant, upon further consideration, concluded that the correct remedy that he should avail of is to file the present second appeal, also appears to be bona fide. The appellant has not been complacent in pursuing his rights and remedies. He has continuously been agitating against the respondent's use and occupation of the *Chabutara* opposite premises No.451.

23. In these circumstances, I am inclined to condone the delay. It is well-settled that it is not the period or length of the delay which is material; it is the sufficiency of reasons given to explain the delay, which has to be gone into and it should appear to the Court that the party concerned has acted

bona fide and has not given up his rights & remedies. In the present case, it certainly cannot be said that the appellant has evinced his intention not to pursue his remedies or to give up his rights. He has been pursuing one or the other remedy continuously.

24. Accordingly, the present application is allowed and the delay in filing the second appeal is condoned.

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25. I have already noted the relevant aspects in the order passed in the aforesaid application seeking condonation of delay. It is evident that the plaintiff invited the dismissal of his suit and the first appeal as they was premised on the plea that the plaintiff was in possession of the *Chabutara* opposite premises Nos.449-452, including premises No.451 as a *Tehbazari* holder, and on the premise that the defendant had recently come to occupy the *Chabutara* opposite premises No.451 illegally. The fact of the matter was that the defendant was also holding *Tehbazari* and had been using the *Chabutara* opposite premises No.451 since 1949. Since the plea of the appellant/ plaintiff was that he was earlier in possession of the *Chabutara*, the Trial Court and the First Appellate Court held that he should seek the relief of possession, and not merely an injunction as the respondent/ defendant was claimed to be a trespasser – which he was not. The relief of mandatory and prohibitory injunction was also denied to the appellant/ plaintiff on the premise that the respondent/ defendant had *Tehbazari* rights in the *Chabutara*. Thus, there can be no valid grievance qua the dismissal of the suit and the first appeal preferred by the appellant/ plaintiff.

26. At the same time, the grievance articulated by the appellant/ plaintiff

to access premises No.451 has not been articulated in the plaint. Consequently, no issue on that aspect was claimed, and none has been ruled upon. The said wrong, if existing, would be a continuing wrong and the appellant/ plaintiff is, therefore, not precluded from preferring an independent suit in that respect. The plaintiff has suffered on account of his overstating his case, and not articulating his grievance with regard to obstruction and breach of his easementary rights, in the suit in question.

27. Accordingly, the appeal is disposed of, while leaving it open to the appellant/ plaintiff to prefer such other remedy as may be available to him in law to ventilate his aforesaid articulated grievance. At the same time, it is made clear that this Court has not ruled on the legitimacy of the grievance urged by the appellant/ plaintiff before this Court with regard to infraction of his easementary rights, and if the said issue is agitated, it shall be for the concerned Court to deal with the same on merits.

28. The appeal stands disposed of in the aforesaid terms.

VIPIN SANGHI, J

SEPTEMBER 24, 2015

B.S. Rohella