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

+ RSA 71/2016

MOHAN RAM

..... Appellant

Through : Mr.Swastik Singh, Advocate.

versus

BALWAN (SINCE DECEASED THR LEGAL
HEIRS) & ORS

..... Respondents

Through : Mr.Jitender Tanwar, Advocate for
R-1A to R-1C.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER

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06.12.2016

RSA 71/2016

1. The instant Regular Second Appeal has been preferred by the appellant impugning the judgment dated October 31, 2012 passed by the learned Trial Court whereby the suit filed by him has been dismissed. Prayer has also been made to set aside the order dated February 12, 2016 whereby RCA No.17/14 preferred by him assailing the judgment dated October 31, 2012 has been dismissed by the First Appellate Court on technical ground i.e. barred by limitation.

2. The grievance of the appellant is that the suit should have been disposed of as having been abated on the death of sole contesting respondent No.1/defendant No.1 Late Sh.Balwan Singh. However, the learned Trial Court proceeded to decide the suit on merits and in the process returned a

finding in respect of the title of the parties in the suit property which could not have been done in a suit for injunction simplicitor.

3. The following substantial questions of law arise in this appeal:-

(i) *Whether the learned Trial Court could have returned a finding on the title of the contesting parties in a suit for injunction when the contesting defendant, against whom injunction was claimed, had expired, with no prayer by the plaintiff to bring on record his LRs?*

(ii) *Whether the learned Trial Court could have considered the incomplete statement of DW-2 Sh.Jagdish Prasad, VLW, BDO Office, Nazafgarh to return a finding on title of the parties?*

4. The Civil Suit No.534/2012 (new number) was filed with the limited prayer:-

(i) to pass a decree of permanent injunction in favour of the plaintiff and against the defendant No.1, his agents, servants, assignees etc. thereby restraining them from taking forcible possession of the suit property/plot bearing No.F-609, Palam Extension, (formerly known as Harizan Basti), New Delhi-110045, as shown in Red in site plan attached, from the plaintiff;

(ii) to pass a decree of permanent injunction in favour of the plaintiff and against the defendant No.1, his agents, servants, assignees etc. thereby restraining them from initiating construction on the suit property/plot bearing No.F-609, Palam Extension, (formerly known as Harizan Basti), New Delhi-110045, as shown in Red in site plan attached;

(iii) to pass a decree of permanent injunction in favour of the plaintiff and against the defendant No.1, his agents, servants, assignees etc. thereby

restraining them from creating any third party right, interest in favour of any other person in respect of suit property/plot bearing No.F-609, Palam Extension, (formerly known as Harizan Basti), New Delhi-110045, as shown in Red in site plan attached;

5. Learned counsel for the parties appearing today have submitted that taking into consideration the limited grievance of the appellant, the observations made by the learned Trial Court about the title in respect of Plot No.609, Palam Extension, New Delhi measuring 115 sq.yds. in the Civil Suit No.534/2012 which otherwise stood abated, may be held to be having no effect on the respective claims about title of the parties in the suit property. The submissions made by learned counsel for the parties is that in future litigation, if any, these observations in a suit which stands abated, may not have any effect on the respective rights of the contesting parties.

6. I have perused the Trial Court record and the Appellate Court record.

7. The Civil Suit No.534/2012 was filed to seek permanent injunction in respect of the suit property only against respondent No.1/defendant No.1 and defendants No.2 and 3 were only proforma respondents. The learned Trial Court has noted in the judgment that the sole contesting defendant No.1 Sh.Balwan Singh has expired. In that case, the suit should have been disposed of at that stage only as the appellant/plaintiff did not bring on record the legal heirs of defendant No.1. Thereafter nothing survived for adjudication by the Court.

8. The learned Trial Court, after considering the testimony of witnesses, preferred to dispose of the suit on merits without realising that in a suit for injunction if the defendant against whom a decree of permanent injunction was prayed, had expired, the cause of action did not survive.

9. In para 21 of the judgment, the learned Trial Court has noted the testimony of DW-2 Sh.Jagdish Prasad, VLW, BDO Office, Najafgarh, Delhi who was summoned to produce the record of Gram Panchayat. The learned Trial Court in the impugned judgment recorded that there is no cross examination of this witness and in view of the decisions in Traders Syndicate vs. U.O.I. AIR 1983 Calcutta 337 and M/s Chuni Lal Dwarka Nath vs. Hartford Five Insurance Co.Ltd. AIR 1958 Punjab 440, the version of DW-2 is deemed to have been admitted.

10. On perusal of LCR it is noticed that examination-in-chief of DW-2 Sh.Jagdish Prasad was recorded on May 04, 2011. His cross examination was deferred on that date. Thereafter, he was not tendered for cross examination.

11. Legal position is well settled that an incomplete statement of a witness cannot be read in evidence. The learned Trial Court committed a grave error in considering the incomplete statement of DW-2 Sh.Jagdish Prasad, official from the office of BDO, Najafgarh for making observation about title in para 21 of the judgment impugned before the First Appellate Court.

12. Unfortunately the First Appellate Court instead of dealing with the contentions on merits, preferred to dismiss RCA No.17/14 on technical ground i.e. limitation despite the fact that the contentions raised before this Court were also raised in RCA No.17/14.

13. The impugned orders suffer from illegality and perversity as the learned Trial Court proceeded to dispose of the Civil Suit on merits despite non-survival of cause of action on the death of sole contesting defendant and inadmissible evidence i.e. incomplete statement of DW-2 Sh.Jagdish Prasad,

VLW, BDO office, Nazafgarh.

14. The First Appellate Court should have at least dealt with the legal issues raised in the appeal instead of summarily dismissing the appeal on technical grounds i.e. of limitation. It may be relevant to mention here that sufficient material was placed before the First Appellate Court about the medical condition i.e. heart attack suffered by the appellant which resulted in delay in filing the first appeal, which is noted in para 5 of the impugned order by the First Appellate Court. The medical condition of the appellant which resulted in delay in filing the appeal required consideration by the appellate Court.

15. In view of above discussion, the impugned orders by the two courts below; order dated October 31, 2012 by learned Trial Court and order dated February 12, 2016 by First Appellate Court are set aside. Civil Suit no.534/2012 is dismissed on account of suit being abated on the death of contesting defendant No.1/respondent No.1.

16. The Regular Second Appeal is disposed of in above terms.

17. Trial Court Record and Appellate Court Record be sent back alongwith copy of this order.

CM No.8714/2016

Dismissed as infructuous.

PRATIBHA RANI, J.

DECEMBER 06, 2016

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