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

% **DECIDED ON: 25.05.2016**

+ CM APPL. 17483, 17484, 17485 & 17486/2016 & 18658/2016
IN RFA (OS) 42/2016

KANCHAN & ORS.

..... Appellants

Through: Mr. Mahavir Singh, Sr. Advocate
with Mr. S.S. Shamsery and Mr. Gagandeep
Sharma, Advocates.

versus

KISHAN CHAND WADHWA

..... Respondent

Through: Mr. B.B. Gupta, Sr. Advocate
with Mr. Udyan Srivastava, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J.(ORAL)

1. The present appeal is directed against the judgment and decree by the learned Single Judge of 07.08.2012. The appellants were arrayed as defendants.

2. The plaintiffs had filed the suit for possession of an industrial plot - plot no.E-6, Block-B-1 Extension, Mohan Cooperative Industrial Estate. It was alleged that the perpetual lessor, i.e., DDA executed a sub-lease deed on 27.10.1998 in favour of the plaintiff. After securing lease rights, the plaintiff discovered that the plot was

encroached upon by various unauthorized occupants who were in possession over different portions. The plaintiff entered into correspondence with Mohan Cooperative Industrial Estate for removal of the encroachments. The authorities, however, informed the plaintiff that since the encroachment was on private property, appropriate legal proceedings for evacuation had to be initiated. It was in these circumstances that the suit was filed. During the course of the proceedings, a Local Commissioner was appointed to ascertain the correct picture. The Local Commissioner after visiting the site informed the Court that there were 97 occupants. After obtaining their names and particulars - a report was filed which forms the basis of an order whereby the memo of parties were permitted to be amended and all 97 defendants were arrayed as parties. Since difficulties were experienced in serving all the defendants, on 20.04.2005, the Court made an order directing affixation of the summons in the premises of one of the defendants and notifying all of them through appropriate beat of drums. The suit records show that these directions were complied with.

3. Apparently, counsel had entered appearance on behalf of defendant nos.10 and 27. In view of the previous order of the Court the said two defendants were treated as representing all other defendants. A written statement too was filed. On 17.03.2006, the Court framed issues. The plaintiff led evidence and its witnesses were cross examined. The said defendants (hereafter called the

contesting defendants) did not lead evidence though affidavits of evidence were filed on their behalf.

4. The learned Single Judge in the impugned order observes that even though the defendants had urged adverse possession as a plea in support of their continued occupation, there was no proof or material on the record. Noticing that the onus to prove adverse possession lay upon the defendants which they did not discharge, the Single Judge proceeded to evaluate the evidence led by the plaintiff. These included documents exhibited as Ex.P-1 to P-13. After considering these, the suit was decreed on 07.08.2012.

5. The plaintiff initiated the execution proceedings. The defendants/appellants were represented in the execution proceedings which continued for almost 2 years, on 19.03.2014. In the course of objections, the defendants urged that the decree was in-executable. The essence of the pleadings and the objections - made under Section 47 is that the counsel who ostensibly represented them was in fact never authorized to do so and furthermore that they never filed the written statement or the affidavits which were on the record. The learned Single Judge after considering the submissions of the parties rejected the objection statement on 28.01.2016. The Single Judge was of the opinion that the applications were not maintainable and that the remedy available if at all was to approach the Court under Order-IX Rule 13 CPC.

6. The appellants approached the Supreme Court claiming to be aggrieved by filing SLP (Civil) 9751/2016. The SLP was, however, permitted to be withdrawn by an order dated 18.04.2016.

7. Counsel for the appellants urged that the impugned judgment and decree cannot be sustained for the reason that the defendants are the victims of fraud. It was urged that in the course of the proceedings on 16.12.2011, the defendants were present in the Court; they disclaim ownership of any affidavit and stated that what was placed on record was never signed by them. It was also clearly stated that the counsel who had filed them was not authorized to do so. Learned counsel submitted that having regard to these circumstances, it was incumbent upon the Court to consider and enquire into the matter further rather than proceeding with the suit on the merits and decree it without granting any opportunity to the appellants/defendants.

8. Learned counsel submitted that the defendants/appellants' case for continuing in occupation is that their possession had crystallized into title by adverse possession. For this purpose, he relied upon number of documents placed on the record. It was urged that an opportunity to consider these should have been given to the appellants and the Court should make appropriate orders at least relegating the matter for further proceedings and proper trial.

9. This Court has carefully considered the record. The order of 16.12.2011 made in the course of the suit recorded the statement of the three defendants who were present in the Court. They stated that

the affidavits ascribed were in fact not executed and that they had not authorized the counsel to do so. On that date one Shri S.K. Verma was representing the appellants/defendants. They were previously represented by Mr. Naresh K. Thanai, Advocate. The Court in these circumstances felt compelled to seek a statement from Mr. Thanai which it did. On 05.01.2012 in fact statement was recorded whereby it was noticed that Mr. Thanai clearly stated that the defendants concerned had approached him and recorded the statement as follows:

“Mr. Thanai, who was earlier appearing on their behalf, has informed that the said affidavits were brought by them in persons and therefore, the same were filed by him. As the rights to lead evidence has rightly been closed, therefore, list the matter now for final disposal in the category of short cause.”

It is, therefore, evident that at least as on 16.12.2011, the defendants were aware both as to the proceedings as well as the fact that some representation was made on their behalf. Assuming - arguendo - that in fact the counsel who had represented them throughout the proceedings did not have the authority to do so, the fact remains that they never took steps to ensure that the suit was defended at least after 2011. Even on 16.12.2011, they were aware as to the next date of hearing, i.e., 05.01.2012. On that day as well no steps were taken by the defendants/appellants to remedy the situation. It was in these circumstances that the suit was decreed on 07.08.2012.

10. It is further noticeable that even after the decree was made, the defendants were notified in execution proceedings and caused appearance to be made. They contested the execution proceedings for

nearly two years after which they filed objection on 19.03.2014. Now, as to the correctness or otherwise of these allegations, the matter has attained finality; the appellants have chosen to prefer an appeal on the merits of the suit rather than the correctness of order dated 28.01.2016. Nevertheless, this Court feels constrained to observe that entire records would bear out the fact that for over seven years, i.e., after due notification of the suit, no steps were taken by the defendants or on their behalf. Even according to the appellants, the plaintiff had intimated them about the pendency of the suit in September, 2011. Assuming that even if credence were to be given to such fact, the proceedings of 16.12.2011 would show that after becoming aware of the pendency of the suit (in which the contesting defendants did appear) no steps were taken. In these circumstances, the Court is of the opinion that the reasons for non-appearance cannot be held to be *bona fide*.

11. As to the merits, this Court noticed that for the first time, the appellants/defendants had produced the material - pre dominantly they are comprised of Voter I.D. Card, copies of ration cards, death certificate etc., none of these disclose that the defendants were in occupation any time prior to 1995 of the suit property. Most of them pertained to the period after 2002. The plaintiff was able to establish in the suit that he is the owner of the property; a perpetual sub-lease deed was marked as Ex.P-1. Being an action for title, the only way in which the defendants could have successfully ensured their lawful occupation was to prove some semblance of rights or interest; the plea

of adverse possession could not have been succeeded with given the nature of the materials that they now seek to rely upon.

12. For the above reasons, we find no merit in the applications and the appeal; they are consequently dismissed.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

MAY 25, 2016
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