

\$~9

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(OS) 2613/2008**

MOHIT GUPTA Plaintiff

Through

versus

SH. DESH PAL GUPTA & OTHERS Defendants

Through: Mr. Nishant Datta and Mr. Pradeep
Bhardwaj, Advocates with LR of D-1
Mr. Puneet Gupta.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

ORDER

% **01.06.2018**

I.A No. 7884/2018 (U/o 9 Rule 13 CPC filed by LR of D-2), I.A. 7885/2018 (delay of 547 days) & I.A 7886/2018 (delay in refiling)

1. By these applications, the legal heirs of the deceased defendant no.2 seeks directions for setting aside of the preliminary decree for partition passed in terms of the judgment dated 5.10.2016 of a learned Single Judge of this Court.

2. The judgment passed by a learned Single Judge of this Court on 5.10.2016 notes that from 31.8.2016 no one appeared for the defendants. Defendant nos. 2 and 3 had filed their separate written statements. Issues were framed in the suit on 10.3.2010 whereafter plaintiff led evidence and

plaintiff's witness was being cross examined and at which stage the defendants stopped appearing. The non-appearance of the defendants, especially the defendant no.2 through whom the applicant claims, is since 31.8.2016 and thereafter on 16.9.2016 and till 5.10.2016 when the judgment was passed passing a preliminary decree declaring the plaintiff, LRs of defendant no.1, defendant no.2 and defendant no.3 to each have 1/4th share in the property bearing no.33, North-West Avenue Road, West Punjabi Bagh, Delhi-110026.

3. By this application the LRs of defendant no.2 states that his mother and wife of deceased defendant no.2 expired on 1.5.2015 and whereafter the defendant no.2 went into depression. It is argued that on account of defendant no.2 going into depression he did not appear in the suit or give instructions in the suit, and that the knowledge of the suit came to the notice of the applicant/LR of defendant no.2 only when notices were received in the execution proceedings.

4. I cannot agree with the contentions raised by the applicant/LR of defendant no.2 because no doubt there are documents which show that the defendant no.2 suffered from depression, however in my opinion there is no such case which is pleaded that defendant no.2 was not able to do anything

whatsoever, understand anything whatsoever, not doing his ordinary day to day occupations of life etc etc. Therefore, the huge delay of 547 days cannot be condoned and there are therefore no sufficient reasons for condonation of delay for setting aside the ex parte judgment and decree passed by a learned Single Judge of this Court on 5.10.2016.

5. I would also like to note that counsel who appears for the applicant is the same counsel who was appearing in the suit for defendant no.2. In the order dated 29.3.2016 it is recorded that defendant no.2 was not giving proper instructions and therefore the counsel for defendant no.2 was to seek discharge. Similar submissions were repeated on behalf of counsel for defendant no.2 on 3.6.2016. Thereafter, counsel for defendant no.2 stopped appearing. There is nothing in the record of the suit including the orders passed therein that counsel for the defendant no.2 ever brought on record of the suit that defendant no.2 was not able to understand the day to day affairs on account of severe depression. In any case, depression without the same completely affecting mental faculties for the concerned person not to be engaged in daily affairs of life cannot be a ground for setting aside of the ex parte decree and which has achieved finality now since around 547 days.

6. Once by passing of decree vested rights have arisen and on expiry of

period of limitation further vested rights arose for not setting aside of such a decree, therefore in the facts of the present case this Court is unable to hold that there exists sufficient cause for condonation of delay or entitling the applicant/LR of defendant no.2 to seek setting aside of the ex parte decree and judgment dated 5.10.2016.

Dismissed.

VALMIKI J. MEHTA, J

JUNE 01, 2018

ib