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

+ CM(M) 1111/2016

SEEMA BANSAL

..... Petitioner

Through Mr.Mukesh Gupta, Advocate

versus

DURGA DASS BANSAL & ORS

..... Respondents

Through Mr.K.C.Jain, Advocate

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

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16.12.2016

CM No.41010/2016 (*exemption*)

Allowed subject to all just exceptions.

CM(M) 1111/2016 & CM No.41009/2016 (*stay*)

1. By the present petition filed under Article 227 of the Constitution of India, the petitioner seeks to impugn the order dated 02.07.2016 by which an application under Order 23 Rule 1 Read with Order 7 Rule 11 CPC was dismissed.
2. The brief facts of the case are that the respondent has filed a suit for possession and recovery of mesne profits alongwith interest and injunction. The petitioner is the daughter-in-law of respondent Nos.1 and 2.
3. Earlier respondent Nos.1 and 2 in 2012 filed an application under the Maintenance and Welfare of Parents and Senior Citizen Act, 2007 where a relief was sought for maintenance and welfare of the said respondents and immediate order for eviction of the petitioner from self acquired property by

the respondents. The said matter came up on 17.08.2012 when the respondents requested that the behaviour their son and daughter-in-law towards him is nice and hence, wants to withdraw the case subject to if any misbehave notices. Accordingly, the said petition was dismissed as withdrawn.

4. Subsequently, the respondent filed a criminal writ petition before this court. The said writ petition was dismissed as withdrawn noting the submission of respondent Nos.1 and 2 that they wish to withdraw the present petition. The direction was passed to the police that in case a request is made for police protection, the respondent shall be provided the same. Respondent Nos.1 and 2 have now filed the present suit for possession and recovery of mesne profits alongwith interest and injunction.

5. The stand of the petitioner is that the said respondents having already availed two different remedies, namely, under the Maintenance and Welfare of Parents and Senior Citizen Act, 2007 and the Criminal Writ Petition, the present suit is barred under Order 23 Rule 1 CPC.

6. The trial court by impugned order concluded that earlier petition was required to be disposed of on merits and as same has not been disposed of on merits, the present suit will lie and dismissed the application.

7. In my opinion, there is no merit in the present petition.

8. Order 23 Rule 1 (4) of the CPC reads as follows:

“1(4) where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without permission referred to in sub-rule (3), he shall be liable for such costs as the court may award and shall be precluded from institution any fresh suit in respect of such subject-matter or such part of the claim.”

9. Hence, it is only if a party abandons a suit or part of claim under sub-rule (3) or withdraws a suit or part of a claim without permission, he is precluded from institution any fresh suit in respect of such subject-matter or such part of the claim. In the present case, the two proceedings, namely, under the Maintenance and Welfare of Parents and Senior Citizens Act and the criminal writ petition were not adjudicated upon on merits but were withdrawn. In the present case Order 23 is not applicable.

10. Petition is dismissed.

JAYANT NATH, J.

DECEMBER 16, 2016/v