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

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Date of Decision: May 9, 2017

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CM(M) No.61/2016

RAMESH

..... Petitioner

Through: Mr.Dinesh Malik, Advocate.

versus

HARBANS NAGPAL & ORS

..... Respondents

Through: Ms.Meenu, Advocate.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

CM(M) 61/2016

1. The petitioner has invoked the jurisdiction of the this Court under Article 227 of the Constitution of India with the following prayers:-

(i) All the record of the Trial Court of Suit No.229/2001 titled as Sh.Harbans Nagpal vs. Dr.Yash & Ors. decided by the Court of Sh. R.L.Meena, Ld. Civil Judge, Tis Hazari Courts, Delhi vide its judgment dated 07.02.2007 be called.

(ii) All the record of the Trial Court of M.No.24/11 titled as Sh.Harbans Nagpal vs. Dr.Yash & Ors. decided by the Court of Sh. Pranjal Aneja, Ld. Civil Judge-06/Central, Tis Hazari Courts, Delhi vide its order dated 15.07.2015 be called.

(iii) All the record of the Trial Court of M.No.39/15 an application for restoration of application under Order IX Rule 13 CPC titled as Sh.Harbans Nagpal vs. Dr.Yash & Ors. decided by the Court of Sh. Pranjal Aneja, Ld. Civil Judge-06/ Central, Tis Hazari Courts, Delhi vide its judgment dated 23.11.2015 be called.

(iv) To set aside/quash the order dated 23.11.2015 passed by the Court of Sh. Pranjal Aneja, Ld.Civil Judge06/Central, Tis Hazari Courts, Delhi and restore the application under Order IX Rule 13 CPC to its original number and the application be decided on merits.

2. In brief, the case of the petitioner Smt.Ramesh is that she has purchased roof of the ground floor measuring 106 sq.yds. of Plot No.1/51, Nirankari Colony, Pradhan Marg, Delhi-110009 from Smt.Narinder Kaur vide agreement to sell dated 27th May, 1998. The General Power of Attorney was executed by Smt.Narinder Kaur in favour of Sh.Pritam Singh – husband of the petitioner. As per the Agreement to Sell dated 27th May, 1998, the petitioner had a right to construct stairs leading from ground floor to top floor and also to raise construction from first floor upto third floor. The *Chajja* was constructed by the petitioner on the stairs which was the property owned by her and she had been residing there alongwith her family for the past fifteen years.

3. For purpose of disposal of this Civil Misc. (Mains), hereinafter the parties would be referred to by their rank in the Civil Suit No.229/2001.

4. The Civil Suit No.229/2001 was filed by plaintiff Sh.Harbans Nagpal (respondent No.1 herein) seeking the relief of permanent injunction against five defendants. The memo of parties (with reference to the relationship of the plaintiff with defendant Nos.1 and 3 to 5 in the margin) reads as under:-

*'Sh.Harbans Nagpal,
S/o Late Sh.Bhagwan Dass, at present
R/o 2/68, Nirankari Colony,
Delhi-9.*

.....Plaintiff

Versus

1. *Dr.Yash,
D/o Late Sh.Asa Ram,
W/o Sh.Harbans Nagpal, (wife of plaintiff)
R/o 1/51, Nirankari Colony,
First Floor, Delhi-9.*
 2. *Smt.Ramesh W/o Sh.Pritam Singh, (Contesting
R/o 1/51, Nirankari Colony, defendant)
Delhi-9.*
 3. *Smt.Devi Bai W/o Late Asa Ram, (mother of defendant
No.1 and mother-in-law
of plaintiff)*
 4. *Shri Chunni Lal S/o Late Asa Ram, } (brothers of defendant
5. *Virender Kumar S/o Late Asa Ram, } No.1 and brothers-in-
law of plaintiff)**
- All r/o 1/51, Nirankari Colony,
First Floor, Delhi-9.Respondents'*

5. Thus, the defendants No.1, 3, 4 and 5 are closely related to the plaintiff as wife, mother-in-law and brothers-in-law respectively. However, the manner in which name of defendant No.2 (the only contesting defendant and not related to this family) has been sandwiched itself reflects that at the time of impleadment, she was placed at serial No.2 with some motive which shall be highlighted in latter part of this order.

6. The defendant No.2 was proceeded exparte on 20th December, 2001

and the exparte order was set aside on 1st August, 2002. The defendant No.2 filed the written statement as well reply to the injunction application. The plaintiff did not file any replication despite availing various opportunities for the same.

7. The plaintiff also filed an application under Section 24 of the Code of Civil Procedure for the transfer of matter to some other Court which was dismissed on 27th March, 2004. Thereafter plaintiff stopped putting appearance in the Court as a result of which the civil suit was dismissed in default on 17th September, 2004. Till 1st August, 2005 the plaintiff did not take any step for getting the said civil suit restored. Thus, the defendant No.2 remained under the impression that the suit stands dismissed and file remained consigned to Record Room.

8. Perusal of LCR of M.No.45/2004 reveals that after the dismissal of the Civil Suit No.229/2001 in default on 17th September, 2004, the application under Order IX Rule 9 CPC seeking restoration of the civil suit was filed by the plaintiff on 25th September, 2004. Without serving any notice on defendant No.2 of the application seeking restoration, the civil suit was restored on 19th April, 2006 on the basis of no-objection given by defendants No.1 and 5. In this context, the proceedings dated 5th February, 2005 assume significance hence extracted hereunder:-

‘5.2.2005

Present : Applicant in person.

Notice of the application served upon respondent No.2 and the notice to the remaining respondents could not be issued due to non filing of PF. In the interest of justice, one more opportunity granted to the applicant to take necessary steps for the service of remaining respondents. Issue fresh notice of the application to the remaining respondents on filing of P.F. for 5.3.2005.

Sd/-
(Civil Judge, Delhi)'

9. It is not understandable that how the process fee could have been filed only for service of defendant No.2 who is the contesting party and not for the remaining defendants. Either the process fee would be filed for service of notice to all the defendants in compliance of the orders of the Court or not filed at all. If the process fee was not filed and other defendants could not be served, there was no question of defendant No.2 being served. Thus, the suit appears to have been restored without any notice being issued to the contesting defendant i.e. defendant No.2.

10. Alongwith this petition, the defendant No.2 has also filed the copy of the application under Order IX Rule 13 CPC wherein it is stated that the defendant No.1 – wife of plaintiff has made statement before the learned Trial Court to the effect that **defendant No.1 alongwith defendants No.2, 3 and 4 have compromised the matter amicably with the plaintiff.** Para 2 of the application quotes the statement made by defendant No.1 Dr.Yash and defendant No.5, wife and brother-in-law respectively of plaintiff Sh.Harbans Nagpal, which are extracted as under:-

'Statement of Dr.Yash, wif of Shri Harbans Nagpal, aged 45 years, Resident of 1/51, Nirankari Colony, Delhi.

I am defendant No.1 in this case. I alongwith defendants No.2, 3 and 4 have compromised with plaintiff amicably whereby we have settled all the disputes pertaining to the suit property. I am giving the statement voluntarily without undue influence.

Sd/-
(Defendant No.1)
RO&AC

sd/-
(Civil Judge)
Delhi'

'Statement of Dr.Virender Kumar, Son of Late Shri Asa Ram,

resident of 1/51, Nireankari Colony, Delhi.

I am defendant No.5 in this case. I alongwith defendants No.1, 3 and 4 have reached on compromise with plaintiff amicably whereby we have settled all the disputes pertaining to the suit property. I am giving the statement voluntarily without undue influence.

*Sd/-
(Defendant No.1)
RO&AC*

*sd/-
(Civil Judge)
Delhi'*

11. The above statement made by defendant nos.1 and 5 in respect of the compromise with the plaintiff even on behalf of contesting defendant No.2 is also a reflection on the conduct of the plaintiff to seek a decree at the back of defendant No.2.

12. **On 7th February, 2007 an exparte judgment was passed by the learned Trial Court wherein it was mentioned that defendants no.2 to 4 have been proceeded exparte on 20th December, 2004 though no such order is available on the record of learned Trial Court to prove that defendant No.2 was proceeded exparte as recorded above.** It is further mentioned in the petition that decree was obtained by playing fraud on the Court.

13. It is also relevant to mention here that after obtaining an exparte judgment and decree dated 7th February, 2007, the plaintiff filed execution petition. He also filed an application under Section 151 CPC on 07th August, 2007 seeking amendment in the decree as well as seeking permission to place on record the site plan showing the existing position of the *chajja*, which was dismissed vide order dated 15th October, 2007.

14. On coming to know about passing of exparte judgment and decree dated 7th February, 2007, defendant No.2 filed an application under Order IX

Rule 13 CPC on 2nd November, 2007.

15. Feeling aggrieved by the order dated 15th October, 2007 dismissing his application seeking amendment in the decree as well seeking permission to place on record the site plan, the plaintiff preferred CM(M) No.846/2008 which was disposed of on 14th January, 2010.

16. Defendant No.2 sought review of the order dated 14th January, 2010 but the review petition was dismissed on 2nd June, 2010.

17. Thereafter defendant No.2 filed SLP(C) Nos.31194-31195 of 2010 impugning the orders dated 14th January 2010 and 2nd June, 2010 which was allowed by Hon'ble Supreme Court vide order dated 23rd March, 2015. The Hon'ble Supreme Court while disposing of Civil Appeal Nos.3105-3106 of 2005, had noted that the appellant (defendant No.2 in the civil suit and petitioner before this Court) was never proceeded ex parte on 20th December, 2004. The relevant observations in this regard appeared in para 6 of the order by the Apex court which reads as under:-

'6. The record indicates that while the matter was pending consideration for restoration of the suit, vide order dated 27.11.2004 the matter stood adjourned to 07.01.2005 and thus there were no proceedings on 20.12.2004. On the other hand, the appellant was initially proceeded ex parte vide order dated 20.12.2001 (sic 20.12.2004) but that order was set aside on 01.08.2002. The suit was restored on 19.04.2006 and there was no order after such restoration setting the suit ex parte as against the appellant. The order dated 05.02.2005 also did not mark the suit ex parte against the appellant.'

18. The Apex Court allowed the appeal directing that the application under Order IX Rule 13 CPC filed by the appellant shall be considered on its own merits. The relevant directions appeared in para 10 of the order which reads as under:-

'10. We have gone through the record and considered the

*rival submissions. In our view, no dimensions were given in the plaint nor did the plaint refer to any sketch. The judgment and decree also did not refer to any dimensions of the chhajja in question nor did it incorporate or refer to any sketch from which dimensions could be gathered. In the premises the view taken by the trial Court was absolutely correct, in that any exercise would amount to going behind the decree. The applications preferred under Section 151 CPC was also vague and lacking in any particulars. The High Court was, therefore, not justified in passing the instant directions. We, therefore, allow the appeal and set aside both the orders under appeal. **It is open to respondent No.1 – plaintiff to take such steps as are open to him in law. We may also observe that the application for setting aside the ex parte decree preferred by the appellant shall be considered on its own merits.***

19. The learned Trial Court has dismissed the application under Order IX Rule 13 CPC on the ground of limitation by passing the impugned order. Para 8 and 9 of the impugned order read as under:-

‘8. In view of the above discussion and finding, applicant has failed to show sufficient cause for condoning the delay in filing the present application, thus, leaving no reason to allow the application u/s 5 Limitation Act. Even otherwise I find no grounds to allow the present application for restoring the application u/o 9 rule 13 CPC.

9. Accordingly, both applications i.e. application for restoration of application u/o 9 rule 13 CPC and u/s 5 Limitation Act are dismissed. In the circumstances of the case, parties to bear their own costs. File be consigned to Record Room.’

20. Since the impugned order is not in compliance with the directions issued by the Apex court wherein it was noted that there was no exparte order passed on 20th December, 2004, the application under Order IX Rule 13 CPC should have been heard and disposed of on merits and not on technical grounds like limitation. Thus, the impugned order dated 23rd

November, 2015 is set aside.

21. The learned Trial Court, after giving an opportunity to the parties to make submissions, shall dispose of the application under Order IX Rule 13 CPC on merits without being influenced by any observations made by this Court while disposing of this Civil Misc. (Mains).

22. The petition is allowed.

23. Parties are directed to appear before the learned Trial Court on 31st May, 2017.

24. LCR be sent back alongwith copy of this order.

25. A copy of this order be sent to the concerned Court for information and compliance and be also given dasti to learned counsel for the parties.

CM No.2245/2016 & CM No.2246/2016

Dismissed as infructuous.

MAY 09, 2017
'st'

PRATIBHA RANI, J.