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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRP No.168/2017, CM No.27592/2017 (for condonation of 47 days delay in filing) and CM No.27594/2017 (for condonation of 150 days delay in re-filing).

MOHINDER KAUR & ORS. Petitioners

Through: Mr. M.B. Harikant, Adv.

versus

SUKHDEVI JAIN & ORS. Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **02.08.2017**

CM No.27593/2017 (for exemption).

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

CRP No.168/2017, CM No.27592/2017 (for condonation of 47 days delay in filing) and CM No.27594/2017 (for condonation of 150 days delay in re-filing).

3. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) has been listed on urgent mentioning and subject to office objection as to the maintainability of the Revision Petition under Section 115 of the CPC.

4. The counsel for the petitioners has been heard.

5. The Revision Petition impugns the orders (dated 29th September, 2016 and 1st December, 2016 in RCA No.11/16 (61216/16) of the Court of Additional District Judge-01 (West), Tis Hazari Courts, Delhi) issuing notice of the appeal preferred by the petitioners to the respondents /

plaintiffs subject to deposit by the petitioners / defendants of decretal amount in the form of FDR and dismissing the application of the petitioners / defendants for re-call of the said order.

6. The only argument of the counsel for the petitioners / defendants is that “the petitioners / defendants though are not willing to deposit the decretal amount but are willing to deposit the *ad valorem* court fees on the decretal amount”.

7. The impugned order dated 29th September, 2016 is as under:-

“29.09.2016

*Present: Appellant no.3 with counsel,
Sh. M.B. Harikant*

*Subject to deposit of decretal amount in
form of FDR within 15 days, notice be issued to
respondent on filing of PF & RC for 01.12.2016.”*

8. A perusal of the paper book shows that the suit filed by the respondents / plaintiffs against the petitioners / defendants was decreed on 22nd August, 2016 for the relief of recovery of possession of immoveable property for recovery of Rs.55,900/- and for recovery of *pendente lite* and future *mesne* profits @ Rs.4,300/- per month, with interest; the petitioners / defendants preferred the appeal aforesaid and in which the orders aforesaid have been made.

9. The decree against the petitioners / defendants also being a money decree and a decree for recovery of possession and stay of which cannot be granted without securing the decretal amount and without ensuring that for the period for which the petitioners / defendants, inspite of the decree, remain in possession, the petitioners / defendants compensate the

respondents / plaintiffs, the learned Additional District Judge was correct in directing deposit.

10. However the error which has been committed by the learned Additional District is, in making the issuance of notice of the appeal subject to said deposit and which is impermissible in accordance with the judgment of the Supreme Court in *Kayamuddin Shamsuddin Khan Vs. State Bank of India* (1998) 8 SCC 676 and in *Devi Theatre Vs. Vishwanath Raju* (2004) 7 SCC 337. The deposit can only be a condition for grant of stay of execution and not a condition for issuance of notice of first appeal.

11. For issuing such clarification and modification, need to issue notice to the respondents / plaintiffs is not felt.

12. The orders impugned are thus modified by providing that if the petitioners / defendants do not deposit the decretal amount and do not continue to deposit the *mesne* profits as awarded during the pendency of the appeal, there shall be no stay of execution and the respondents / plaintiffs shall be entitled to execute the decree. However, non-deposit to not come in the way of issuance of notice of the appeal and the appeal being considered on merits.

The petition is disposed of.

No costs.

RAJIV SAHAI ENDLAW, J

AUGUST 02, 2017

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