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

+ CM(M) 848/2014

RAM KISHAN (NOW DECEASED) THROUGH LR Petitioner

Through: Mr. Jawahar Chawla, Advocate

Versus

UTTAM CHAND (NOW DECEASED) THROUGH LR.... Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **17.10.2017**

1. This petition under Article 227 of the Constitution of India impugns the order dated 22nd February, 2014 in RCA No. 14/2008 of the Court of Additional District Judge-03, Central, Delhi of dismissal of the appeal preferred by the petitioner as infructuous.
2. The petition was entertained and notice thereof ordered to be issued. The matter thereafter was adjourned from time to time for service of the respondents. Ultimately, the petitioner applied for serving the respondents by publication and which was allowed vide order dated 27th March, 2017. The learned Joint Registrar has in order dated 22nd August, 2017 recorded that the respondent has been served by publication. None appeared for the respondent before the Joint Registrar. None appears for the respondent today also before this Court. The counsel for the petitioner has been heard and the paper book perused.
3. The respondent instituted the suit, from which this petition arises, against the petitioner, for specific performance of an agreement of sale of

immovable property and which suit being suit no. 1228/1986 of the Court of Shri D K Malhotra, Civil Judge, Delhi was decreed vide judgment dated 21st September, 1996 and the petitioner/defendant was directed to take steps for execution of the sale deed. The petitioner/defendant preferred the appeal aforesaid being RCA No. 14/2008 against the aforesaid decree.

4. The counsel for the petitioner/defendant, on enquiry, states that the appeal, though preferred in the year 1996 itself and within time, remained pending till 2014 owing to the parties negotiating settlement.

5. The impugned order dated 22nd February, 2014 shows that none appeared for the petitioner/defendant/appellant before the Additional District Judge on that date and the counsel for the respondent stated that no settlement had been reached; the counsel for the respondent further submitted that in execution of the decree under appeal, the sale deed had already been executed in favour of the respondent on 30th May, 2002. Recording the same, the learned Additional District Judge, observing that the appeal had become infructuous as the decree appealed against had already been executed, disposed of the appeal.

6. That explains the reason, why the respondent has not been appearing in the present proceedings. I have inquired from the counsel for the petitioner as to who is in possession of the property.

7. The counsel for the petitioner states that the respondent, pursuant to execution of sale deed in her favour had taken possession of the property. The counsel however does not know as to who is in possession of the property today.

8. It appears that the respondent, after the execution of the sale deed in her favour on 30th May, 2002, must have in the last 15 years sold/transferred

the property and the property must have exchanged several hands by now.

9. I have thus enquired from the counsel for the petitioner as to for what purpose the present petition is being pursued.

10. The counsel for the petitioner argues that this petition was filed within time and the order of the learned Additional District Judge dismissing the appeal as infructuous is erroneous. It is contended that the learned Additional District Judge should have decided the appeal on merits.

11. I have next inquired from the counsel for the petitioner as to how this petition under Article 227 of the Constitution of India is maintainable when the remedy of second appeal under Section 100 was available to the petitioner.

12. The counsel for the petitioner states that since the appeal was dismissed as infructuous, and not on merits, the remedy of second appeal would not be available.

13. Prima facie, it appears that the appeal, even if dismissed as infructuous, would entitle the plaintiff/defendant to prefer a second appeal and not invoke the jurisdiction under Article 227.

14. Be that as it may, attention of the counsel has further been drawn to Order XLI Rule 17 which provides for dismissal of the appeal in default for appearance of the appellant.

15. It was thus not incumbent upon the learned Additional District Judge to decide the appeal on merits and the remedy of the petitioner was to apply for readmission of the appeal under Order XLI Rule 19 CPC. The petitioner, instead of availing the aforesaid remedy, chose to prefer this petition.

16. However technically, the order impugned dated 22nd February, 2014 appears faulty. The learned Additional District Judge ought to have

dismissed the appeal in default. Even otherwise, the learned Additional District Judge did not consider that even if the decree had been executed, it did not entitle the respondent/decreed holder to have the appeal dismissed as having become infructuous, inasmuch as in the event of the appeal being allowed, the decree would have been restituted.

17. The counsel for the petitioner states that he will withdraw this petition and take appropriate remedy.

18. For the aforesaid reasons, without going into the lacuna aforesaid and in order to prevent this Court from being burdened further with such luxurious litigations, it is deemed appropriate to allow this petition by setting aside the order dated 22nd February, 2014 and directing the appeal to be restored to its original position and being heard on merits, but subject to the petitioner depositing costs of Rs. 50,000/- with the Delhi High Court Bar Association Lawyers Welfare Fund within one month of today. Upon the petitioner depositing the said cost and furnishing the proof, the impugned order shall stand set aside and the Additional District Judge-03, Central, Delhi / the District Judge, Central, shall restore the appeal aforesaid to its original position.

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19. The counsel for the petitioner, at this stage, withdraws the petition.

20. Dismissed as withdrawn. Needless to state, the petitioner need not deposit the costs as aforesaid.

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