

\$~57&58

- * **IN THE HIGH COURT OF DELHI AT NEW DELHI**
CM(M) No.756/2017
SURENDER KUMAR MEHRA Petitioner
Through: Mr. Bharat Gupta, Adv.
versus
JAHANGIR BAIG AND ORS Respondents
Through: Ms. Suruchi Aggarwal, Adv. for
Punjab & Sind Bank.
- AND**
- + CM(M) No.757/2017
SURENDER KUMAR MEHRA Petitioner
Through: Mr. Bharat Gupta, Adv.
versus
JAHANGIR BAIG AND ORS Respondents
Through: Ms. Suruchi Aggarwal, Adv. for
Punjab & Sind Bank.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

%

24.07.2017

CM No.25738/2017 (for exemption) in CM(M) No.756/2017 and CM No.25741/2017 (for exemption) in CM (M) No.757/2017.

1. Allowed, subject to just exceptions.
2. The CMs stand disposed of.

CM(M) No.756/2017 & CM(M) No.757/2017.

3. CM(M) No.756/2017 under Article 227 of the Constitution of India impugns the order dated 23rd May, 2017 in CS DJ No.77554/16 of the Court of Additional District Judge-II (North-West), Rohini, Delhi dismissing for non-prosecution the suit of the petitioner / plaintiff against defendants no.1,2,3&7 and closing the right of the petitioner / plaintiff to file replication to the written statement of the defendants no.4,5&6.

4. I have enquired from the counsel for the petitioner / plaintiff the need to file replication to the written statement of the defendant no.4,5&6.

5. The counsel for the petitioner / plaintiff states that he is not pressing this petition qua the said challenge.

6. As far as the dismissal of the suit for non-prosecution against defendants no.1,2,3&7 is concerned, it is *inter alia* the case of the petitioner / plaintiff in the plaint (i) that the defendant no.1 agreed to sell an immovable property to the petitioner / plaintiff and received a sum of Rs.27,61,000/- from the petitioner / plaintiff; (ii) the said property was encumbered with the defendant no.5 Punjab & Sind Bank and which encumbrance was paid by the petitioner / plaintiff; (iii) however subsequently it was discovered that the property was also encumbered with the defendant no.6 Oriental Bank of Commerce; and, (iv) the defendant no.2 is the wife of the defendant no.1 and the defendants no.3&7 had acted in concert with the defendants no.1&2 and the petitioner / plaintiff had entered into Agreement and made payment because of false representations of all of them.

7. The petitioner / plaintiff has instituted the suit from which CM(M) No.756/2017 arises for specific performance of Agreement to Sell and in the alternative for refund of his monies.

8. The counsel for the petitioner / plaintiff states that the petitioner / plaintiff has also filed a First Information Report (FIR) against defendants no.1,2,3&7 and in which FIR also it is informed that all the said persons are absconding.

9. A perusal of the order sheets shows that (i) summons of the suit were CM(M) No.756/2017 & CM(M) No.757/2017

issued on 23rd September, 2015 by this Court for 14th December, 2015; (ii) the petitioner / plaintiff took steps for service of all the defendants but the defendants no.1,2,3&7 remained unserved; (iii) on 14th December, 2015, owing to the enhancement in the minimum pecuniary jurisdiction of this Court, the suit was transferred to the District Court and parties directed to appear on 13th January, 2016; (iv) on 13th January, 2016, the learned Additional District Judge to whom the suit was assigned was on leave and the suit adjourned to 12th April, 2016; (v) on 12th April, 2016, fresh summons were ordered to be issued to defendants no.1,2,3&7 for 8th August, 2016; (vi) though the petitioner / plaintiff took steps for service of defendants no.1,2,3&7 but they remained unserved; (vii) on 8th August, 2016, fresh summons were ordered to be issued to the said defendants for 23rd January, 2017; (viii) the petitioner / plaintiff filed an application for substituted service of the said defendants but which was dismissed on 23rd January, 2017 and the petitioner / plaintiff directed to furnish fresh address of defendants no.1,2,3&7 and serve them for 23rd May, 2017; and, (ix) vide the impugned order dated 23rd May, 2017, owing to the petitioner / plaintiff having not filed fresh address, the suit against defendants no.1,2,3&7 was dismissed for non-prosecution and aggrieved wherefrom as aforesaid, CM(M) No.756/2017 has been preferred.

10. CM(M) No.757/2017 has been filed under Article 227 of the Constitution of India impugning the order dated 23rd January, 2017 aforesaid of the same Additional District Judge dismissing the application for substituted service.

11. In the aforesaid state of affairs, the order of the learned Additional

District Judge, refusing substituted service of defendants no.1,2,3&7 and dismissing the suit against defendants no.1,2,3&7 for non-prosecution for failure of petitioner / plaintiff to furnish fresh address of defendants no.1,2,3&7 and taking steps for their service at fresh address, are indeed harsh and unjustified.

12. The petitioner / plaintiff is found to have taken steps on each date for service of the defendants no.1,2,3&7 but they remained unserved. It cannot be lost sight of that the petitioner / plaintiff is but an agreement purchaser from the said defendants and cannot be said to be in a position to discover their whereabouts once they go missing from the address at which they were at time of entering into Agreement to Sell. Moreover, when the Police, investigating the FIR against such persons has been unable to find them, it is unreasonable to expect the petitioner / plaintiff to discover fresh address of the said defendants.

13. The learned Additional District Judge is thus indeed found to have not exercised jurisdiction vested in him to serve defendants no.1,2,3&7 by publication, which the petitioner / plaintiff on affidavit stated that they were not available at their known address and which was also supported by report on repeated summons issued to the said defendants.

14. The learned Additional District Judge is also found to have erred in directing the petitioner / plaintiff to furnish fresh address of the said defendants and in dismissing the suit against defendants no.1,2,3&7 for non-prosecution for failure of the petitioner / plaintiff to furnish fresh address.

15. The petitioner / plaintiff is thus in the circumstances aforesaid also held entitled to serve the defendants no.1,2,3&7 by publication.

16. Since defendants no.1,2,3&7 have not been served and since the other appearing defendants are not concerned with the orders impugned in these petitions, need to issue notice to anyone is not felt.

17. The petitions thus succeed and are allowed.

18. The orders of dismissal of suit in so far as against defendants no.1,2,3&7 for non-prosecution and the order of dismissal of application of the petitioner / plaintiff for service of said defendants by publication are set-aside.

19. The petitioner / plaintiff to appear before the learned Additional District Judge on 5th September, 2017 when the learned Additional District Judge shall order for service of defendants no.1,2,3&7 by publication for the date already fixed of 26th October, 2017.

20. The petitions are disposed of.

A copy of this order be forwarded to the learned Additional District Judge.

RAJIV SAHAI ENDLAW, J

JULY 24, 2017

‘pp’..