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

+ CM(M) 1170/2016

OM PRAKASH Petitioner
Through Mr.Alok Kumar, Adv.
versus
MOHAN LAL (NOW DECEASED) THR LRS
SHANTI SWAROOP Respondent
Through

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

ORDER

% **04.01.2017**

1. By the present petition under Article 227 of the Constitution of India the petitioner seeks to impugn the order dated 30.8.2016 by which three applications filed by the respondent/plaintiff i.e. one for revival/re-opening of the suit, second for substitution of legal heirs of the plaintiff and third seeking condonation of delay in filing the accompanying application under Order 22 Rule 1 CPC were disposed off.
2. The plaintiff/respondents filed the suit for permanent and mandatory injunction praying for a direction to the defendants/petitioner to vacate and surrender peaceful possession of the suit property i.e. two rooms and one kitchen in suit property bearing No.O-IV/19, Lajpat Nagar, New Delhi. The parties are brothers. It is the case of the respondent that the petitioner was permitted to reside in the suit property by the respondent. Litigation took place between the parties. The petitioner filed a suit for declaration and partition. In view of the said suit having been filed on 17.9.2005 on an application under Order I Rule 10 CPC the present suit was stayed. In the

meantime, suit of the petitioner was dismissed. The appeal was also dismissed and SLP was also dismissed by the Supreme Court.

3. The original respondent died on 1.1.2012. The LR has now moved the present three applications on 15.7.2015.

4. The trial court while adjudicating upon the application under section 5 of the Limitation Act noted that one of the grounds stated in the application was that the respondent was not aware of the pendency of the present suit. It, however, noted that as per ordersheets of 25.11.2004 and 4.1.2005, the respondent's attendance as son of the plaintiff alongwith counsel have been noted. Regarding the other pleas raised by the respondent about problems in the office of the counsel for the respondent, the court did not find it convincing, However, noting that the SLP was dismissed on 30.6.2014 and that the suit could be revived only thereafter, the trial court, however, noted that it cannot lose sight of the fact that both the parties have been under full fledged litigation since a long time. It further held that the court cannot lose sight of the fact that for a layman it is not possible to comprehend that even if the opposite party fails to prove his rights, title or interest in the suit property and loses the litigation till the supreme court he will still be required to seek relief of mandatory injunction so as to obtain/regain possession of the suit property. Hence, the trial court condoned the delay in filing of the application subject to costs of Rs.10,000/- and allowed the application.

5. Learned counsel appearing for the petitioner has reiterated that once the suit has abated, he had a vested right in the matter. He stresses that in the application under section 5 of the Limitation Act filed by the respondent there is a clear wrong statement made. He relies upon judgment of the

Supreme Court in the case of *Balwant Singh vs. Jagdish Singh, 2010 (2) LLJ 401* to contend that the applicant seeking aid of the court for exercising its discretionary power for condoning the delay, is expected to state the correct facts and not lies.

6. In my opinion, there is no merit in the present petition. It is a matter of fact that the petitioner has filed the suit for partition of the suit property. The suit of the petitioner was dismissed and even at the appellate stage including in the Supreme Court the petitioner failed to get any relief. Hence, the petitioner has no right, title or interest in the suit property. On the other hand, the suit of the respondent for mandatory injunction which has been filed was stayed under Section 10 CPC in 2005. It could be revived only in/after 2014 when the SLP filed by the petitioner in the other suit was dismissed. The plaintiff/respondent died on 1.1.2012 while stay of the suit was in operation. It is quite plausible that the son of the deceased plaintiff who stepped into the shoes of the plaintiff was not be fully aware of the facts or could comprehend the legal issues involved. The trial court has rightly allowed the applications.

7. There is no merit in the present petition. Same is dismissed.

JAYANT NATH, J

JANUARY 04, 2017

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