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

+ CM(M) 900/2017

ANAND KUMAR GAUTAM

..... Petitioner

Through: Mr. S.C. Rana, Adv.

Versus

ANAND PRAKASH BANSAL & ANR

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **22.08.2017**

CM No.30018/2017 (for exemption)

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

CM(M) 900/2017 & CM No.30019/2017 (for stay)

3. This petition under Article 227 of the Constitution of India impugns the order [dated 22nd April, 2017 in MCA No.2036/2016 of the Court of Additional District Judge (ADJ)-01 (South), New Delhi] of dismissal of an appeal under Order XLIII Rule 1(r) of the Code of Civil Procedure, 1908 (CPC) preferred by the petitioner against the order dated 3rd July, 2015 in CS No.261/2013 of the Court of Senior Civil Judge (South), Saket Courts, New Delhi allowing the application of the respondents/plaintiffs under Order XXXIX Rules 1&2 CPC and restraining the petitioner/defendant from opening/installing doors/windows/balconies “in the suit property towards *gali* of the plaintiff as shown in blue colour in the site plan and to close the

same, in case they have been opened” till final disposal of the suit on merits.

4. The petitioner, though preferred the appeal aforesaid, but the impugned order dated 22nd April, 2017 records that the petitioner/defendant chose not to argue the appeal inspite of taking four adjournments in the past and inspite of adjournment being refused on 22nd April, 2017. The learned ADJ has in the circumstances, dismissed the appeal after hearing the counsel for the respondents/plaintiffs and perusing the record.

5. The petitioner/defendant having chosen not to argue the appeal, cannot have a second round by way of this petition under Article 227 of the Constitution of India. The supervisory jurisdiction of this Court is to enable this Court to correct the errors, if any, capable of interference in such jurisdiction, committed by the Courts subordinate to this Court. However, the jurisdiction under Article 227 of the Constitution is not meant to be invoked when the litigant invoking the same chooses not to pursue the proceedings before the Trial Court and wants to substitute this Court to, for the first time, adjudicate the dispute. The jurisdiction under Article 227 of the Constitution cannot be converted into appellate jurisdiction. This Court in ***Dewan Daulat Rai Kapur Vs. R. Chatha Ram*** (1986) 30 DLT 364 held that the High Court, in exercise of powers of superintendence under Article 227, cannot for the first time determine question of law without there being any determination of those questions by the Subordinate Court. Power of superintendence was held to not include power to determine even pure questions of law which questions have not been determined by Subordinate Court. Supreme Court also in ***Montford Brothers of St. Gabriel Vs. United India Insurance*** (2014) 3 SCC 394 held that the High Court erred in setting aside the judgment of Motor Accidents Claim Tribunal by ignoring the fact

that the issue had not been pressed before the Tribunal. It was held that the High Court, for the first time in a writ petition under Article 227, could not have decided the issue. It was further held that petition under Article 227 could be exercised for limited purpose only.

6. It is also not as if there was any reason for the petitioner/defendant to have not argued the appeal. Neither has any reason been set out in the memorandum of this petition nor is the counsel able to state so on enquiry and vaguely blames the advocate for the petitioner/defendant before the Appellate Court.

7. Five adjournments in a row are inexcusable and cannot be countenanced.

8. Though the petition is liable to be dismissed on this ground alone but the counsel for the petitioner/defendant has also been heard on merits.

9. Though the learned ADJ exercising powers as an Appellate Court has merely affirmed the view taken by the learned Senior Civil Judge but the learned Senior Civil Judge is found to have given detailed reasons for grant of the interim injunction.

10. It is not in dispute that in a suit filed by the mother of the respondents/plaintiffs against the predecessor-in-interest of the petitioner/defendant, the predecessor-in-interest of the petitioner/defendant had been restrained by a decree of permanent injunction from so opening doors and windows towards the *gali* which was held to be a private street and not a public street. The learned Senior Civil Judge has primarily based the interim order thereon.

11. The counsel for the petitioner/defendant has argued that even as per the judgment and decree against the predecessor-in-interest of the

petitioner/defendant, the predecessor-in-interest of the petitioner/defendant or subsequent purchaser were entitled to open ventilators towards that side. Attention in this regard is drawn to page 37 of the paper book being the first para of the judgment dated 3rd June, 1989 of the Court of Sh. R.S. Mahla, Sub Judge, Ist Class, Delhi in Suit No.12/1982.

12. However, a perusal of the relief granted in the said judgment does not show any such liberty having been given to the petitioner/defendant and the argument of the counsel for the petitioner/defendant is based on a misreading of the judgment inasmuch as he is relying on the pleadings of the predecessor-in-interest of the petitioner/defendant and not the relief given in the suit to the mother of the respondents/plaintiffs.

13. The counsel for the petitioner/defendant has then contended that though the judgment dated 3rd June, 1989 has become final but there were lots of flaw therein. It is also stated that Municipal Corporation of Delhi has filed a report stating that the “*gali*” is a public street.

14. It is also the argument of the counsel for the petitioner/defendant that by way of the interim order, the final relief which could have been granted in the suit, has been granted and not only has the petitioner/defendant been restrained from opening any windows but has also been directed to close the existing openings.

15. In view of the judgment against the predecessor-in-interest of the petitioner/defendant, no error is found in the said direction also.

16. All the other questions raised are subject matter of final adjudication in the suit. For the purposes of interim order, the judgment against the predecessor-in-interest of the petitioner/defendant would bind the petitioner/defendant.

17. There is no merit in the petition.

18. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

AUGUST 22, 2017

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