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

+ CM(M) 674/2017 & CM No.23271/2017 (for stay).

AFTAB & ORS

..... Petitioners

Through: Ms. Manpreet Kaur, Adv.

versus

NAJMA BEGUM & ORS

..... Respondents

Through: Mr. V.L. Madan, Adv.

AND

+ C.R.P. 219/2017 & CM No.36057/2017 (for condonation of 95 days delay in filing).

TASLIM & ORS

..... Petitioners

Through: Mr. V.L. Madan, Adv.

versus

AFTAB & ORS

..... Respondents

Through: Ms. Manpreet Kaur, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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09.10.2017

CM No.36058/2017 (for exemption) in C.R.P. 219/2017.

1. Allowed, subject to exceptions.

2. The application stands disposed of.

CM(M) 674/2017 & CM No.23271/2017 (for stay) and C.R.P. 219/2017 & CM No.36057/2017 (for condonation of 95 days delay in filing).

3. This order is in continuation of the earlier order dated 12th July, 2017 in CM(M) No.674/2017.

4. Since then, CRP No.219/2017 which has come up today for the first time, has been filed by the respondents in CM(M) No.674/2017, also impugning the same order dated 23rd February, 2017 as impugned in CM(M) No.674/2017 and seeking rejection of the suit under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC). Issue notice of CRP No.219/2017.

CM(M) 674/2017 & C.R.P. 219/2017

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5. Notice is accepted by the counsel for the respondents therein.
6. The matter has been considered.
7. The parties hereafter shall be referred to by their nomenclature in the suit from which both these petitions arise i.e. the petitioners in CM(M) No.674/2017 and who are respondents in CRP No.219/2017, as the plaintiffs and the respondents in CM(M) No.674/2017 and who are petitioners in CRP No.219/2017, as the defendants.
8. I have straightaway enquired from the counsel for the defendants as to what is their defence to the suit.
9. A perusal of the judgment and decree dated 19th November, 2011 in earlier Suit No.164/2002 of the Court of Ms. Swati Katiyar, Civil Judge-III, Tis Hazari Courts, Delhi filed by the defendants shows,
 - a) that in the said suit, the following issues were framed:-
 - “1. *Whether the plaintiffs are entitled to the relief of declaration as claimed in the plaint? OPP*
 2. *Whether the plaintiffs are entitled to the relief of permanent injunction as claimed in the plaint? OPP*
 3. *Whether the suit property is under the ownership of the defendant? OPD*
 4. *Whether the plaintiffs are the tenants in the suit property? OPD*
 5. *Relief.*”
 - b) Issue no.1 aforesaid was decided against the defendants who were plaintiffs in that suit.
 - c) Issue no.2 aforesaid was decided in favour of the defendants and the plaintiffs were restrained from forcibly dispossessing the defendants from the property without due process of law.

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- d). Issue No.3 was decided against the defendants and the Issue no.4 was decided against the plaintiffs who were defendants in that suit.

10. Thus, while the plaintiffs, in the earlier suit were, claiming the defendants to be tenants in the property, the defendants controverted the same and it was held that the defendants were not tenants under the plaintiffs in the property.

11. The defendants preferred an appeal against the aforesaid decree and which was dismissed vide order dated 3rd October, 2012 in RCA No.54/2011 of the Court of Additional District Judge-01 (South) District, Saket Courts Complex, New Delhi. The said order attained finality. The Appellate Court *inter alia* also held that the defendants had not shown their ownership over the property.

12. I have today also enquired from the counsel for the defendants whether the defendants claim to be tenants in the property.

13. The counsel for the defendants states that the defendants do not claim to be tenants in the property.

14. I have enquired from the counsel for the defendants that what is the title which the defendants claim in the property and which has not been adjudicated in the earlier suit.

15. The counsel for the defendants states that the defendants claim to be owners of the property by adverse possession and no such claim was made in the earlier suit.

16. On enquiry, it is clarified that in the earlier suit, the defendants claimed to be in ownership by possession of the property.

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17. I have enquired from the counsel for the defendants, what is the difference between the claim of owners in possession and the claim of ownership by adverse possession. To my understanding, there is no difference between the two and since the claim of the defendants in the earlier suit has been negated, it necessarily implies that the defendants have no title to the property.

18. The counsel for the defendants states that had the defendants taken the plea of adverse possession, they would have been necessarily required to admit title of the plaintiffs and which the defendants were disputing. Reliance in this regard is placed on ***Dagadabai Vs. Abbas*** 2017 (5) Scale 22.

19. Though I am of the view that this Court, in exercise of jurisdiction under Article 227 of the Constitution of India can pass appropriate orders as ought to have been passed in the suit, even when the parties come before this Court against some other order, if finds the process of the Trial Court being wasted but since there has been no finding of the Trial Court on the aspects, it is deemed appropriate to follow the traditional view and to remand the matter to the Trial Court with directions to consider the same in the correct light.

20. However, from the aforesaid, it stands admitted by the defendants that Issue no.6 in the suit framed on 24th January, 2015 as under:-

“6) *Whether the jurisdiction of Civil Court is barred by virtue of Section 50 of the Delhi Rent Control Act? OPD*”

is erroneous.

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21. Once the defendants also do not claim to be tenants in the property, the issue aforesaid as to the bar of Section 50 of the Delhi Rent Control Act, 1958 is clearly misconceived.

22. From the aforesaid, it is also found that Issue no.1 as under:-

"1) Whether the defendants are in illegal and unauthorised possession of suit property? OPP

is covered by the judgment in the earlier suit.

23. The counsel for the defendants has argued that the order of the learned Additional District Judge on Issue no.5 as under:-

"5) Whether the plaint is liable to be rejected under Order 7 Rule 11 CPC?OPD"

is erroneous.

24. On enquiry as to the ground on which the plaint in the suit from which this petition arises, is liable to be rejected, it is argued that the Article 65 of the Schedule to the Limitation Act, 1963 would apply.

25. On enquiry as to when the defendants first claim to have become owners by adverse possession, the counsel for the defendants states the claim to have been made on two occasions; firstly when the defendants refused to accept the plaintiffs as owners and secondly, on 19th May, 2000 when the earlier suit was instituted by the defendants.

26. However, the defendants have already stated that in the plaint in the earlier suit, the defendants did not take the plea of adverse possession. The said plea was taken for the first time in the written statement to the suit from which this petition arises. I fail to see as to how, when the defendants in the

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earlier suit filed by them did not set up the plea of adverse possession, can they claim the suit filed by the plaintiffs to be barred by time. No merit is found in the contention of the counsel for the defendants, of the defendants on the date of filing of the earlier suit being required to plead the position as prevailing on that date; rather the same shows that on the date of filing of the earlier suit, the defendants were not claiming to have become owners by adverse possession. At no point during the pendency of the earlier suit also did they take the said plea. There is thus no merit in the CRP No.219/2017 which is dismissed.

27. Thus the only issues which remain in the suit are as under:-

3) *Whether defendants have become owner in respect of suit property by adverse possession or by law of prescription? OPD*

4) *Whether suit is barred by limitation? OPD*

7) *Whether the judgment dated 19.11.2011 passed in Suit No.164/2002 by the Court of learned Civil Judge, Tis Hazari Courts, Delhi and findings given therein shall operate as resjudicata on the parties to this suit for deciding the issues in controversy in the present suit? If so, to what extent? OP – Both the parties.*

8) *Whether the plaintiffs are entitled to the relief of possession, as prayed for? OPP*

9) *Whether the plaintiffs are entitled to any mesne profits? If so, at what rate and for which period? OPP*

10) *Whether the plaintiffs are entitled to any interest on mesne profits? If so at what rate and for which period? OPP*

11) *Relief."*

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28. Though the CRP No.219/2017 has been dismissed but I am at present not tinkering with the Issue no.4 qua the plea of limitation for the reasons hereinafter appearing.

29. Similarly, though the learned Additional District Judge has vide impugned order dated 23rd February, 2017 already decided Issue No.7 but for the reasons hereinafter appearing, it is deemed appropriate that the learned Additional District Judge considers the same in the correct perspective as hereinafter mentioned.

30. The learned Additional District Judge to hear fresh arguments on Issue no.7 aforesaid and to, in the said context consider:-

- (i) Whether the plea of the defendants of adverse possession requires any trial in the light of the defendants having in the earlier suit not set up any plea of adverse possession.
- (ii) Whether there is any difference between the claim of the defendants in the earlier suit, of ownership by possession and the suit from which these petitions arise, of ownership by adverse possession.
- (iii) If the answer to the above issue is in favour of the defendants, whether it is open to the defendants to, after having failed in the plea in the earlier suit, set up such a plea and whether not such a plea is barred by Order II Rule 2 of the CPC or otherwise.
- (iv) Whether the defendants could have become owners by adverse possession after institution of the earlier suit and during the pendency of the proceedings in the earlier suit and / or appeal thereagainst.

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- (v) If any of the issues are decided in favour of the defendants, whether there is any plea of limitation which requires trial.

31. It is for the aforesaid reason that I have not deleted Issue no.4 inspite of affirming the finding of the learned Additional District Judge in order dated 23rd February, 2017.

32. If the learned Additional District Judge, in pursuance to the aforesaid enquiry, comes to a finding in favour of the plaintiffs, needless to state a decree for possession shall be passed forthwith and the enquiry into *mesne* profits ordered. However, if the learned Additional District Judge is of the view that any evidence is required to be led, the suit will be listed therefor.

33. With the aforesaid directions, CM(M) No.674/2017 is disposed of.

OCTOBER 09, 2017

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RAJIV SAHAI ENDLAW, J

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