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

+ **CM(M) 1150/2017**

KANTA & ORS

..... Petitioners

Through: Mr. Rajiv Shankar Dvivedi, Adv.

Versus

MAYA CHAUHAN & ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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16.10.2017

CM No.37317/2017 (for exemption)

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

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3. This petition under Article 227 of the Constitution of India impugns,
a) the order [dated 20th October, 2016 in CS No.2380/2016 of the Court of Additional District Judge (ADJ)-02 (East), Karkardooma Courts, Delhi] allowing the oral request of the respondents No.1 to 3/ plaintiffs No.2 to 4 to withdraw the suit with liberty to file a fresh suit on the same cause of action and so dismissing the suit as withdrawn with liberty aforesaid to respondents No.1 to 3/plaintiffs No.2 to 4; and, b) the order dated 18th August, 2017 disposing of the application filed by the petitioners for review of the order.
4. Vide impugned order dated 20th October, 2016, since none had appeared before the Suit Court on behalf of the plaintiff No.1 in the suit,

court notice was ordered to be issued to plaintiff No.1 for 16th November, 2016. The counsel for the petitioners/defendants, on enquiry, states that the suit qua the plaintiff No.1 has since been dismissed.

5. It has come on record that the respondents No.1 to 3/plaintiffs No.2 to 4, after 20th October, 2016, have instituted a fresh suit, according to them in accordance with the liberty granted to them in order dated 20th October, 2016. However, there is no clarity with respect to the date of institution of the said second suit, though the counsel for the petitioners/defendants states that the same was instituted in second half of January, 2017. The counsel for the petitioners/defendants, on enquiry, also states that that the review petition which has been disposed of on 18th August, 2017, was instituted on 23rd December, 2016.

6. The first grievance of the counsel for the petitioners is that on oral request, the suit could not have been dismissed as withdrawn with liberty aforesaid.

7. No merit is found in the said contention. The Court is certainly entitled to act on the basis of an oral request which can be entertained and request for withdrawal of the suit with liberty to sue afresh may fall in such category, depending upon the facts of the case.

8. The order dated 20th October, 2016 though records the presence of the counsel for the petitioners/defendants does not record any opposition by them to the request of the respondents No.1 to 3 for withdrawal of the suit.

9. The application for review was also filed after nearly two months therefrom, along with an application for condonation of delay, though in the

application for review it was pleaded that the counsel for the petitioners/defendants had opposed the grant of liberty sought by the respondents No.1 to 3/plaintiffs No.2 to 4 to sue afresh.

10. The learned ADJ, in the order dated 18th August, 2017 on the application of the petitioners for review, has found / observed / held i) that the suit was filed as far back as in the year 1995, for the reliefs of partition and rendition of accounts; ii) that the suit was subsequently transferred to the High Court for the reason of the subject matter of the suit being beyond the pecuniary jurisdiction of the Civil Judge before whom the suit was filed; iii) that the suit was however transferred back to the District Court, on enhancement of the minimum pecuniary jurisdiction of the High Court; iv) that only the review applicants / defendants were the contesting defendants in the suit; the right of some of the other defendants to file written statement stood closed and the other defendants in the suit as originally instituted had either been proceeded against *ex parte* or had been deleted from the array of defendants; v) that none had been appearing on behalf of plaintiff no.1 in the suit also; vi) that the issues were framed in the suit on 15th December, 2010; vii) that on 1st October, 2016, when the suit was pending for evidence, adjournment was sought by the counsel for the plaintiffs no.2 to 4 in the suit for filing an application for amendment of the plaint to include the relief of possession; viii) that subsequently, an application for amendment was filed; ix) that however instead of pressing the application, the counsel for the plaintiffs no.2 to 4 made a statement that the suit suffered from inherent defects and accordingly sought permission to withdraw the suit with

permission to file any other proceedings in accordance with law; x) that statements of plaintiffs no.2 to 4 to this effect were recorded and the suit permitted to be dismissed as withdrawn on behalf of plaintiffs no.2 to 4 with liberty to file any proceedings in accordance with law; xi) that while it was the contention of the counsel for the review applicants / defendants that they had filed their written submissions opposing the prayer for withdrawal of the suit on the very next day, after the suit on 20th October, 2016 was dismissed as withdrawn with liberty aforesaid, it was the contention of the counsel for the plaintiffs no.2 to 4 that the order dated 20th October, 2016 was a consensual order and the review applicants/defendants who were present on 20th October, 2016 had not opposed the prayer of the plaintiffs no.2 to 4 for withdrawal of the suit; xii) that it was also the contention of the counsel for the plaintiffs no.2 to 4 that they had already filed the second suit but only against the review applicants / defendants and for the relief of possession alone since other reliefs as claimed in the suit were not maintainable and which was the inherent defect in the suit which could not have been rectified by any amendment; xiii) that the order dated 18th January, 2010 in the suit recorded the contention of the counsel for the review applicants / defendants that the suit in the form as existed then, for partition and rendition of accounts was not maintainable as the review applicants / defendants were in unauthorized occupation of the property and the proper course for the plaintiffs was to file a suit for possession; xiv) that the application for review had been filed after learning of the fresh / second suit filed by the plaintiffs no.2 to 4; xv) that the order dated 20th October, 2016 falsified the contention of the counsel for the review applicants / defendants of having opposed

withdrawal; thus the order dated 20th October, 2016 was either consensual or without opposition of the counsel for the review applicants / defendants; xvi) that the counsel who had filed review application had himself appeared on 20th October, 2016 and had not opposed the withdrawal of the suit; xvii) that the Court while passing the order dated 20th October, 2016 is deemed to have considered the inherent defects in the suit; xviii) that the argument of the counsel for the review applicants / defendants that he, on 20th October, 2016 was under the impression that the order on the oral request for withdrawal of the suit had been reserved and the next date was 16th November, 2016 and under that impression had filed objections on 21st October, 2016 to the oral request for withdrawal of the suit could not be believed as the order dated 20th October, 2016 was an oral order dictated in open Court and was within the hearing and knowledge of the review applicants / defendants and their counsel; xix) that the plea of the review applicants / defendants that they came to know of the order dated 20th October, 2016 only on 16th November, 2016 also thus could not be believed and there was no sufficient cause for delay in applying for review; xx) that the only other argument of the counsel for the review applicants / defendants was that the witnesses of the review applicants / defendants were quite old and may not survive for another round of litigation but the same could not be a ground to deny permission for withdrawal of the suit; xxi) that however no blanket order or permission could have been granted by the Court while granting permission for withdrawal; xxii) that accordingly the order dated 20th October, 2016 was modified to the extent that the suit on behalf of

plaintiffs no.2 to 4 stood dismissed as withdrawn for the relief so claimed by them in the suit and with liberty to file fresh suit in respect of the subject matter of the suit; xxiii) that it was also the contention of the counsel for the review applicants / defendants that costs should have been imposed upon the plaintiffs no.2 to 4 while granting permission to withdraw the suit; and, xxiv) that however cost could be imposed only when the plaintiffs abandoned any suit or part of the claim and thus the said prayer also could not be accepted.

11. As the aforesaid would disclose, the learned ADJ has sufficiently and reasonably dealt with the matter under the review application filed by the petitioners / defendants, even though has held the review sought by the petitioners / defendants to be otherwise barred by time and refused to condone the delay in applying therefor.

12. Neither has the counsel for the petitioners / defendants urged any argument in this respect nor have the petitioners / defendants in the memorandum of the petition controverted that the suit was for the relief of partition and rendition of accounts and the second suit which has been filed is for the relief of recovery of possession of immovable property. Once that is so, I otherwise also, do not find any reason to interfere with the impugned order.

13. The counsel for the petitioners / defendants has referred to ***K.S. Bhoopathy Vs. Kokila*** (2000) 5 SCC 458 and ***V. Rajendran Vs. Annasamy Pandian*** (2017) 5 SCC 63 to contend that permission to withdraw the suit with liberty to file afresh could not have been granted in such a casual manner and without setting out any reason.

14. I have perused the aforesaid judgments. Though undoubtedly, in ***K.S. Bhoopathy*** supra, it was held that before granting such permission, the Court is duty bound to satisfy itself that proper grounds exist for granting such permission and merely stating that the defendants will not be prejudiced by the grant of permission is not sufficient compliance of the statutory mandate but it must be noticed that the Supreme Court in that case was concerned with grant of such permission at the appellate stage and the reason which prevailed was that the defendants were losing the benefit of the decision of the lower Court in their favour. It was in this context held that recourse to Order XXIII Rule 1(3) of the CPC cannot be permitted where the claim, as set out in the original suit, is weak and adverse findings have been recorded against the plaintiff. ***V. Rajendran*** supra merely holds that an error in the description of the property subject matter of the suit constitutes 'formal defect' within the meaning of Order XXIII Rule 1(3) of the CPC.

15. Before parting with this order, I may notice that the substantive part of the order was dictated in open Court after the hearing on 16th October, 2017; at that stage, the counsel for the petitioners / defendants stated that he will submit certain judgments and in the light whereof the dictation of the order was not completed and the file was sent to the Chamber for completing the dictation of the order after perusing the judgments to be cited by the counsel for the petitioners/defendants. The counsel for the petitioners/defendants thereafter handed over to the Court Master the copies of the judgments aforesaid. However, the order remained to be completed in

Chamber and the file went on a backburner and the order is being released on the date hereunder mentioned. While adding the consideration of the judgments aforesaid and releasing the order, the Court Master has also informed of an application having been filed by the petitioners / defendants though not listed, for re-hearing of the case on the ground of delay in release of the order. The petitioners / defendants are found to have wrongly stated therein that orders were reserved. However, need for re-hearing is not felt since substantive part of the order dismissing the petition was dictated in open Court on the date of hearing and only on the request of the counsel for the petitioners/defendants, the file was sent to the Chamber to enable him to submit the judgments.

16. There is no merit in the petition.

Dismissed.

RAJIV SAHAI ENDLAW, J.

OCTOBER 16, 2017

bs /gsr

(corrected & released on 15th February, 2018)