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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CM(M) 1279/2017**

ATUL KRISHNA SINGH Petitioner

Through: Mr. Daleep Dhyani, Adv.

Versus

ACHAL SINGH & ANR Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **14.11.2017**

CM No.40971/2017 (for exemption)

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

CM(M) 1279/2017 & CM No.40970/2017 (for stay)

3. This petition under Article 227 of the Constitution of India impugns the orders [dated 23rd September, 2017 and 11th October, 2017 in CS No.907/2017 of the Court of Additional District Judge-05 (ADJ), New Delhi District, Patiala House Courts, New Delhi], though issuing summons of the suit filed by the petitioner / plaintiff for partition of immovable property and for permanent injunction but not granting interim order sought by the petitioner / plaintiff.

4. On 23rd September, 2017, the counsel for the petitioner / plaintiff did not even bother to appear before the learned ADJ when the suit came up for admission and resultantly, the application for interim relief was not pressed. The learned ADJ issued summons of the suit for 8th February, 2018.

5. The counsel for the petitioner / plaintiff thereafter filed an application under Section 151 of the Code of Civil Procedure, 1908 (CPC) for appointment of Local Commissioner and which application has been dismissed vide order dated 11th October, 2017.
6. I have enquired from the counsel for the petitioner / plaintiff as to how against non-grant of *ex parte* ad-interim order in an application under Order XXXIX Rules 1&2 of the CPC, a petition under Article 227 of the Constitution of India lies.
7. Order XLIII Rule 1(r) of the CPC makes an order on an application under Order XXXIX Rules 1&2 of the CPC appealable and once there is a remedy available under the CPC, Article 227 of the Constitution of India cannot be invoked.
8. The counsel for the petitioner / plaintiff then states that he is aggrieved by the order of dismissal of the application for appointment of Local Commissioner.
9. Thus this petition is treated as a challenge only to the order dated 11th October, 2017 of dismissal of the application for appointment of a Local Commissioner.
10. *Ex parte* appointment of Local Commissioner was sought pleading i) that the petitioner / plaintiff was earlier residing in the property of which partition was sought and after locking the room in his possession shifted to a rented accommodation; ii) that the possession of the said room was still with the petitioner / plaintiff and it was apprehended that the respondents / defendants may disturb the possession of the petitioner / plaintiff on receipt

of summons of the suit; and, iii) that appointment of Local Commissioner was sought to ascertain the possession of the petitioner / plaintiff of the said room.

11. The learned ADJ, in the impugned order, has reasoned i) that the property of which partition was sought was Flat No.156, Vasant Enclave, Vasant Vihar, New Delhi; ii) that the petitioner / plaintiff was seeking to have his possession verified but there was no relief of possession sought in the suit; and, iii) that the claim for one-third share in the flat was on the basis of a Family Settlement dated 15th February, 2006.

12. I have enquired from the counsel for the petitioner / plaintiff whether not the flat of which partition is sought has been allotted by the Delhi Development Authority (DDA) and if so, in whose favour it has been allotted.

13. The counsel for the petitioner / plaintiff states that the said flat has been allotted by the DDA in the name of the respondent / defendant no.1 who is the father of the respondent / plaintiff.

14. On further enquiry, it is stated that the said flat is duplex comprising of three bed rooms and besides the father of the petitioner / plaintiff, the mother, brother and brother's wife are residing in the said house.

15. On enquiry as to how the petitioner / plaintiff has a share in the said flat, the counsel for the petitioner / plaintiff draws attention to the photocopy of a document dated 15th February, 2016 but which also records the ownership of the father of the petitioner / plaintiff of the said flat and only

records that the father of the petitioner / plaintiff had decided to sell the said flat and to divide the proceeds equally between himself, petitioner / plaintiff and the brother of the petitioner / plaintiff.

16. I fail to see as to how the same constitutes the petitioner / plaintiff as the owner of the flat and as to how does it give to the petitioner / plaintiff a right or share in the flat. The only remedy of the petitioner / plaintiff can be to enforce the document if at all it is enforceable in law.

17. The learned ADJ to, before proceeding further, satisfy about the maintainability of the suit.

18. There is no merit in the petition.

Dismissed.

No costs.

A copy of this order be forwarded to the Court where the suit is pending.

RAJIV SAHAI ENDLAW, J

NOVEMBER 14, 2017

‘gsr’..