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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on :- 18th January, 2018

+ CM (M) 27/2015 and CM APPL.1765/2016, 1390-1393/2018

**POONAM PANDEY (NOW DECEASED) THR LEGAL
HEIRS & ANR. Petitioners**

Through: Mr. Nitin Dahiya Advocate with
Mr. Prateek Dahiya, Adv.

versus

POORNA NAND BAJPEI & ORS Respondents

Through: Mr. F.S.Chauhan, Advocate with
Mr. Kapil Chaudhary, Adv. for R-1(a)
to 1(c).

**CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA**

ORDER (ORAL)

1. This matter has brought to light utter neglect and complete mishandling almost by all concerned with the proceedings arising out of the civil suit, the details of which are mentioned herein below.

2. Civil suit (suit No.321/2014) was instituted by Poonam Pandey (wife of Om Babu Pandey) and Rama Nand Bajpai joining as first and second plaintiffs in 1993, seeking reliefs in the nature of partition,

separate possession, etc. The respondents herein were impleaded as defendants. The suit had reached advanced stages when on 19.03.2014 the Additional District Judge (ADJ) in *seisin* of the matter recorded the proceedings as under:-

“Present: Shri Manohar Lal Sharma, Advocate Counsel for plaintiff with plaintiff in person.

Shri Parvender Kumar Sharma, Advocate counsel for defendants No.1(a) to 1(c).

Shri Rakesh Kumar Sharma, Advocate counsel for defendants No.4 to 6.

After it is pointed out to the counsel for plaintiff that plaintiff has not filed on record any document of title in his favour as whose predecessor or successor in interest they are claiming to pursue this remedy.

Counsel for plaintiff wants to make statement on instructions.

Counsel appearing on the opposite sides have no objection to the same.

Separate statement of counsel for plaintiff under instructions recorded. In view of the same, the suit is permitted to be withdrawn.

File be consigned to record room.”

3. On 17.04.2014, the two aforesaid plaintiffs moved an application under Section 151 of the Code of Civil Procedure, 1908 (CPC) taking exception to the dismissal of the suit as withdrawn by the counsel arbitrarily and without instructions, taking a clear position that neither of the two plaintiffs were present before the court on 19.03.2014. While the application seeking revival of the proceedings in the suit was pending, the first said plaintiff (Poonam Pandey) died.

The matter was thereafter pursued by her legal heirs. The application for revival, however, was dismissed by the ADJ on 10.11.2014 recording the reasons as under:-

“Present: Shri Kapil Kumar Tyagi, Advocate counsel for applicant with applicant.

An application has been moved on behalf of legal heir of deceased plaintiff saying that order of withdrawal on the statement of counsel has put them into great difficulty as the withdrawal was without instructions.

Though, the complaint has been filed against the counsel in the Bar Council and the prayer is not to a Judge but to God that whatever legal order has been passed may be permitted to be changed because it has caused hardship to the applicant.

I am sorry to say that though the job of the Judge is like that of God because the Judge through his decision also determines sometime, the destiny of the people but the Presiding Judge is not restored with the power like God and the discretion of God. He has to decide the cases on the basis of law only and as per the Oath of Office, administered to him and sometimes there may be clash between law and justice.

Under the present circumstances to the case, I feel constrained to say that the law is not in favour of applicant though the counsel for applicant has cited a judgment at Bar reported in 2009 (2) FLC 491, titled as Dwarika Prasad vs. Nirmala & Others, that fraud has been played upon court.

Perusal of the record shows that no fraud has been played upon the Court.

The counsel who has argued on findings that too commenting upon the proceedings of the case on merits will be out of place and while disposing off the application but to suffice to say record as is stands today

at the time of final argument, may have resulted into order not to the liking of the parties.

Hard cases should not be the basis of laying down the law because if the hard cases are allowed to determine the law, the whole shape of the law to be followed, will change if the hard case will become the basis of change of law.

I am constrained to dismiss with a great brief the application of the applicant, admittedly no documents of title have been placed on record, till the conclusion despite the fact that applicant has examined as witness.

In any case, as far as the position of law as it stands as on date, the application is liable to be dismissed and it is accordingly dismissed.

File be consigned to record room.”

4. The petition at hand was filed challenging the aforesaid orders. It appears the first defendant Poorna Nand Bajpei had died earlier in the year 2000 and on an application moved under Order 22 CPC, his legal heirs had already been substituted. It appears that the certified copies of the orders dated 19.03.2014 and 10.11.2014 were issued by the District Court under the cover of memo of parties of the suit as originally presented (page 26 of the paper book). Thus, in the petition Poorna Nand Bajpei was shown as first respondent. The petitioners later realized this error and moved an application (CM Appl.1765/2016) seeking permission to file amended memo of parties wherein they would reflect the legal heirs of the first respondent (first defendant before the trial court) as already substituted in his place upon his death. Notices were issued on the said application to the said legal heirs who appeared through counsel. When the matter has

reached the stage of hearing for final disposal, Mr. F.S. Chauhan, Advocate representing the aforesaid parties submitted that he has not been served with copy of the main petition. Though, during the course of hearing, he conceded that copy of the main petition is available with him, another copy was served on him by the counsel for the petitioners.

5. Since the first respondent had died in the year 2000 and since his legal representatives had already been brought on record before the impugned orders were passed, the prayer in the application (CM Appl.1765/2016) deserves to be granted. The amended memo of parties is taken on record.

6. The petition as presented has been objected to on the ground that there has been no move till date for substitution of the first plaintiff by her legal representatives in the civil suit. Pertinent to recall here that the first plaintiff had died when the proceedings in the civil suit had come to an end upon the ADJ allowing the counsel for the plaintiffs to withdraw the suit on his statement on 19.03.2014. Since the death of the first plaintiff occurred during the period when the application for revival was pending, the objection is hypertechnical and should not come in the way of the prayer being granted.

7. It can be concluded from the above facts that the cause of action for prosecuting the matter for revival of the proceedings of the civil suit has survived in favour of the legal representatives of the deceased plaintiff. Given the fact that in the proceedings throughout, particularly on the application for revival moved by the deceased

plaintiff herself joined by the other plaintiff, fraud has been attributed to the counsel representing them, the lapse described to be on account of improper or deficient legal advice, the delay has been properly explained. Thus, the applications for substitution of the legal representatives of the first petitioner (first plaintiff before the trial court) and for condonation of delay are also granted. The applications (CM APPL.1390-1393/2018) stand allowed in these terms.

8. The counsel for the first respondent objects to the prayer for revival primarily on the ground that the first plaintiff (Poonam Pandey) had limited interest in the subject property. He also contends that the second petitioner had sued through next friend, he having been described in the will as mentally weak. These objections relate essentially to the merits of the case which must not to be gone into by this court at this stage.

9. Fact of the matter is that the plaintiffs of the suit had cried foul almost immediately after the withdrawal of the suit by statement made by the counsel on their behalf. The proceedings recorded on 19.03.2014 leave it a matter of mystery as to which of the two plaintiffs was present in person. Noticeably, the name of the plaintiff who statedly was present is not disclosed. There are documents shown indicating the first plaintiff was then terminally ill and, on this, it is the case of petitioners that she could not have been present. The weakness of mental capacity of the second plaintiff as alluded to by the respondent itself renders the possibility of his presence doubtful. This only substantiates the case that both plaintiffs were not present.

10. This court finds substance in the contention that it was inconceivable for the plaintiffs to suddenly withdraw the suit after they had prosecuted it for almost two decades. The technical defect which was referred to as the reason in the statement made by the counsel seeking to withdraw was not elaborated nor considered by the trial Judge. The materials on record indicate that the plaintiffs of the suit had also filed complaint against the counsel before the Bar Council of Delhi. It may be that the Bar Council has not taken any action on such complaint but that cannot mean that the complaint was unfounded.

11. Curiously, during the course of hearing, Mr. F.S. Chauhan, Advocate representing the first respondent submitted that a notice should have been issued to Mr. Manohar Lal Sharma, Advocate for complying with the principles of natural justice. This argument coming from a party which benefited from the act attributed to Mr. Manohar Lal Sharma, Advocate, seemingly unauthorized, needs to be only noted for record in the context of the allegations of fraud attributed by the plaintiffs to the said counsel.

12. Less said the better about the propriety of the observations recorded by the ADJ in the order dated 10.11.2014 whereby application for revival was dismissed. The reasons set out in the said order (if there is any meaning of such reasons) show that the approach of the trial Judge was wholly misdirected.

13. In the above facts and circumstances, the non-suiting of the petitioners on the basis of a statement by the counsel who apparently

did not have any authorization was incorrect. This cannot be permitted to thwart a litigation which had begun in 1993.

14. The petition is, thus, allowed. The proceedings in the civil suit stand revived on the file of the trial court. The parties are directed to appear before the trial court for further proceedings in accordance with law on 5th March, 2018.

15. *Dasti.*

JANUARY 18, 2018

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R.K.GAUBA, J.