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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 10th January, 2018

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RFA 391/2016 & CM APPL.27606/2016

NABA NAEEM & ANR

..... Appellants

Through: Mr. Yeshu Jain & Mr. Naeemul
Hasan, Advocates.

versus

ANEES AHMED ABBASI

..... Respondent

Through: Ms. Padmini Kumari & Mr. Parves
Siddiqui, Advocates.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

CM No. 27606/2016

1. By this application, the Appellants/Plaintiffs (*hereinafter*, 'Plaintiffs') pray for addition of the name of Ms. Sana Naeem to the memo of parties. The Plaintiffs submit that the Agreement to Sell was entered into in the names of both Ms. Naba Naeem and Ms. Sana Naeem - daughters of Sh. Naeemul Hasan. Though the entire description is given in the plaint, only the name of Ms. Naba Naeem is mentioned in the memo of parties. This is an inadvertent error. Accordingly, the Plaintiffs pray that the name of Ms. Sana Naeem be permitted to be added to the memo of parties. For the reasons stated in the application, the same is allowed. Ms. Sana Naeem is added to the memo of parties. The amended memo of parties, already filed, is taken on record.

RFA 391/2016

2. This Regular First Appeal impugns judgment dated 6th April, 2016 by which the suit filed by Plaintiffs was dismissed. The present suit for specific performance was instituted on 2nd September, 2011. The case of the Plaintiffs is that they had entered into an agreement to sell with the Respondent/Defendant (*hereinafter, 'Defendant'*) dated 9th April, 2010.

3. The Plaintiffs submit that the total consideration for the sale of the suit property bearing no. B-7/1, B-7/4, Sarai Khalil, Delhi was Rs.60,00,000/- (Rupees Sixty Lakh) out of which Rs.40,00,000/- (Rupees Forty Lakh) was paid, as stated in the Plaint. The receipt of the entire amount of Rs.40,00,000/- is however disputed by the Defendant.

4. Vide order dated 9th October, 2012, a Ld. Single Judge of this court on the Original Side, had directed that the Defendant shall maintain status quo as to the title and possession of the suit property, subject to the Plaintiffs depositing a sum of Rs.48,00,000/- (Rupees Forty Eight Lakh) which shall be kept in a Fixed Deposit Receipt. This amount continues to remain deposited in this court. Due to the change in the pecuniary jurisdiction of this court, the matter was transferred to the District Court.

5. Vide order dated 6th April, 2016, the learned Additional District Judge recorded that despite innumerable opportunities, the Plaintiffs have failed to lead evidence. Accordingly, the Plaintiff's evidence was closed and thereafter, since none of the issues were proved by the Plaintiff, the suit was dismissed vide judgment of the same date i.e., 6th April, 2016.

6. A perusal of the record reveals that the Plaintiffs have filed their list of witnesses, and evidence by way of affidavit of three witnesses numbered 1, 2, and 4 is on record at pages 137, 163 and 165 of the paper book. Thus,

the Plaintiffs have filed the evidence of three witnesses. There is no doubt that the Plaintiffs have delayed the recordal of evidence. The Counsel for the Plaintiffs submits that the reason for non-production of the witnesses and recordal of evidence was because an application was pending for verification of signature of the Respondent on the acknowledgment, which would have proved payment of Rs.28,09,163/- (Rupees Twenty Eight Lakh Nine Thousand One Hundred and Sixty-Three) by the Plaintiffs to the Defendant.

7. There is further confusion caused by the Plaintiffs by not impleading Ms. Sana Naeem, who is one of the signatories to the agreement to sell. She is the sister of Ms. Naba Naeem. Both sisters had entered into the agreement to sell. The father of the two sisters Sh. Naeemul Hasan is their power of attorney holder. An application being CM No. 27606/2016 has been moved before this court for impleading Ms. Sana Naeem, which has been allowed today.

8. The counsel for the Defendant submits that the Plaintiffs have been grossly negligent in prosecuting the suit to the extent that they failed to even properly implead Ms. Sana Naeem and hence the suit was rightly dismissed. She also submits that unnecessary delay is being caused and the Defendant is being made to defend the proceedings and has incurred huge costs on the same.

9. There is no doubt that there have been gross lapses by the Plaintiffs, however, it is also the admitted position that substantial amounts have been either paid/deposited by the Plaintiffs pursuant to the Agreement to Sell. Considering the payments made by the Plaintiffs, dismissal of the suit would result in enormous injustice to the Plaintiffs. The error in the memo of

parties and the delay in producing the witnesses are procedural and do not affect the substantive case of the Plaintiffs, who deserve a fair opportunity to prove their case. Of course, they could have been more diligent in prosecuting the suit. The filing of the memo of parties and the application to refer the matter to CFSL appear to be on legal advice and the parties ought not to be faulted for the same. The record also reveals that the father of the Plaintiffs has been present before the court on several occasions and hence there may not be any negligence or an intention to delay.

10. The non-filing of evidence in this case does not appear to be either deliberate or malafide. In fact the delay in adjudication of the suit works against the Plaintiffs, who have paid money for the property and are unable to enjoy the property. The closure of evidence of the Plaintiffs and pronouncement of judgment on the same day, is of great detriment to the Plaintiffs. The non-impleadment of one of the sisters, moving of an application for obtaining a certificate from CFSL, and the non-appearance of witnesses, for tendering of evidence and cross examination, whose affidavits were already on record, are all steps usually taken by litigants under legal advice. This case appears to be no different. However, for a Plaintiff to be met with such grave consequences of dismissal of the suit, which may result in rendering the hard earned money which has been paid to the Defendant and the money deposited in the Court, completely redundant, appears to be disproportionate. On a balance of consideration, the court is of the opinion that the Plaintiffs can be put to terms and can be allowed to produce the evidence to establish their case. The Plaintiffs deserve an opportunity to tender the evidence on their behalf.

11. The appeal is accordingly allowed and the Plaintiffs are permitted to

lead evidence in the suit subject to the following terms and conditions:

- (i) Amended memo of parties adding the name of Ms. Sana Naeem in the suit be filed within one week;
- (iii) The list of witnesses of the Plaintiffs is restricted to the three witnesses whose affidavits have already been filed, as also witness No. 3, Mr. Govind Bhambhani.
- (iv) No further witnesses would be permitted.
- (v) The evidence would now be recorded by a Local Commissioner. Mr. S.K. Tandon, retired ADJ is appointed as the Local Commissioner for recording of evidence.
- (vi) Cross examination of Plaintiffs' witnesses shall begin from 22nd January, 2018 and shall be recorded on a day to day basis and in any case, shall be concluded by 10th February 2018.
- (vii) The Defendant shall file a list of witnesses by 18th January, 2018. Defendant's evidence shall be completed by 15th March, 2018.
- (viii) If the parties wish to produce any handwriting expert(s) to prove their respective cases, the same shall be done within the prescribed time schedule fixed for both sides.

12. The learned Trial Court shall hear arguments immediately after recordal of evidence and endeavour to dispose of the matter after hearing arguments within a month.

13. The fee of the Local Commissioner shall be a consolidated sum of Rs.1,00,000/- (Rupees One Lakh) to be paid in two installments. Rs.50,000/- shall be paid initially on the first date of hearing before the Local Commissioner. The second installment of Rs.50,000/- (Rupees Fifty Thousand) shall be paid on the date when the Defendant's evidence

commences. At this stage, the fee shall be fully borne by the Plaintiffs and shall be subject to an order of costs in the suit.

14. The appeal is allowed in the above mentioned terms subject to payment of Rs.20,000/- (Rupees Twenty Thousand) as costs to the counsel for the Defendant.

15. Since the parties have consented to the above order, refund of court fee to the tune of Rs.30,000/- (Rupees Thirty Thousand) is permitted. The Trial court record be sent back forthwith after retaining scanned copies of the same.

16. All pending applications are disposed of.

PRATHIBA M. SINGH
(Judge)

JANUARY 10, 2018/ R

