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

Date of decision: 18th May, 2018

+ **RFA 588/2016**

MUKESH KUMAR

..... Appellant

Through: Mr. Gaurav, Proxy counsel (M-7065997605).

versus

M P MADAN

..... Respondent

Through: Mr. Pankaj Kapoor, Advocate (M-9810832523).

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

CM APPL. 7892/2018(CM For Restoration)

1. This is an application under Order XLI Rule 19 filed on behalf of Appellant/Defendant (*hereinafter Defendant*). Counsel for the Defendant has submitted that due to his ill health, he could not appear on 15th February, 2018. Therefore, the judgment passed on 15th February, 2018 deserves to be recalled. A perusal of the order sheet of this file shows that as recorded in order dated 16th February, 2017 repeated adjournments were sought by the Defendant. The said order dated 16th February 2017, reads as under:

“1. Proxy counsel appearing for the counsel for the appellant seeks an adjournment on the ground that the arguing counsel is in personal difficulty.

2. A perusal of the order sheets reveals that the matter has remained at the stage of admission since August, 2016. Counsel for the appellant has been

accommodated for adjournment on three occasions. This is the fourth time that a request for adjournment is being made and that too, at the stage of admission.

3. *While accommodation the counsel for the appellant for the last time, list on 21.04.2017 for admission.*

4. *It is made clear that if the counsel for the appellant is not available on the next date of hearing, this Court would be compelled to dismiss the present petition for non-prosecution.”*

2. Again, on 21st April, 2017 adjournment was sought by the Defendant. On 15th February, 2018 the matter was passed over on the first call. There was no appearance even on the second call. None appeared for the Defendant and no request was even made on the ground of ill-health of the Counsel.

3. Thereafter this Court proceeded to hear arguments on behalf of the Plaintiff/Respondent (*hereinafter Plaintiff*) and passed orders.

4. On 28th February, 2018, the counsel for the Defendant relied upon two judgments of the Supreme Court ***Ghanshyam Dass Gupta v. Makhan Lal (2012) 8 SCC 745*** (*hereinafter referred as Ghanshyam Dass Gupta*) and ***UNA Co-operative Group Housing Society Ltd. v. Ravindra Brothers 142 (2007) DLT 774(DB)*** to submit that the appeal could have only be dismissed for non-prosecution and not on merits. Considering the judgment of the Supreme Court in ***Ghanshyam Dass Gupta (supra)***, the Appeal is restored and this Court has heard the parties on the merits of the appeal.

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5. The present appeal arises out of the impugned judgement and order dated 29th March, 2016 by which the suit for specific performance in respect

of property bearing No.155/1 out of Khasra No. 22/12 measuring 120 sq. yds. Village Burari, Abadi Known as Kamalpur, Delhi (hereinafter '*suit property*'), was decreed in favour of the Plaintiff. The Trial Court also granted a decree of permanent injunction restraining the Defendant from selling, alienating or creating any third-party interest in the suit property.

6. The case of the Plaintiff is that the Defendant had executed various documents by which the suit property was transferred in his favour. Since the suit property is located in Burari which is an unauthorised colony, hence registration of documents was not possible. Accordingly, the documents executed by the Defendant vest the ownership of the suit property in the Plaintiff.

7. The case of the Plaintiff is also that the said documents were executed by the Defendant because of a large sum of money which was to be paid by the Defendant to the Plaintiff. The counsel for the Plaintiff submits that the notice dated 31st March, 2011 gives the background to the transaction but the documents lastly executed are relied upon in support of the relief of possession and specific performance.

8. The main submission made by the Defendant is that the legal notice dated 31st March, 2011 Ex.PW-1/12 refers to a transaction of 2005. It is his submission that this transaction has not been pleaded in the plaint and hence the Plaintiff is guilty of suppression. He further submits that the documents which are relied upon by the Plaintiff i.e. GPA-PW1/7, Deed of Sale Agreement- PW1/8, Affidavit-PW1/9, Receipt-PW1/10 and Possession Letter-PW1/11 and General Power of Attorney-PW1/1, all of which are not registered documents and no right or title passes in favour of the Plaintiff in respect of the suit property by virtue of these documents.

9. The further submission is that two police complaints were lodged by the Defendant against the Plaintiff on 5th March, 2011 and 15th March, 2011 and it is argued that the said documents on the basis of which possession is being sought were executed by the Defendant under duress and coercion.

10. The Trial Court had heard the submissions on behalf of both the parties. The Trial Court, on 1st May, 2013 had framed the following nine issues:

- (i) Whether the plaintiff is entitled for a decree of specific performance as prayed for? OPP.*
- (ii) Whether the plaintiff is entitled for decree of permanent injunction as prayed for? OPP.*
- (iii) Whether the plaintiff is entitled for recovery of amount of Rs. 12 Lacs as prayed in prayer clause (c)? OPP.*
- (iv) Whether the suit of the plaintiff is not maintainable in the present form as the plaintiff has no locus standi to file the present suit? OPD.*
- (v) Whether the plaintiff has suppressed and concealed the material facts and suit is liable to be dismissed on this ground alone? OPD.*
- (vi) Whether the suit of the plaintiff is barred by limitation? OPD.*
- (vii) Whether the suit of the plaintiff has not been valued properly for the purpose of court fee? OPD.*
- (viii) Whether the suit of plaintiff is not properly signed and verified? OPD.*
- (ix) Relief.”*

11. The Trial Court thereafter decreed the suit of the Plaintiff and granted the relief of specific performance and possession. The Trial Court came to a categorical finding that the Defendant has put up a sham plea in respect of appointing his wife as a GPA holder. The Defendant admitted DW.2/PX-1. The finding of the Trial Court is extracted herein below:

“In the light of above discussion, I am of the considered opinion that plaintiff by way of leading his evidence has been able to show that:

(i) He has entered into an agreement to sell with the defendant.

(ii) Certain documents have been entered into.

(iii) payment i.e. sale consideration has been made.

(iv) possession is yet to be handed over.

By all these facts, the plaintiff is successful in shifting the onus upon the defendant. Defendant, on the other hand, has not been able to establish his defence. He has neither filed any counter claim nor filed a separate suit for declaration against the document dated 28.01.2011. The document Ex. DW2/PX-1 also reflects and prima facie establishes that there are dues standing against the defendant. The story narrated by the defendant during final arguments that his wife is the owner since 2009 also appears to be false and sham for the reason that application filed on her behalf under Order 1 Rule 10 CPC stands dismissed on merits, and neither she nor defendant has placed on record any such document to show that suit property in question has been transferred in her name. More so, the defendant himself has been stating during entire trial that he is the owner of the suit property in question. Thus, defendant himself has taken a contrary plea at the stage of final arguments which is not tenable in the eyes of law. By all these observations, I am of the considered opinion that defendant has failed to establish his defence. Therefore, issue no. 1 is decided in favour of the plaintiff.”

12. The Court has heard the submissions on behalf of the parties. The main plea of the Counsel for the Defendant/Appellant is that in view of the judgement of the Supreme Court in ***Suraj Lamp and Industries Pvt Ltd v. State of Haryana and Anr (2012) 1 SCC 656*** (hereinafter referred as *Suraj*

Lamps), unregistered documents could not have been recognised.

13. The documents in the present case are of January 2011. The Supreme Court in *Maya Devi v. Lalta Prasad (2015) 5 SCC 588* has held that the judgment of *Suraj Lamp (supra)* applies prospectively. The observation of the Supreme Court is set out below: -

“What has also escaped the attention of the executing court is that Suraj Lamp has prospective operation, thereby rendering it inapplicable to the subject 2006 transaction...”

The judgement in *Suraj Lamps (supra)* was rendered in 11th October, 2011. The judgement is prospective in its operation. Thus, the plea that the documents are not registered and hence no title passes has no basis. Moreover, at the time when the Agreement to Sell and other documents were executed, no possession was handed over. As per *Suraj Lamp (supra)*, the said documents can be used to obtain execution of the conveyance deed and other documents of ownership. There would be no illegality in the same. The relevant portion of the judgement in *Suraj Lamps (supra)* is extracted hereinbelow:

“26. we have merely drawn attention to and reiterate the well-settled legal position that SA/GPA/will transactions are not “transfers” or “sales” and that such transaction cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents the affected parties from getting registered deeds of conveyance to complete their title. The said “SA/GPA/WILL transactions” may also be used to obtain specific performance or to defend possession under section 53-A of TP Act. If they are entered before this day, they may be relied upon to apply for

regularization of allotments/leases by development authorities. We make it clear that if the documents relating to "SA/GPA/WILL transactions" have been accepted/acted upon by DDA or other developmental authorities or by the municipal or Revenue Authorities to effect mutation, they need not be disturbed, merely on account of this decision."

14. On the issue of specific performance which was the main issue, the Trial Court has examined in detail the pleadings of the parties as also the evidence on record. Various documents dated 16th May, 2001 were executed between the parties for sale of property no.155/1 out of Khasra No. 22/12, Burari, Abadi Known as Kamalpur, Delhi, measuring 120 sq. yd. All the original documents were handed over to the Plaintiff after full payment of the amount of Rs.3 lakhs which was the agreed sale consideration. The link documents, namely, the documents by which the Defendant came into possession and claimed ownership are also similar documents, namely, GPA, Agreement to Sale, Affidavit, Receipt and Possession Letter etc., which are filed as Ex. PW 1/1 to 1/6. The Defendant sought one month's time to hand over the possession of the property and the same was not given on the expiry of one month. The Plaintiff served a legal notice and despite service of the legal notice, the property was not handed over.

15. The Defendant's case is that certain blank papers were got signed by him on 4th March, 2011. The Defendant claims that he was unaware of the contents of the said documents. However, in cross-examination, when the Defendant was confronted with Ex.DW2/PX-1 wherein he had agreed to pay a sum of Rs.16 lakhs to the Plaintiff, he did not deny the said document. The translated text of the said document reads as under:

*“To,
The SHO
Police Station
Paschim Vihar
Delhi -63*

Subject:- settlement of 16 Lacs amount transaction to be paid to Mr. M.P. Madan from Mr. Mukesh r/o Burari.

Sir, I , Mukesh Kumar, r/o 165/1, Ekta Enclave Burari, Delhi-84. today on 06/02/2009 at Paschim Vihar Police Station in the presence of Mr. J.P.S Tyagi and Mr. Gautam Narula agree to give to Mr. M.P. Madan r/o 59A Ekta Apartments A-2-B Block, Paschim Vihar, Delhi this amount of Rs 16 Lacs will be returned by me to Mr. M.P. Madan within 6 to 9 months. From today, that is 06/02/2009 this amount of Rs. 16 Lacs will be given by 06/10/2009.

*Thanking you,
Sd/-
Mukesh Kumar
06/02/09”*

Witness:

*1) Gautam Narula
2) J.P.S Tyagi*

This document was not disputed by the Defendant. Upon being confronted with this document, the Defendant who appeared as DW-1 admitted as under:

“At the stage, the witness is confronted to a document dated 06.02.2009, a settlement entered into between the parties at PS Paschim vihar. The document is Ex. DW2/PX-1 (OSR). It is correct that as per this document, I had agreed to pay in full and final settlement of all the claims of the plaintiff, I had agreed to pay the plaintiff a sum of Rs. 16 Lacs. I say that I am the owner of the suit property in question. Vol. I gave the powers to my wife in respect to the suit property in question in 2009. I have not filed any document in respect of the property giving the authority to my wife”

16. However, he thereafter sought to resile from this by deposing that that he no longer has control over the property as he has now appointed his wife as a Power of Attorney holder. An application under Order I Rule 10 was moved by his wife seeking impleadment, which was dismissed. It is clear from the testimony of the Defendant that there was no plausible defence.

17. The Defendant in the Written Statement clearly admits to his signatures on the documents. He also admitted in Ex. DW-2/PX-1 that he would pay a sum of Rs. 16,00,000/- to the Plaintiff as a full and final settlement. The Defendant has also transferred by way of Power of Attorney the suit property to his wife. The Trial Court has come to the conclusion that this plea of the Defendant is completely sham and bogus. Insofar as the two complaints before police dated 5th March, 2011 and 15th March, 2011 are concerned, the said two documents are not exhibited and are recorded as mark A and mark B. The same cannot be looked into as they are not exhibited documents. In any event, these complaints are extremely old and no fruitful outcome has arisen therefrom. The mere filing of these complaints cannot result in the conclusion that the documents were executed by the Appellant under duress and coercion. Insofar as the unregistered documents is concerned, since all these documents were executed prior to the judgment in *Suraj Lamp (supra)* and considering that Burari is an unauthorised colony, where registration is not permissible, it cannot be held that there was no sale. In fact, the Defendant himself claims the title on the basis of similar documents from his predecessor, Shri Om Prakash. Thus, this plea has no basis.

18. A perusal of the pleadings, documents and evidence on record, reveals that the documents entered into between the parties are not disputed. Receipt

of sale consideration is also not disputed. Even the document dated 6th February 2009, by which the Defendant agreed to pay a sum of Rs. 16 lakhs to the Plaintiff, in lieu of his rights in the suit property is also not disputed. The Defendant's plea that the documents were entered under coercion or duress is not made out. Thus, the Plaintiff, who had paid the entire sale consideration, as agreed, is entitled to relief. The remaining objections in respect of limitation, signing of plaint, etc. have all been rightly rejected by Trial Court. The Trial Court finally granted a decree for specific performance and possession in favour of the Plaintiff.

19. This Court finds that the trial court judgement does not warrant any interference. There is no illegality or perversity in the judgment of the Trial Court.

20. The appeal is dismissed on merits.

PRATHIBA M. SINGH
JUDGE

MAY 18, 2018
Rahul/ds