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

Decided on: 31st January, 2018

+ CM(M) 1159/2015 and CM APPL.28230/2015

PAWAN KUMAR & ORS

..... Petitioners

Through: Mr. Vipin Kumar Saini, Advocate
with Mr. Ashok Saini, Advocate

versus

SHANTI DEVI & ORS.

..... Respondents

Through: Mr. Satish Kumar, Advocate

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The proceedings at hand arise out of a suit which was instituted by the petitioners on 21.04.1973, Risal son of Lala being the sole defendant, praying for injunction mandatory for removal of *malba* and prohibitory against any construction in the said plot of land. It is clear from the averments made that the petitioners as plaintiffs were asserting their title to the subject property and Risal, the defendant, resisted the suit, claiming himself to be the owner. The suit was eventually dismissed by the civil judge by judgment dated 30.10.2004, against which decision the appeal (presently registered as RCA No.81/2007) is pending before the court of additional district judge (ADJ). It is during the course of hearing on the said appeal that application under Order XLI Rule 27 of the Code of Civil Procedure,

1908 (CPC) was moved on 29.02.2008, seeking liberty for additional evidence to be adduced to prove the date of birth of Risal and of one Ram Kishan, described by the petitioners (plaintiffs) as son of said Risal.

2. It is undisputed that Risal has since died and stands substituted by his legal heirs, who are the respondents in the petition at hand. It is the case of the petitioners that Ram Kishan, described by them as son of the said Risal, had died earlier, even before the suit was instituted.

3. The prayer for opportunity for leading additional evidence has been declined on the ground that it was highly belated, the petitioners having failed to show due diligence.

4. Given the fact that the application for additional evidence was submitted on 19.03.2008, the fact that it was decided more than seven years thereafter by the first appellate court is itself a cause for concern. Such application could not have taken such long time for being considered or adjudicated upon.

5. Be that as it may, the petitioners had pleaded before the first appellate court that they were able to lay hands on the proof of date of birth after making lot of efforts in this regard. Apparently, the birth registers on which reliance is placed were not within the custody or control or possession of the petitioners. In these circumstances, the first appellate court should have been indulgent and granted the opportunity.

6. During the course of hearing, the counsel for the respondent was asked if the parties represented by him are ready to discover on oath the date of birth of the aforementioned two persons or of relation

between Risal and Ram Kishan. He submitted, on instructions from Ved Prakash, one of the respondents present in person, that the respondents are not aware of the date of birth of their predecessor-in-interest, their case being that Ram Kishan had no connection with Risal.

7. In the above facts and circumstances, it will not be fair to deny to the petitioners an opportunity for adducing additional evidence. The prayer stands granted. The petition and the application under Order XLI Rule 27 CPC moved before the first appellate court are allowed.

8. The learned ADJ shall afford one opportunity to the petitioners to prove the date of birth of the aforementioned two persons, *inter alia*, by having the requisite official records summoned.

9. The petition and the applications filed therewith stand disposed of in above terms.

JANUARY 31, 2018

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R.K.GAUBA, J.