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

+ **FAO(OS) 278/2016 & CM APPL. 35500/2016 (stay)**

Date of decision: 1st November, 2018

PRANAY DUBEY & ANR.

..... Appellants

Through: Ms. Anusuya Salwan and Ms. Kanika
Bansal, Advs.

Versus

MEENA KUMARI & ORS

..... Respondents

Through: Mr. D.V. Khatri, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

SANJIV KHANNA, J. (ORAL):

This intra-court appeal under Order XLI, Rule 1 of the Code of Civil Procedure, 1908 (the Code, for short) read with Section 10 of Delhi High Court Act, 1966 impugns order dated 02.09.2016 passed by the learned single Judge, whereby suit CS(OS) No. 1545/2009 filed by the present appellants, Pranay Dubey and Sanjay Dubey, has been dismissed for failure to pay costs of Rs. 50,000/- in terms of the order dated 25.05.2016 passed in RFA (OS) No. 11/2016.

2. The appellants herein are plaintiffs who had filed CS(OS) No. 1545/2009 for specific performance and permanent injunction relating to the property known as KD Modern School, ad-measuring about 1,000 sq. yards in Khasra No. 29/9 Village Barwala, Delhi 110039. The suit was predicated on the agreement to sale-purchase dated 17.1.2008 for Rs. 2.15 Crores.

3. Respondent No.1, Meena Kumari (since deceased), Saurabh Abhishek and Rajender Kumar, the respondent Nos. 2 and 3 before us, were defendants to the suit.
4. By an interim order dated 24.08.2009 the respondents-defendants were restrained from selling, alienating, transferring, transferring or creating any third party interest in respect of the property.
5. Issues in the suit were framed on 20.04.2012 and the case was fixed for trial.
6. Nearly three years after issues were framed the appellants right to lead evidence was closed by the Joint Registrar vide order dated 21.05.2015, which reads:-

“Request for adjournment made by Learned counsel for plaintiff on the grounds that PW Mr. Sanjay Dubey (plaintiff No. 2) is not available today as had to take his mother for treatment to Uttrakhand. It is further submitted that mother of the plaintiff’s is suffering with renal failure. Learned counsel for plaintiff submits that adjournment slip could not be moved as he got the instruction late yesterday in the evening. Learned counsel for defendant has opposed the adjournment. Learned counsel for defendant has drawn my attention to order dated 05.03.2013 passed by my learned predecessor. Learned counsel for defendant has also pointed out that plaintiffs have not taken steps for summoning the official witnesses despite specific direction given by my learned predecessor on the last date.

I have considered the submissions made by learned counsel for parties.

Sufficient opportunities have been granted to the plaintiff for PE. There is no justification for not summoning

the official witnesses for today. Plaintiffs could have also scheduled their visit to Uttrakhand in a manner which would have allowed them to examine PW Mr. Sanjay Dubey (plaintiff No.2) today. Plaintiffs are not entitled for further adjournment. PE is closed. Learned counsel for defendant submits that he will examine whether defendants have to lead their evidence. In case defendants want to lead evidence, affidavit of DWs be filed within eight weeks with advance copy to learned counsel for plaintiff.

Matter is adjourned to 31st September, 2015 for DE."

7. Chamber Appeal vide OA No. 368/2015 filed by the appellants under Chapter II Rule 4 of Delhi High Court Original Side Rules, 1967, was rejected by the learned single Judge vide order dated 28.01.2016. This order refers to repeated opportunities and persistent failure of the appellants from 2012 to 2015 to lead evidence. Accordingly, the suit was dismissed as the appellants had failed to discharge the onus of proving the issues *in exercise of power under Order XVII Rule 3 of the Code.*

8. However, the appellants were given a reprieve and one last opportunity to lead and conclude their evidence within three months and in any event not later than 31.08.2016 vide order dated 25.05.2016 passed in RFA (OS) No. 11/2016. The indulgence was subject to the appellants paying costs of Rs. 50,000/- within eight weeks. All rights of the parties were reserved. The order dated 28.01.2016 dismissing the OA No. 368/2015 was set aside and the suit was restored on terms.

9. The appellants took another chance by filing an application, I.A. No.30665/2016 in RFA (OS) No.11/2016, for waiver of costs. The

application was dismissed by the Division Bench vide order dated 29.08.2016 observing that it would be open to the appellants to move the learned single Judge for appropriate extension of time to deposit costs. On an application being filed it would be open to the learned single Judge to use his discretion.

10. By order dated 29.08.2016 passed by the learned single Judge, the appellants were granted one week's time pay cost of Rs.50,000/- to the "said defendants" through counsel as a last opportunity. This was without prejudice to the rights and contentions of the first and third defendants, the respondent Nos.1 (since deceased) and 3 in present appeal. The appellants were warned that if the costs were not paid within the extended time of one week, no further opportunity would be granted. It was observed that the court was not in a position to grant opportunity to the appellants to lead evidence beyond the date fixed by the Division Bench.

11. The appellants had thereupon preferred CM No. 31897/2016 for extension of time in RFA (OS) No. 11/2016. This application was disposed of by the Division Bench vide order dated 31.08.2016 observing that the appellants were simply interested in prolonging the litigation. Issues were settled in 2012 and for over three years and nine months and nine opportunities the appellants had failed to lead evidence. Nevertheless, vide order dated 25.5.2016 the Division Bench had afforded one opportunity to the appellants to lead evidence within three months. Subsequently, by the order dated 29.08.2016 the Division Bench while dismissing the application seeking withdrawal of costs, had observed that the appellants could move an application before the learned single judge for extension of time for payment

of costs. In harmony with the said orders, the appellants were given an option to move a composite application before the learned single Judge for extension of time to deposit costs and for leading evidence.

12. Impugned order dated 02.09.2016 passed by the learned single Judge states that the appellant Sanjay Dubey had appeared in person and stated that costs of Rs. 50,000/- had been paid through RTGS transfer to the account of the second defendant i.e. Saurabh Abhishek. Learned single Judge observed that no “such” direction was given by the Division Bench in the order dated 25.05.2006 or the order passed by her on 29.08.2016. Further, the second defendant Saurabh Abhishek had not appeared and was not represented before the Division Bench on 25.05.2016 or before the learned single Judge on 29.08.2016.

13. Learned counsel for Respondent No.3, Rajender Kumar, has stated that Saurabh Abhishek, is absconding and untraceable. He is not in touch with his brother i.e. Respondent No. 2, or his mother respondent No.1, Meena Kumari, who has since died. He submits that the RTGS payment was deliberately and intentionally “made” by the appellants to Saurabh Abhishek, knowing fully-well that Saurabh Abhishek had disassociated himself from the first and third respondents who were contesting the proceedings. Order dated 29.08.2016 passed by the learned single Judge vide para 5 had therefore specifically directed that costs shall be paid to the first and third defendants i.e., respondent No.'s 1 and 3, by referring to them as the said defendants.

14. The appellants accept and admit delay in payment of costs, albeit state that the mother of the first appellant was ailing and had to undergo dialysis

thrice a week. The respondents had failed to furnish details of third party interest in spite of direction by the Division Bench in FAO(OS) No. 188/2013.

15. The suit for specific performance filed by the appellants in 2009 has been deliberately delayed and prolonged as the appellants were enjoying an interim order. Despite numerous opportunities spread over three years and directions of the Division Bench to the appellants to conclude evidence within three months vide order dated 25.05.2016 subject to payment of costs of Rs.50,000/-, neither the costs were paid to the respondent Nos. 1 and 3 nor evidence was led. Plea of lack or non-furnishing of details of the third party interest is a sham and frivolous submission. The order in this regard relied on by appellants was made on 09.04.2013, whereas the order of the Division Bench granting one opportunity with costs of Rs.50,000/- was passed on 25.05.2016.

16. By order dated 29.08.2016 the learned single Judge had directed that costs be paid either to the first defendant or third defendant i.e. respondent No. 1 and 3 before us and not to Saurabh Abhishek. This is clearly the direction given in para 5 of the said order. Saurabh Abhishek had not entered appearance before the Division Bench when the order dated 25.05.2016 was passed in RFA (OS) No. 11/2016. The conduct of the appellants in purportedly paying costs to Saurabh Abhishek, a factum that cannot be verified, was mala fide and wrong. The appellants had acted maliciously and with evil intent paying 'costs' to Saurabh Abhishek. There was non-compliance.

17. However, on two aspects the appellants are factually correct. Two Division Benches vide two orders dated 25.05.2016 and 31.08.2016 had given an option to the appellants to approach the learned single Judge for extension of time to deposit costs and also to lead evidence. The aforesaid fact and indulgence was not noticed by the learned single Judge while dismissing the suit vide order dated 02.09.2016. Secondly, learned single Judge had granted the appellants one week's time with effect from 29.08.2016 for payment of costs. This period was not over when the impugned order dismissing the suit was passed on 02.09.2016.

18. Keeping in view the aforesaid position, we partially allow the present appeal with the direction that the appellants shall pay Rs. 75,000/- i.e. Rs. 50,000/- plus additional Rs. 25,000/- as costs to respondent no. 3 within a period of twenty days from today. On the payment of the said costs, the suit will be revived. In case the cost imposed is not paid, the suit will not be revived. Costs would be paid by way of demand draft in favour of Rajender Kumar i.e. respondent no. 3. Demand draft would be deposited with the Registry of this court within twenty days from 12.11.2018.

19. We also direct that the appellants would complete their evidence on or before 29.03.2019. No further opportunity would be granted.

20. However, we are not inclined to restore the interim stay order which was passed earlier. Deliberate delay and desire to prolong the litigation on the part of the appellants is apparent. This malevolent behaviour has been repeatedly highlighted in different orders, but the appellants have paid no heed. In any case there is no stay order in operation from the date of dismissal of the suit on 02.09.2016.

21. Delay and conduct of the appellants in prosecuting the suit would be examined at the time of judgement, if the suit is restored on payment of costs. However, we would clarify that observations made in this order would not be treated as final findings on other aspects and issues.

22. The appeal and pending applications are disposed of.

SANJIV KHANNA, J.

ANUP JAIRAM BHAMBHANI, J.

NOVEMBER 1, 2018/uj

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