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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 06.09.2023

+ **CM(M) 1298/2023 & CM APPL. 41555/2023**

KAMLA DEVI Petitioner

Through: Mr. A.K. Mehta, Advocate

versus

SMT. DROPATI DEVI (SINCE DECEASED) THROUGH HER
LEGAL HEIRS Respondent

Through: Ms. Vidit Gupta, Advocate

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. The present petition filed under Article 227 of the Constitution of India impugns the order dated 08.06.2023 passed by the ADJ, Karkardooma Court, Delhi ('the Appellate Court') in MCA No. 05/2020 whereby, the Appellate Court has dismissed the application filed by the Petitioner seeking condonation of delay of 1149 days in filing the appeal under Order XLIII Rule 1 (d) of Code of Civil Procedure, 1908 ('CPC') and consequently, also dismissing the appeal for having being filed beyond limitation.

1.1. The appeal was filed impugning the order dated 22.12.2016 passed by the Civil Judge, Tis Hazari Courts, Delhi ('Trial Court') dismissing the application filed under Order IX Rule 13 CPC for being beyond limitation. The said order dated 22.12.2016 as well has been impugned in the present petition.



Brief Facts

2. The Petitioner is the original defendant in the civil suit and Respondents are the legal representatives of the now deceased plaintiff i.e., late Smt. Dropati Devi. The civil suit was filed seeking specific performance of the Agreement to Sell dated 29.08.1993 ('ATS') with respect to the property bearing No. X/3938, Shanti Mohalla, Gandhi Nagar, Delhi ('suit property').

2.1. The Petitioner was proceeded ex-parte on 06.12.1995 before the Trial Court as it came on record that the Petitioner has been avoiding service. Accordingly, after evidence, suit was decreed in favour of the Respondent vide judgement dated 30.04.1996. The Respondent sent a bank draft of Rs. 1,00,000/- to the Petitioner alongwith a notice dated 25.05.1996.

2.2. The Respondent filed an execution petition for enforcement of the judgement dated 30.04.1996. Though, as per the record of the Executing Court, the Petitioner refused to accept notice; the Petitioner entered appearance before the said Court through a counsel on 21.02.1997.

2.3. The Petitioner on 28.10.1997 filed an application under Order IX Rule 13 CPC for setting aside of the judgement dated 30.04.1996 albeit with a delay of approximately ten (10) months. This application was accompanied with a second application seeking condonation of delay. The said applications (filed in 1997) were dismissed by the Trial Court vide impugned order dated 22.12.2016. The Trial Court while dismissing the said applications made scathing observations about the conduct of the Petitioner in failing to prosecute the said applications for nineteen (19) years. The Trial



Court after perusing the record returned factual finding on merits recording that the Petitioner had been duly served and she had deliberately avoided delivery of service on four separate occasions and once also in execution petition bearing no. 148/02/96. The relevant portion of the order reads as under: -

"12. Arguments were addressed on behalf of both the parties on both the applications. Written synopsis was also submitted on behalf of respondent/DH.

13. I have perused the material on record and also duly considered submissions made on behalf of both the parties. I will firstly dispose off the application U/s 5 of Limitation Act.

14. As per provisions of Order IX Rule 13 CPC r/w Article 123 of Limitation Act, any application to set aside an ex parte decree has to be filed within thirty days from the date of decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree. As per JD, she had received summons to appear before court for 06.12.1996 after which her counsel appeared before the court but she could not follow up due to matrimonial dispute. Thereafter upon settlement with her husband in September 1997, she could appear through her counsel on 03.10.1997 only.

15. Perusal of record shows that the submissions made by JD are factually incorrect. No summons/notice had been issued by the court to JD to appear on 06.12.1996 before the court. Infact, notice of execution was issued to JD directing her to appear on 04.10.1996 after filing of execution bearing no. 56/96 (arising out of main suit bearing no.85/95). This notice was served on JD on 21.09.1996 by way of affixation since JD had refused to accept the said notice. Infact separate statement of the then process server Sh. Raj Kumar was also recorded by the Ld. Predecessor on 19.11.1996 regarding refusal of JD to accept the notice and service of notice on her by way of affixation. Hence JD was having knowledge of pendency of execution and the decree on 21.09.1996 (date of affixation) even as per her own admission.

16. The limitation period as per article 123 of Limitation Act shall run from 21.09.1996 when she first got the knowledge of decree and not from 06.12.1996 as has been contended by her through this application for condonation of delay. However there is no explanation given by JD in her entire application regarding the delay between 21.09.1996 when notice was served by way of affixation upon her refusal and the date when her counsel firstly appeared before the court on 06.12.1996.

17. Infact this application is beyond limitation period evenif the period is counted starting from 06.12.1996. For the sake of arguments, if it is presumed that JD got knowledge of execution and decree only on 06.12.1996 still there is no document filed on record to suggest existence of



any such alleged matrimonial dispute between her and her husband, on the ground of which she is seeking condonation of delay. A delay of about one year in filing this application (the application was filed on 29.10.1997 whereas the date of service of notice was 21.09.1996) cannot be liberally condoned without any sufficient cause being shown.

In view of the same, there is no ground to condone the delay in moving the application U/o IX Rule 13 CPC. Hence application U/s 5 of Limitation Act stands dismissed.

18. Furthermore even on merits, this application U/o IX rule 13 CPC is not maintainable. JD contends that she did not receive summons of suit bearing C.S NO 85/95. She has also alleged that process server had given a false report in collusion with DH's son. However I find both the allegations to be completely false and baseless. Firstly, there is absolutely no ground for the court to believe that process server of court had intentionally given a false report and that too on mere oral allegations of JD without any proof.

19. Secondly, as per report of process server on summons returned on 08.03.1995, the same was served by way of affixation since JD herself had refused to accept the same. It can be seen that a similar report regarding refusal and affixation has been given qua notice of execution as stated above which the JD had herself admitted of having received. Both the process servers who went to JD's address on different dates, will not give the same report of refusal and affixation. This also falsifies the contention of JD regarding having not refused to accept the said summons.

20. Thirdly, from perusal of record it also transpires that summons of suit were sent to JD by registered post and the postman has also given a report that JD was intentionally avoiding to receive the same. No explanation has been given by JD as to why even the postman gave a false report of her avoiding to receive the summons.

21. Fourthly, the contention of JD further gets falsified from the fact that later on, Ld. Predecessor had issued a notice to JD upon an application of DH U/o VI Rule 17 CPC which was returnable for 06.12.1995. The said notice was served by way of affixation at JD's address as she did not meet at the spot despite repeated visits. Further one person who was available at the spot, did not give any satisfactory reply.

22. Fifthly, notice of this application was also sent to JD through registered post and the same was also returned back unserved with the report of JD avoiding to take delivery. So it can be seen that four attempts were made to serve summons and notice of suit bearing no. C.S 85/95 upon JD, on different dates and through different modes, out of which two processes have returned back unserved with the report of refusal and avoidance by JD and two were served upon JD by way affixation as once she refused to accept the summons and secondly she did not meet at the spot. To reiterate even the notice of execution bearing no. 148/02/96 had been returned back unserved with the same report of refusal by JD upon which the same was affixed at her address.

23. It is apparent that JD had been avoiding the service of notice and



summons intentionally and deliberately and is now trying to take advantage of her own wrong by claiming that she was not served with notice or summons. The plea taken by JD is completely false and frivolous. Moreover, she has not shown any sufficient cause for delay in moving this application. Infact it transpires from record that the sole intention of JD had been to delay the proceedings in this case in any manner whatsoever and due to which, this application was kept pending for years. Infact the same was untraceable for more than 15 years but no steps were taken by JD to inform the court about its whereabouts, despite repeated directions in this regard. With these observations, the application U/o IX Rule 13 CPC also stands dismissed. Further cost of Rs.10,000/ is imposed upon JD for taking false and frivolous pleas and for delaying the proceedings. Cost is to be deposited with Prime Minister Relief Fund. Both the applications are accordingly, disposed off. Miscellaneous file be consigned to record room after due compliance."

(Emphasis Supplied)

2.4. Thus, the Trial Court while dismissing the application under Order IX Rule 13 CPC dismissed the said application on merits as well as on account of delay.

2.5. The Petitioner at this stage instead of filing a statutory appeal under Order XLIII Rule 1 (d) CPC against the order dated 22.12.2016, opted to file a petition under Article 227 of the Constitution being C.M. (M.) No. 322/2017 before this Court. The Respondent filed its reply on 23.04.2019 in the said petition and raised an objection to the maintainability of the petition in view of the alternate statutory remedy of appeal. The objection of the Respondent that the Petitioner has an alternate remedy of a statutory appeal available against the order dated 22.12.2016 was also recorded before the Executing Court in its order dated 21.05.2018. However, the Petitioner did not take steps to file an appeal at this stage.

2.6. The Petitioner on 17.02.2020 unilaterally withdrew the petition C.M. (M.) No. 322/2017 with liberty to approach the appropriate forum for impugning the order dated 22.12.2016. The order dated 17.02.2020 passed by this Court reads as under: -



“Ld. Counsel for the Petitioner seeks permission to withdraw the present petition in order to approach the appropriate forum for challenging the order dated 22nd December, 2016. Ld. counsel for the Respondent submits that no benefit for the period during which the petition was pending in this Court ought to be granted. This Court is not commencing on the question as to whether any benefit under Section 14 of the Limitation Act 1963, if sought, should be granted or not. However, the Petitioner is permitted to withdraw the present petition with liberty to avail his remedies in accordance with law. Petition is dismissed as withdrawn with liberty as prayed.”

2.7. The Petitioner preferred an appeal Order XLIII Rule 1 (d) CPC on 18.03.2020 alongwith an application seeking condonation of delay of 1149 days. The Appellate Court *vide* impugned order dated 08.06.2023 has dismissed the application seeking condonation of delay and consequently, dismissed the appeal. The Appellate Court after perusing the orders passed in the Executing Court and the proceedings in C.M. (M.) No. 322/2017 concluded that the Petitioner was not prosecuting the petition filed before the High Court with due diligence or in good faith. It therefore concluded that the Petitioner was not entitled to exclusion of time under Section 14 of the Limitation Act, 1963 ('Limitation Act'). In addition, the Appellate Court held that the time taken by the Petitioner between 17.02.2020 and 18.03.2020 (53 days) after withdrawing the petition from the High Court was also by itself is not sufficiently explained and on this ground itself the delay cannot be condoned. In these circumstances, the Appellate Court declined to condone the delay as prayed for by the Petitioner. The operative portion of the impugned order dated 08.06.2023 reads as under: -

“5. Appellant is seeking condonation of delay in filing the present appeal in view of the section 14 of Limitation Act on the ground that due to advise of the previous counsel, impugned order dated 22.12.2016 was assailed before Hon'ble High Court of Delhi in CM (M) No. 322/17 instead of filing the appeal before this court. It is contended on behalf of respondent that an application u/s 151 CPC was filed on 30.10.2017 before ld. Executing Court stating that impugned order is appellable u/s 104 r/w order 43 rule 1 (d)



CPC. It is also contended on the before of respondent that on 23.04.2019 respondent filed counter affidavit by providing copy to the appellant therein also respondent specifically pleaded that the impugned order is appellable u/s 104 r/w order 43 rule 1 (d) CPC and appellant is to file the appeal before district court. Ld. Counsel for respondent has also filed order dated 18.05.2016 passed by ld. Executing court. Perusal of this order also shows that ld. Trial court specifically gave findings that any order passed on the application u/o 9 rule 13 CPC is 5. Appellant is seeking condonation of delay in filing the present appeal in view of the section 14 of Limitation Act on the ground that due to advise of the previous counsel, impugned order dated 22.12.2016 was assailed before Hon'ble High Court of Delhi in CM (M) No. 322/17 instead of filing the appeal before this court. It is contended on behalf of respondent that an application u/s 151 CPC was filed on 30.10.2017 before ld. Executing Court stating that impugned order is appellable u/s 104 r/w order 43 rule 1 (d) CPC. It is also contended on the before of respondent that on 23.04.2019 respondent filed counter affidavit by providing copy to the appellant therein also respondent specifically pleaded that the impugned order is appellable u/s 104 r/w order 43 rule 1 (d) CPC and appellant is to file the appeal before district court. Ld. Counsel for respondent has also filed order dated 18.05.2016 passed by ld. Executing court. Perusal of this order also shows that ld. Trial court specifically gave findings that any order passed on the application u/o 9 rule 13 CPC is appellable under the provision of order 43 rule 1 (d) CPC. Ld. Counsel for respondent has also filed photocopy of counter affidavit filed on behalf of the respondent which also shows that the respondent had challenged on the ground that the said petition was not maintainable as the remedy against the impugned order is appeal u/s 104 r/w order 43 rule 1 (d) CPC.

6. Perusal of the order and counter affidavit filed by the respondent shows that even during the pendency of petition before the Hon'ble High Court of Delhi, the appellant was aware that said petition was not maintainable and despite that the appellant kept on pursuing the said petition. This shows that the said petition was filed by the appellant in order to linger on the execution petition filed by the respondent before the ld. Executing Court. One of the essential requirements of seeking condonation of delay u/s 14 of Limitation Act is that the appellant has been prosecuting another proceeding (petition before Hon'ble High Court of Delhi) with due diligence and same is prosecuted in good faith. On perusal of order dated 18.05.2016 passed by ld. Executing court and counter affidavit filed by the respondent before Hon'ble High Court of Delhi in the said petition shows that the appellant was from the very beginning aware of the fact that said petition was not maintainable and despite that appellant was pursuing the said petition. This shows that appellant was neither prosecuting the said petition before Hon'ble High Court of Delhi with due diligence nor was prosecuting the same in good faith. Hence, the appellant cannot claim that the period during which the appellant had been prosecuting, his petition



bearing CM (M) No.322/17 be excluded for computing the period of limitation for filing the present appeal. It is also a settled legal principle that a litigant must show due diligence in pursuing or defending the case and mere entrustment of a case to the counsel does not absolve the litigant of all responsibilities. Shifting of blame entirely upon the counsel as the sole reason is not acceptable.

7. Even for sake of argument, it is presumed that period during which the above mentioned petition was pending, be excluded, even then the present appeal is beyond period of limitation. The appellant filed the above mentioned petition with a delay of around 53 days and after withdrawal of the petition appellant filed the present appeal with a delay of 30 days but no reasonable explanation has been given by the appellant regarding above mentioned period in filing the present appeal. Hence, the present appeal filed by the appellant with a delay of more than 1149 days which is beyond the period of limitation. Hence, present application for filing the present appeal is dismissed. In view of above, the present appeal filed by the appellant is also dismissed being filed beyond period of limitation.”

(Emphasis Supplied)

3. Mr. A.K. Mehta, the learned counsel for the Petitioner stated that the filing of the C.M. (M.) No. 322/2017 was on the advice of the advocate and upon receiving correct advice; the said petition was withdrawn on 17.02.2020. He states that this enunciation is sufficient for explaining the time taken by the Petitioner from 17.03.2017 to 17.02.2020. He states that the subsequent period of 17.02.2020 to 18.03.2020 i.e., 53 days should be condoned in the interest of justice.

4. Mr. Vidit Gupta, the learned counsel for the Respondent states that the proceedings before the Executing Court and the petition filed under Article 227 of the Constitution i.e., C.M. (M.) No. 322/2017; sufficiently evidences that the Respondent herein repeatedly raised the issue that the remedy of statutory appeal under Order XLIII Rule 1 (d) CPC was available to the Petitioner; however, the Petitioner deliberately did not file an appeal to deny the fruits of the decree dated 30.04.1996 to the Respondent. He states that a perusal of the record of the Executing Court and the Trial Court evidences that the Petitioner deliberately did not participate in the trial



despite due notice. He states that therefore, no ground is made out for invoking the jurisdiction of this Court.

4.1. He states that the Petitioner is guilty of suppressing a material fact that she has sold the suit property to third parties to frustrate the judgement dated 30.04.1996. He states that the Petitioner is left with no right, title or interest in the suit property and this is the proxy litigation.

4.2. He states that during the pendency of the Order IX Rule 13 CPC application before the Trial Court, a sale deed has been executed in favour of the Respondent on 09.11.2011 in pursuance to the orders passed by the Executing Court.

5. This Court has considered the submissions of the counsel for the parties and peruse the record.

6. The order of the Trial Court dated 22.12.2016 dismissing the application filed under Order IX Rule 13 CPC records in detail the conduct of the Petitioner in refusing to accept service of summons on four (4) separate occasions during pendency of suit and once before the Executing Court. The Trial Court has also recorded the conduct of the Petitioner in not pursuing her application filed under Order IX Rule 13 CPC on 28.10.1997 for nineteen (19) years.

7. The Trial Court has dealt with each aspect in detail and dismissed the said application on merits and on account of delay. The counsel for the Petitioner did not address any arguments on the findings recorded in the said order. The finding of Trial Court exhibit glaring misconduct by the Petitioner. This Court finds no infirmity in the said impugned order dated 22.12.2016 in fact or in law.

8. Similarly, the finding of the Appellate Court that the Petitioner herein is not entitled to the benefit of Section 14 of the Limitation Act on the



finding that the Petitioner herein was not prosecuting the proceedings in C.M. (M.) No. 322/2017 in good faith is also correct on facts.

9. The Respondent repeatedly raised the contention to the knowledge of the Petitioner, that the statutory remedy of appeal was available to the Petitioner against the order dated 22.12.2016. In this regard, reference to the order dated 21.05.2018 of the Executing Court and reply dated 23.04.2019 filed by the Respondent in the C.M. (M.) No. 322/2017 is relevant.

10. The withdrawal by the Petitioner on 17.02.2020 was unilateral and not pursuant to an order of this Court refusing to entertain the said petition; and therefore, the Appellate Court in the facts of this case has rightly not given the benefit of Section 14 of the Limitation Act to the Petitioner.

10.1. The Appellant Court has also given an additional and independent reason for explaining the delay for the period between 17.02.2020 to 18.03.2020 (i.e., 53 days). Even before this Court, the Petitioner has not offered any explanation for the said time taken in filing the appeal after withdrawing the petition.

10.2. The Appellate Court has passed the impugned order after duly considering the facts on the record and has correctly concluded that the Petitioner has not shown any cause for condoning the delay.

11. In the facts of this case, this Court is of the opinion that the Petitioner has deliberately not availed her statutory remedy of filing the appeal within the prescribed period of limitation and used the pretext of filing the Article 227 petition C.M. (M.) No. 322/2017 to obstruct the execution proceedings.

12. There is no error of law or error of fact in the impugned orders. The Appellate Court and the Trial Court have acted well within their jurisdiction and therefore, this Court finds no merit in this petition and accordingly, the same is dismissed with costs of Rs. 10,000/- in favour of the Respondent. It



is directed that in case the Petitioner fails to pay the said costs, the Respondent will be entitled to recover the same in the execution proceedings.

13. Pending applications stand disposed of.

MANMEET PRITAM SINGH ARORA
(JUDGE)

SEPTEMBER06, 2023/rhc/asb

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