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

% *Date of Decision: 16th January, 2023*

+ RFA 436/2021

SH. DHARAMPAL GUPTAAppellant
Through: Mr. Sumit Behl and
Mr. Akshaya Mehta, Advocates.
versus

SMT. LAXMI DEVI AND ORSRespondents
Through: Ms. Gita Dhingra and
Ms. Gayatri Aggarwal, Advocates.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

C.M. APPL. 46860/2021 (delay of 47 days in filing)

1. Present application has been filed on behalf of the Appellant seeking condonation of delay of 47 days in filing the appeal.
2. Issue notice.
3. Ms. Gita Dhingra, learned counsel accepts notice on behalf of the Respondents.
4. For the reasons stated in the application, the same is allowed and disposed of.

RFA 436/2021 & C.M. APPL.46857/2021 (for stay)

5. By way of present appeal, Appellant raises a challenge to the judgment and decree dated 11.08.2021 passed by the Trial Court in Civil Suit no. 739/2016.
6. Appellant herein was Defendant No. 1 before the Trial Court and Respondent No. 1 herein was the Plaintiff and the parties are referred to by their nomenclature and litigating status before the Trial Court.

7. Plaintiff filed a suit seeking decree of possession, damages/mesne profits for illegal use, occupation and possession of property bearing No. RZ-B-1/137, out of Khasra No. 5/12, situated in the area of village Mirzapur Colony, known as Vijay Enclave, Ambedkar Gali, New Delhi (hereinafter referred to as the suit property) as well as for permanent injunction against the Defendants.

8. The case set up by the Plaintiff was that husband of the Plaintiff expired on 02.01.2012 leaving behind the Plaintiff, three sons and two daughters being Defendants No. 2 to 6 and since he died intestate, the suit property fell to the share of the Plaintiff and other legal heirs of the deceased to the extent of 1/6th undivided share, each. It is averred that the deceased had authorized his brother Shri Rakesh Gupta to look after the suit property and after the death of her husband, Plaintiff wanted to look after the suit property and upon visiting the premises was shocked to see that Defendant No. 1 had illegally and unauthorizedly occupied the same. Plaintiff received a notice dated 16.11.2015 issued by one Shri Sunil Kumar, Advocate on behalf of Defendant No. 1 claiming therein that the deceased had allegedly executed an Agreement to Sell on 11.08.2009, for which earnest money/*bayana* had been paid. On 04.12.2015, Plaintiff replied to the notice and disputed and denied the allegations made as well as the execution of the agreement.

9. It is the case of the Plaintiff that Defendant No. 1, after the death of Plaintiff's husband, in collusion with Shri Rakesh Gupta, brother of the deceased, unauthorizedly occupied the suit property and even Shri Rakesh Gupta became hostile and un-cooperative towards the Plaintiff. Plaintiff sent a notice on 04.12.2015 terminating whatever rights Defendant No. 1 claimed in the suit property and upon failure of Defendant No. 1 to vacate the suit property, filed the suit,

aforementioned. Plaintiff also claimed damages/mesne profits at the rate of Rs.10,000/- per month from the date of filing of the suit till delivery of possession to the Plaintiff.

10. Upon filing of the suit, summons were issued to the Defendants. Written statement was filed by Defendant No. 1 and Replication was filed by the Plaintiff. Trial Court framed the following issues:

“(1) Whether the suit of the plaintiff is not maintainable as claimed and defendant is in occupation of the suit property in his own rights as claimed?OPD-1

(2) Whether the plaintiff is entitled to the relief of possession as claimed with respect to property bearing no. RZ-B-1/137, out of Khasra No. 5/12, situated in the area of village Mirzapur Colony, known as Vijay Enclve, Ambedkar Gali, New Delhi-110045?OPD

(3) Whether the plaintiff is entitled to the relief of damages/mesne profits from defendant no. 1 to the extent of Rs.3,60,000/-, as claimed? OPP

(4) Whether the plaintiff is entitled to the claim of pendentelite and future damages/mesne profits @ Rs.10,000/- per month?OPP

(5) Whether the plaintiff is entitled to the relief of permanent injunction as claimed? (OPP, however, the onus has inadvertently not been mentioned in the order dated 17.04.2018, same stands corrected)

(6) Relief.”

11. In order to substantiate the case, Plaintiff examined herself as PW-1 and relied upon the following documents:

“(i) Site plan is Ex.PW1/1.

(ii) Copies of title documents are Ex.PW1/2.

(iii) Copy of the death certificate is Mark PW1/3.

(iv) Copy of legal notice dated 16.11.2015 sent to plaintiff for an on behalf of defendants is EX.PW1/4.

(v) Reply of notice dated 16.11.2015 of defendants by plaintiff is Ex.PW1/5.

(vi) Postal receipt vide which reply was sent is Ex.PW1/6.

(vii) Courier receipt is Ex.PW1/7.

(viii) Copy of notice dated 04.12.2015 is Ex.PW1/8.

(ix) Postal receipt of notice dated 04.12.2015 is Ex.PW1/9.

(x) Courier receipt is Ex.PW1/10.

(xi) Original returned envelope vide which notice was is Ex.PW1/11.

(xii) Certified copy of orders dated 12.01.2018 passed in a suit bearing CS No. 738/2017 titled as Dharampal Gupta v. Laxmi is Ex.PW1/12.”

12. Plaintiff's evidence was thereafter closed and the matter was listed for Defendants' evidence on 05.04.2021, on which date the counsel after examining Defendant No.1 as DW-1, requested the Trial Court to close the defence evidence, as he did not wish to examine any other witness. After evidence was completed and arguments were heard, the Trial Court decreed the suit in favour of the Plaintiff.

13. The primordial argument of the learned counsel for Defendant No. 1 is that at the stage of defence evidence, Defendant No.1 could not produce and examine witnesses in defence, as they were untraceable on account of Pandemic COVID-19 and urges that Trial Court be directed to permit examination of witnesses in defence at this stage. It is submitted that Defendant No. 1 was initially a tenant in the suit property at a monthly rent of Rs.1,300/- per month but subsequently the deceased executed an Agreement to Sell in his favour on 11.08.2009, in respect of the suit property, for a sale consideration of Rs.34,80,000/-, out of which Rs.10,00,000/- had been paid and remaining amount was to be paid at the time of execution of the sale documents in favour of Defendant No. 1. Defendant No. 1 is in possession of the suit property and had issued notice to the Plaintiff to execute the sale documents but there was no response. It is also argued that Plaintiff was unable to substantiate her claim that no sale agreement was executed between her deceased husband and Defendant No. 1 or that the sale agreement dated 11.08.2009 was forged and fabricated. In any case, the Plaintiff being co-owner could not have filed a suit on behalf of co-sharers i.e. Defendants No. 2 to 6 to claim their 5/6th share in the suit property. It is also contended that in any case the agreement to sell confers title and ownership on Defendant No. 1 which cannot be terminated being irrevocable in nature. In a nutshell, the contention of the learned

counsel is that had the Trial Court given an opportunity to Defendant No. 1 to produce witnesses, Defendant No.1 would have effectively proved his case that he was the owner of the suit property and thus not liable to vacate the suit property and/or pay damages/mesne profits.

14. Counsel for the Plaintiff, on the other hand, opposes the appeal on the ground that the judgment and decree cannot be assailed by Defendant No. 1 by indirectly laying a challenge to the order dated 05.04.2021, whereby defence evidence was closed by the Trial Court. It is submitted that on 05.04.2021, matter was listed for defence evidence and it was Defendant No. 1 who had stated before the Court that he did not wish to examine any other witness in evidence, whereupon the evidence was closed by the Trial Court. No request was made to the Trial Court to defer the recording of evidence on account of unavailability of defence witnesses. Plaintiff has discharged the burden and proved her case and at this stage Defendant No. 1 cannot be permitted to lead further evidence.

15. I have heard learned counsels for the parties and examined their submissions.

16. It is undisputed that Defendant No. 1 is in possession of the suit property and while admitting his tenancy in the suit property, set up a defence of execution of an Agreement to Sell by the husband of the Plaintiff, qua the suit property. Significantly, Defendant No. 1 had filed a suit for specific performance, seeking enforcement of the alleged Agreement to Sell, which was dismissed and this order was placed on record of the Trial Court as Ex.PW1/12. Trial Court has, thus, rightly held that in view of the dismissal of the said suit and in the absence of registration of the alleged Agreement to Sell, benefit of Doctrine of part performance cannot accrue to Defendant No. 1, in

view of the amendment to Section 53(A) of the Transfer of Property Act, 1882.

17. Insofar as the plea that Trial Court be directed to permit Defendant No. 1 to produce and examine further defence witnesses is concerned, the same is wholly untenable. First and foremost permitting Defendant No. 1 to do so at this stage, would amount to setting aside the order dated 05.04.2021, which was never assailed by Defendant No. 1 at the appropriate stage and is not under challenge even in the present Appeal. As rightly contended by the Plaintiff, counsel for Defendant No. 1 had categorically stated before the Trial Court that he did not wish to examine any more defence witnesses and no application was admittedly filed for recall of the said order. Assuming for the sake of argument that at that stage defence witnesses were untraceable/unavailable on account of Pandemic COVID-19, as now alleged, it was open to Defendant No. 1 to request the Trial Court to defer the evidence on this count, which was not done. In view of the position adopted by Defendant No. 1, before the Trial Court on 05.04.2021 or even subsequent thereto, no error can be found with the impugned judgment and decree passed by the Trial Court and this Court finds no merit in the present appeal, which accordingly deserves to be dismissed.

18. At this stage, learned counsel for Defendant No. 1, on instructions from Defendant No. 1, who is present in Court submits that Defendant No. 1 be given some time to vacate the suit premises and he does not wish to press the present appeal.

19. Learned counsel appearing on behalf of the Plaintiff fairly submits that she has no objection to a period of four months being granted to Defendant No. 1 to vacate the suit property, provided he gives an undertaking to the Court that he shall handover

vacant and peaceful possession on or before expiry of four months from today.

20. As aforementioned, *albeit* Court does not find any merit in the appeal, however, in view of the assurance given by Defendant No. 1 that he shall vacate the suit property within four months from today and this being acceptable to the Plaintiff, this Court deems it appropriate to grant a period of four months to Defendant No. 1 to vacate the suit property, subject to Defendant No. 1 furnishing an undertaking on an affidavit to this effect. The affidavit shall be filed within a period of three weeks from today.

21. Appeal stands disposed of in the aforesaid terms along with the pending application.

JANUARY 16, 2023/shivam

JYOTI SINGH, J