

IN THE HIGH COURT OF DELHI

FAO No. 48/2008

S.N.Sapra Appellant
! through: Mr. Kuldeep Kumar, Advocate

VERSUS

\$ Mr. P.K.Jana & Ors. Respondents
^ through: Mr. S.K.Bahaduri, Advocate
Ms. Indrani Ghosh, Advocate
Mr. S.N.Singh, Advocate

% DATE OF DECISION: 5.3.2008

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **PRADEEP NANDRAJOG, J.** (Oral)

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1. The instant appeal challenges two orders passed by the learned Trial Judge. The two orders are dated 3.8.2007 and 7.12.2007. Vide first order dated 3.8.2007, plaintiff's application under Order 9 Rule 9 of the Code of Civil Procedure has been dismissed. Order dated 14.5.2007 dismissing the

suit filed by the appellant in default of appearance was sustained.

2. Reasons stated in the application under Order 9 Rule 9 CPC for non appearance on 14.5.2007 was that the counsel for the plaintiff had gone to attend the marriage of his near relative and on said account could not appear in court.

3. Learned Trial Judge noted that the application was supported with the affidavit of the clerk of the counsel. It has further been observed by the learned Trial Judge that *even counsel of the plaintiff has failed to tell as to whose relation he has gone in the marriage on 14.5.2007.*

4. The second order impugned i.e. the order dated 7.12.2007 has disposed of a second application filed under Order 9 Rule 9 of the Code of Civil Procedure.

5. Reason given for dismissing the second application is that no second application lies for restoration of a suit dismissed in default when an earlier application has been disposed of.

6. It appears that the second application under Order 9 Rule 9 CPC was filed to cure the defect in the earlier application under Order 9 Rule 9 CPC which was dismissed vide order dated 3.8.2007.

7. Before adverting to the grounds of appeal and the

merits of the controversy, certain relevant backdrop facts need to be noted.

8. I would be referring to the respondents as Janas. I would be referring to the appellant as S.N.Sapra, i.e. by his name.

9. Janas and S.N.Sapra are at loggerheads with each other since the year 1994. They have been litigating with respect to the second floor of property bearing Municipal No.M-38, Chitranjan Park, New Delhi.

10. The said property was owned by P.K.Jana and his wife Usha Jana. On her death her half share was inherited by her two children Sandeep and Saurabh.

11. Janas filed a suit for ejectment alleging that S.N.Sapra was a tenant under them in respect of the second floor of property bearing No. M-38, Chitranjan Park, New Delhi. They alleged that the tenancy stood determined and hence they were entitled to possession thereof.

12. In the said suit, S.N.Sapra filed a counter claim. He relied upon a memorandum dated 5.1.1994 and pleaded that the same was an agreement to sell. He pleaded possessory rights under the memorandum dated 5.1.1994. He stated that the total sale consideration agreed upon between him and Janas was Rs.3 lacs. He stated that he paid Rs.30,000/- when

the memorandum was executed. He pleaded that from time to time he made further payments. Prayer made was that a decree be passed as under:-

I. That the counter claim be accepted, the decree/order be passed in favour of the defendants directing the plaintiffs to execute the transfer deeds in respect of the flat No.M-38, Chittranjan Park, New Delhi.

II. A decree for permanent injunction be passed in favour of the defendants restraining the plaintiffs from alienating, transferring, disposing off creating any third party interest and also from interfering with the supply of water and electricity in the said flat.

III. Cost of counter claim be allowed.

Any other and further relief which this Hon'ble Court may deem fit and proper in the circumstances of the case including the dismissal of plaint may also be granted."

13. Having defended the suit by filing a written statement and also laying a counter claim for a decree of specific performance being passed in his favour directing plaintiffs to execute transfer documents in respect of the property, S.N.Sapra failed to defend the suit and prosecute his counter claim. The result was that the counter claim was dismissed in default and Janas were granted an ex-parte decree for possession on 4.9.2004.

14. Being relevant it may be noted that the suit for possession being suit No.237/1995 was filed by the Janas on

6.6.1995 and counter claim was filed on 18.11.1997.

15. S.N.Sapra filed an application under Order 9 Rule 13 CPC for setting aside of the ex-parte decree dated 4.9.2004. He pleaded that the suit was premised on the claim that he was a tenant but the facts were otherwise. He relied upon the memorandum dated 5.1.1994 to plead that he was a bona fide purchaser of the second floor.

16. Suffice would it be to record that the scope of Order 9 Rule 13 CPC being restricted to the sufficiency of the cause shown for non appearance when suit was decreed ex-parte, learned Trial Judge did not go into any other issue save and except the sufficiency of the cause shown for non appearance when ex-parte decree was passed. Finding none, vide order dated 20.5.2005 application under Order 9 Rule 13 CPC filed by S.N.Sapra was dismissed.

17. S.N.Sapra fought the battle challenging the order dated 20.5.2005 right up to the Supreme Court. His first appeal failed in this court. Petition for special leave to appeal suffered a dismissal before the Hon'ble Supreme Court.

18. The ex-parte decree became a subject matter of repeated challenges by S.N.Sapra from time to time as and when Janas obtained warrants for possession of the property.

19. Instant suit which suffered a dismissal in default was

filed in the year 2004. Prayer made in the suit is as under:-

"I) To pass a decree of declaration in favour of the plaintiff and against the defendants whereby declaring that the plaintiff alone is entitled to get the regular sale deed executed from the defendants No.1 and 2 under the terms and conditions of Memorandum of Understanding dated 1-5-94 of second floor flat forming part of property No.M-38, Chitranjan Park, New Delhi morefully shown and described in the site plan annexed with the plaint and the defendants No.3 and 4 have no right, title or claim over the said flat against the plaintiff to meet the ends of justice.

II. To pass a decree of Permanent Injunction in favour of the plaintiff and against the defendantss 1 to 4 whereby be pleased to restrain the defendants 1 to 4 their attorneys, agents etc. from selling, transferring or alienating the suit property morefully shown and described in the site plan the second floor forming part of property No.M-38, Chitranjan Park, New Delhi to any other person to meet the ends of justice.

III. To pass a decree of Specific Performance in favour of the plaintiff and against the defendants No.1 and 2 whereby be pleased to direct the defendants No.1 and 2 to accept the balance sale consideration of Rs.1,76,400.00 (Rupees One Lakh seventy six thousands and four hundred) from the plaintiff being balance sale consideration of second floor flat, morefully shown and described in Site plan forming part of property No.M-38, Chitranjan Park, New Delhi and sing and execute the regular sale deed of suit property at the expenses of plaintiff in favour of plaintiff and get the same registered in the office of Sub-Registrar concerned AND/OR IN THE ALTERNATIVE:

On failure of the defendants No. 1 and 2 to accept the balance consideration amount from

plaintiff, direct the plaintiff to deposit the same in the court and payable to defendants 1 and 2 and the Hon'ble Court execute regular sale deed of suit property in favour of the plaintiff to meet the ends of justice.

IV. Costs of suit be also awarded in favour of the plaintiff to meet the ends of justice.

V. Any other and further orders/directions which this Hon'ble Court may deem fit and proper into the circumstances of the case be also passed in favour of the plaintiff to meet the ends of justice."

20. In the said suit S.N.Sapra pleaded a claim under the memorandum dated 5.1.1994 i.e. the memorandum on which the counter claim was predicated. He further stated that out of the agreed sale consideration in sum of Rs.3 lacs he had paid Rs.1,23,600 and that he was ready and willing to pay the balance sale consideration of Rs.1,76,400/-. Relevant would it be to note that in the suit in question S.N.Sapra has not mentioned that he had already filed a counter claim when Janas sue for his ejectment and that the said counter claim was dismissed in default.

21. As noted hereinabove, suit filed by S.N.Sapra was not prosecuted by him resulting in same being dismissed in default on 14.5.2007.

22. In the execution proceedings set into motion by Janas when decree of ejectment was put into execution, objections were filed by S.N.Sapra alleging that the decree was

a nullity, in that, it was predicated on his status being a tenant whereas he was in possession under the MOU dated 5.1.1994. Vide order dated 27.5.2005 the said objections were dismissed. The order was not challenged. It attained finality.

23. S.N.Sapra resorted to a third action. He filed a civil suit on the original side of this court registered as CS(OS) No.2202/2006. In the said suit he challenged the decree of ejectment dated 4.9.2004. The said suit was dismissed as withdrawn on 28.11.2006.

24. S.N.Sapra went back to the executing court and filed another objection to the execution of the decree which objection was dismissed vide order dated 2.12.2006. The order was challenged by and under C.R.No. 360/2006. The same was dismissed by this court vide order dated 14.1.2008. Further challenge failed before the Hon'ble Supreme Court when petition for special leave to appeal seeking to challenge the order dated 14.1.2008 disposing of C.R.No. 360/2006 was dismissed as withdrawn.

25. Dismissing C.R.P.No.360/2006 it was observed by this court that S.N.Sapra was prima facie resorting to multifarious litigation and that prima facie his right to litigate on the basis of the MOU dated 5.1.2004 stood foreclosed when his counter claim was dismissed. Needless to state, restoration

of the counter claim was never prayed for. Exemplary costs in sum of Rs.25,000/- was imposed upon S.N.Sapra.

26. Order 9 Rule 9 of the Code of Civil Procedure reads as under:-

“9. Decree against plaintiff by default bars fresh suit – (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to cost or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.”

27. Prima facie, where a suit has been dismissed under Rule 8 of Order 9 the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. Right is to seek restoration of the suit.

28. It is true that a dismissal of a suit under Order 9 Rule 9 CPC does not operate as res judicata for the reasons principles enunciated under Section 11 of the Code of Civil Procedure are entirely different, but Order 9 Rule 9 CPC, it cannot be forgotten, is based on public policy, being that, on the same cause a defendant should not be sued for a second

time.

29. Independent of the reasons given by the learned Trial Judge while dismissing both applications, prima facie the very suit filed by S.N.Sapra seeking a decree for specific would not lie for the reason for the same relief and on the same cause of action counter claim was predicated by S.N.Sapra when Janas sued for his ejectment.

30. Additionally, a suit for specific performance has to be filed within 3 years from the date when cause of action accrues.

31. Obviously, a cause of action to seek specific performance of the MOU dated 5.1.1994 had accrued to S.N.Sapra prior to 18.11.1997 for the reason on said date he filed a counter claim in the suit for ejectment filed by the Janas. In the counter claim he sought a decree for specific performance. Prima facie, the instant suit would obviously be barred by limitation for the reason, admittedly cause of action to seek specific performance of the MOU dated 5.1.1994 had accrued, if not later, at least on 18.11.1997.

32. It is obviously a case where S.N.Sapra is using virtually every provision in law to frustrate a decree for ejectment obtained by the Janas. Needless to state the decree has attained finality. Even objections to the decree have been

dismissed. The same have also attained finality.

33. In my opinion, the frivolous nature of the litigation itself disentitles S.N.Sapra to any indulgence from a court of law which must, in my opinion, possesses inherent powers to nip a frivolous litigation at the bud if the litigation is opined to be an abuse of the process of the court.

34. Be that as it may, I concur with the view taken by the learned Trial Judge when order dated 3.8.2007 was passed that no sufficient cause has been shown for non appearance when the suit was dismissed in default on 14.5.2007.

35. I may take on record that the counsel concerned had filed an affidavit in support of the application under Order 9 Rule 9 CPC. But, it would be relevant to note that neither in the application nor in the affidavit has the counsel disclosed as to whose marriage he had gone to attend. The venue of the marriage, the time of the marriage, none have been disclosed.

36. In the backdrop of the multifarious litigation resorted to by S.N.Sapra, particulars of the stated marriage which the counsel had attended assume significance for the reason, as noted hereinabove, S.N.Sapra is using every trick up his sleeve to frustrate a legal and valid decree obtained by the Janas.

37. Pertaining to second order which has been challenged in the instant appeal, being the order dated 7.12.2007, suffice would it be to state that law does not permit successive applications to be filed under Order 9 Rule 9 CPC.

38. I find no merits in the appeal.

39. The appeal is dismissed with costs in sum of Rs.25,000/-.

March 5, 2008
MM

PRADEEP NANDRAJOG
JUDGE