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IN THE HIGH COURT OF DELHI

Judgment reserved on : August 29, 2008

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Judgment delivered on : September 22, 2008

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RFA 674/2005

MANOJ GODHA

..... Appellant

Through: Mr. Ashok Bhasin, Sr. Advocate
with Mr. A.K. Vashishtha, Advocate

VERSUS

SUBHASH BARJATIYA & ORS.

..... Respondents

through: Mr. Gaurav Duggal, Advocate for
respondent No.1
Mr. S. Vaidyalingam with Mr. Tulshi
Dass for respondents No.2 to 4

CORAM:

Hon'ble Mr. Justice Pradeep Nandrajog
Hon'ble Mr. Justice Sunil Gaur

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.

1. Two preliminary issues have been decided by the learned Trial Judge vide impugned judgment and decree dated 4.4.2005. Both issues have been decided against the appellant. The result is that the suit filed by the appellant has

been dismissed. The two issues which have been decided read as under:-

“Issue No.1-A: whether the suit is not maintainable in view of preliminary objection No.1 in the WS of defendant No.1? OPD-1

Issue No.2: Whether suit is valued properly for the purposes of court fee and jurisdiction? OPP”

2. Preliminary objection No.1 in the written statement filed by defendant No.1 reads as under:-

“1. That the present suit is not maintainable in present form. The plaintiff by way of mandatory injunction wants to recover the alleged jeweler, which is not maintainable under the Specific Relief Act.”

3. The suit filed by the plaintiff, to say the least, is most unartistically drafted and if pleadings are read pedantically, indeed the findings returned by the learned Trial Judge have to be upheld. But for the reasons hereinafter recorded, since law requires pleadings to be construed liberally and to subserve the cause of justice an opportunity should ordinarily be granted to a party to take corrective action, the appellant shall live to fight the battle against the respondent No.1 on another day.

4. Stating in the plaint vide para 1 that the appellant is the sole proprietor of M/s. Shantivijay Jewellers, in para 2 of

the plaint it is stated that the appellant was owner of jewellery detailed in said para. In para 3 of the plaint it is stated that defendant No.1 introduced himself to the plaintiff as a dealer of precious jewellery and requested the plaintiff to provide him unique jewellery, preferably royal jewellery, for sale in the market. In para 3 of the plaint it is pleaded that the appellant told defendant No.1 that such jewellery is very rare and costly and that defendant No.1 should make advance payment to the plaintiff in sum of Rs.4 crores.

5. In para 4 of the plaint it is stated that defendant No.1 agreed to arrange the sum of Rs.4 crores in the next 6-7 months. In para 5 of the plaint it is stated that in June, 1992, defendant No.1 introduced defendant No.2 to the plaintiff, who gave Rupees 1.5 crores to the plaintiff as security for the jewellery intended to be taken by defendant No.1 from the plaintiff. In para 6 of the plaint it is stated that on 23.11.1993, the defendant No.1 gave a pay order of Rupees 2.25 crores to the plaintiff and took delivery of jewellery from the plaintiff on approval basis up to 31.12.1993. It is pleaded in para 6 that in this manner till 23.11.1993, the defendant No.1 made advance payment of Rs.3.75 crores to the plaintiff towards the jewellery.

6. Thereafter, in para 7 of the plaint, it is stated that

on 30.12.1993 the defendant No.1 paid a further sum of Rs.20 lacs to the plaintiff.

7. In para 8 of the plaint it is explained that in the business of jewellery and precious stones the word “approval” means that one party takes jewellery from the other for a particular time as mutually fixed by the parties with an understanding that if price of the jewellery is not paid by the date fixed the jewellery is to be returned by the date fixed.

8. In para 9 it is stated that defendant No.1 took jewellery on approval basis with the clear understanding that either the jewellery would be returned by the end of December, 1993 or price thereof would be paid in sum of Rupees 8.5 crores.

9. In para 10 of the plaint it is stated that defendant No.1 agreed that as and when he would sell jewellery to any third party, sale price received by him would be deposited with the plaintiff, who would disburse equivalent amount to defendants No.3 and 4 after making necessary adjustments as said defendants had deposited Rs.1.5 crores as security for the jewellery intended to be taken by defendant No.1. In para 11 of the plaint it is stated that defendant No.2 was introduced to the plaintiff by defendant No.1 in June, 1992. In para 12 it is stated that defendant No.2 handed over a cheque

in sum of Rs.1.5 crores to defendant No.1 who handed over the same to the plaintiff as it appeared to the plaintiff that defendant No.1 had some commercial dealings with defendant No.2.

10. In para 13 of the plaint it is stated that till the second week of January, 1994 defendant No.1 kept on assuring the plaintiff that the jewellery would be sold for a good price but later on told the plaintiff that he would return the jewellery and, therefore, the appellant should make arrangement to refund the sum of Rupees 3.95 crores received by him.

11. In para 14 of the plaint it is averred that the plaintiff agreed to refund the said amount to the defendant in instalments because it was a huge amount. In para 15 it is pleaded that between 24.3.1994 and 21.9.1994 plaintiff returned Rs.1,75,40,000/- to defendant No.1. In para 16 it is averred that the plaintiff returned Rs.35 lacs to defendant No.4 by tendering three payments on 22.1.1994, 25.1.1994 and 1.2.1994 in sum of Rs.20 lacs, Rs.10 lacs and Rs.5 lacs respectively.

12. Stating, in para 17, that in the manner aforesaid plaintiff returned Rupees 2.1 crores with an assurance that the jewellery would be returned, the plaintiff awaited the

return of his jewellery.

13. In para 18 of the plaint plaintiff stated that sum of Rs.1,75,40,000/- paid by him to defendant No.1 on the dates set out in para 15 of the plaint were towards return of Rs.2,25,00,000/- received by him and the sum of Rs.35 lacs given to defendant No.4 on the dates specified in para 16 of the plaint were towards Rs.1,50,00,000/- received by him from defendants No.3 & 4.

14. Continuing the story further, in para 19 and 20 of the plaint it is pleaded that on 12.1.1996, defendant No.4 came to the shop of the plaintiff and said that he will persuade defendant No.1 to return the jewellery provided the plaintiff gave certificate with regard to the payment made by plaintiff to defendant No.4 on respective dates mentioning the balance amount due out of the security payment of Rs.1,50,00,000/- only with further condition that the plaintiff would issue 2 cheques in the name of defendants No.3 & 4 in sum of Rs.5 lacs each. It is pleaded that on said assurance the plaintiff issued 2 cheques in sum of Rs.5 lacs each favouring defendants No.3 & 4.

15. It is pleaded in para 21 that after taking the cheques, defendant No.2 did not revert back to the plaintiff but got a legal notice served upon the plaintiff on behalf of

defendants No.3 & 4 under Section 138 of the Negotiable Instruments Act calling upon the plaintiff to pay Rs.10 lacs against the cheques which were dishonoured.

16. After making the further averment that the defendant no.1 detained the jewellery of the plaintiff without any authority and making the statutory pleadings pertaining to the accrual of the cause of action on the date specified, territorial jurisdiction of the courts at Delhi and valuation for purposes of court fee and jurisdiction, valuing the relief in sum of Rs.5,10,000/- the suit has been filed praying as under:-

“(a) issue a mandatory injunction directing the defendant No.1 to return the jewellery to the plaintiff against the balance payment of Rs.1,84,60,000/- (Rs. One Crore eighty four lacs sixty thousand only)

(c) and may pass any other decree/order(s)/ direction(s) as this Hon’ble Court may deem fit and proper in the given facts and circumstances of the present case.”

It is noted that there is no prayer (b).

17. Defendants No.2, 3 & 4 stated that the payments which they had made to the plaintiff and which were admitted by the plaintiff as made by them were by way of a loan. Payments stated by the plaintiff as made to defendants No.2, 3 & 4 were explained by way of return of the loan. It was pleaded that since the plaintiff had not repaid the full loan

amount they had filed recovery suits against the plaintiff which were pending on the Original Side of this Court.

18. In the written statement filed by defendant No.1 he denied having received any jewellery from the plaintiff as alleged. It is stated that Rupees 2.25 crores paid by him to the plaintiff was for sale of certain jewellery by him to a buyer if the same could fetch at least Rs.4 crores. It was pleaded that defendant No.1 received only Rs.70 lacs from the plaintiff and that the plaintiff was unnecessarily detailing the balance amount.

19. Technical defences were raised by defendant No.1 pertaining to the form of the suit.

20. On the pleadings of the parties, issues were settled and as agreed, issue No.1-A and issue No.2 were treated as preliminary issues.

21. Issue No.1-A settled was as noted in para 1 above.

22. It is important to note that the appellant/plaintiff has made loose and laconic averments pertaining to amount received by him from defendants No.2 to 4. Defendant No.2 in the suit is Mukund Goyal. Defendant No.4 is M/s. Goyal Modes stated to be a sole proprietary firm of Ashish Goyal, S/o Sh. Mukund Goyal. Defendant No.3 is "Goyal Fashions Pvt. Ltd.", a company registered under the Companies' Act. It has

been sued through its Director Mukund Goyal.

23. Shri Ashok Bhasin, learned Senior Counsel for the appellant/plaintiff stated at the bar during arguments that his client intended to plead that defendant No.1 had tendered certain amounts to his client through Mukund Goyal. Thus, reference in the pleadings of return of money to defendants No.3 and 4 with reference to sum of Rs.1.5 crores stated to have been received from defendant No.2 is the result of mixed up pleadings.

24. As we understand, the plaintiff has clearly intended to say, that defendant No.2 by himself or through his company or through the sole proprietary firm of his son, handed over certain cheques to defendant No.1 or to the plaintiff and that the cheques handed over by defendant No.2 to defendant No.1 were tendered by defendant No.1 to him pursuant to his dealings with defendant No.1.

25. Deciding Issue No.1-A against the appellant the learned Trial Judge has held that under Section 41(h) of the Specific Relief Act, where a party has an equally efficacious remedy mandatory injunction may not be issued. Learned Trial Judge has held that on the pleadings in the plaint it was apparent that the plaintiff acknowledged having handed over jewellery worth Rs.4 crores to defendant No.1 for which he

had received Rs.3.95 crores and as pleaded by him, he had returned Rs.1,75,40,000/- meaning thereby he was out of pocket in sum of Rs.1,84,60,000/- (Rupees One Crore Eighty Four Lacs and Sixty Thousand only). Learned Trial Judge has accordingly opined that the plaintiff ought to have sued for recovery of said amount.

26. Issue No.2 has likewise been decided on same line of reasoning holding that the suit could not be valued at Rs.5,10,000/-.

27. Shri Ashok Bhasin, learned Senior Counsel for the appellant very fairly conceded that meaningfully read the plaint actually intends to seek recovery of money or recovery of the jewellery. Learned counsel says that the claim of the appellant was that the jewellery entrusted to defendant No.1 was agreed to be sold for Rs.8.5 crores and therefore, the appellant would actually be entitled to recover the differential of Rs.8.5 crores and the money which has already been received by the appellant (after giving adjustment of the amount returned by the appellant to the respondents). Thus, learned counsel conceded that the suit was for money due and payable to the plaintiff.

28. In the decision reported as (2005) 7 SCC 667 "*Joseph Severance & Ors. Vs. Benny Mathew & Ors.*" Hon'ble

Supreme Court observed that in relation to an immovable property a claim for mandatory injunction directing the defendant to hand over possession of immovable property to the plaintiff would and should be read as a claim for possession. Similar view was expressed in an earlier decision reported as AIR 1985 SC 857 "*Sant Lal Jain Vs. Avtar Singh*". In para 7 whereof it was observed as under:-

"In the present case it has not been shown to us that the appellant had come to the court with the suit for mandatory injunction after any considerable delay which will disentitle him to the discretionary relief. Even if there was some delay, we think that in a case of this kind attempt should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all the attendant delay, trouble and expense. The suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds is possession of the property to which he may be found to be entitled. Therefore, we are of the opinion that the appellant should not be denied relief merely because he had couched the plaint in the form of a suit for mandatory injunction."

29. Order VII Rule 11 (c) of the Code of Civil Procedure reads as under:-

"11. **Rejection of plaint.** – The plaint shall be rejected in the following cases:-

(a)

(b)

(c) where the relief claimed is properly valued

but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;"

29. In our opinion an opportunity ought to have been granted by the learned Trial Judge requiring the appellant to pay the adequate court fee on the money value of the suit.

30. Before concluding we note that in a summary fashion learned Trial Judge has held that defendants No.2 to 4 have been unnecessarily dragged in the present litigation and hence the suit against them is not maintainable.

31. Though the findings of the learned Trial Judge on said point are cryptic but we note that a meaningful reading of the plaint, as now conceded by Shri Ashok Bhasin, learned Senior Counsel for the appellant, shows that the case of the plaintiff is that he entrusted certain jewellery to defendant No.1 who by himself or through his associates paid certain advance money to the plaintiff. Qua defendants No.2 to 4 the only averment is that they gave money to the plaintiff on behalf of defendant No.1. Privity of contract is essential in law, in India, to bind the parties to jural relationship. Privity of consideration is not essential. If 'A' gives money to 'B' at the asking of 'C, in a dispute between 'B' and 'C', 'A' would have no role to play other than as a witness of the parties.

32. Even in the prayer in the instant suit relief claimed is only against defendant No.1. Further, as noted above, in para 5 of the plaint the appellant has clearly pleaded that money given to him by defendant No.2 was by way of security for the jewellery intended to be taken by defendant No.1 from the plaintiff. We thus uphold the findings of the learned Trial Judge that defendants No.2 to 4 have been unnecessarily dragged into the litigation. We delete defendants No.2 to 4 from the array of defendants.

33. Appeal stands disposed of setting aside the impugned order dated 4.4.2005. The suit is restored. Learned Trial Judge would grant an opportunity to the plaintiff to file adequate court fee and formally amend para 27 of the plaint where averments pertaining to valuation of the suit for purposes of court fee and jurisdiction have been made. The plaintiff would be permitted to amend said para in light of our present decision and if necessary corrective action is taken by the plaintiff the suit would be transferred to the court of competent pecuniary jurisdiction for decision as per law. Needless to state if the plaintiff does not pay the proper court fee as per our present decision, in said eventuality the plaint shall be liable to be rejected as per law.

34. Though plaintiff has succeeded in appeal since the

plaintiff did not take corrective action at the right time and has forced the respondents to an unnecessary round of litigation, we direct that the plaintiff shall pay costs of Rs.5,000/- each to respondents No.1 to 4.

35. Trial Court Record be returned.

PRADEEP NANDRAJOG, J.

SUNIL GAUR, J.

September 22, 2008
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