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HIGH COURT OF DELHI : NEW DELHI

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FAO (OS) No.178/2008

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Judgment Reserved on : 30th September, 2008

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Judgment pronounced on : 9th January, 2009

Ms. Jyotika Kumar ...Appellant
Through : Mr. Rudra Kahlon, Adv.

Versus

Mr. Anil Soni & Ors. Respondents
Through : Mr. Sharat Chandra, Adv. with
Mr. Sachin Chandra, Adv. for
Respondents No.1 & 2

Coram:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE MANMOHAN SINGH

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

Yes

MANMOHAN SINGH, J.

1. This is an appeal against the order dated 25th February, 2008 passed in CS (OS) No. 277/2004 whereby the learned Single Judge has dismissed two applications of the Appellant, one under Order 39 Rule 4 read with Section 151 CPC and other under Order 6 rule 16 read with Order 7 rule 11 CPC while disposing of other applications i.e. I.A. No. 6058/07 (under Order 39 rule 1 & 2 CPC) , I.A. No. 6057/2007 (under Order 12 Rule 6 CPC), I.A. No. 5382/2007 (under Order 6 Rule 17 CPC) and I.A. No.2192/2006

(under Section 151 CPC).

2. The brief facts of the matter are that the owner of Chauhan Jewellers who are having their offices at Karol Bagh and South Extension were introduced to an Iraqi businessman by Respondent No.3, Mr. Vijay Khanna.

3. The said Chauhan Jewellers dealt with the said Iraqi as a result of which the cheque given by the said Iraqi national to the Chauhan Bros. bounced and there was a dispute between Chauhan Jewellers and their office and Respondent No.3 i.e. Vijay Khanna.

4. The case of the Appellant is that the owner of Chauhan Jewellers with the help of various senior officers of Police foisted a number of false cases against the said Respondent No.3 and got him arrested and also against Respondent No.4 who is the wife of Respondent No.3. It is alleged by the appellant that the said owners of Chauhan Jewellers got some documents forcibly signed from the respondent No. 3 and 4 on which forged documents were prepared later regarding the sale of the residential house at 189-A, Carriappa Marg, Khirki Extension, New Delhi-110062. The sale of the said residential house was shown to have been executed in favour of respondent No.7 i.e. Sh. Kedar Nath Bhardwaj.

5. Subsequently, respondent No.3 and 4 filed a writ petition which was dismissed. However, on appeal being Civil Misc. Petition No.3895/1998 made to the Supreme Court, the matter was remanded back to this Court and vide order dated 5th November, 1998 in Crl. Writ Petition No.779/1994,

it was held that the said documents of the alleged sale to respondent No.7 were forged and the respondent No.7 was in illegal possession of the said premises belonging to respondent No.3 and 4. The respondent No.1 and 2 who claimed to have purchased the said residential house from respondent No.7 were directed to vacate the said residential house and hand over the possession back to respondent No.3 and 4 who were the original owners of the same.

6. The Special Leave Petition against the said order dated 5th November, 1998 filed by respondent No.1 and 2 ie Anil Soni and Ms. Madhu Soni was dismissed by order dated 6th August, 1999. However, it was made clear that the question of title is not decided either by the High Court or by the Supreme Court in the said order.

7. In view of the order passed by a Division Bench of this Court on 5th November, 1998 the possession of the residential house was handed over by respondent No.1 and 2 to respondent No.3 and 4. Thereafter the respondent No.1 and 2 filed suit for possession of the said property being CS (OS) No.277/1998 before this Court after a lapse of five years for handing over of the possession. No injunction was granted by this Court in the application under Order 39 Rules 1 & 2 CPC. During the pendency of the suit respondent No.3 and 4 sold the said residential house to respondent No.5 and 6 who later on sold the same to the present appellant.

8. In view of the above the respondent No.1 and 2 filed an application for impleadment of the present appellant as defendant No.3 (c)

and further prayed for restraining the appellant from selling the said residential house to any other person.

9. The learned Single Judge passed the interim order against the appellant on 22nd May, 2007. Upon the service of the said order, the appellant entered appearance and also filed an application being IA No.8258/2007 under Order 6 rule 16 and Order 7 Rule 11 CPC for dismissal of the suit on the ground that the same is an abuse of the process of law and the suit for possession is not maintainable.

10. The appellant filed another application under Order 39 Rule 4 read with Section 151 CPC being I.A. No.6058/2007 which was also dismissed by the impugned order. The learned Single Judge also disposed of the other applications filed by respondent No.1 and 2 and passed the interim order to maintain status quo in respect of the suit property and further directed all the parties that they should not create any third party interest in respect of the suit property till the final disposal of the suit and preserve its status that exist as on that date. Against the said order dated 25th February, 2008 the present appeal has been filed by the appellant who is defendant No.3 in the main suit.

11. We have heard learned counsel for the parties and have gone through the pleadings and the relevant documents.

12. The respondent No.1 and 2 have filed the suit for possession of property and a decree for damages for use and occupation before this court being C.S.(OS)No.277/04. A mere reading of the plaint shows that it is not a

disputed fact that a Division Bench of this court has held that the possession of the suit property by respondent No.1 and 2 was illegal. The Special Leave Petition filed against the said order was also dismissed except that the Apex court left open the question of title of the suit property.

13. Learned counsel for the appellant has argued that the suit has been filed by the respondent No.1 and 2 on the basis of the document which were not admittedly registered. The said documents are only notarized and on the basis of the said documents, the respondent No.1 and 2 bought the said property. Therefore, it is clear that the above said documents are contrary to the provisions of the Transfer of Property Act and the said sale is not to be considered as a valid sale under the law. Further, he has argued that the Division Bench had also come to the conclusion in the writ petition that the said documents of title are forged. He has further argued that on the date of filing of the suit for possession of the property, the suit for declaration of title was already time barred under Article 58 as the limitation for suit for declaration of title is three years. It is not in dispute that the Hon'ble Apex Court by order dated 9th August 1999 while disposing of the Special Leave Petition left open the question of title and the suit for possession was filed after 5 years which otherwise was not maintainable on the date of filing as the question of possession was already determined by the Division Bench and later on by the Apex Court and in its compliance, the possession of the property was handed over by the respondent No.1 and to respondent No. 3 and 4.

14. Learned counsel for respondents No.1 and 2 has argued that the appeal filed by the appellant does not lie under the provisions of Order 43 Rule 1 CPC and the said appeal is incompetent and is liable to be dismissed. In support of his arguments he has referred to the case of **Prahladrai Agarwalla & Ors. Vs. Smt. Renuka Pal & Ors., AIR 1982 Calcutta 259.**

15. We are not inclined to accept his submission that the appeal is not maintainable under Section 43 Rule 1(r) as the impugned order passed by the learned Single Judge is a composite order whereby various applications filed by the appellant have been decided and dismissed including two applications under Order 39 Rule 4 CPC and Order 6 Rule 16 read with Order 7 Rule 11 of the Code of Civil Procedure. It is not in dispute that an appeal lies against the dismissal of application under Order 39 Rule 4 under Order 43 Rule 1(r) of the Code of Civil Procedure. As regards filing of the appeal against the dismissal of the application under Order 7 Rule 11 CPC is concerned, it is also maintainable in view of judgment of Apex Court passed in **Shah Babulal Khimji vs. Jayaben, AIR 1981 SC 1786**, where the maintainability of the Letters Patent appeal has been discussed and determined at great length. The relevant paras 113, 114 and 116 of the abovesaid judgment read as under :-

“113. Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a court. As a judgment constitutes the reasons for the decree it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.  ⁵⁵ The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by sub-section (2) of Section 2 cannot be physically imported into the definition of the word “judgment” as used in

clause 15 of the letters patent because the letters patent has advisedly not used the terms “order” or “decree” anywhere. The intention, therefore, of the givers of the letters patent was that the word “judgment” should receive a much wider and more liberal interpretation than the word “judgment” used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the letters patent. It seems to us that the word “judgment” has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds:

(1) *A final judgment.*— A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial Judge indisputably and unquestionably is a judgment within the meaning of the letters patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

(2) *A preliminary judgment.*—This kind of a judgment may take two forms—(a) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and therefore appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, *res judicata*, a manifest defect in the suit, absence of notice under Section 80 and the like, and these objections are decided by the trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, ⁵⁶ be construed to be a judgment so as to be appealable to a larger Bench.

(3) *Intermediary or interlocutory judgment.*— Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the letters patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43 Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the

trial Judge in a suit under Order 37 of the Code of Civil Procedure refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the letters patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an order passed by the trial Judge would not amount to a judgment within the meaning of clause 15 of the letters patent but will be purely an interlocutory order. Similarly, suppose the trial Judge passes an order setting aside an ex parte decree against the defendant, which is not appealable under any of the clauses of Order 43 Rule 1 though an order rejecting an application to set aside the decree passed ex parte falls within Order 43 Rule 1 clause (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of letters patent. The fact, however, remains that the order setting aside the ex parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the trial Judge setting aside the ex parte decree vitally affects the valuable rights of the  ⁵⁷ plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench."

114. In the course of the trial, the trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the trial Judge.

116. We might give another instance of an interlocutory order which amounts to an exercise of discretion and which may yet amount to a judgment within the meaning of the letters patent. Suppose the trial Judge allows the plaintiff to amend his plaint or include a cause of action or a relief as a result of which a vested right of limitation accrued to the defendant is taken away and rendered nugatory. It is manifest that in such cases, although the order passed by the trial Judge is purely discretionary and interlocutory, it causes gross injustice to the defendant who is

deprived of a valuable right of defence to the suit. Such an order, therefore, though interlocutory in nature contains the attributes and characteristics of finality and must be treated as a judgment within the meaning of the letters patent. This is what was held by this Court in *Shanti Kumar case*³⁹, as discussed above.”

The decision in Prahladrai Agarwalla’s case (supra) cited by the learned counsel for respondent No.1 and 2 is, therefore, not applicable as the decision of the Apex Court in Babulal Khimji’s case (supra) has not been referred or considered in this case by the Bench. The objection raised by the respondent is, therefore, unacceptable and the same is rejected.

16. After hearing of the appeal the judgment was reserved on 30th September, 2008. Subsequently, the respondent No.1 and 2 filed an application under Order 6 Rule 17 read with Order 41 Rule 33 and Section 151 CPC seeking amendment of the plaint filed in Suit No. 277/04 in which the prayer was made to amend the suit for declaration and possession of the property. The said C.M. No.14556/08 was dismissed as withdrawn for seeking permission to move an application before the learned single Judge in the said suit.

17. Learned counsel for respondent No.1 and 2 has argued that the finding arrived at in the Criminal Writ Petition No. 779/94 is not binding on the civil court, therefore, the suit filed by the respondent Nos. 1 and 2 for possession is maintainable

18. On the other hand, the learned counsel for the Appellant has countered the argument of the learned counsel for the respondent by referring the decision in C.S.(OS) No. 393/92 in **P.P. Sharma vs. Raj Dev Singh & Ors** decided on 21st April, 2000 by Sanjay Kishan Kaul, J. A similar

question arose in this case and the learned Single Judge has opined that the observation of the Division Bench in the judgment made the matter res integra between the parties. Paras 3 and 4 of the said judgment are reproduced below:-

“3. The plaint notes that the defendant had filed a Civil Writ Petition No. 445/1988 being the owner of the property which was decided on 26.4.1990. The said decision is reported as in *S. Rajdeo Singh & Ors. vs. Union of India & Ors.* AIR 1991 Delhi 1 being the decision of a Division Bench of this Court. The pleas in relation to the allotment and the derequisitioning of the property were considered in depth. It was held that the possession of respondent No. 6 therein (plaintiff herein) had become unlawful and the competent authority was justified in passing the order for him to hand over possession. Thus, the plaintiff was dispossessed in accordance with law as held by the Division Bench. The Division Bench also held that the appropriate relief to be granted in the writ petition was that if there was a dispute about as to whom the property was to be handed over, an enquiry would be held by the Collector (Requisition) after possession is taken over from the plaintiff and that the plaintiff was bound to deliver possession to the competent authority.

4. The present suit is the second round filed after the categorical observations of the Division Bench in the aforesaid judgment which really made the matter res integra between the parties. This suit has also been dismissed on three occasions for non-prosecution and restored. The issues in the suit have not even been framed and thus on the last date of hearing taking into consideration the nature of the controversy the Court directed that the admission/denial of documents would be carried out before the Joint Registrar on 22.3.2007 and the case was listed for framing of issues. The plaintiff was required to remain present in Court for recording of his statement under Order 10 Rule 2 of the Code of Civil Procedure, 1908 (for short, ‘CPC’).”

19. It is admitted fact between the parties that the respondent No.1 and 2 claimed the title of the property in dispute through respondent No.7

herein (Defendant No.4 in the suit) whose possession was held to be illegal on forged documents as decided by the learned Division Bench in the Criminal W.P. No. 779/1994, the operative and relevant portion of the order reads as under:-

“...Evidently, trespass into aforesaid house no. E-224 was made on 14/26th April, 1994 in the absence of the petitioners. The stand taken by the respondent no. 15 of his having been inducted as a tenant on the ground floor as also the plea taken by respondent no. 16 of his having been delivered possession of the entire house except the tenanted portion, by petitioner no. 2 are supported by the said respondents on the basis of the documents which are prima facie fabricated. Trespass into the house was committed prima facie in collusion with the police authorities. Petitioners are out of possession of their valuable property for about 4-1/2 years. In such circumstances, it is obligation and the duty of the Court to direct the restoration of the possession of the said house to the Petitioners and they cannot be non-suited on the ground of availability of alternate remedy.

Kedar Nath Bhardwaj/respondent no. 6 in his statement recorded on 13th August, 1998, has, inter alia, stated that respondent no. 15 vacated the ground floor about 4-5 months after he purchased the house and delivered possession thereof to him; that after about one year he sold the house to Anil Soni and Madhu Soni/respondents for a consideration of Rs. 5,00,000/- and handed over vacant possession thereof to them. Respondent no. 21, however, alleges to have purchased the house for Rs. 5,50,000/-. As noticed earlier, submission made on behalf of respondent nos. 20 and 21 has been that they being bona fide purchasers for valuable consideration cannot be dispossessed from the house in these proceedings; that the conduct of the petitioners who are involved in a number of criminal cases of forgery and cheating etc., is not above board and the dispute in question being between private parties, disentitle the grant of discretionary relief as claimed to the petitioners. Respondents 20 and 21 derive their right, title and interest in the aforesaid house from respondent no. 16. They cannot have the rights more than what respondent no. 16 was

having in the house. Since the possession of respondent no. 16 over the aforesaid house was itself unlawful, respondents 20 and 21 cannot resist the handing over of the possession thereof to the petitioners on the ground of their being bona fide purchasers for valuable consideration.”

20. The respondent No.1 and 2 in their suit have only sought the prayer for possession from respondent No.3 and 4 with whom they have no privity of contract. The said respondent No.1 and 2 have not prayed for possession from respondent No. 7 (Defendant No.4 in the suit) who has not filed his written statement. In the absence of suit for declaration of title of suit property in their favour, the suit filed by the respondent Nos. 1 and 2 was not maintainable and is barred by law in view of the reasons given above. There was no valid cause of action against the appellant as on the date of filing of the suit, the prayer of the suit for declaration has already become time-barred under Article 58 of the Limitation Act. It is clear that respondent No.1 and 2 have no cause of action for filing the suit and the suit is barred by law under the provisions of Order 7 Rule 11 CPC. A mere reading of the plaint itself shows that the suit filed by respondent No.1 and 2 is not maintainable.

21. We do not agree with the order passed by the learned single Judge who has disposed of the application of the Appellant merely on the reasons that it would be appropriate and in the interest of justice in case all the parties to the present suit are directed to maintain status quo in respect of the suit property as it exists as on that date and they are restrained from creating third party interest in respect of the said property till the final

adjudication of the rights of the parties in respect of the property in the present suit. The learned Single Judge has not passed the speaking or valid reason while rejecting the applications filed by the appellant under Order 39 Rule 4 CPC and Order 6 Rule 16 and Order 7 Rule 11 CPC.

22. The findings of the learned single Judge are not sustainable due to the reason that the suit filed by respondent No.1 and 2 for possession was itself not maintainable on the date of filing of the suit as the possession of the property was already decided by the Division Bench of this Court in Crl. Writ Petition No. 779/94 when the possession was restored and the order of the Division Bench was confirmed by the Hon'ble Apex Court vide order dated 9th August 1999 while dismissing the special leave petition except the question of title for determination between the parties. The respondent No.1 and 2 had not filed the suit for declaration of title of the disputed property. Suit for possession was filed after the expiry of 5 years from the date of order passed by the Apex Court. It appears that the respondent No.1 and 2 did not file the suit for declaration as they felt that it is already barred by time. The limitation for filing of the suit under Article 58 of the Limitation Act for suit for declaration is 3 years. We feel at this stage, even an application for amendment of the plaint is also not maintainable. The application filed by the appellant under Order 7 Rule 11 of Code of Civil Procedure is, therefore, allowed.

23. In view of the facts and circumstances of the matter, we hold that the suit filed by respondent No.1 and 2 is not maintainable being time

barred and without any cause of action. The appeal is allowed and the impugned order is set aside. The suit filed by the respondent No.1 and 2 is dismissed with costs. All interim orders granted in the suit stands vacated.

MANMOHAN SINGH, J.

JANUARY 09, 2009
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A.K. SIKRI, J.