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

\+ **CRP.No.172/2008**

% **Date of decision: 15th December, 2009.**

VIJAY MANCHANDA & ANR ……. Petitioners

Through: Mr. Prabhjit Jauhar, Advocate

Versus

ASHOK MANCHANDA ..... Respondent

Through: Mr. Anupam Srivastava, Advocate.

AND

FAO 423/2008

ASHOK MANCHANDA ……. Petitioner

Through: Mr. Anupam Srivastava, Advocate

Versus

VIJAY MANCHANDA & ORS ..... Respondents

Through: Mr Prabhjit Jauhar, Advocate

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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

RAJIV SAHAI ENDLAW, J.

1. The revision petition under section 115 of the CPC and the FAO under Order 43 rule 1(r) of the CPC arise from the orders in the same suit, disposing of the applications under Order 39 Rules 1 and 2, Order 39 Rule 4 and Order 7 Rule 11 of the CPC.

2. The suit from which these petition and appeal have arisen was instituted by Shri Ashok Manchanda hereinafter referred to as the plaintiff against Shri Vijay Manchanda and Smt Poonam Manchanda hereinafter referred to as the defendants. The suit was instituted for cancellation of sale deed dated 10th August, 2000 executed by the defendant No.1 Shri Vijay Manchanda in favour of the defendant No.2 Smt Poonam Manchanda with respect to the property No.699, first floor, double storey, New Rajinder Nagar, New Delhi. It is, inter alia, the case of the plaintiff in the plaint that the plaintiff and the defendant No.1 are brothers; the defendant No.2 is the wife of the defendant No.1; that the plaintiff and the defendant No.2 had vide agreement dated 17th August, 1993 agreed to purchase the aforesaid property from one Smt Usha Sachdev and had paid the entire sale consideration to the said Smt Usha Sachdev and the property agreed to be purchased being lease hold and the execution of the sale deed thereof being not immediately possible, the said Smt Usha Sachdev had, as per practice, executed a general power of attorney with respect to the said property in favour of the defendant No.1 enabling the defendant No.1 to sell the said property; that the plaintiff and the defendant No.2 in part performance of the agreement to sell were also put into possession of the aforesaid property and were thereafter holding themselves out as owner of the said property having half share each; that the defendant No.1 however misused the power of attorney executed in his favour in pursuance to the agreement to sell aforesaid and executed sale deed of one half share in the property in favour of the defendant No.2 on 9th August, 2000 and another sale deed with respect to the other half share in the property on 10th August, 2000 thereby purporting to make his wife the defendant No.2 who under the agreement to sell was entitled to only half share in the property, the absolute owner of the property; that the plaintiff learnt of the execution of the said sale deeds only on 29th October, 2007. The plaintiff thus instituted the suit for cancellation of the sale deed dated 10th August, 2000 with respect to the one half share in the property.

3. The suit was accompanied with an application for interim relief. It appears that vide ex parte/interim order the defendants in the suit were restrained from dealing with the property.

4. The defendants contested the suit and filed an application under Order 7 Rule 11 of the CPC for rejection of the plaint and also filed an application under Order 39 Rule 4 of the CPC for vacation of the stay.

5. The trial court vide order impugned in these petitions/appeal has dismissed the application of the plaintiff under Order 39 Rules 1 and 2 of the CPC, allowed the application of the defendants under Order 39 Rule 4 of the CPC and vacated the order restraining the defendants from dealing with the property and also dismissed the application of the defendants under Order 7 Rule 11 of the CPC.

6. The Revision petition has been preferred by the defendants in the suit against the dismissal of their application under Order 7 Rule 11 of the CPC. The appeal has been preferred by the plaintiff in the suit against the order of dismissal of his application under Order 39 Rule 1 and 2 of the CPC. Both have been directed to be taken up together.

7. Since the revision petition entails the question of very maintainability of the suit, it is deemed expedient to take up the same first. The counsel for the defendants has contended that rejection of the pliant under Order 7 Rule 11 of the CPC was sought on three grounds. Firstly, on the ground of the claim for cancellation of the sale deed being barred by limitation, secondly on the ground of the suit for mere cancellation of sale deed being not maintainable without the plaintiff claiming the subsequent relief of possession of the property and thirdly on the ground that the plaintiff was merely an agreement purchaser and had no right in the property and / or a right to claim setting aside of the sale deed with respect to the property and as an agreement purchaser could at best sue for specific performance of agreement to sell and which had not been done and as such the plaint did not disclose any cause of action for the suit.

8. The trial court has dismissed the application holding that on a perusal of the plaint the same was found to disclose a cause of action; that from the averments of the plaint the cause of action is shown to accrue on 29th October, 2007 only and though the said fact is disputed by the defendants but the same is to be subject matter of trial and the plaint could not be rejected as barred by time and also on the ground

that the appropriate remedy of the plaintiff being a suit for specific performance could not be a ground for rejection of the plaint.

9. In my opinion the grounds of limitation and the plaint not disclosing a cause of action are not made out in the present case. As far as limitation is concerned, the same, considering the nature of the suit is governed by Article 59 of the Schedule to the Limitation Act. The limitation provided is of three years commencing from the date when facts entitling the plaintiff to the relief of cancellation of a deed or document first became known to the plaintiff. As per the averments in the plaint and which alone are to be seen at this stage, the said facts first became known to the plaintiff within three years prior to the institution of the suit. The counsel for the defendants has sought to demonstrate that the plaintiff had contemporaneous knowledge of the sale deeds. However, that is a matter of evidence. Suffice it is to state that no document has been shown from which it can be said positively that the plaintiff had knowledge of the sale deed sought to be cancelled, at any time prior to three years prior to the institution of the suit.

10. As far as the plea of the plaint not disclosing the cause of action is concerned, in the facts of the case I do not find that the plaintiff can be said to be having no rights in the property without claiming the relief of specific performance. The Division Bench of this court in ***Asha M. Jain Vs. The Canara Bank*** 94 (2001) DLT 841 has taken judicial notice of the practice prevalent in Delhi of properties being transacted by the mode of agreement to sell, power of attorney etc. The grievance of the plaintiff is not against the agreement seller. It is not the case that the agreement seller in violation of the agreement has executed the sale deed in favour of the co-purchaser of the plaintiff. On the contrary, the grievance of the plaintiff is that while, as per the sale through the aforesaid documents, the rights were created in favour of the plaintiff and the defendant No.2, the defendant No.2 in collusion with her husband, the defendant No.1, has got transferred the title of the property to herself only. The plaintiff, if able to establish that the power of attorney was executed by the agreement seller in favour of the defendant No.1 in consideration of agreement to sell in favour of the plaintiff and the defendant No.2, would have a claim against the defendant No.1 for wrongfully acting under the said power of attorney and to the

detriment of the plaintiff. Thus, the principle that an agreement purchaser has no rights in the property, save the right to claim specific performance, has no application to the facts of the present case.

11. The main plea which arises for consideration is whether it can be said that the suit for the relief of cancellation of sale deed alone without claiming relief of possession is not maintainable. First, on the factual aspects. The counsel for the plaintiff has contended that for the purposes of adjudication of application under Order 7 Rule 11 of the CPC only the plaint is to be seen and the averments of the defendants in the written statement or otherwise cannot form the basis of rejection of the plain. He has in this regard relied upon ***Mayar (H.K.) Ltd. Vs. Owners and Parties, Vessel M.V. Fortune Express*** AIR 2006 SC 1828. He has drawn attention to para 6 of the plaint which is as under:

> "That the parties were in the possession of the suit premises since the execution of the agreement to sell. The plaintiff and defendant No.2 held themselves to be the owner of the respective half property."

12. He has contended that the case in the plaint is of the plaintiff being in possession of the property and thus the question of the plaintiff being required to claim the further relief of possession does not arise, even if the legal proposition aforesaid were to be correct.

13. The trial court has qua the applications under Order 39 Rules 1 and 2 and Order 39 Rule 4 of the CPC in the order impugned recorded that it is the admitted position that the plaintiff is not in possession of the property. I have inquired from the counsel for the plaintiff whether he has in the memorandum of appeal challenged that para of the order or taken a ground that the said observation of the trial court is erroneous. The answer is in the negative. Even otherwise, on inquiry, the counsel for the plaintiff has fairly stated that the defendants are residing in the property and the plaintiff is not in physical possession of the property. He has contended that the plaintiff, as owner, is however in constructive possession of the property and the possession of defendant No.2 as a co-owner is the possession of the plaintiff as well. On further inquiry as to what the plaintiff will gain even if succeeding in the suit, the

answer is that once the sale deed of one half share is set aside, the plaintiff will thereafter either claim the relief of partition or possession or claim any other relief. In yet further inquiry whether such claim would not be barred by order 2 Rule 2 of the CPC the answer is that the cause of action for such relief of possession of partition would be different from the cause of action for the suit from which these proceedings arise.

14. As far as the plea of it being the case in the plaint that the plaintiff is in possession, the Supreme Court has in ***T. Arivandandam Vs. T.V. Styapal*** AIR 1977 SC 2421 and further in ***Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner*** AIR 2004 SC 1801 held that in dealing with the applications under Order 7 Rule 11 of the CPC a meaningful and not a pedantic reading of the plaint is to be undertaken. Thus merely by clever drafting, a plaint which otherwise is liable for rejection cannot be made maintainable. The purpose of Order 7 Rule 11 of the CPC is to nip in the bud those litigations which are otherwise doomed and not to allow them to take up the time of the courts and/or not to allow multiplicity of litigation. The same thought is found to also run in the dicta of the Supreme Court in ***Liverpool and London S.P. & I Association Ltd. Vs M.V. Sea Success I*** (2004) 9 SCC 512 Thus I am not able to accept the contention of the counsel for the plaintiff that as per the averments in the plaint the plaintiff is in possession of the property. The plaintiff has used the word "were" in relation to the possession. Moreover, as aforesaid, the trial court records that it is the admitted position that the plaintiff is not in possession and no challenge has been made thereto by the plaintiff in this court. The matter thus has to be considered in the light of the plaintiff not being in possession of the property.

15. The next question which arises is whether the plaintiff can maintain a suit for cancellation of a document simplicitor even when the plaintiff is found entitled to further relief. The counsel for the defendants has contended that the principle in the proviso to Section 34 of the Specific Relief Act applies to Section 31 also; the same being a facet of declaration only. He has in this regard also drawn attention to ***AIR 1932 Vindya Pradesh 69***. On the contrary, the counsel for the plaintiff has contended that Sections 31 and 34 are situated in different chapters of the Specific Relief Act

and while the legislature has deemed it appropriate to insert the proviso in Section 34, no such condition has been imposed in Section 31.

16. However, the aforesaid question need not detain me further in as much I am unable to accept the plea of the defendants that the plaintiff is entitled to the further relief of possession. The claim of the plaintiff is not of exclusive ownership of the property/flat. The claim is of joint ownership of the property/flat along with the defendant No.2. One co-owner cannot claim the relief of possession against the other co-owner. Thus contrary to what the counsel for the defendants has urged, I do not find the plaintiff to be entitled to a further relief of possession and for the reason of not claiming which relief it can be held that the plaintiff is not entitled to maintain the suit for the relief of declaration of cancellation of document simplicitor. In ***Joy Gopal Singha Vs Probodh Chandra Bhattacharjee*** AIR 1935 Cal 646, a Division Bench held that a co-owner / co-sharer has no right to recover possession from another co-owner / co-sharer. This view has consistently been taken by all the High Courts as well as the Supreme Court, as noticed by another Division Bench in ***Minor Nantu Bag Vs Rasana Bala Dasi*** AIR 2001 Cal 53. The plaintiff as co-owner is only entitled to maintain a suit for partition against the other co-owner. However, the relief of partition is not such which a person/party can be compelled to claim. A person/party may be satisfied in keeping the property joint and may not be interested in partition and separate possession of his share. It would be inequitable if a co-owner is forced to have a partition of the property and cannot otherwise get his share of the property which is actually being received by his co-sharer even though the effect of partition may be a practical destruction of the property or a deterioration in its value. It was held in ***Abu Shahid Vs Abdul Dobhash*** AIR 1940 Cal 363 that this principle which is statutorily recognized in English law can be applied as a rule of equity, justice and good conscience in India. It thus cannot be said that merely because the plaintiff is claiming the relief of cancellation of sale deed of one half share of the property to which the plaintiff claims entitled to, he is also required to necessarily claim the relief of partition. If the plaintiff succeeds in having the relief of cancellation of sale deed, the result thereof would be that the defendant No.2 and the plaintiff in terms of the agreement to sell would be the owners of one half share each in the property and the plaintiff would be entitled to the sale deed of the other half share in his favour.

17. I, therefore, do no find that the plaint can be rejected on this ground either. In the circumstances, no jurisdictional error can be found in the order of the trial court in so far as dismissing the application of the defendants under Order 7 Rule 11 of the CPC. Revision petition is accordingly dismissed.

18. That brings me to the appeal preferred by the plaintiff against the order of dismissal of his application under Order 39 Rules 1&2 of the CPC. A perusal of the order would show that the trial court has dismissed the application for the reason of not finding a prima facie case in favour of the plaintiff. The trial court has given six reasons in this regard. It has been held that Smt. Usha Sachdeva owner of the property and M/s Brothers Builders and Developers builders of the property have not been impleaded as parties to the suit; that the relief claimed by the plaintiff is not complete; that the plaintiff should have first obtained the relief of specific performance of agreement to sell in his favour; that since the agreement is of 2000 and the plaintiff did not take any steps till 2007, the trial court also held the question of limitation against the plaintiff. No findings have been given by the trial court on the ingredients of irreparable loss and injury and balance of convenience.

19. As far as the ingredients of irreparable injury and balance of convenience are concerned, the suit is relating to rights in immovable property and it is presumed that if the property in which the plaintiff is claiming rights is transacted during the pendency of the suit, the plaintiff shall suffer irreparable loss and injury. The provisions of Section 52 of the Transfer of Property Act of lispendens also apply. However, the same is not a bar to granting an injunction. Considering the entirety of the facts the ingredients of irreparable injury and balance of convenience are found to be in favour of the plaintiff and against the defendants. The defendants are stated to be residing in the flat. They will not suffer any injury if they are restrained from selling, alienating or parting with possession of the property. On the contrary, if they do so, it will lead to problems of multiplicity of parties and inherent delays in disposal of the suit.

20. In so much as the trial court has held the ingredient of prima facie case against the plaintiff, most of the reasons for holding so, are already covered by what has been discussed above. The grievance of the plaintiff is not against Smt. Usha Sachdeva or

against the builder. In pursuance to the agreement to sell in favour of the plaintiff and the defendant No.2, it is the admitted position that the power of attorney was executed in favour of the defendant No.1 to enable him to execute the sale deeds whenever possible and in terms of the agreement to sell. The defendants do not dispute that the purchase was to be equally in favour of the plaintiff and the defendant No.2. Their case is of, owing to a subsequent settlement in the family, the defendant No.2 having become entitled to the entire property. That settlement is yet to be proved. Till then, it cannot be said that the plaintiff has no share in the property. Thus it cannot be said at this stage that the non inclusion of Smt. Usha Sachdeva and the builder is an impetus to the grant of interim relief in favour of the plaintiff. If any case, no suit can be defeated for the reason of non-joinder. Similarly, it has been held above that a co-owner cannot claim the relief of possession against the other co-owner and cannot be compelled to seek the relief of partition. I have also already dealt with, there being no need for the plaintiff to claim specific performance of the agreement in as much as there is no refusal by the seller to the performance. Similarly, merely because the agreement to sell is of the year 2000 does not bar the plaintiff from claiming the relief of cancellation of sale deed alleged to be executed in contravention of the agreement, within three years of the date when the facts entitling the plaintiff to the said relief of cancellation first became known to the plaintiff.

21. It would be thus be seen that the reasoning given by the trial court for not finding the ingredient of prima facie case in favour of the plaintiff is contrary to law.

The counsel for the defendants has relied on:-

1. ***Bhupinder Singh Rekhi Vs. C.S. Rekhi*** 1998 VII AD (Delhi) 200 on the aspect of a suit for declaration simplicitor. However, I have found above that the plaintiff is only seeking the relief of cancellation of a sale deed averred to have been executed in contravention of the agreement to sell and as co-owner being not entitled to sue for possession.
2. ***Deewan Arora Vs. Tara Devi Sen*** 163 (2009) DLT 520 this case is concerned with injunctions in suits for specific performance. However, in view of the discussion above that is not the test to be applied here.

3. ***Vinay Krishna Vs. Keshav Chandra*** AIR 1993 SC 957. Also laying down that the suit for declaration simplicitor when the plaintiff is entitled to further relief is not maintainable. However, as aforesaid the plaintiff in the present case was not entitled to the subsequent relief of possession on the basis whereof the plaint was sought to be got rejected.
4. ***Fateh Raj Laxmi Devi Vs. Smt. Jalveen Rosha*** 103(2003) DLT 60. This was also a case of injunction by a purchaser against the seller and which was held to be not maintainable because of the alternative remedy of specific performance being available.
5. ***Ram Prakash Kathuria Vs. Ved Prakash Kathuria*** 2007 V AD(Delhi) 694 in which case the prayer in the plaint was found to be in the teeth of the prohibition contained in the Benami Transaction Prohibition Act.

22. None of the aforesaid judgments persuade me to decline the relief of interim injunction to the plaintiff.

23. The appeal preferred by the plaintiff thus succeeds. The order of the trial court dismissing the application under Order 39 Rule 1&2 of the CPC is set aside. The application is allowed. The defendants during the pendency of the suit are restrained from alienating, encumbering or parting with possession of the property subject matter of the suit.

However in the facts as aforesaid, the parties are left to bear their own costs.

RAJIV SAHAI ENDLAW
(JUDGE)

December 15th, 2009
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