

the time when the Suit was dismissed. We desist from giving a detailed account of the litigation as it will make this Judgment needlessly prolix. However, it is germane to mention that the learned Single Judge had, by Order dated 19.11.2008, framed as many as nine Issues; had granted the parties an opportunity to file List of Witnesses within three weeks; had directed the Plaintiff to file affidavit by way of Examination-in-Chief; and had further directed the Joint Registrar to fix the dates for cross-examination of the Plaintiff's Witnesses. On that date, all other pending applications had been posted for hearing on 23.11.2009. The impugned Order came to be passed on 22.12.2010 consequent upon the filing of an application under Section 151 of the CPC by the Defendant. We think it relevant to mention that the Defendant had also previously filed an application under Order VII Rule 11 of the CPC which was rejected. Learned counsel for the Respondent/Defendant submits that that application related only to the question of limitation. Even if that is so, it seems to us that the principle of *issue estoppel* would preclude the Court from entertaining another application under Order VII Rule 11 of the CPC based on the same factual matrix. In other words, if it was the Defendant's contention that the Plaint ought to have been rejected on the ground that there was material suppression of relevant facts, that argument ought to have been ventilated under the said application.

3. We will now briefly state the facts of the case. However meticulously hard we may endeavour to abjure from articulating a view on the facts in contention, it may not be possible to completely succeed on this score. We must, therefore, state that any appreciation of facts that we may voice would only be *prima facie* in nature and should not influence the mind of the learned Trial Judge.

4. The Plaintiff has filed a Suit for Specific Performance in respect of three Receipts-cum-Agreements dated 16.6.1993, 11.12.1993 and 11.1.1995 respectively. It is noteworthy that the Plaintiff proceeds on the premise that possession of the property is already with the Plaintiff. The Written Statement does not traverse this position. The Plaintiff had also approached the Revenue Authorities under Section 85 of the Delhi Land Reforms Act, 1954 for being declared as a Bhumidar and for correction of Revenue records asserting his possession, and even in these proceedings the Defendants have not challenged the Appellant's possession. It also transpires that the Plaintiff had, *inter alia*, filed a Suit for Permanent Injunction from interfering with his possession of the Suit land and for an order restraining the Defendants from entering into the Sale Agreement with any third party.

5. The first application for amendment to the Plaint was allowed by the learned Single Judge opining that “though there is a variation or inconsistency regarding the nature of the claims sought to be introduced the ends of justice require the same should be allowed”. The Defendants had filed an Appeal against the Order which came to be accepted by the Division Bench. It was observed by the Appellate Court that there was no suppression of material particulars and that a period of three years had elapsed between the filing of the Plaint and the preferment of the application. The Division Bench also recorded that an abuse of the Court process would be caused if the amendment were to be allowed. Significantly, neither was a prayer for dismissal of the Suit made nor did the Trial Court think it proper, even in the background of the observations pertaining to the abuse of Court process and withholding of material particulars, to dismiss the Suit. The second amendment application was also dismissed and in Appeal one of us (Vikramajit Sen, J.) had not thought it necessary to interfere with that Order.

6. The Plaint avers that the sale consideration is ₹ 25,90,000/-; that the Plaintiff is in possession of the land from the date of the execution of the Receipts; that a total of ₹ 28,00,000/- has been paid to all the Defendants vide different Receipts; that several Sale Deeds for ₹ 1,90,000/- each were to be executed and, therefore, fourteen separate ‘Application Forms’

were submitted to the Additional District Magistrate and permission was granted on 12.5.1995; that the Defendants had requested that the Sale Deeds be registered at the residence of the Plaintiff. Consequent upon the increase in land prices, the Defendants had refused to execute the Sale Deeds. A Local Commissioner was appointed on the first date of hearing and her Report, though favourable to the Plaintiff, has not been assailed by the Defendants. In the Written Statement, they have pleaded that the sale price of the said land was ₹ 35,00,000/- per acre amounting ₹ 1,89,94,791/-. The defence is that the Plaintiff was unable to pay the sum agreed upon, leaving no alternative to the Defendants but to refuse to execute the Sale Deeds.

7. All the relevant facts were before the learned Single Judge at the time when he had framed nine Issues. A perusal of the first three Issues makes it palpably clear that the learned Judge was fully alive to the rival stands of the parties. A reading of the impugned Order also makes it patent that the Defendants had not contended that the Suit should be dismissed. There can be no gainsaying that something substantial would have to have transpired between the framing of the Issues and the dismissal of the Suit soon thereafter by a different learned Single Judge who succeeded the one who framed the Issues. The only event that has taken place is the filing of an application under Section 151 of the CPC pursuant to the change in Roster. It has not been argued that

in the interregnum vital documents had been shown to the Court by the Defendants, or that a Statement had been made under Order X of the CPC. Neither of these events, or for that matter any other, have occurred immediately prior to the passing of the impugned Order. The impugned Order is totally irreconcilable to the earlier Order directing the Trial to commence. In fact, the impugned Order negates and nullifies the previous Order.

8. Learned Counsel for the Defendants has relied on *S.P. Chengalvaraya Naidu -vs- Jagannath*, JT 1993(6) SC 331 : AIR 1994 SC 853. This was a case where a Preliminary Decree had been passed but it was subsequently found that it was obtained by fraud. Accordingly, the application for drawing up a Final Decree was dismissed. It was in that context that their Lordships observed that the failure to mention the Release Deed at the trial tantamounted to playing a fraud on the Court; and hence the Suit was justifiably dismissed. The case does not apply to the facts obtaining before us for the simple reason that the Trial has been aborted for no justifiable reason, after the Court had thought it fit to frame Issues. Reliance on the decision by learned counsel for the Respondent in *MCD -vs- State of Delhi*, (2005) 4 SCC 605 is of no relevance since that case kept criminal proceedings in perspective. *Chandra Shashi -vs- Anil Kumar Verma*, (1995) 1 SCC 421 deals with the Contempt of Courts Act, 1971. No such proceedings are pending or have even been initiated. In *Satish Khosla -vs- Eli Lilly Ranbaxy*

Ltd., 1998 I AD(Delhi) 927, the failure of the Plaintiff in a previous Suit was concealed in the second salvo of litigation. Essentially, the principles of *res judicata* would have been applicable and for that reason no mention had been made of the previous Plaintiff. The ratio of the Judgment is that the conduct of the Plaintiff rendered him liable for punishment for criminal contempt. It was held that – “While, therefore, we do not propose to take action against the respondent for contempt except to issue a warning to respondent No.2 to be more careful in future, we direct the dismissal of the suit (being suit No.261/1997) itself”. Facially, this case is not a precedent to resolve the conundrum which has unfolded before us. In *G. Jayshree –vs- Bhagwandas S. Patel*, (2009) 3 SCC 141, the Appeals were directed against the reversal of a judgment and decree dismissing a suit for specific performance. It was reiterated that specific relief is inherently discretionary in nature and if the Plaintiff has approached the Court with unclean hands, such a relief can be declined. ***Mohammadia Cooperative Building Society Limited –vs- Lakshmi Srinivasa Cooperative Building Society Limited***, (2008) 7 SCC 310 does not take the proposition any further. ***Jayshree*** as well as ***Mohammadia*** were authored by the same learned Judge who noted in paragraph 71 of the later that the grant of a decree for specific performance is a discretionary relief. Learned counsel for the Respondents has only multiplied precedents by mentioning *Lourdu Mari David –vs- Louis*

Chinnaya Arogiaswamy, (1996) 5 SCC 589. In our opinion, if Trial Judge comes to the conclusion that the Plaintiff has approached the Court with unclean hands, he would be within the contours of law to decline the discretionary relief, even if he was confronted with an otherwise enforceable contract. But this conclusion should not be hastily arrived at. Reliance on ***Abdul Gafur -vs- State of Uttarakhand***, (2008) 10 SCC 97, in fact, militates against the submissions made before us. That decision prescribes that if a plaint does not disclose material facts, it could be rejected under Order VII Rule 11 of the CPC. It is not the case of the Respondents that on a plain reading of the Plaint, on a demurrer, the Plaint could be rejected under Order VII Rule 11 of the CPC or the Suit could be dismissed under Order XII Rule 6 of the CPC. The contention is that the Suit needs to be dismissed because of alleged suppression of material facts. This assertion can be substantiated only after the Trial. In *Mayar (H.K.) Ltd. -vs- Owners & Parties, Vessel M.M. Fortune Express*, AIR 2006 SC 1828, the Court has clarified that – “So long as the plaint discloses some cause of action which requires determination by the Court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose cause of action and, therefore, the High Court has rightly

said that the powers under Order 7 Rule 11 of the Code cannot be exercised for rejection of the Suit.”

9. We are fully aware of the salutary observations of the Supreme Court in *T. Arivandandam -vs- T.V. Satyapal*, (1977) 4 SCC 467 to the effect that if “on a meaningful reading of the plaint it is manifestly clear that it is vexatious it should be dismissed”. However, we should also not lose sight of the dictum laid down by Chief Justice Bhagwati in *S.P. Gupta -vs- Union of India*, AIR 1982 SC 149 that procedure is a handmaid of justice. **Abdul Gafur**, in fact, lays down that “the law confers on every person an inherent right to bring a suit of civil nature of one’s choice, at one’s peril, howsoever frivolous the claim may be, unless it is barred by a statute”.

10. It has also been contended that given the state of the averments in the Plaint, the Plaintiff will be hard put to prove the assertions made by him; it may even be difficult for him to place on the judicial record all the documents which he seeks to rely upon. We must not make any observations on this aspect of the litigation since it falls within the province of the learned Trial Judge to monitor the suit with a view to arrive at truth. It is in this regard that we were again reminded of the adage that procedure is a handmaid of justice.

11. In this analysis of the law, we are of the considered opinion that the impugned Order is not in consonance with law and visits injustice on the Plaintiff. The previous learned Judge had framed nine Issues which specifically covered the myriad nuances of the dispute which have led to the passing of the impugned Order. It is significant that none of the Issues were treated as Preliminary Issue, obviously for the reason that a decision can be rendered on them only after reception of evidence. The Defendants did not agitate the framing of Issues before the Appellate forum. In other words, the Defendants were in agreement with the Court as well as the Plaintiff that a Trial was necessary. It was not, therefore, permissible for the learned Trial Judge to dismiss the Suit precipitately. We reiterate that the circumstances had not changed so as to warrant the filing of an application under Section 151 of the CPC keeping in perspective the preferment of earlier application under Order VII Rule 11 of the CPC. In *Durgesh Sharma -vs- Jayshree*, AIR 2009 SC 285 their Lordships have once again cautioned against a mechanical invocation of Section 151 of the CPC. The Court reiterated the settled position that “inherent powers may be exercised *ex debito justitiae* in those cases, where there is no express provision in the Code. The said power cannot be exercised in contravention or in conflict of or ignoring express or specific provisions of law”. In similar vein, it has been opined in *State of U.P. -vs- Roshan Singh*, AIR 2008 SC 1190 that “inherent

powers of the Court are not to be used for the benefit of a litigant who has remedy under the CPC”.

12. It is for these manifold reasons that we find that the impugned Order deserves to be set aside. We restore the Suit to the position that it was at pursuant to the Orders passed on 19.11.2008.

13. Parties shall now appear before the leaned Trial Judge on 4.2.2011. Trial Court records be sent back forthwith. There shall be no order on costs.

(VIKRAMAJIT SEN)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

February 02, 2011
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