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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.442/2002

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18th November, 2011

SHRI NARESH CHAND JAIN

..... Appellant

Through: Mr. J.K.Seth, Sr. Advocate with
Ms. Shalini Kapoor, Advocate.

VERSUS

M/S MIRAHUL ENTERPRISES & ANR.

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. This appeal came up for hearing for the first time on 31.10.2011 when the appellant was represented but no one appeared for the respondents. Counsel for the respondents was stated to be busy in the Supreme Court as the counsel for the appellant in fairness called up the counsel for the respondents. On 4.11.2011, the appeal was once again adjourned at the request of the respondent to 14.11.2011. On 14.11.2011, I have specifically noted that ordinarily, I would not have granted adjournment, however, a new counsel appeared for the respondent and stated that he did not have the

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paper book of the appeal, and which the learned senior counsel for the appellant fairly agreed to supply to the new counsel for the respondent. I am informed that even though the paper book has been duly supplied to counsel for the respondents, however, today though the matter is effective item no.2 on the 'Regular Board' no one appears for the respondents although it is 12:25 P.M. I have therefore heard the counsel for the appellant and am proceeding to dispose of the appeal after perusing the record.

2. This appeal has been filed under Section 96 of the Code of Civil Procedure (CPC), 1908 impugning the judgment dated 31.5.2002 of the Trial Court which dismissed the suit as being barred by Order 2 Rule 2 CPC.

3. The facts of the case are that there was an agreement to sell dated 2.6.86 between the parties, with the appellant/plaintiff being the proposed purchaser and the defendant/respondent being the proposed seller with respect to a flat bearing no.G-4, Mirahual Apartments, A-13, Green Park Extension, New Delhi. The total consideration for sale was fixed at Rs.4.5 lacs, out of which the appellant/plaintiff paid an amount of Rs.2,00,000/- by means of two cheques of Rs.1,00,000/- each to the respondents/defendants. Another post dated cheque of Rs.2,00,000/- was given on 20.6.1986, which the appellant/plaintiff stopped payment of as it was transpired that the area of the disputed flat was much less than 1730 square feet as stated in the agreement to sell. The appellant also received

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possession of the disputed flat pursuant to the agreement to sell.

4. The appellant before filing of the present suit had also filed a suit for injunction restraining respondents/defendants from taking forcible possession of the suit property, and which suit was ultimately withdrawn by the appellant/plaintiff on 1.9.1989 before the Appellate Court in which an appeal was pending against an interim order, inasmuch as, in the meantime the appellant/plaintiff had already filed the present suit for specific performance, etc.

5. The Trial Court has decided the suit on a preliminary issue by holding that the suit is barred by Order 2 Rule 2 CPC by giving the following findings:-

“21. It is not disputed that the parties entered into an agreement to sell of disputed flat on 2.6.86 for a consideration of Rs.4,50,000/- out of which Rs.2 lacs by two cheques of Rs.1 lac each were paid by the plaintiff to the defendants and advance payment of Rs.2 lacs was also made for a sum of Rs.2 lacs by way of post dated cheques. It is also not disputed that plaintiff is in possession of the disputed flat, though there is dispute regarding manner in which the plaintiff occupied the disputed flat. According to the plaintiff, possession of the disputed flat was delivered to him on 2.6.86, when he made part payment of the sale consideration at the time of agreement to sell, t the defendants, while according to the defendants, the plaintiff after obtaining ex-parte injunction from the court of Sub-Judge, Delhi, by filing suit for injunction, had trespassed into the disputed flat.

22. The basic dispute between the parties is regarding areas of the disputed flat which is the foundation of the present suit, filed by the plaintiff and which according to the plaintiff led him to stop payment of the post dated cheque dated 20.6.86 of Rs.2 lacs. The certified copies of the pleadings of the parties and judgment/decreed dt. 20.1.286 of Ld. Sub-

Judge, Delhi regarding withdrawal of the suit and statement of Ld. counsel for the appellant/plaintiff dt.1.9.89 are also on record and these documents are not disputed during arguments. The facts as disclosed in the plaint of the plaintiff in the earlier suit for permanent injunction being suit no. 304/86 filed before senior sub-Judge, Delhi by the plaintiff on 4.7.86 and facts disclosed in the present suit are almost identical and in the said suit also the plaintiffs have alleged that the disputed flat should have been of 1730 sq. ft., but was of plinth area of 1200 sq. ft. including the area of setback, percentage of stairs etc. of not more than 1400 sq. ft. In para No. 9 of the plaint in the earlier suit, the plaintiff has alleged that cause of action arose when on various dates the defendants mis-represented about the area of flat was 1730 sq.ft. and against the area of 1400 sq.ft. and also on 6.6.1986 when the relevant fact was discovered by the plaintiff.

23. In the present suit also, the plaintiff in para No. 26 of the plaint has alleged that the cause of action arose against the defendants, when the defendants entered into an agreement to sell dt.2.6.86 and received a sum of Rs.2 lacs by two cheques and in part performance of the agreement to sell, delivered possession of the disputed flat and also on 2.6.1986, when the area of flat was discovered short on 3.7.86 when the defendants threatened to dis-possess the plaintiff."

6. Learned senior counsel for the appellant contends that the Trial Court in fact mis-directed itself in dismissing the suit under Order 2 Rule 2 CPC inasmuch as it was really the provision of Order 23 Rule 1 which was called upon to be decided in the present case and not Order 2 Rule 2 CPC inasmuch as the earlier suit was not disposed of on merits but was withdrawn by the appellant/plaintiff. It is argued that a suit on the same cause of action cannot be filed under Order 23 Rule 1 only after withdrawal of the earlier suit, however, if a suit, i.e. present suit, was already filed when the earlier

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suit for injunction seeking restraint against forcible dis-possession was pending, then, in such circumstances, the present suit was not barred under Order 23 Rule 1 CPC. Reliance is placed upon the decision of the Supreme Court in the case of ***Vimlesh Kumari Kulshrestha vs. Sambhajirao and Another (2008) 5 SCC 58***. It is also argued by learned senior counsel for the appellant that the cause of action in the earlier suit for injunction was confined to the cause of action qua the threat of illegal dis-possession based on the rights which had come into existence under the agreement to sell dated 2.6.1986, and which rights were in substance, though not specifically pleaded, were rights actually under Section 53-A of the Transfer of Property Act, 1882 containing the doctrine of part performance. It is also argued that the suit for specific performance is a separate cause of action than the earlier suit for injunction inasmuch as in the present suit for specific performance, besides the issue of readiness and willingness which is required to be averred, there would be an issue of the area of the disputed flat which would be required to be determined so as to decide the price which would be payable, and which was not a part of the cause of action in the earlier suit for injunction, which as already stated, was confined to seeking restraint against the illegal threat of dis-possession.

7. In my opinion, all the arguments as raised by learned senior counsel for the appellant are well merited and therefore the appeal has to succeed. Firstly, the Supreme Court has quite clearly

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observed in the facts of the case of **Vimlesh Kumari Kulshrestha** (**supra**) that really the provision of Order 23 Rule 1 CPC will not apply if the second suit is already filed before the earlier suit has been withdrawn. Therefore, the subject suit was validly filed and could not have been dismissed by applying either the provisions of Order 23 Rule 1 CPC or Order 2 Rule 2 CPC. In fact, for the reasons as contained in the arguments of the learned senior counsel for the appellant, cause of action in the present suit for specific performance is surely different and in much larger expanse than the earlier suit for injunction, which was on a limited cause of action of the threat of dispossession. The test, as repeatedly held in various judgments, in deciding whether the later suit is barred by provisions of Order 2 Rule 2 CPC is to see if evidence in the earlier suit will be the same as required to be led in the second suit. Admittedly, evidence in the present suit for specific performance would definitely not be the same to the earlier suit for injunction. Therefore, there is no scope for applicability even of Order 2 Rule 2 CPC.

8. Accordingly, the appeal is allowed. The impugned judgment and decree dismissing the suit under Order 2 Rule 2 CPC is set aside. Parties are left to bear their own costs. Decree sheet be prepared. Trial court record be sent back.

9. The appellant to appear before the District and Sessions Judge on 20.12.2011, and on which date District and Sessions Judge, Delhi will mark the suit to a competent Court for disposal in
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accordance with law. The competent Court to whom the suit is marked will issue necessary notices to the respondents/defendants before proceeding ahead with the suit, inasmuch as the respondents/defendants have not been represented in the present appeal.

VALMIKI J. MEHTA, J.

NOVEMBER 18, 2011
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