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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.617/2004

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July 26th, 2011

SMT. VIDYA DEVI

..... Appellant

Through: Mr.Dinesh Kumar Gupta, Advocate

VERSUS

SMT. RAMWATI DEVI

..... Respondent

Through: Mr. O.P.Aggarwal, Advocate

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. The challenge by means of this regular first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment dated 15.4.2004 which has decreed the suit of the respondent/plaintiff for possession and mesne profits.
2. The respondent/plaintiff in the trial court sought recovery of possession and mesne profits from the appellant on the ground that a decree for specific performance was passed in favour of the respondent

vide judgment dated 13.5.1988 of Sh. R.K.Tiwari, ADJ, Delhi. It was also alleged that the appellant/defendant had moved an application for setting aside the judgment and decree dated 13.5.1988 and which was dismissed. In execution of this decree, the respondent/plaintiff had got the sale deed executed in her favour.

3. The defences of the appellant/defendant were the defences of the judgment dated 13.5.1988 of the ADJ having been obtained by fraud and the denial of receipt of sale consideration.

4. The trial court has dealt with the aforesaid aspects in paras 7 to 9 of the impugned judgment and decree which reads as under:

“7. After considering the submission made on behalf of both the parties and the relevant record, I decided the issues as under:-

Issue No.1

The onus of proving this issue was on the defendant. In her evidence by way of affidavit, she stated that she had received summons from the court of Sh. R.K. Tiwari, ADJ, Delhi in Suit No.480/88 filed by the plaintiff for specific performance of the agreement dated 24.9.87. She filed written statement in the said suit and refuted the allegations made therein. On 24.7.96 she was proceeded ex parte in that case due to fault of her counsel. She was under the impression that her rights were being defended by her counsel. She learnt on 24.12.99 about passing of ex parte decree dated 8.1.97 against her, by the court of Sh. Lal Singh, ADJ, Delhi, when she received notice dated 15.12.99 to the effect that sale deed had been executed through the court of Sh. B.N. Chaturvedi, ADJ, Delhi. After

coming to know of exparte decree, she contacted her counsel Sh. R.S. Gulia and requested him to take proper steps. The advocate told her that due to this ill health, he was not able to take any legal action and asked her to contact him in middle of January, 2000. The advocate expired on 21.1.00 and then she engaged Sh. N.D. Patel Adv., who inspected the file and came to know of the facts. She stated that on inspection, it was found that the case was dismissed in default on 14.8.96 and 15.10.96 but was restored without following the procedure u/o 9 Rule 9(2) CPC. After death of R.S. Gulia Adv., her new counsel made application u/o 9 Rule 13 and another application U/s. 5 of Limitation Act, which were dismissed by the court of Sh.I.C. Tiwari, ADJ. She stated that due to non-appearance in the said suit and negligence on the part of counsel, her rights could not be defended properly and exparte decree was obtained.

8. The entire evidence of the defendant in her affidavit shows that she was very well aware of the proceedings. She had appeared and contested the case. The allegation made by her that decree was obtained by fraud is, therefore false and baseless. She had made application u/o 9 Rule 13 CPC for setting aside the exparte decree, which was dismissed. If she was aggrieved by the exparte judgment or dismissal of the application u/o 9 Rule 13 CPC, she could have approached the higher forum. Once a decree had become final, she cannot escape the consequences thereof. The defendant was supposed to be more cautious and diligent as even earlier an exparte decree was passed in favour of the plaintiff, which was set aside on application made by her. Later on, when the trial again proceeded, neither she nor her counsel appeared in court, resulting in proceeding the case ex-parte and exparte decree was passed. The decree is valid and binding. The issue is decided against the defendant and in favour of the plaintiff.

Issue No.2

9. The plaintiff has proved the execution of sale deed through the court in respect of the suit property and has also proved the payment of total sale consideration. This court cannot get into the questions of non-payment of sale consideration or fraud as the same have already been dealt with and it has been decided by competent court that defendant had entered into an agreement to sell and received part consideration and was liable to execute the sale deed. The court passed a decree of specific performance and got the sale deed executed.”(underlining added)

5. I must note a subsequent event that after passing of the impugned judgment a petition being CM(M) No. 1735/2005 filed by the appellant against the judgment dismissing the Order 9 Rule 13 CPC application has also been dismissed by learned Single Judge of this court vide judgment dated 21.1.2011. Two of the relevant paragraphs in the CM(M) No. 1735/2005 are paras 8 and 9 which read as under:-

“8. In the application filed by the petitioner under Section 5 of the Limitation Act and also in the application under Order 9 Rule 13 CPC, the petitioner disclosed that she had received the notice dated 15.12.99 on 24.12.99, which was handed over by her to one Mr. R.S.Gulia, Advocate who did not take any steps in the matter and had expired on 21.1.2000. The petitioner thereafter managed to get back the notice and engaged a new counsel on 29.1.2000. In the application it was further stated that the petitioner had got the case file inspected in the first week of May 2000, and thereafter she got filed the said applications on 8.5.2000. Since the petitioner in her both the said applications failed to give any reasons for not filing the application between 29.1.2000 till 8.5.2000, therefore the learned trial court did not find any ground to condone the delay in filing the application by the petitioner

under Order 9 Rule 13 CPC. The learned trial court also did not find any merit in the explanation given by the petitioner that since due to the dismissal of the said case on four occasions different goshwara numbers were given, therefore, the same resulted in not locating the file for a long period of four months. The learned trial court further found that the petitioner did not disclose the fact that for how long the lawyers remained on strike during the said period of delay.

9. Under Article 123 of the Limitation Act, the limitation for filing an application to set aside an ex-parte decree is 30 days and the time begins to run from the date of the judgment and decree or where the summons or notice were not duly served from the date when the applicant has derived knowledge of the decree. In the facts of the present case, the learned trial court passed the ex-parte judgment and decree dated 8.1.1997 while the said application under Order 9 Rule 13 and application under Section 5 of the Limitation Act were filed by the petitioner on 8.5.2000. The petitioner has claimed knowledge of the said ex-parte judgment and decree dated 8.1.1997 on 24.12.99 when she had received the notice from the court in the other case. Prior to this date the petitioner has claimed total ignorance about passing of the said ex-parte judgment and decree against her. From the said date of notice dated 15.12.99, 30 days period came to expire on 14.01.2000. In both the applications the petitioner has failed to advance any explanation as to why the said applications could not be filed by the petitioner within the said period of 30 days from the date of the receipt of the notice. The only explanation given by the petitioner is that she had handed over the notice to Mr. R.S.Gulia, Advocate who had expired on 21.1.2000. Even if the said period is condoned, then also the petitioner should have explained the delay from 29.1.2000 when she had engaged a new advocate. Even from that date again no explanation has come forth from the petitioner to explain the delay. The petitioner has also not disclosed as to when the counsel for the petitioner had taken steps to inspect the file and how the counsel did not succeed in carrying out the inspection of the said four files and how come the

counsel for the petitioner could only inspect the files in the first week of May, 2000.”

6. The trial court, in my opinion, has therefore rightly given the finding and conclusion that there is no issue of decree having been obtained by fraud. Once the appellant was served in the earlier suit but she failed to appear, and the reason for not appearing having been believed by the courts, including by the judgment dated 21.1.2011 in CM(M) No.1735/2005, it does not lie in the mouth of the appellant to allege that the earlier decree was obtained by fraud. If the argument of the appellant is accepted then a person may choose to remain ex parte in an earlier proceeding and thereafter seek to collaterally challenge the judgment by filing a suit alleging fraud. This is impermissible in law. If a person has a good case on merits, such person is bound to contest the earlier litigation, which if not done and the earlier judgment becomes final, then, a fresh suit does not lie alleging fraud.

7. In view of the above, I do not find any merits in the appeal. The appeal is accordingly dismissed leaving the parties to bear their own costs. Trial court record be sent back.

JULY 26, 2011
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VALMIKI J. MEHTA, J.