

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

% Judgment delivered on: 30.05.2011

+ **RSA No.152/2010 & CM Nos.14172-73/2010**

ONKAR SAROOP MAHAJAN

.....Appellant
Through: Ms. Jyoti Singh, Sr. Advocate with
Mr. Anil Sharma, Advocate.

Versus

PS MAHAJAN & OTHERS

.....Respondents

Through: Ms. Amrit Kaur Oberoi and
Ms. Kanika Sabharwal, Advocates.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J. (Oral)

1 This appeal has impugned the judgment and decree dated 01.07.2010 which has reversed the finding of the trial Judge dated 31.03.2010. Vide judgment and decree dated 31.03.2010, the suit filed by the plaintiff Onkar Saroop Mahajan seeking possession of the suit property i.e. property comprising of two rooms set on the ground floor as also two rooms set on the first floor (as shown red in the site plan) bearing No. D-E/73 Tagore
RSA No.152/2010

Garden, New Delhi had been decreed. The impugned judgment had reversed this finding; suit of the plaintiff had been dismissed.

2 The parties are brothers. The plaintiff had filed a suit for possession qua the aforementioned suit property. Suit property is in his name; he was the successful bidder at auction conducted by the DDA pursuant to which this suit land had been allotted in his favour. After taking possession, a building had been constructed upon it; loan of Rs.10,000/- had been raised by the plaintiff; the ground floor comprising of four room, kitchen, store, lavatory, staircase and passage had been made. The completion certificate had been obtained vide letter dated 06.10.1965. Father of the parties died on 11.11.1965 leaving behind his three brothers apart from the plaintiff. The plaintiff at the request of the defendants had permitted them to occupy the suit property; they were minors at that time and were permitted to stay in the house. However, since the plaintiff was short on accommodation, he requested the defendants to vacate the suit property but inspite of notice they have failed to do so; defendants had in fact threatened to dispossess the plaintiff. Present suit was accordingly filed.

3 The defence of the defendants was that this property had

been purchased by father of the parties in the name of the plaintiff; it was a benami dealing. The property had been purchased from the funds of their late father Gopal Dass Mahajan; amount of earnest money had also been paid by their father from his retirement benefits as also by selling their plot No. 14 at Punjabi Bagh. The plaintiff and the defendants were joint owners of the suit property. The family had entered into a family settlement dated 19.04.1985 whereby the first floor was constructed in order that all four brothers could be accommodated in the suit property. This family settlement is binding upon the parties.

4 On the pleadings of the parties, the following six issues were framed:-

1. Whether the defendants are co-owners of the property in dispute? OPD
2. Whether the defendant contributed jointly for the construction of first floor and barsati floor of the property in dispute? OPD
3. Whether the property in dispute was partitioned by the settlement cum partition deed dated 19.04.1985 and defendants were exclusive owners in their portions? OPD
4. Whether the defendants have become owner by adverse possession as alleged? OPD
5. Whether the plaintiff is entitled to the damages? If so at what rate and at what amount? OPP
6. Relief. OPP
7. Whether the cheque for ₹5,700/- was recovered by the father of the parties on 08.10.1963? OPD

8. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction? OPD

5 Oral and documentary evidence was led. The trial Judge had decreed the suit of the plaintiff.

6 The impugned judgment had reversed this finding. The suit of the plaintiff was dismissed on two counts. The court was of the view that the trial court did not have the pecuniary jurisdiction to deal with the suit. The plaintiff had valued the suit at Rs.9,600/-. Thereafter pursuant to the amendment in the written statement, the plaintiff had valued the suit at Rs.72,000/- for the purpose of court fee and jurisdiction. While disposing of issue No. 8, the impugned judgment had noted that the Court did not have the pecuniary jurisdiction to try the suit. Thereafter the Court had proceeded to deal with the merits of the controversy. This was while dealing with issues No. 1, 2, 3 & 7. The court was of the view that the evidence led by the defendants was higher in the balance of probabilities; defendants were able to show that they were co-owners; it was a benami transaction effected in favour of the plaintiff; the plaintiff did not have the source of income to purchase this property; money had been paid out of the funds of the retirement benefits of their deceased father and after the sale

of their property at Punjabi Bagh; thereafter the construction had also been raised by all the brothers; the family settlement dated 19.04.1985 (Ex.D-3) was binding between the parties. All these issues were decided in favour of the defendants and against the plaintiff. The suit of the plaintiff had been dismissed.

7 This is a second appeal. It has been admitted and on 02.11.2010, the following substantial question of law was formulated:-

Whether the findings in the impugned judgment dated 01.07.2010 are perverse whereby the impugned judgment had held that the Trial Court had no pecuniary jurisdiction to deal with the matter and thereafter the Court had itself proceeded to decide the case on merits itself? If so, its effect?

8 Being a second appellate court, the jurisdiction of this Court is restricted and it has to answer only the question so formulated by it on 02.11.2010. Arguments had been heard at length. Learned counsel for the appellant has made a broken submission to substantiate her submission that further substantial questions of law have arisen; no such question has been pointed out; that apart not a single argument having been addressed on the merits of the controversy; it is clear that no further substantial question of law has arisen and this Court has to answer only the substantial question of law formulated by it on 02.11.2010.

9 It has been urged that the provisions of Order 7 Rule 11 (b) of the Code of Civil Procedure (hereinafter referred to as the 'Code') clearly stipulate that where a suit has been under or over valued, it is the bounden duty of the Court to return the plaint to the plaintiff in order that he could make the deficiency in the court fee; this has not been adverted to; decree passed on merits is a nullity. To support her submission, learned counsel for the appellant has placed reliance upon 2006 IV AD (Delhi) 316 Maharaji Educational Trust & Another Vs. Punjab & Sind Bank & Another. It is pointed that in such a case the plaint is liable to be returned back. Reliance has also been placed upon 2006 II AD (Delhi) 143 Surinder Kaur & others Vs. S. Rajdev Singh & Others to support this submission. For the same proposition reliance has also been placed upon AIR 1983 Patna 272 Mannu Das and others Vs. Kisto Das and another.

10 Arguments have been countered. It is pointed out that the defect of pecuniary jurisdiction would not make the judgment a nullity; it is only a technical irregularity which is curable. Reliance has been placed upon AIR 1954 SC 340 Kiran Singh and others Vs. Chaman Paswan and others.

11 Record has been perused. The plaintiff had filed the present suit seeking possession of the suit property. In the plaint

he had valued the suit property for the purpose of court fee and jurisdiction at ₹9,600/- upon which the requisite court fee had been paid. Thereafter after a span of about 13 years, the amendment in the written statement had been permitted; it was for the first time that an objection of pecuniary jurisdiction had been taken; case of the defendants was that the value of suit property is ₹6 lacs; plaint has not been properly valued. Issue No. 8 had been framed qua this objection; it reads as follows:-

“Whether the suit is not properly valued for the purpose of Court fee and jurisdiction? OPD”

12 While disposed of issue No. 8, the trial Judge had noted that after the written statement had been amended, the plaintiff had valued the suit at the estimated market value i.e. ₹72,000/-. The valuation given by the plaintiff had been accepted. This finding had been reversed in the appeal court. The impugned judgment while reversing this finding had also dealt with the merits of the case. No argument had been addressed on merits. This Court has to decide as to whether the finding in the impugned judgment holding that the trial court had no pecuniary jurisdiction would lead to the decree having become a nullity/non-est or whether it was only a technical defect and would not affect the merits of the case of the parties.

13 In the judgment of *Kiran Singh & others* (Supra), the Supreme Court had adverted to the conflicting decisions of various courts on this issue; provisions of Section 11 of the Suit Valuation Act, 1887 had been expounded. While dealing with the aforementioned contention, the Apex Court had noted inter-alia as follows:-

“14. The question, therefore, is, can a decree passed on appeal by a court which had jurisdiction to entertain it only by reason of undervaluation, be set aside on the ground that on a true valuation that court was not competent to entertain the appeal? Three High Courts have considered the matter in Full Benches, and have come to the conclusion that mere change of forum is not a prejudice within the meaning of Section 11 of the Suits Valuation Act. Vide *Kelu Achan v. Cheriya Parvathi Nethiar*⁵ *Mool Chand v. Ram Kishan*⁶ and *Ramdeo Singh v. Raj Narain*¹. In our judgment, the opinion expressed in these decisions is correct. Indeed, it is impossible on the language of the section to come to a different conclusion. If the fact of an appeal being heard by a Subordinate Court or District Court where the appeal would have lain to the High Court if the correct valuation had been given is itself a matter of prejudice, then the decree passed by the Subordinate Court or the District Court must, without more, be liable to be set aside, and the words “unless the overvaluation or undervaluation thereof has prejudicially affected the disposal of the suit or appeal on its merits” would become wholly useless. These words clearly show that the decrees passed in such cases are liable to be interfered with in an appellate court, not in all cases and as a matter of course, but only if prejudice such as is mentioned in the section results. And the prejudice envisaged by that section therefore must be something other than the appeal being heard in a different forum. A contrary conclusion will lead to the surprising result that the section was enacted with the object of curing defects of jurisdiction arising by reason of overvaluation or undervaluation, but that, in fact, this object has not been achieved. We are therefore clearly of opinion that the prejudice contemplated by the section is

something different from the fact of the appeal having been heard in a forum which would not have been competent to hear it on a correct valuation of the suit as ultimately determined.”

14 The question of prejudice is thus of utmost importance. What is the prejudice, if any, which has been suffered by the plaintiff? On a specific query put to the learned counsel for the appellant he has no answer of explanation. In fact there could not have been any prejudice suffered by the plaintiff. It was the defendant who had taken this objection of pecuniary jurisdiction. Thereafter pursuant to this objection having been taken in the amended written statement, the plaintiff had enhanced the valuation from ₹9,600/- to ₹72,000/-.

15 The question of prejudice had also been explained by the Apex Court in this case as under:-

“16 That brings us to the question as to what is meant by “prejudice” in Section 11 of the Suits Valuation Act. Does it include errors in findings on questions of fact in issue between the parties? If it does, then it will be obligatory on the court hearing the second appeal to examine the evidence in full and decide whether the conclusions reached by the lower appellate court are right. If it agrees with those findings, then it will affirm the judgment; if it does not, it will reverse it. That means that the court of second appeal is virtually in the position of a court of first appeal. The language of Section 11 of the Suits Valuation Act is plainly against such a view. It provides that overvaluation or undervaluation must have prejudicially affected the disposal of the case on the merits. The prejudice on the merits must be directly attributable to overvaluation or undervaluation and an error in a finding of fact reached on a consideration of the evidence cannot possibly be said to

have been caused by overvaluation or undervaluation. Mere errors in the conclusions on the points for determination would therefore be clearly precluded by the language of the section. It must further be noted that there is no provision in the Civil Procedure Code, which authorises a court of second appeal to go into questions of fact on which the lower appellate court has recorded findings and to reverse them. Section 103 was relied on in *Ramdeo Singh v. Raj Narain*¹ as conferring such a power. But that section applies only when the lower appellate court has failed to record a finding on any issue, or when there had been irregularities or defects such as fall under Section 100 of the Civil Procedure Code. If these conditions exist, the judgment under appeal is liable to be set aside in the exercise of the normal powers of a court of second appeal without resort to Section 11 of the Suits Valuation Act. If they do not exist, there is no other power under the Civil Procedure Code authorising the court of second appeal to set aside findings of fact and to rehear the appeal itself on those questions. We must accordingly hold that an appellate court has no power under Section 11 of the Suits Valuation Act to consider whether the findings of fact recorded by the lower appellate court are correct, and that error in those findings cannot be held to be prejudice within the meaning of that section.”

16 Where there has been any prejudice or not has to depend upon the facts of each case. Prejudice would arise if there has been an erroneous assumption of jurisdiction by a subordinate court as a result of overvaluation or under valuation and there has been a consequential failure of justice. As noted hereinabove, even on a specific query put to learned counsel for the appellant, there is no answer regarding prejudice which has been suffered by the plaintiff even assuming that there has been a under valuation.

17 In the instant case, the impugned judgment after an examination of oral and documentary evidence and reappreciation of the same reversed this finding returning all the issues in favour of the defendants and against the plaintiff. As noted hereinabove (supra) these findings are not in challenge before this Court. This Court has to answer the substantial question of law as formulated by it. In this context, the observations in para 18 of the judgment of the Apex Court are useful extract. They read as follow:-

“It would be an unfortunate state of the law, if the plaintiffs who initiated proceedings in a court of their own choice could subsequently turn round and question its jurisdiction on the ground of an error in valuation which was their own. If the law were that the decree of a court which would have had no jurisdiction over the suit or appeal but for the overvaluation or undervaluation should be treated as a nullity, then of course, they would not be stopped from setting up want of jurisdiction in the court by the fact of their having themselves invoked it. That, however, is not the position under Section 11 of the Suits Valuation Act. Why then should the plaintiffs be allowed to resile from the position taken up by them to the prejudice of their opponents, who had acquiesced therein?”

17. There is considerable authority in the Indian courts that clauses (a) and (b) of Section 11 of the Suits Valuation Act should be read conjunctively, not withstanding the use of the word “or”. If that is the correct interpretation, the plaintiffs would be precluded from raising the objection about jurisdiction in an appellate court. But even if the two provisions are to be construed disjunctively, and the parties held entitled under Section 11(1)(b) to raise the objection for the first time in the appellate court, even then, the requirement as to prejudice has to be satisfied, and the party who has resorted to a forum of his own choice on his own valuation cannot himself be heard to complain of any prejudice. Prejudice can be a ground for relief only when it is due to the

action of another party and not when it results from one's own act. Courts cannot recognise that as prejudice which flows from the action of the very party who complains about it."

18 That apart in this case there is no prejudice which has been suffered by the appellant; a full and fair hearing had been accorded to the appellant; the merits of controversy had been adverted to; no injustice has been pointed out on any count.

19 In view of the aforementioned discussion, substantial question of law is accordingly answered in favour of the respondent and against the appellant. There is no merit in this appeal. Appeal as also pending applications are dismissed.

INDERMEET KAUR, J.

MAY 30, 2011

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