

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

% *Date of Judgment: 09.05.2012*

+ CM(M) 184/2008

RAJYASHREE BHARTIA & ORS Petitioners
Through Mr. Sanjeev Sachdeva, Sr.
Advocate with Mr. Preet Pal
Singh, Adv.

versus

ASHOK KUMAR MEHRA & ANR Respondents
Through Mr. Nishant Dutta, Adv. for R-1.
Mr. Asheesh Jain, Adv. for R-2
(a) to R-2 (f).

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 Order impugned before this Court is the order dated 06.11.2007
vide which the application filed by the plaintiff Rajyashree Bhartia
under Sections 151, 152 & 153 of the Code of Civil Procedure
(hereinafter referred to as the 'Code') seeking a clarification/correction
in the judgment dated 21.04.1982 was declined.

2 Record reveals that the two suits were pending disposal before the trial Court which have subsequently been ordered to be consolidated.

3 The first suit being civil Suit No. 214/04/82 was filed by Madan Lal Mehra seeking a cancellation of a document i.e. an agreement to sell dated 28.05.1980 wherein his brother Ashok Kumar Mehra had been impleaded as defendant No. 4. The second suit was civil suit No. 78/05/03 which was a suit for specific performance filed by Rajyashree Bhartia against Ashok Kumar Mehra; it was qua the same agreement to sell dated 28.05.1980. In these proceedings, an application under Order 1 Rule 10 of the Code was filed by Madan Lal Mehra; his contention was that this property is an HUF and the defendant Ashok Kumar Mehra alone has no right, title or interest in the property. This application was allowed and Madan Lal Mehra was impleaded as defendant No. 2 in that suit.

4 Both the suits were consolidated vide order dated 18.09.1987. Issues were framed prior to the order of consolidation. Issues No. 3 to 5 were relevant for the controversy in the second suit which read herein as follows:-

“(iii) Whether plot No. 127, Block N. Panchshila Co-operative House Building

Society Ltd. New Delhi is owned by joint Hindu Family of which plaintiff is a Karta? OPP.

(iv) If issue No. 3 is proved in favour of the plaintiff, whether agreement to sell dated 28.05.1980 is legal and binding on the HUF? OPD.

(v) Whether the agreement to sell dated 28th May, 1980 was not intended for the benefit of defendants No. 4 & 5 and against the interest of HUF?"

5 After the order of consolidation, two additional issues which were framed which are also relevant for the controversy which read herein as follows:-

“(i) Whether the agreement to sell dated 28.05.1980 is liable to be cancelled.?”

(ii) Whether the plaintiff is entitled to the restoration of possession of plot No. 127, Block N. Panchshila Co-operative House Building Society Ltd. New Delhi. ”

6 Record further shows that the first suit was treated as the main suit and in fact the order of consolidation also directed evidence to be recorded in this suit which was to be read in the other suit as well. Record also reveals that Rajyashree Bhartia did not lead any evidence; Madan Lal Mehra came in the witness box. It was his evidence alone i.e. of Madan Lal Mehra which was available with the Court; however, in spite of this since Madan Lal Mehra could not prove his case to the hilt, his suit stood dismissed. Since the second suit (filed by the plaintiff

Rajyashree Bhartia) seeking a specific performance of the agreement to sell dated 28.05.1980 had not been pursued and the plaintiff therein had not led any evidence on any score and the defendant also disputing the part of the plaintiff to be ready and willing to perform his part of the agreement, that suit also by necessary implication stood dismissed. The Court in fact in the opening part of the judgment which was delivered in the first suit had recorded that the suit of the plaintiff stands dismissed and a copy of this judgment be also kept in the file of the suit for specific performance.

7 The contention of the plaintiff Rajyashree Bhartia is vehement to the effect that since the second suit which was a suit for cancellation of a document and it had been dismissed; the next corollary is that there should be an automatic decree of his suit for specific performance. This was also the submission before the first appellate Court which has been declined by the impugned order and rightly so.

8 There is no doubt to the proposition that even in an ex-parte proceeding, the plaintiff has to stand on his own legs and must prove the averments pleaded in the plaint. In the first suit for specific performance filed by Rajyashree Bhartia, the written statement filed by the defendant

Ashok Kumar Mehra, had specifically disputed the willingness and readiness on the part of the plaintiff to perform his part of the agreement. Thereafter the parties did not led any evidence; the plaintiff chose not to prove his case. In the absence of any evidence having been led on this score, the Court while disposing of the second suit (suit for cancellation of document) and dismissing that suit had noted that a copy of this judgment be also placed in the file of the suit for specific performance; impliedly that suit also stood dismissed.

9 The present application was filed under Section 151 read with Sections 152 & 153 of the Code. Section 153 deals with the powers of the Court to amend any defect or error in any proceeding in a suit; Section 152 deals with the powers of the Court to make corrections relating to clerical or arithmetical mistakes in the suit and Section 151 deals with the inherent powers of the Court. There is no doubt that powers of the Court which are inherent are of wide amplitude yet these powers have to be exercised fairly and with discretion; they cannot be exercised of the cuff on the mere asking of the one party.

10 Vehement contention of the petitioner is that in the impugned judgment dated 12.07.2005 while dismissing the suit of Madan Lal

Mehra for cancellation of a document, it had not decided the relief to which the plaintiff in the other suit Rajyashree Bhartia was entitled or not entitled; it had only state that a copy of the said judgment be placed in the file of the suit for specific performance; the relief had not been specifically decided and in such circumstance, the only remedy available with the petitioner is to file an application under Section 152 of the Code which the impugned order by not entertaining this application as committed an illegality. Reliance has been placed upon (2003) 1 SCC 197 Lakshmi Ram Bhuyan Vs. Hari Prasad Bhuyan and Others, where the Apex Court while dealing with the provisions of Orders 20 of the Code had noted that Order 20 requires a judgment to contain all the issues and findings or decision thereon with the reasons thereof; the judgment has to state the relief allowed to a party and the decree must follow the judgment; it casts an obligation on the author of the appellate judgment to state the points for determination, the decision and the reasons for the decision and the relief to which the appellant is entitled. To the extent that such an application under Section 152 of the Code is maintainable is a submission with force. Thus this submission of the petitioner that the impugned order had rejecting the application of the

petitioner on this score alone suffers from an infirmity is a correct submission.

11 Be that as it may, the question which arises for is even if the application under Section 152 read with Sections 151 & 153 of the Code was maintainable, was it a case where such power has to be exercised by the Court or was it a case where the application was rightly declined. The latter is the answer. The proceeding in the two suits was that after the two suits had been consolidated on 18.09.1987, it was noted that the proceedings in the suit for cancellation of a document i.e. suit No. 1369/1982 would be treated as the main suit. As noted supra, the certain issues had been framed prior to the consolidation of the suits and these issues had been framed in the suit for cancellation of a document; in the suit for specific performance, no issue had been framed. Even after the date of consolidation, two additional issues as noted above have been noted to the effect that whether the plaintiff is entitled to the relief of specific performance. This clearly appears to be a case where the plaintiff Rajyashree Bhartia has all along lackadaisical and negligent in his approach; he has never cared or bothered to get any issue framed in his case either before the consolidation of the suit or after the

consolidation of the suits as to whether he was entitled to the relief of specific performance. No evidence has also been led by Rajyashree Bhartia on any score in the absence of which question of automatic decree of his suit for specific performance did not arise.

12 Although the trial Court has gone wrong in holding that the powers under Section 152 of the Code were not available to such a litigant yet it had otherwise on all factual parameters rightly dismissed the prayer. There was no occasion to decree the suit of the petitioner. Since admittedly both the suits stood consolidated, the judgment had to be passed in one suit only. The suit of Madan Lal Mehra seeking cancellation of his document stood dismissed and a copy of this order had been directed to be placed in the file of suit for specific performance as well. It has come on record that no evidence has been led by Rajyashree Bhartia on his suit; by necessary implication, his suit was deemed to be dismissed. Order 20 Rule 5 of the Code specifically postulates that the Court has to state its decision on each issue which had been answered. The Court had even otherwise answered all the issues which were framed and given its points for determination as also the reasons for its discussions.

13 In fact, if the suit of the plaintiff is decreed (which is the submission now urged) when admittedly the plaintiff has not led any evidence on this score, would tantamount to a perversity; as noted supra, the plaintiff has to prove his case by standing on his own legs; he cannot take advantage of the weaknesses in the case of the defendant in another suit proceedings; merely because the suit of the defendant seeking cancellation of the document dated 28.05.1980 stood dismissed, there was no reason to draw a conclusion that the suit for specific performance of the same agreement stood decreed. Relevant would it be to state that there are certain essential ingredients which have to be necessary before the first suit for a specific performance can be decreed.

14 The Apex Court in 2010 (12) SCR 515 Man Kaur Vs. Hartar Singh Sangha in this context has noted that the following are the essential ingredients to succeed in a suit for specific performance; they read as under:-

(a) that a valid agreement of sale was entered by the defendant in his favour and the terms thereof;

(b) that the defendant committed breach of the contract; and

(c) that he was always ready and willing to perform his part of the obligations in terms of the contract.

15 This power available with the Court while dealing with a suit for specific performance is even otherwise a discretionary power and there is no mandate upon the Court to decree the suit.

16 The impugned judgment has noted all the facts in the correct perspective. Findings returned herein are as follows:-

“10 As it may be seen suit for specific performance was prior in point of time than the other suit for cancellation of documents. It may also be noted that subject matter in both the cases were the disputed property regarding which Ashok Kumar Mehra had executed an agreement to sell dated 28.05.1980 in favour of Ms. Rajyashree Bhartia, applicant herein a challenge to which was made by Sh. Madan Lal Mehra on the ground that Ashok Kumar Mehra has no authority to execute any such agreement to sell as it was a HUF property and not his personal property. For the cancellation of this agreement as stated above a separate suit was also filed beside moving an application by Sh. Madan Lal Mehra for impleading him as a co defendant in the civil suit of specific performance.

11 As may be noted from the ordersheet no issues were framed in suit of specific performance before the date of passing of consolidation orders. In the said suit for specific performance the plaintiff had averred to the relevant para of the plaint that plaintiff in the said suit is willing and ready to perform his part of obligation in that agreement. The defendant No. 1 in that suit i.e. respondent No. 1 i.e. Sh. Ashok Kumar Mehra in corresponding para of reply had disputed and denied the willingness on the part of the plaintiff in that suit to complete his part of contract beside taking the other challenges in his evidence. The two other issues as aforementioned were framed vide order dated 16.10.2000 but it may be observed that these two issues are not to be taken as sufficient to decide the suit for specific

performance more particularly when defendant in the suit for specific performance has challenged the willingness of the plaintiff in that suit to discharge his part of the obligation.

12 Trial Court while passing the impugned judgment and deciding issue No. 3 which was a dominant issue for the purpose of case of the plaintiff in suit for cancellation of documents against him in that case has also disposed of the other issues in the light of the finding of issue No. 3. Issue No.3 may be the dominant issue for the purpose of civil suit for cancellation of documents and may also have some bearing for the purpose of the suit for specific performance but may not be considered as an issue conclusively deciding all the controversies arising in the suit for specific performances wherein plaintiff had expressed his desire to perform the obligations on his part which was disputed and denied by the defendant and to the same there was no issue framed at all. This was a disputed fact and had an important bearing on the ultimate outcome in suit for specific performance.

13 As may be seen from the record both the cases have been decided on the basis of the ex-parte judgment of the plaintiff in suit for cancellation of documents. The defendant Rajyashree Bhartia in that suit has not led any evidence in rebuttal nor Sh. Ashok Kumar Mehra had led any evidence. As a result what remains on record is only ex-parte evidence of the plaintiff for the purpose of suit for specific performance either in the shape of rebuttal evidence to the ex-parte evidence or in the shape of the own evidence of the plaintiff in the suit for specific performance.

14 The trial Court in the opening para of the impugned while observing that this judgment is with respect to both the suits has dismissed the suit of the plaintiff with a direction that copy of the judgment be also kept in suit for specific performance.

15 In this background, the counsel for applicant herein submits that the dismissal of the suit for cancellation of documents tantamount to the decreeing of the suit for specific performance because there is no dispute by Sh. Ashok Kumar Mehra acceding execution of the agreement to sell in his favour and in WS his only defence was that it was HUF property and which issue has been decided by the trial

Court holding that this was not a HUF property. It was submitted by the counsel for applicant that WS in suit for specific performance Sh. Ashok Kumar Mehra has admitted that agreement to sell was executed with an intention to act upon that and burden to prove that plaintiff was not willing to perform his part of obligation was upon the defendant and Ashok Kumar Mehra since has not led any evidence, therefore, in view of this position this application should be allowed by issuing proper directions that judgment impugned herein also decrees the suit of the plaintiff in the matter of specific performance.

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18. *As it may be seen in this case these were two suits initially filed separately. One suit was for specific performance. The second suit was for cancellation of documents. Both the suit have different areas of controversy. They may be overlapping to some extent but it does not mean regarding which property the suit for specific performance was filed would by itself be sufficient to pass a decree in suit for specific performance. Though the trial court has referred that the judgment is disposing both the suits but as it may be seen from the record the plaintiff in the suits for specific performance who is the applicant herein has never chosen to press for the framing of the issues for the purpose of his case and has also not led any evidence in his own suit as a result the suit is without any issue and without any evidence. The finding of the trial court on issue no.3 that the property was not an HUF property as referred to in the judgments may be having some relevance for the purpose of the suit for specific performance but this alone will not be sufficient to determine and decide the suit for specific performance as for the purpose of that suit there is also other ingredients required to be satisfied and one of which is the willingness of the plaintiff to perform his part of obligation which he would prove if he intends to succeed in his suit. Since in the suit for specific performance the defendant has disputed the willingness of the plaintiff in that suit to discharge his part of obligation issue was required to be framed and a decision should have been*

recorded on that issue. Since there was no such issue and there was no finding of the trial in the judgment on this issue by which trial court was deciding both the suits, it cannot be said that decision in civil suit no. 214/04/82 for cancellation of documents dismissing that suit would also automatically make the plaintiff in suit for specific performance entitled to a decree in his favour. It may be noted that even in the decree sheet prepared after passing of the impugned judgment there is a reference to both the civil suits on it which rather goes on to reflect that trial court probably seems to have dismissed both the suits by the aforesaid judgment. However, this court vide its order is not touching to that aspect except highlighting the same and is constrained to observe that judgment of the trial court cannot be said to have been decreeing the suit of the applicant/plaintiff for specific performance by recording the fact of dismissal of the suit. After reading the complete judgment from nowhere this inference can be drawn at all.

17 The impugned judgment suffers from no infirmity. Petition is without any merit. Dismissed.

INDERMEET KAUR, J

MAY 09, 2012

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