

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

+ **RSA 8/2012**

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Date of Decision: 24.01.2012

PRABHU DAYAL

..... Appellant

Through : Mr. R.D. Sharma with Mr. Rajat
Sharma, Mr. Chetan Sharma and
Mr. Manish, Advs.

versus

INDER DEV

..... Respondent

Through : None

CORAM:

HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.

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CM No. 1410/2012 (exemption)

Exemption as prayed is allowed, subject to just exceptions.

Application stands disposed of.

RSA No. 8/2012

1. By way of second appeal, the appellant-Prabhu Dayal has challenged the impugned judgment dated 3rd October, 2011 passed by the Senior Civil Judge cum RC (Central), Delhi in RCA No.8/2010 whereby the appeal filed

by appellant and his two brothers against the judgment dated 15th December, 2001 passed by the Civil Judge, has been dismissed.

2. Factual background of the case is as under:-

Appellant herein along with his two brothers/plaintiffs had filed a suit against the respondent herein i.e. defendant before the trial court praying for a decree of declaration to the effect that they are owners in possession in respect of one half of portion of property No.24 (MCD number), new number A-13 and A-21, Sanwal Nagar, New Delhi, as shown red in the site plan attached with the plaint. Their case before the Ld. Civil Judge, Delhi was that their father had become the owner of the half share in the aforesaid property by virtue of agreement dated 9th July, 1980. The said suit was dismissed by the learned Civil Judge vide judgment dated 15.12.2001 on the ground that the issue involved in the said suit had already been decided on 28.02.1998 in the earlier suit being suit no.379/1989 between the same parties and the said decision has become final and conclusive and Section 11 of the CPC bars trial of any suits in which the issue directly or substantially in issue in the former suit between the same parties has been finally heard and decided by such court. It was held that in view of the judgment in the earlier suit referred to above, the court cannot try the present case on the basis of principle of *res judicata* and accordingly, dismissed the suit.

3. Aggrieved with the said judgment/decreed, plaintiffs i.e. appellant and his two brothers preferred an appeal before the learned Senior Civil Judge cum RC (Central) Delhi which was also dismissed on 21st December, 2009 on the ground of limitation. Against the said order, a CM(M) 152/2010 was

preferred before this court wherein delay was condoned and the matter was remanded to the First Appellate Court for reconsideration of appeal. The said appeal has also been dismissed vide judgment dated 3rd October, 2011. Aggrieved with the judgment/decreed dated 3rd October, 2011, present appeal is filed.

4. Learned counsel for the appellant has submitted that the earlier suit decided between the parties was for permanent injunction whereas the suit which has been dismissed by the learned Civil Judge and appeal thereof has been dismissed by the learned Senior Civil Judge cum RC (Central), Delhi is in respect of suit for declaration, as such bar imposed under Section 11 of CPC will not apply.

It is admitted that the parties in the former suit i.e. suit no.379/89 as well as the suit bearing no.93/99 are common. The suit property is also common in both the cases.

It may be noted that former suit i.e. suit no.379/89 was filed by the respondent herein against the appellant and his two brothers wherein prayer was made for passing a decree of permanent injunction restraining the appellant and his two brothers from dispossessing respondent from property no.24 (new no.A-13 also known as A-21) Sanwal Nagar near Sadiq Nagar, New Delhi. The said suit was contested by the appellant and his two brothers by filing a written statement. The relevant issue in the said case is issue no.2 which is as under:-

“Whether the plaintiff has become owner of the suit property in view of Agreement dated 9.7.80? OPP”.

5. The finding of the learned Civil Judge in this regard is as under:-

“The onus of proving this issue falls on the plaintiff whether the plaintiff becomes owner in view of the agreement dated 9.7.80. It was the plaintiff case that the plaintiff’s father and defendant has entered into an agreement by which it was decided that Asha Ram the father of the plaintiff executed a sale deed in favour of three sons of Mangu Ram with the conditions that the defendant would pay Rs. 7000/- in cash, within three months. In case the sale deed has been drawn in one month no interest was accrued but if the sale deed was got executed within three months then 1% p.m. interest has to be paid by the defendant to said Sh. Asha Ram on the above said Rs.7000/-. In the said agreement boundaries of the portion was mentioned. In the eastern side of the said plot remains to be portion of the three sons of Mangu Ram and the western side as portion remains with Sh. Asha Ram. To prove this fact the plaintiff examined himself and deposed that he was the owner of Plot No.A-13, A-21 Old No. 24 Sawal Nagar, Near Sadiq Nagar, N. Delhi. The said plot was owned by his father Sh. Asha Ram through regd. sale deed the copy of the same is exhibited as P.W. 1/A. His father had died on 6.11.84 bequeathing the said plot in his name through Will on 22.2.89 duly registered with Sub-Registrar of Delhi and duly exhibited as P.W. 1/B. He also got mutated the said plot in his name in the MCD Record. He also deposed that said property is correct as per the site plan and the same is P.W. 1/C. He got water connection from MCD and the same is installed in the premises on 30.9.87 and exhibited the water bill as Ex.P.W.1/D. He had paid the development charges to the DDA of the said plot two times dated 23.5.79 and 4.4.79 the same was also got executed as P.W.1/E and P.W.1/F. He also deposed that the defendant did not paid

even single paisa till today even after his father sent the notice after expiry of the period of said notice. Therefore, the above said agreement stands cancelled. He also deposed that the defendant threatened to dispossess him forcibly and illegally on 12.4.89 when three defendants along with one Bihari Lal and Budh Prakash tried to enter forcibly into the premises but due to timely intervention it was saved. Even the police got undertaking from the defendant that they will not dispossess the plaintiff without the order of the court. The said undertaking was signed by him and the defendant, the carbon copy of the same is mark 'D'.

P.W. 2 was the sister of the plaintiff and she deposed that entire plot is in possession of the plaintiff. She also deposed that the defendant took up quarrel with the plaintiff regarding the plot and they entered into the plot about four years back. P.W. 3 Shri Mohan Lal deposed that he know the plaintiff who is owner and in possession of the plot which is situated in Sanwal Nagar, New Delhi and he got photographed of the said plot showing the door and wall which is duly exhibited as P.W. 3/A and Negative of the same is Ex. P.W. 3/B, although he is not a professional photographer and has not been able to tell the exact date when the said photographs was taken by him. Even he had tendered the said photographs in the Court but the same was given to him by the plaintiff. P.W.4, Gajanand, the, Mason, deposed that he repaired the said property of the plaintiff bearing number situated in Sanwal Nagar for two days @ Rs. 70/- per day and he had issued the receipt of the payment and the same bears the signatures dated 1.7.90. He had executed the said receipt and identified the signatures on Ex.P.W.4/A. Although he also submitted that the plaintiff gave the receipt and paid him the money and thereafter he had signed the same.

To decide this issue the document Ex.P.W.1/2 is most important. After going through the said agreement which was written in Devnagri script. Under the agreement, it was compulsory that the sale deed has to be executed within the

three months (TEEN MAAH KAI UNДАР REGISTRY JARUR KARANI HOGI). The word 'Jarur' which was written in the above said agreement denotes compulsion. Besides this there is one condition that in case, sale deed has to be executed within one month interest has not to be paid but thereafter interest will be charged 1% P.M. on the above said Rs.7000/- to be paid to the father of the plaintiff. Although D.W. 1 stated that he had paid the amount of Rs.7000/- to the plaintiff. But he has not been able to state, in whose presence the said Rs.7000/- was paid to the plaintiff's father. P.W. 1 has stated in his cross examination that no receipt of the above said payment was executed by the plaintiff. Even the defendant Budh Ram has not explained in the examination-in-chief or in the cross examination whether all the three brothers had gone to the father of the plaintiff for the payment of the said amount as per the agreement or he alone had gone. D.W. 2 Behari Lal deposition is not material as he was heard only about the above said payment by Sh. Budh Raj. He candidly admitted that no amount was given in the presence. Although he had denied that Asha Ram the father of the plaintiff did not execute the document as the defendant did not pay the amount of Rs.7000/- as per the agreement.

For the reason that neither defendant had tendered any document regarding the payment of Rs.7000/- as per agreement nor he had put anything about the fact that he had paid Rs.7000/- to the plaintiff's father in the presence of any person. As the agreement Ex.P.W. 1/1 was executed between the parties besides signed by all the witnesses Behari Lal, etc it is most improbable that the payment was made by the defendant and no document was executed by said Sh. Asha Ram, the father of the plaintiff.

It is unimaginable that the defendant did not give any specific date regarding the payment of money as deposed or averred in their W.S. that they had paid the said amount.

As it was the condition precedent of the agreement P.W. 1/1 that Asha Ram the father of the plaintiff shall execute the sale deed of the half portion of eastern side in the name of three brothers (Son of Mangu Ram) only when three brothers would pay Rs.7000/- within three months. Defendants failed that he had ever paid Rs.7000/-. For the reasons given above the agreement executed by father of the plaintiff Sh. Asha Ram, Ex. P.W. 1/1 stand cancelled automatically. Plaintiff was the owner of the suit property according to the agreement Ex.P.W.1/1 the sale deed executed in the name of his late father Sh. Asha Ram, thereafter through will executed by Sh. Asha Ram Ex. P.W.1/3. As the condition of the agreement has not been fulfilled by the defendant, the agreement Ex. P.W. 1/1 stand cancelled automatically.

For the above said discussion this issue also goes in favour of the plaintiff and against the defendant.”

6. After appreciating the evidence of both the parties, the Ld. Civil Judge, Delhi gave a finding that the agreement dated 09.08.1980, Ex.PW1/1, stood automatically cancelled and it was held that plaintiff i.e. respondent herein has become the owner of the suit property by virtue of the aforesaid agreement and the issue was decided in favour of respondent/plaintiff. The appellant and his brothers/plaintiffs had again based their rights on the basis of aforesaid agreement dated 09.08.1989 Ex. PW1/1 which stood cancelled vide decision of the former suit.

The aforesaid judgment has not been challenged by the appellant rather he along with his two brothers had filed a fresh suit i.e. suit no.93/1999 claiming a decree for declaration on the basis of the aforesaid agreement which has been held to have been cancelled automatically in suit no.379/89.

7. By way of subsequent suit being Suit no.93/99, appellant/plaintiffs have re agitated the issue. Accordingly, preliminary issue was framed in the said case which is as under:-

“As to whether the present suit is hit by the principles of res judicata.”

As noted above, the matter in issue has already been decided on 28th February, 1998 and the said findings have attained finality as the same were never challenged in any higher forum. Both the courts have rightly held that appellant/plaintiff cannot re-agitate the same issue. No substantial question of law arises for consideration. It may also be mentioned that the present appeal is bad for non-joinder of necessary parties. The two brothers of the present appellant who were parties in the suit no.93/99 as well as the appeal before the learned Senior Civil Judge cum RC (Central), Delhi have not been made party in the present appeal.

8. In view of above discussion, the present second appeal stands dismissed.

CM 1409/2012(for stay)

In view of the order passed in the appeal, no further orders are required on the present application. The same stands disposed of accordingly.

VEENA BIRBAL, J

JANUARY 24, 2012

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