

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

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Date of decision: 26th November, 2013.

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RFA 258/2013

PUSHPAWATI

..... Appellant

Through: Mr. V.K. Sharma, Advocate.

Versus

NARAIN PRASAD GUPTA & ORS

..... Respondents

Through: Mr. Gautam Dutta, Adv. for R-1, 3, 4,
5 & 6.

Mr. Karan Jain, Adv. for R-2 MCD.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree dated 24th November, 2012 of the Court of Additional District Judge (ADJ) (Central-07), Tis Hazari Courts, Delhi of dismissal of Suit No.15/2008 filed by the appellant consequent to rejection under Order VII Rule 11 of the Civil Procedure Code (CPC), 1908 of plaint therein, after issues had been framed and substantial evidence had been recorded in the suit.

2. Notice of the appeal was issued and thereafter the appeal was admitted for hearing and the Trial Court record requisitioned. Considering the nature of the controversy, the hearing of the appeal was expedited.

3. The counsel for the appellant and the counsel for the respondents No.1, 3, 4, 5 & 6 have been heard.

4. The appellant instituted the suit from which this appeal arises, claiming the following reliefs:

- “(a) pass a decree to the sum of Rs.9,92,500/- (Rs. Nine Lac Ninety Two Thousand Five Hundred Only) alongwith pendentlite and future interest @ 24% p.a. and cost of the suit jointly and severally against defendant No.1 and defendants No.3 to 6 and in favour of the plaintiff regarding the estimated cost of reconstruction of property of the plaintiff i.e. 4/1156, Gali No.11, Bhola Nath Nagar, Shahdara, Delhi which has been damage due to illegal acts of unauthorised and unlawful construction carried out by defendant No.1 and subsequently purchased by defendants No.3 to 6 in Property No.438/4, Gali No.11, Bhola Nath Nagar, Shahdara, Delhi.*
- (b) pass a decree of mandatory and permanent injunction against defendant No.2, thereby directing the defendant No.2 to take legal action in accordance with law against the property bearing No.438/4, Gali No.11, Bhola Nath Nagar, Shahdara, Delhi as the defendant No.1 had constructed the same illegally and unauthorisedly without sanction/permission and approval of defendant No.2.*
- (c) pass a decree of mandatory and permanent injunction against defendant No.1 and defendants No.3 to 6 thereby directing and commanding said defendants, their associates, agents, assignees, employee, etc. not to construct the property No.438/4, Gali No.11, Bhola Nath Nagar, Shahdara, Delhi without approval / sanction /*

permission of defendant No.2 or any other concerned authority.”

5. Needless to state that the respondents contested the suit by filing a written statement; though in the circumstances it is not necessary to detail the pleadings, but the flavor thereof can be gauged from the issues framed in the suit on 29th September, 2009, as under:

- “1. Whether the plaintiff has no locus standi to file the present suit neither being the owner nor in occupation of the property in question? (OPD-1)*
- 2. Whether the suit of the plaintiff is bad for non-joinder of parties? (OPD-1)*
- 2A. Whether the suit is bad for mis-joinder of defendant No.4 to 6? (OPD 4 to 6)*
- 3. Whether the plaintiff is entitled to relief of damages as asked for in the plaint alongwith interest? (OPP)*
- 4. Whether the plaintiff is entitled to mandatory and permanent injunction as asked for in the plaint? (OPP)*
- 5. Relief.”*

6. The appellant/plaintiff on 5th October, 2011 withdrew the reliefs of mandatory and permanent injunction aforesaid claimed in the suit.

7. After several witnesses of the appellant/plaintiff had been examined, an application under Order VII Rule 11 of the CPC was filed by the respondents/defendants 1 & 3 contending, (i) that during the recording of the evidence it had been disclosed that the property No.4/1156, Gali No.11, Bhola Nath Nagar, Shahdara, Delhi had already been sold by the

appellant/plaintiff to one Smt. Priyanka Jain vide registered Sale Deed dated 13th July, 2011; (ii) that since the suit, only for recovery of the costs of dismantling and costs of reconstruction thereof survived and the question of the appellant/plaintiff, after sale of the property, being entitled to dismantle the property and reconstruct the same did not arise and further since the purchaser of the property had immediately after purchase already demolished the property and raised new construction thereon, the suit had become infructuous.

8. The appellant/plaintiff filed a reply to the said application, not denying the sale of the property, but controverting that the suit had become infructuous.

9. The learned ADJ vide the order rejecting the plaint has recorded that the contention of the counsel for the appellant/plaintiff before the Suit Court was that the appellant/plaintiff is entitled to compensation towards mental harassment. The learned ADJ has however held that the appellant/plaintiff, though in the notice preceding the suit had claimed compensation for mental harassment, but in the suit filed, had not made any claim on this account. The learned ADJ accordingly allowed the application under Order VII Rule 11 of the CPC and held that the suit after sale of his property by the

appellant/plaintiff did not disclose any cause of action. It was also observed that merely because substantial evidence had been recorded, was no ground to complete the trial.

10. Notice of the appeal was issued on the contention of the appellant/plaintiff, without filing any copy of the plaint with the appeal, that his suit was for recovery of damages for injury already caused to his property by the respondents/defendants while constructing their property, and which relief survived notwithstanding the sale of his property by the appellant/plaintiff. However, on receipt of the Trial Court record, the relief claimed by the appellant/plaintiff is found to be not of recovery of compensation for loss already suffered but for recovery of the amounts which the appellant/plaintiff would be required to incur in dismantling and reconstructing his property.

11. Faced therewith, the counsel for the appellant/plaintiff states that the relief though claimed in the language aforesaid, is indeed for compensation for loss caused to his property.

12. I am afraid, it cannot be held to be so. A perusal of the contents of the plaint shows the plea of the appellant/plaintiff to be that on account of

unauthorized and illegal construction by the respondents/defendants in their property adjoining to the property of the appellant/plaintiff, the property of the appellant/plaintiff had become weak, unstable and unsafe and light and air to the property of the appellant had also been blocked and the appellant/plaintiff was thus required to demolish the existing structure of his property and raise new construction thereon and costs whereof were claimed in the plaint.

13. The appellant/plaintiff, after selling his property, did not take any plea that he got lesser than the market price thereof for the reason of unauthorized and illegal construction by the respondents/defendants in their property. The appellant/plaintiff in reply to the application under Order VII Rule 11 of the CPC also did not deny that the purchaser from him had immediately after purchase demolished and reconstructed the said property. Therefrom it is borne out that the purchaser paid the price to the appellant/plaintiff for the land underneath the property and not for the superstructure thereof.

14. The appellant/plaintiff now in arguments in this appeal cannot be permitted to change the nature of his claim. His claim as borne out from the plaint, was for expenses required to be incurred by him on reconstruction of his property. Now, when the appellant/plaintiff, owing to sale of his

property, is no longer entitled/competent to demolish or reconstruct his property, the question of his being entitled to any expenses on such account, does not arise.

15. In fact it appears that the argument raised in this appeal is different from the argument raised before the learned ADJ, of the appellant/plaintiff being entitled to damages for harassment and which is also not the case pleaded.

16. No error is thus found in the order of rejection of plaint. It has been held in *Shri Varinder Sahni Vs. Pratap K. Kaula* MANU/DE/3224/2013 that a cause of action which may exist on the date of institution of suit, can disappear owing to subsequent events and continuation of a suit which has become infructuous by disappearance of cause of action will amount to abuse of process of Court and such suit should be disposed of as infructuous. It has further been held by the Supreme Court in *Shipping Corporation of India Ltd. Vs. Machado Brothers* (2004) 11 SCC 168 that if by subsequent event the original proceeding has become infructuous, it is the duty of the Court to take such action as is necessary and which includes disposing of infructuous litigation as continuing such litigation will be like flogging a dead horse and not benefit any of the parties.

17. There is thus no merit in this appeal, which is dismissed. However, in the facts and circumstances, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 26, 2013

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