

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

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Date of decision: 11th September, 2013

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RFA No.227/2013

SMT. TRIVENI VERMA

..... Appellant

Through: Mr. Sanjiv Bahl, Mr. R.K. Tarun, Mr. Ajay Shekhar & Mr. Eklavya Bahl, Advs.

Versus

SH. VIKAS GIRDHAR

..... Respondent

Through: Mr. J.P. Sengh, Sr. Adv. with Mr. Rakesh Patiyal, Mr. Sumeet Batra & Ms. Ankita Gupta, Advs.

CORAM :

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This appeal impugning the *ex parte* judgment and decree (dated 22.01.2010 of the Court of Additional District Judge-01, North, Delhi in CS No.242/2009 filed by the respondent for specific performance of an Agreement of Sale) is accompanied with CM No.7455/2013 for condonation of 1155 days delay in filing the appeal.

2. Notice only of the application seeking condonation of delay in filing the appeal was issued and the counsel for the respondent / plaintiff has filed reply thereto. When the matter was listed on 19.08.2013, finding that the appellant / defendant had also applied under Order 9 Rule 13 of the CPC but which application had been dismissed by the learned Additional District Judge vide order dated 26.03.2013, it was enquired from the counsel for the

appellant / defendant whether the appellant / defendant had preferred any remedy there against. The counsel for the respondent / plaintiff informed that the appellant had preferred FAO No.246/2013 against the order of dismissal of the application under Order 9 Rule 13 of the CPC but which appeal had also been dismissed vide order dated 29.05.2013. It was in these circumstances enquired from the counsel for the appellant whether not the scope of this appeal was confined only to the error if any in the judgment on the basis of *ex parte* pleadings and evidence and not on the ground of the appellant / defendant having been wrongfully proceeded against *ex parte* and which aspect at least as far as this Court is concerned had attained finality with the order dated 29.05.2013. Before the counsel for the appellant / defendant could reply, realizing that formal notice of the appeal had not been issued and the Trial Court record had not been requisitioned, a formal notice of the appeal also was issued subject to the decision on the application for condonation of delay, and the appeal was listed for hearing. Thereafter on 02.09.2013 it was informed that the appellant / defendant had preferred a Special Leave Petition to the Supreme Court against the order dated 29.05.2013 of this Court and which had also been dismissed.

3. It was the contention of the senior counsel for the respondent on 02.09.2013 that the grounds taken by the appellant / defendant in the application for condonation of 1155 days delay in preferring the appeal were the same as taken in the application under Order 9 Rule 13 CPC application and which had been dismissed and order whereon had attained finality till the Supreme Court and thus the delay on the same grounds could not be

condoned. The counsel for the appellant / defendant had sought time to examine the Order 9 Rule 13 proceedings.

4. The counsel for the appellant / defendant has today argued.

- (i) that though the Order 9 Rule 13 application had also been filed beyond the period of limitation prescribed therefor but was not accompanied by any application under Section 5 of the Limitation Act, though the learned Additional district Judge had considered the Order 9 Rule 13 application on merits;
- (ii) that the tests to be applied in condoning the delay in preferring an application under Order 9 Rule 13 and in preferring an appeal would be different, with the test being more stringent in the former than the latter because the effect of condoning the delay in filing the application under Order 9 Rule 13 of the CPC is to set aside an *ex parte* decree whereas the effect of condoning the delay in preferring the appeal is only to allow consideration of the judgment and the decree on the basis of the records before the Trial Court. Reliance in this regard is placed on ***D.V.H. Industries Vs. Hartley Knits*** 176 (2011) DLT 106 (DB) where inspite of dismissal of an application under Order 9 Rule 13 of the CPC, the delay in preferring the appeal was condoned.

5. The learned Additional District Judge vide order dated 26.03.2013 dismissed the application filed by the appellant / defendant under Order 9 Rule 13 of the CPC finding / recording / holding:

- (i) that the summons issued to the appellant / defendant of the suit vide ordinary process as well as registered post were issued for 18.09.2009;
- (ii) that though the AD card received back was unsigned but the ordinary process was personally served upon the appellant / defendant on 26.08.2009;
- (iii) that despite service, the appellant / defendant failed to appear before the learned Additional District Judge on 18.09.2009 and the suit was posted for the appearance of the appellant / defendant on 21.10.2009;
- (iv) that on 21.10.2009, the suit was adjourned to 26.11.2009;
- (v) that since the appellant / defendant failed to appear on 26.11.2009 also, she was proceeded against *ex parte* and after recording the *ex parte* evidence, the suit for specific performance was decreed vide judgment dated 22.01.2010;
- (vi) that since the service of the summons on the appellant / defendant was not in dispute, the application under Order 9 Rule 13 CPC as per Article 123 of the Schedule to the Limitation Act should have been filed within 30 days from the date of decree i.e. on or before 21.02.2010 – however the same had been filed on 09.12.2011 i.e. after inordinate delay of more than 21 months;

- (vii) that the application under Order 9 Rule 13 of the CPC was not even accompanied by an application for condonation of delay and thus was not maintainable;
- (viii) that the learned Additional District Judge however proceeded to consider the application under Order 9 Rule 13 of the CPC on merits;
- (ix) that the appellant / defendant had not disputed the service of summons of the suit on her on 26.08.2009 but had averred that she did not understand the import thereof and had been assured by the respondent / plaintiff that he would explain the same to her later and as the respondent / plaintiff had good relations with the appellant / defendant and her family, she did not make any further enquiries;
- (x) that it was not the case of the appellant / defendant that she later on made any enquiry regarding the summons from the respondent / plaintiff or that she was misguided about the same by him;
- (xi) that if the appellant / defendant had not understood the import of the summons, it was incumbent upon her to seek legal assistance and appear before the Court; instead of doing so, she chose not to contest the suit;
- (xii) that after the passing of the *ex parte* decree, the respondent / plaintiff filed an execution and notice whereof also was served on the appellant / defendant on 16.07.2010; however the

appellant / defendant again failed to appear and the Court had to appoint its official for execution of the Sale Deed in favour of the respondent / plaintiff;

(xiii) that it was only when the bailiff visited the suit property for execution of the warrants of possession that the appellant / defendant had approached the Court with the application under Order 9 Rule 13 of the CPC;

(xiv) that the aforesaid conduct of the appellant / defendant clearly reflected deliberate inaction on her part and the application under Order 9 Rule 13 of the CPC had been preferred with the sole intention of depriving the respondent / plaintiff of the fruits of the decree; and,

(xv) that the appellant / defendant had failed to show any sufficient cause for her non appearance in the suit.

6. A perusal of the order dated 29.05.2013 of this Court in FAO No.246/2009 preferred by the appellant / defendant shows this Court to have agreed in toto with the order aforesaid of the learned Additional District Judge and to have further observed that the appellant / defendant had not only slept over the matter after receiving the summons but had not even cared to file an application seeking condonation of delay and which clearly shows gross negligence on her part and that the law of limitation is based on the fundamental principle that the law helps those who are vigilant about their rights.

7. Though the counsel for the appellant / defendant had faintly attempted to suggest that the finding in the order aforesaid, of the appellant / defendant having been served with the summons of the execution on 16.07.2010, is erroneous but upon being told that the said finding cannot be re-opened has not pressed the same further. The senior counsel for the respondent / plaintiff also points out that no such ground has been taken in the memorandum of this appeal either.

8. The Court of the Additional District Judge and this Court in appeal while dealing with the application under Order 9 Rule 13 of the CPC were *inter alia* concerned with the delay in preferring the same from 30 days after the *ex parte* decree dated 22.01.2010 i.e. from 21.02.2010 to 09.12.2011 when the application under Order 9 Rule 13 was filed.

9. The delay in preferring this appeal is also from 24.04.2010 i.e. after 90 days (for preferring the appeal) from 22.01.2010 being the date of the *ex parte* decree and till the filing of the appeal on 02.05.2013. It has been enquired from the counsel for the appellant / defendant whether not the period of delay in filing the application under Order 9 Rule 13 and filing this appeal overlaps at least from 25.04.2010 till 09.12.2011 and if it is so how, when a view has already been taken including by this Court that no sufficient ground has been disclosed, a different view can be taken and whether not the same if permitted would amount to different findings being rendered by two different Benches on the same facts.

10. The counsel for the appellant / defendant besides relying on ***D.V.H. Industries*** (supra) has reiterated his argument, of the test for condonation

being different in the two proceedings i.e. one under Order 9 Rule 13 and the other being this appeal.

11. As far as is ***D.V.H. Industries*** is concerned though undoubtedly there was overlapping period in that case also but the issue as has been raised by the senior counsel for the respondent / plaintiff was not raised in that case and there is thus no discussion or finding thereon. The Division Bench in the said judgment has not addressed the issue whether there could be two different tests / criteria for condonation of delay in the two proceedings though on the basis of the same facts. It is the settled position in law that a judgment is a precedent on what is for decision therein and what it decides and not on what may be inferred therefrom. ***D.V.H. Industries***, in which the issue as arising here was not raised, does not bind me to hold that notwithstanding a Co-ordinate Bench of this Court in the same facts having held no sufficient ground for condonation being made out, it is open to me to hold so.

12. As far as the argument of the test of sufficiency being different in Order 9 Rule 13 proceeding and in appeal being different, the counsel for the appellant / defendant fairly admits that inspite of his research he has been unable to support the said contention with any precedent.

13. Though I do not choose to lay down as an absolute rule but at least in the facts of the present case, I am unable to hold that a different view is required to be taken in considering the application for condonation of delay in this appeal than from that which was taken in dismissing the application under Order 9 Rule 13 of the CPC *inter alia* as time barred. What weighed

heavily with the Court in dismissing the application under Order 9 Rule 13 CPC was the service on the appellant / defendant on 16.07.2010 of notice of the execution and the quietus of the appellant / defendant even thereafter. The said factor remains a concern in this appeal also. The appellant / defendant at least on service on 16.07.2010 of the notice of the execution petition ought to have been stirred into action. The appellant / defendant however chose to remain quiet for more than one year thereafter also.

14. I am therefore of the view that no different view of sufficiency of cause for condonation of delay can be taken than which was taken in the Order 9 Rule 13 proceedings.

15. However to satisfy the judicial conscience, I have also asked the counsel for the appellant / defendant to address on the merits of the *ex parte* judgment, again cautioning him that the challenge thereto can be within the confines of the judgment and decree being not possible in the face of the *ex parte* pleadings and evidence.

16. Though the counsel for the appellant / defendant contended that there was no averment or proof in compliance of Section 16(c) of the Specific Relief Act, 1963 but on going through the plaint and the *ex parte* evidence led, I am unable to find so. The respondent / plaintiff has averred and deposed of his readiness and willingness to pay the balance sale consideration.

17. The counsel for the appellant / defendant has argued that the respondent / plaintiff except for bare statement has not shown his bank

statement or any other source from which it can be said that he was in a position to pay the balance sale consideration of Rs.7 lacs.

18. The respondent / plaintiff having stated that he was so in a position to pay and there being no challenge to his said statement, in my opinion was not required to prove before the Court the documents of so being in a position.

19. It is the well settled principle of law that a purchaser of immovable property is not to show cash in his pocket. The Supreme Court in ***N.P. Thirugnanam Vs. Dr. R. Jagan Mohan Rao*** (1995) 5 SCC 115 has held that a plaintiff seeking specific performance is not required to prove necessary cash in his hands but his readiness and willingness and no fault can be found with him for not having the necessary funds in hand from the date of the agreement; what is required of him is that he has done nothing to make the contract unenforceable and he was having necessary capacity to raise funds when needed.

20. Though the counsel for the appellant / defendant has also contended that in view of the other averments in the plaint, of the respondent / plaintiff having earlier arranged money from others for advancement to the appellant / defendant as loan, the respondent / plaintiff cannot be said to be possessed of sufficient amounts but without the appellant / defendant having availed of the opportunity to cross examine the respondent / plaintiff, such allegations in challenge to the *ex parte* judgment and decree are not tenable.

21. The counsel for the appellant / defendant has next contended that the discretion in the grant of relief of specific performance ought not to have

been exercised in favour of the respondent / plaintiff inasmuch as it was the admitted position that out of the total sale consideration of Rs.18 lacs, Rs.1,50,000/- was initially advanced as loan against security of the subject property and the respondent / plaintiff had asked for another sum of Rs.1,50,000/- as loan only. Inviting attention to Section 20(1) of the Specific Relief Act, 1963, it is contended that a case thereunder was made out.

22. I am unable to agree. For the defendant in a suit for specific performance to contend that the discretion for grant of the relief of specific performance, which is ordinarily the relief to be granted in such suit, should not be exercised, the defendant has to plead and prove a case for exercise against the plaintiff of the discretion. There is nothing on the basis of the *ex parte* pleadings and evidence on record to show that the ordinary rule of granting the relief of specific performance should not have been granted.

23. The counsel for the appellant / defendant has sought to urge the argument of the Agreement to Sell being of a suspicious nature but the same is also beyond the scope of challenge to an *ex parte* judgment and decree.

24. In fact I have enquired from the counsel for the appellant / defendant whether not the effect of allowing the appellant / defendant to urge all such arguments in appeal and which cannot be urged without setting aside the *ex parte* / judgment and decree, would be the same as sought in the other proceeding under Order 9 Rule 13 CPC and which has been denied to the appellant / defendant till the Supreme Court.

25. No plausible answer is forthcoming.

26. I am of the view that the impugned judgment cannot be said to be such as not possible on the basis of *ex parte* pleadings and evidence and allowing other grounds to be urged thereagainst would have the same effect as setting aside thereof and which relief in the Order 9 Rule 13 proceeding has been denied to appellant / defendant.

27. I am thus on merits also satisfied that the learned Additional District Judge has not on the basis of the *ex parte* material on record committed any error in decreeing the suit.

28. Resultantly, the application for condonation of delay as well as the appeal fail and are dismissed. However in the facts no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 11, 2013

‘gsr’..