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

% **DECIDED ON:15.07.2013**

+ **FAO (OS) 313/2013
CM APPL.10415/2013**

**TRILOK SINGH (DECEASED) THROUGH:
LR JAGMOHAN SINGH** Appellant

Through: Mr. Sujeet Kr. Mishra, Advocate.

versus

INDER PAL (DECEASED) & ORS Respondents
Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. The present appeal is directed against an order of the learned Single Judge dated 12.03.2013, dismissing I.A. No.14076/2007. By that application, the plaintiff - who died during the pendency of appeal - has sought for recall of the order dated 23.03.2007 by which the suit had been withdrawn.

2. The brief facts necessary for disposing off the present appeal are that the plaintiff approached the Court seeking a declaration that registered gift deed dated 5.5.2004 in favour of his grand sons arrayed as second and third respondents was invalid and not enforceable. He also sought consequential reliefs such as perpetual injunction.

Apparently, after the execution of the gift deed, the second and third defendants had further transferred the property through a registered sale deed dated 11.04.2005. The subsequent purchaser was also arrayed as a party.

3. During the pendency of the suit, the plaintiff who was of advanced age apparently moved an application - I.A.3425/2007 seeking to unconditionally withdraw the proceedings. By an order dated 23.03.2007, the Court accepted the application and recorded unconditional withdrawal of the suit in the following terms: -

“This is an application under Order 23 Rule 1 of the Code of Civil Procedure filed on behalf of the plaintiff for unconditional withdrawal of the suit. The plaintiff as well defendant No.1 is present in court.

The suit is dismissed, as prayed.”

4. On 17.11.2007, the plaintiff again approached the Court. This time alleging that fraud had been practised upon him by counsel which had resulted in unwarranted withdrawal of the suit. Notice was issued on the application. Subsequently, during the pendency of I.A.14076/2007, the plaintiff died. Legal representatives were substituted by the Court. The learned Single Judge dismissed the application seeking recall of the earlier order recording withdrawal. The material portion of the impugned order reads as follows: -

“16. The application is totally lacking in particulars of fraud allegedly played on the deceased plaintiff in having the suit dismissed as withdrawn. The deceased plaintiff admits that he signed the papers for withdrawal of the suit. The only plea is that he was told that he and his

family members shall remain in possession of the basement and ground floor of the property.

17. The said averment does not inspire confidence and does not constitute a plea of fraud. Once the deceased plaintiff had agreed to the withdrawal of the suit and his suit itself was that the property stood transferred vide Gift Deed to defendants No.2and3 and thereafter to the defendant No.4, the question of any such assurance in the face of him being told that the suit was being withdrawn is incongruous.

18. As far as the plea taken by the deceased plaintiff of his old age of 91 years is concerned, it may be mentioned that Mr. Jagmohan Singh who has now been substituted in place of the deceased plaintiff was fully in the know of the present suit during the lifetime of the deceased plaintiff also as is evident from the presence of Mr. Jagmohan Singh as representative of the deceased plaintiff being recorded in the order dated 25.07.2006 in the suit. The present plaintiff was thus fully in the know of the suit. Moreover, there is no denial even of the presence of the deceased plaintiff in this Court on 21st March, 2007 when the suit was withdrawn and as recorded in the order sheet of that date.

19. Even if it is to be believed that the present plaintiff and the deceased plaintiff were under the impression that the suit shall be taken up for hearing on 05.04.2007 and had not discharged Mr. Manish Sharma and Mr. Amit Bhardwaj, Advocates, there is no explanation whatsoever as to why, immediately after 05.04.2007, on not finding the suit in the list, no steps were taken and the application was filed only in November, 2007.

20. It cannot be lost sight of that the defendant No.1 was the son of the deceased plaintiff and the defendants No.2and3 are the grandsons of the deceased plaintiff and

the present plaintiff is another son of the deceased plaintiff. On enquiry, it is informed that the present plaintiff is also residing in the same property and it is informed that the present plaintiff is independently pursuing a suit against the defendants No.2 and 3 asserting his rights in the property.

21. In the aforesaid circumstances, the pleas of fraud are not such which are required to be put to trial.”

5. It is urged by the appellant that the impugned order discloses grave errors. Learned counsel pointed out that there was no cause for the counsel to be substituted only for the purpose of moving an application for withdrawal of the suit. In addition, argued counsel, at least 50% of the property sought to be gifted was also the subject matter of a gift made in 1982. He relied upon paragraph 10 of the plaint in support of this submission. Counsel emphasized the point at the time when the application for recall was made and the deceased plaintiff Trilok Singh was alive and in fact he had affirmed the affidavit in support of that application.

6. This Court has considered the relevant averments in the amended suit - which was pointed out during the hearing - as well as the material documents. Paragraph 10 of the suit generally avers about some gift which was unconditionally accepted. There are, however, no averments suggestive of the fact that the property was ever the subject matter of any valid registered gift deed. There is also mention of a memorandum of family settlement - in paragraph-15 & 16. Here too, there are no particulars as to when such family settlement was arrived at. Paragraph 17 of the suit alludes to

a partition deed of 22.01.2001 between the plaintiff and the first defendant. Here again, there is no express averment that such partition deed was registered. The materials on record also disclose that on the date when the Court recorded withdrawal of the suit, i.e., on 23.03.2007, the plaintiff and the first defendant were present. The application filed by the plaintiff does not contest this fact. The material averments alleging fraud are in paragraphs 5 and 7 of the application; they are extracted below: -

“5. That the suit was listed for 5.4.2007 and the application for withdrawal of suit was filed on 21.3.2007 by Mr. Anubhav Mehrotra Advocate without taking no-objection certificate from earlier Advocates Mr. Manish Sharma and Mr. Amit Bhardwaj.

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7. That the plaintiff/applicant later-on came to know about the contents of application and a fraud was played upon the plaintiff who is +91 years old and an impression was given as to the whole dispute regarding basement and ground floor has been settled in favour of plaintiff but nothing of that sort was mentioned in the application for withdrawal of suit and now the plaintiff/applicant and his family members are being threatened to vacate the basement as well as ground floor of A-51, New Friends Colony, New Delhi.”

7. This Court is of the opinion that having regard to the state of pleadings in the application for recall of the previous order, the impugned order dismissing it cannot be faulted. The averments are bereft of any particulars. This Court further notices that there is no

averment that any complaint or proceeding was drawn or made against the counsel concerned who is alleged to have committed the fraud upon the deceased plaintiff. The vague and general allegations (which were disbelieved by the Single Judge) were, in the opinion of this Court, rejected justifiably so.

8. In view of the above discussion, the Court finds no reason to interfere with the impugned order passed by the learned Single Judge.

9. FAO (OS) 313/2012 is accordingly dismissed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

JULY 15, 2013

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