

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

% *Date of Judgment: 20.03.2013*

+ **FAO(OS) 280/2012**

MOHD ASLAM & ORS Appellants
Through **Mr.S.K.Bhalla, Adv.**
versus

ABDUL WAHID & ORS Respondents
Through **Mr. Rajiv K. Garg, Adv.**

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The appellants (Ahmed Mian and his successors-in-interest) before this Court are the defendants in the suit proceedings. They are aggrieved by two orders i.e. order dated 03.03.2011 and order 18.05.2012. Vide order dated 18.05.2012, the review petition filed by the appellants seeking a review of the order dated 03.03.2011 had been dismissed. The Court had returned a finding that there was no error apparent on the face of the record calling for the review of order dated 03.03.2011. Vide order dated 03.03.2011, the learned Single Judge had negatived the argument of learned counsel for the appellants predicated

on Explanations III & IV of Section 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'Code'). The learned Single Judge was of the view that neither of the aforementioned Explanations apply to the facts of the case and the plea that the present suit was barred by the principle of res-judicata had been declined.

2 The subject matter of the suit is property bearing No. 878, Haveli Azam Khan, Chitli Qabar, Delhi measuring 120 square yards. It was owned by Mohd. Mian. After his death the property fell to the share of his two sons namely Mehmood Mian and Ahmed Mian. Mehmood Mian was in occupation of the first floor of the premises. Ahmed Mian and his family were living on the ground floor.

3 The respondents before this Court are Abdul Wahid and his successors-in-interest. The case of the respondents is that they were inducted into the first floor of the suit property by Mehmood Mian as tenants. On 08.08.1987, the parties had entered into an agreement to sell vide which the respondents had agreed to purchase the first floor of the property owned by Mehmood Mian for a consideration of Rs.48,000/-; a sum of Rs.10,000/- was given in cash as earnest money by the

respondents to Mehmood Mian in terms of the agreement to sell dated 08.08.1987

4 In October, 1987 the appellants filed a suit (suit No. 605/1987) for perpetual injunction against Mehmood Mian. A status quo order was passed on 30.10.1987 qua the title and possession of the suit property. On 06.11.1987, a duly registered sale deed was executed between Mehmood Mian and the respondents which was in furtherance of the agreement to sell dated 08.08.1987. This sale deed was executed during the pendency of the status quo order. The case of the respondents is that at the time of the execution of the sale deed a sum of Rs.38,000/- was paid by them to Mehmood Mian.

5 Mehmood Mian expired on 19.11.1987. He was issueless.

6 Thereafter Suit No. 605/1987 was sought to be amended in view of the subsequent fact i.e. execution of the sale deed dated 06.11.1987 by Mehmood Mian in favour of the respondents. Plaint was amended and the respondents were added as parties. In this amended plaint, the appellants sought a cancellation of this said sale deed dated 06.11.1987 in addition to their prayer for perpetual injunction.

7 Written statement was filed by the respondents in the said suit. The claim made by the appellants was disputed. Submission was that Mahmood Mian being a co-owner in the property (although admittedly an undivided share in the property) was legally authorized to sell his half share and the prayer made in the plaint accordingly be not granted.

8 In the said suit, the following issues were framed:-

1. *Whether the plaintiffs have no locus standi to file the present suit? OPD.*
2. *Whether the suit is bad for non-joinder and mis-joinder of necessary parties as per preliminary objections no. 4” OPD.*
3. *Whether plaintiffs have not valued the suit properly for the purpose of Court fee and jurisdiction? Onus on parties.*
4. *Whether the sale deed dated 6.11.87 executed by Mahmood Mian in favour of defendants No. 2 and 3 in respect of property no. 878, Gali Masjid Anarwali, Bazar Chitli Kabar, Haveli Azqam Khan, Jama Masjid Anarwali, Bazar Chitli Kabar, Haveli Azam Kham, Jama Masjid, Delhi is illegal, void and ineffective. If so, its effect? OPD.*
5. *Whether the plaintiffs are entitled to decree of possession by preemption or on payment of such sum as the Court deem to be fit to the abovementioned property? OPP.*
6. *Whether the plaintiffs are entitled to relief of possession as prayed for, with respect to suit property? OPP.*
7. *Whether the plaintiffs are entitled to decree of perpetual injunction as prayed for? OPP.*
8. *Whether the suit in its present form is maintainable? OPP.*

9. *Relief.*”

9 While returning a finding on issue No. 4, the Court had declared the sale deed executed by Mehmood Mian in favour of the respondents as invalid; this was primarily on the basis that it was in violation of the Court’s order which had directed status quo to be maintained qua the suit property; inspite of the status quo order operating, the parties having entered into a sale deed qua the property, no right or title could have been conferred in favour of the vendee; the sale deed was accordingly declared as invalid; this was by application of the principle of *lis pendens*. Issue No. 5 was not pressed in view of the statement given by the plaintiffs in Court. No finding was accordingly returned on this issue. The judgment of the Court was delivered on 13.11.2006. The suit of the plaintiffs was partly decreed; the sale deed dated 06.11.1987 executed by Mehmood Mian in favour of the respondents was declared void and ineffective and was ordered to be cancelled; the respondents were directed to handover the vacant and peaceful possession of the first floor of the suit property to the appellants. This order has since been

complied with. Admittedly the entire suit property is now in possession of the appellants.

10 The present suit [CS(OS) No. 1449/2010] had been filed by the respondents for specific performance, mandatory injunction, declaration and perpetual injunction. They had sought specific performance of the agreement to sell dated 08.08.1987. This suit was filed in July, 2010. Admittedly interim relief was declined to the respondents.

11 Written statement was filed by the appellants. The allegations made in the plaint were refuted.

12 The following issues were framed in this suit; they read as under:-

- 1. Whether late Shri Abdul Waheed, son of late Shri Abdul Majid was inducted as a tenant in the entire first floor of property no. 878, First Floor, Haveli Azam Khan, Chitli Qabar, Delhi, as alleged in the plaint?*
- 2. Whether late Shri Mahmood Mian had agreed to sell the first floor of property no. 878, First Floor, Haveli Azam Khan, Chitli Qabar, Delhi to Abdul Waheed and Fakra Sultana on 8.8.1987 for a consideration of Rs. 48,000/- as alleged in the plaint?*
- 3. Whether the suit is barred by res judicata, as alleged in the written statement?*
- 4. Whether the plaintiffs are entitled to specific performance of the agreement alleged to have been executed by Mahmood Mian on 8.8.1987?*

5. *Whether the plaint is proper valued for the purpose of court jurisdiction?*
OPP
6. *Whether the plaintiffs are entitled to declaration sought by them? OPP.*
7. *Whether the plaintiffs are entitled to injunction sought by them? OPP.*

13 The impugned order dated 03.03.2011 had also framed an additional issue on limitation which is to the following effect:-

“Whether the suit is within limitation? OPP”

14 Vide the same order, issue No. 3 was taken up as a preliminary issue and the plea set by the appellants that the present suit is barred by the principle of res-judicata had been negatived. The learned Single Judge was of the view that Section 11 of the Code would have no application to the instant facts as what had been decided in the earlier suit was the invalidation of the sale deed dated 06.11.1987 based on the principle of *lis pendens*; there was no finding on the agreement to sell purported to have been executed by Mehmood Mian on 08.08.1987; there was also no finding that Mehmood Mian was not competent to enter into the aforementioned agreement to sell or to execute the sale deed in favour of the respondents. The plea of res-judicata was accordingly dispelled.

15 The learned counsel for the appellants is aggrieved by this finding. His submission is that the entire exercise has been taken up by the respondents only to pressurize and harass the appellants; the respondents have lost the battle on the sale deed right up to the Supreme Court; the order passed in suit No. 605/1987 declaring the said sale deed to be null and void has been upheld in RFA No.80/2007 on 20.04.2010 and finally by the Apex Court on 20.08.2010 in Special Leave to Appeal (Civil) No.22467/2010. There was no occasion for the respondents to have filed the present suit seeking specific performance of an agreement to sell which was admittedly executed prior in time to the sale deed and once the sale deed itself had been declared null and void, the question of going into the merits of the agreement to sell would not arise. To advance this submission, reliance has been placed upon Ramadhar Shrivastava Vs. Bhagwandas 2005 (2) RCR 584; submission being that the present suit was barred by the principle of constructive res-judicata; the object of Explanation IV of Section 11 of the Code is to compel the plaintiff or defendant to take all grounds in one and the same suit; it was incumbent upon the respondents to have disclosed to the Court in their written statement in the first suit (Suit No. 605/1987) that there was any

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agreement to sell in their favour; they not having done so are now impliedly barred from raising this plea; this document is even otherwise a sham document as the entire transaction even as per the respondents is by cash; it is also not possible for the respondents to cross the hurdle of limitation; the present suit has admittedly been filed in July, 2010 seeking enforcement of an agreement to sell dated 08.08.1987. On all counts, the suit is liable to be dismissed; the impugned order is liable to be set aside.

16 Learned counsel for the appellants has also drawn the attention of this Court to an order passed by the executing Court in Execution No. 108/2011 wherein the respondents who were the judgment debtors before the executing Court had chosen to file an application challenging the decree dated 13.11.2006 which was in favour of the appellants and against the respondents relying upon certain communications as also a relinquishment deed by one son of the appellants in their favour; these documents had been set up by the respondents to ward off the execution of the decree for which purpose police aid had also been granted to the appellants pursuant to which possession of the premises had also been

taken over by the decree holder. These documents relied upon by the respondents had been examined by the trial Court to return a finding that they were sham documents; objections filed by the respondents/objectors before the executing Court were dismissed with cost of Rs.1 lac; it had been noted that the judicial system has been abused. Learned counsel for the appellants urges that this order which has since become final is a reflection of the conduct of the respondents.

17 Arguments have been countered by the learned counsel for the respondents. His submission is that the impugned order does not suffer from any infirmity; the learned Single Judge has rightly returned a finding that the principle of res-judicata cannot apply in the instant factual scenario as what had been decided was the validity of the sale deed dated 06.11.1987 and the agreement to sell dated 08.08.1987 had not been gone into.

18 We are not in agreement with the submissions made by learned counsel for the respondents. This case appears to have a chequered history. The respondents had been inducted as tenants by Mehmood Mian in 1987 on the first floor portion of the suit property. An

agreement to sell dated 08.08.1987 has been set up by the respondents on the basis of which the present suit has been filed. This suit has admittedly been filed in July, 2010. A question has been posed to the learned counsel for the respondents as to how he would seek to cross the hurdle of limitation in view of the issue of limitation having now been framed on 03.03.2011 as a preliminary objection. Learned counsel for the respondents has no answer. Admittedly he is seeking specific performance of an agreement to sell dated 08.08.1987 by filing a suit in July, 2010. In fact, in para 29 of the plaint, the respondents have admitted that the right to challenge the agreement to sell has now become barred by limitation.

19 Be that as it may the impugned order even otherwise cannot be sustained.

20 The doctrine of res-judicata is contained in Section 11 of the Code. It reads herein as under:-

“11. Res judicata.-

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under
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the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

21 Explanation IV is relevant; it reads as under:-

Explanation IV.- Any matter which might and ought to have been made ground of defence of attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

22 The principle of res-judicata is based on the need of giving a finality to judicial decisions. The bar contained in the principle is that the same matter should not be adjudged again. Section 11 embodies a rule of conclusiveness of judgments as to the points decided. It bars as a plea an issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue has become final. The essential ingredients to give effect to this doctrine can be enumerated as under:-

- “(i) that the parties are same or litigating under same title,*
- (ii) that the matter directly and substantially in issue in the subsequent suit must be same which was directly and substantially in issue in the former suit,*
- (iii) that the matter in issue has been finally decided earlier and*
- (iv) that the matter in issue was decided by a Court of competent jurisdiction.”*

23 All these conditions must co-exist.

24 Explanation IV of Section 11 is premised on the principle of constructive resjudicata. It states that any matter which might and ought to have been made a ground of defence or attack in the former suit of the nature, (referred to in the body of the section) shall be deemed to have been a matter directly or substantially in issue in such a suit. This explanation, therefore, refers to pleas which ought to have been taken in the former suit but not actually taken. In the nature of things, therefore, such pleas which are not actually taken but which ought to have been taken, can never be heard and much less decided. From a reading of Section 11 read with the aforementioned explanation it is evident that a decision of the Court is final not only if it has been decided in an earlier suit between the same parties but also even if the matter might or ought to have been made a ground of defence or attack in the former suit.

25 By applying these principles to the facts of the instant case, it is clear that in the first suit which had been filed by the appellants seeking an invalidation of the sale deed dated 06.11.1987, a written statement had been filed by the respondents negating these averments. In this written statement, the plea of the agreement to sell (dated 08.08.1987)

had not been set up. The agreement to sell was not adverted to in this written statement; the attack on the sale deed necessarily envisaged an attack on the agreement to sell as well as in terms of the invalidated sale deed only the balance amount of Rs.38,000/- was paid out of the total consideration of Rs.48,000/- as an earlier sum of Rs.10,000/- had already stood paid as earnest money at the time of the execution of the agreement to sell. The respondents at the time of filing of their written statement in the first suit had the opportunity to raise this issue; they not having raised it, such a plea which might or ought to have been taken by them in this earlier suit shall be deemed to have been taken and decided against them and could not be set up in the subsequent suit. It was a matter directly and substantially in issue in the first suit. On this principle of constructive res-judicata, the second suit which is premised on this agreement to sell is necessarily barred.

26 The rule of constructive res-judicata is founded on consideration of public policy. It is not only in the interest of public at large based on a principle that a finality should be attached to binding decisions pronounced by Courts of competent jurisdiction; individuals should not

be vexed twice over for the same litigation. By the deeming fiction, the judgment of the first Court while invalidating the sale deed dated 06.11.1987 had also pronounced its verdict on the agreement to sell dated 08.08.1987 which was a matter 'directly and substantially in issue' in the said suit; even though no specific plea or defence about the said agreement had been taken by the respondents in those pleadings.

27 The impugned order is accordingly set aside. The suit of the plaintiffs being barred by res-judicata, as a necessary consequence it must be dismissed. It is accordingly dismissed.

28 Appeal is allowed in the aforesaid terms. Parties are left to bear their own costs.

CM No. 11117/2012 (for stay)

29 In view of the above orders passed in the main appeal, no further orders are called for in this application which is accordingly disposed of.

INDERMEET KAUR, J.

SANJAY KISHAN KAUL, J.

MARCH 20, 2013

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