

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 17.09.2013

+ **FAO(OS) 424/2013**

SHRI VED PRAKASH YADAV

..... Appellant

Versus

SHRI NARAYAN DAS (DECEASED)

THROUGH: LEGAL HEIRS & ORS.

..... Respondents

Advocates who appeared in this case:

For the Appellant	:	Mr R.M.Sinha, Adv.
For the Respondents	:	Mr Kirti Uppal, Sr. Adv. With Ms Aastha Dhawan, Adv.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM No. 14539/2013

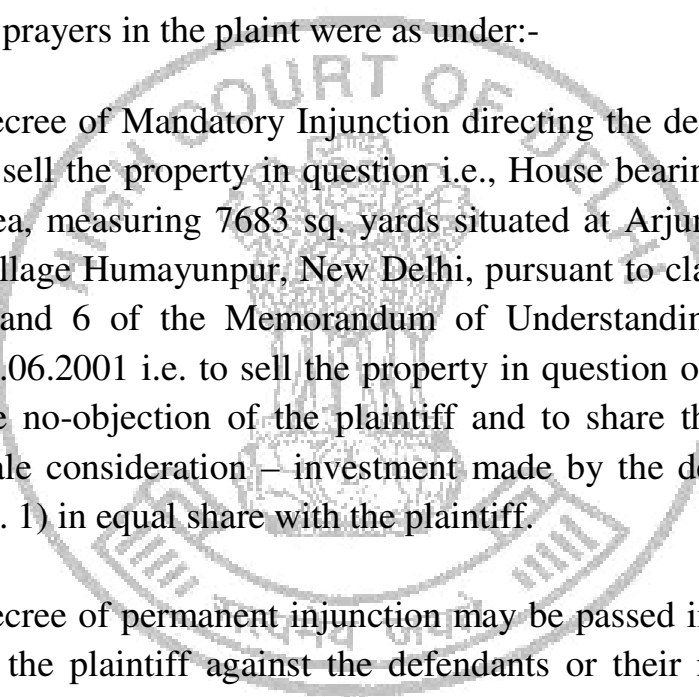
Exemption is allowed subject to all just exceptions.

FAO (OS) 424/2013

1. This appeal is directed against the order dated 27.08.2013 passed by a learned single Judge of this court in I.A. Nos. 22522/2012 and 2963/2013. The said applications were filed in CS(OS) No. 1042/2005 which has been filed by the appellant / plaintiff. I.A. No. 22522/2012 was an application

seeking restoration of the said suit. I.A. No. 2963/2013 was an application under Order VI Rule 17 CPC seeking amendment of the plaint.

2. The said suit as originally filed by the appellant/plaintiff sought several reliefs including the relief of mandatory injunction injunctioning the defendant from selling the property in question namely House No. 2 situated at Arjun Nagar, village Humayunpur, New Delhi, measuring 7683 Sq.Yards. The prayers in the plaint were as under:-

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- “i. Decree of Mandatory Injunction directing the defendants to sell the property in question i.e., House bearing No. 2 area, measuring 7683 sq. yards situated at Arjun Nagar, Village Humayunpur, New Delhi, pursuant to clause No. 5 and 6 of the Memorandum of Understanding dated 18.06.2001 i.e. to sell the property in question only with the no-objection of the plaintiff and to share the profit (sale consideration – investment made by the defendant no. 1) in equal share with the plaintiff.
 - ii. Decree of permanent injunction may be passed in favour of the plaintiff against the defendants or their nominee restraining them from selling, alienating, transferring, creating third party interest or other otherwise parting with the possession of the property i.e., House bearing No. 2 area, measuring 7683 sq. yards situated at Arjun Nagar, Village Humayunpur, New Delhi in violation of clause No. 5 and 6 of Memorandum of Understanding dated 18.06.2001 i.e. not to sell the property in question till no objection is obtained from the plaintiff and without paying the profit (sale consideration – investment of the defendant No. 1) in equal share to the plaintiff.

- iii. Such other or further orders may be passed in favour of the plaintiff and against the defendants as this Hon'ble Court deems fit and proper under the circumstances of the case.
- iv. Cost of the suit may also be awarded to the plaintiff."

3. The defendant No.1 filed an application being I.A. No. 7017/2005 under Order VII Rule 11 CPC for rejection of the plaint on the ground that it failed to disclose a cause of action. During the pendency of the said application the plaintiff had filed two applications being I.A. Nos. 3040/2006 and 1703/2007 both under Order VI Rule 17 CPC for amendment of the plaint. By an order dated 26.09.2012 the learned single Judge allowed the defendant's application (I.A. No. 7017/2005 under Order VII Rule 11 CPC) and thereby passed an order rejecting the plaint on the ground that it failed to disclose a cause of action. The court observed that on the date of the suit, no mandatory injunction could have been sought directing the defendants to sell the suit property to the plaintiff as the plaintiff had admitted in the plaint itself that the defendant No.1 had already sold the suit property. It is on that basis that the defendant Nos.2 to 4, who were the purchasers, were made co-defendants in the said suit. However, while rejecting the plaint, the learned single Judge also observed that apart from the relief of injunction, no other relief was claimed and it is for that reason that the plaint was rejected for not disclosing any cause of action.

4. Being aggrieved by that order, the appellant / plaintiff filed an appeal before being FAO(OS) No. 514/2012 which was disposed of by a Division Bench by an order dated 31.10.2012. The learned counsel for the appellant/plaintiff pointed out before the Division Bench that the suit was not just for mandatory injunction or permanent injunction but that it also had a prayer with regard to sharing of profits with regard to the (sale consideration-investment made by the defendant No.1) in equal share with the appellant/plaintiff. The learned counsel pointed out before the Division Bench that prayer (i) of the plaint had two parts and that the learned single Judge had not noted the second part of the prayer. It is in this context that the Division Bench, by virtue of its order dated 31.10.2012, had observed as under:-

“However, our attention has been drawn to the manner in which the first relief has been framed. Apart from the decree of mandatory injunction, a further relief has been claimed to share the profits (sale consideration – investment by the defendant No. 1) in equal share with the plaintiff. It is, thus, the case of the appellant that in terms of the agreement inter se the parties, he is entitled to this money. Learned counsel for the appellant states that this is the only relief which he seeks to press, which has not been dealt with in the impugned order.”

From the above extract it is apparent that before the Division Bench the appellant/plaintiff had only made a claim with regard to the second part of prayer (i) of the plaint. And, that part pertains to the share of profit (sale consideration-investment made by the defendant No.1) in equal share with

the plaintiff. It is pertinent to note that the Division Bench order specifically records the statement of the learned counsel for the appellant that it is the only relief which the plaintiff seeks to press and the same had not been dealt with in the impugned order dated 26.09.2012. It is on this basis that the Division Bench observed as under:-

“Learned counsel for the appellant also concedes that having come to know of the exact amount, he would be liable to pay ad valorem court fees on the amount for which he seeks recovery on the basis of 50% share of the difference between the investment and the further sale.

We are conscious of the fact that this may necessitate an appropriate application to be filled by the appellant seeking amendment of the plaint. In case the appellant seeks amendment of the plaint, we leave it open to the respondents to raise all such defences as are permissible in law, but in view of this stand of the learned counsel for the appellant, the directions for rejection of the plaint could not have been passed as this relief survived for consideration, whatever be its worth.

In view of the aforesaid, while we agree with the decision of the learned Single Judge qua the plea of mandatory and permanent perpetual injunction, which also is conceded by learned counsel for the appellant, the plaint is not liable to be rejected on account of the latter part of prayer(i).

The appeal is allowed to the limited extent aforesaid, leaving the parties to bear their own costs.”

From the above, it is apparent that the plaint survived only with regard to the latter part of prayer (i) of the plaint as originally filed by the appellant/plaintiff. It is also evident that that was the only relief which the

appellant / plaintiff sought in the said suit. Thereafter, the said application for restoration was moved by the appellant/plaintiff as also the application, being I.A. No. 2963/2013 under Order VI Rule 17 CPC, for permitting amendments. The learned single Judge observed that on 17.12.2012 when the said I.A. No. 22522/2012 for restoration had come up for hearing, the learned counsel for the plaintiff had stated that he would file an appropriate application to amend the plaint so as to claim a specific amount and would pay ad valorem court fee on that amount. Thereafter, the matter was renotified for 12.03.2013. In the meanwhile, the appellant/plaintiff filed the said application being I.A. No. 2963/2013 under Order VI Rule 17 CPC on 30.01.2013. The learned single Judge observed that the amendment application was not in terms of the order passed by the Division Bench on 31.10.2012 inasmuch as, apart from the second part of the prayer (i) of the plaint as originally filed, the plaintiff was also seeking several other reliefs which were not permissible because of the order passed by the Division Bench.

5. The learned single Judge dismissed both the applications being I.A. No. 22522/2012 and 2963/2012 as under:-

“10. Admittedly the plaintiff is yet to pay the appropriate court fees. However, the amendment does not set out the precise amount constituting the share of profit which the plaintiff is seeking, and which is the only relief permitted to be claimed by him in terms of the Division Bench by the order dated 31st October 2012. In other words, this court finds that the amendment now sought by the

plaintiff is not consistent with the order dated 31st October 2012 passed by the Division Bench. He has neither amended the plaint to indicate the precise amount of profit of which he is seeking a half share nor has he paid the appropriate court fees on that basis. In the absence of such amendment, the question of revival of the main suit, on the basis of the Order dated 31st October 2012, does not arise.

11. Consequently, both the applications, i.e., IA. No. 22522 of 2012 and 2963 of 2013 are dismissed. However, it is clarified that as and when the plaintiff files an appropriate application consistent with the order of the Division Bench dated 31st October 2012, such application will be considered on its merits.”

6. The learned counsel for the appellant submits that the order is contrary to law inasmuch as after the revival of the suit on account of the order dated 31.10.2012 passed by the Division Bench, the plaintiff was entitled to move any application for amendment, as also to press for the applications for amendment which he had filed prior to the rejection of the plaint. We are not impressed by this argument at all inasmuch as before the Division Bench the appellant/plaintiff had categorically stated that the only relief which the plaintiff sought to press was the relief with regard to the latter part of prayer (i) of the plaint as it originally stood. Having made that statement, the appellant/plaintiff cannot now alter the course of the suit. This is so precisely because when the order of rejection of the plaint was set aside by the Division Bench this was perhaps one of the circumstances which weighed before the Division Bench. If the

appellant/plaintiff was aggrieved by that order of the Division Bench it was open to him to have taken this matter in appeal by Special Leave before the Supreme Court. He chose not to do so. In other words the order dated 31.10.2012 passed by the Division Bench was binding on the learned single Judge. The learned single Judge has merely held that in the wake of the Division Bench order of 31.10.2012 the two applications filed by the appellant / plaintiff cannot be accepted inasmuch as the plaintiff had not, in the first place, paid the requisite court fee and in the second place, had sought amendments beyond what was permitted by the Division Bench.

7. The learned counsel for the appellant / plaintiff referred to three decisions of the Supreme Court namely:-

- (i) **Sampath Kumar v. Ayyakannu and Anr:** JT 2002(7) SC 182;
- (ii) **B.K.N. Pillai v. P. Pillai & Anr:** JT 1999(10) SC 61; and
- (iii) **Delhi Wakf Board v. Jagdish Kumar Narang & Ors:** (1997) 10 Supreme Court Cases 192.

8. Insofar as **Sampath Kumar** (*supra*) is concerned, that decision has no bearing on the facts and circumstances of the present case. The question which arose before the Supreme Court in that case was whether it was permissible to convert, through amendment, a suit which was merely for permanent prohibitory injunction into a suit for declaration of title and recovery of possession. In that case the amendment had been disallowed by the trial court although the cause of action had arisen to the plaintiff during the pendency of the suit insofar as the relief for declaration of title

and recovery of possession was concerned. The trial court took the view that it was open to the plaintiff to file a fresh suit. However, the Supreme Court felt that if it was permissible for the plaintiff to file an independent suit then why, for the same relief, could an amendment not be permitted in the existing suit in order to avoid multiplicity of legal proceedings. This is not the case in the present matter. Here, before the Division Bench the appellant/ plaintiff had categorically limited his relief to the latter part of prayer (i) of the plaint as it originally stood and that is how the order on 31.10.2012 must be read and that is how the learned single Judge has read it. And, in our view, correctly so.

9. The second judgment, that is, ***B.K.N. Pillai*** (*supra*) was pressed into service by the learned counsel for the appellant only to show that the court should not have adopted a hyper-technical approach and that a liberal approach should be the general rule particularly in cases where the other side can be compensated with costs. We are of the view that the approach adopted by the learned single Judge was not a hyper technical one. The learned single Judge was abiding by the order passed by the Division Bench and the clear cut and categorical statement made by the learned counsel for the appellant / plaintiff before the Division Bench when the order dated 31.10.2012 was passed. That order has become final inasmuch as no appeal had been preferred by the appellant/plaintiff in respect of that order.

10. The third decision of ***Delhi Wakf Board*** (*supra*) also has no application to the facts and circumstances of the present case and would be

of no assistance to the appellant/plaintiff inasmuch as it deals with Order VII Rule 13, which is not an issue here. It is not as if the appellant/plaintiff had filed a suit only claiming mandatory and permanent injunction and that suit had been rejected. If that would have been the case, it is only then that Order VII Rule 13 might have been pressed into the action. The facts are entirely different and, therefore, the said decision of the Supreme Court in **Delhi Wakf Board** (*supra*) is also of no assistance to the appellant/plaintiff.

11. For all these reasons, there is no merit in the appeal. The same is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

SEPTEMBER 17, 2013

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