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HIGH COURT OF DELHI AT NEW DELHI

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R.S.A. NO.24 of 2013

Decided on : 14th February, 2013

BHULE RAM

..... Appellant

Through: Mr. Mr.Uchit Bhandari, Advocate.

Versus

OM PAL THR. LRS. & ANR.

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

CM no.1970/2013

1. This is an application seeking condonation of ten days delay in re-filing the appeal.
2. I have heard the learned counsel for the appellant and gone through the averments made in the application.
3. For the reasons mentioned in the application, as 'sufficient cause' has been shown, the delay of ten days in re-filing the appeal is condoned.

4. The application stands disposed of.

RSA no.24/2013

1. This is a regular second appeal filed by the appellant against the judgment dated 28.8.2012 passed by the learned District Judge (East), Karkardooma, Delhi in RCA no.34/2012.
2. Briefly stated the facts of the case are that the appellant/Bhuleram filed a suit for declaration and perpetual injunction. It was claimed by the appellant that he had purchased a plot of land measuring 214 sq. yds. forming part of Khasra No.904/319 along with the super structure comprising of one room, one hand pump and boundary wall with a gate situated in the revenue estate of Village Gharoli, Illaqa Shahdara, Delhi on 19th March, 1998 from one Ram Swaroop, S/o Sh.Chhidi Lal.
3. It is further stated that Ram Swaroop had executed transfer documents by way of General Power of Attorney, agreement to sell, receipt dated 19.3.1998. It was further stated that the appellant was in peaceful possession of the said parcel of land in the capacity of its owner. The case of the respondent no.1 was that he had purchased the land measuring 335 sq. yds. forming part of

Khasra no.904/319(same Khasra) at Village Gharoli, Shahdara, Delhi vide agreement to sell, receipt etc. from the respondent no.2/Rishipal. It was alleged that the respondent no.1 filed a suit for specific performance and possession before the Court of learned ADJ bearing suit no.134/99 titled **Ompal Vs. Rishi Pal and three others** in the month of June, 1999.

4. In the suit for declaration, two parties were impleaded as defendants, namely, Ompal and Rishi Pal Verma. In the said suit for declaration, the appellant had contended that an ex parte decree dated 18.8.2001 was passed by the Court of ADJ in Suit no.134/99 in favour of Ompal in respect of the suit property which was common to both; the respondent no.1 and the present appellant. It was pointed out that an application under Order 9 Rule 13 CPC for setting aside the ex parte decree filed by the appellant was also dismissed. Thereafter, the appellant instead of preferring any appeal against the said order of dismissal of his application under Order 9 Rule 13 CPC chose to file the present suit. It was also contended that the land in question was acquired by the Government in 1982-83 and therefore, the said land had not

been transferred by Rishipal to Ompal. It was prayed that the appellant be declared as the owner of the suit land and the respondents namely Ompal or his successor in interest/the other defendants be prohibited from interfering with the possession of the land in question. In this suit, the following issues were framed:-

“(i) Whether the suit is not maintainable in the present form? OPD

(ii) Whether the present suit is barred by the rule of res judicate? OPD

(iii) Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD

(iv) Whether the defendants have played fraud upon the court in the former suit no.34/99 decided by Sh.S.C. Rajan, Ld. ADJ? OPP

(v) Whether the plaintiff is entitled to a declaration declaring the decree dated 18.8.2001 passed in suit no.34/99 as null and void? OPP

(vi) Whether the plaintiff is entitled to a decree of permanent injunction as prayed for in the plaint? OPP

(vii) Relief.

5. All these issues were decided against the appellant and the suit was dismissed.
6. Feeling aggrieved, the appellant has challenged the same by filing an appeal which came to be decided by the District Judge, upholding the judgment passed by the trial court.
7. Still feeling aggrieved, the appellant has filed the present second appeal contending that a substantial question of law is arising from the appeal. The question of law which the learned counsel for the appellant has formulated is as under:-

“Whether the ex parte decree dated 18.8.2001 passed in favour of the respondent no.1 on the basis of fraud can be sustained in the eyes of law?”

8. The learned counsel for the appellant contended that the decree was obtained by fraud because the land in question had already been acquired by the UOI and therefore, could not have been transferred by Rishipal in favour of respondent no.1/Ompal.
9. I have carefully considered the submissions made by the learned counsel for the appellant. I find myself unable to agree with this contention of the learned counsel for the appellant.

10. There is no doubt that the Apex Court in case titled **S.P.Chengalvaraya Naidu (dead) Vs. Jagannath (dead)** AIR 1994 SC 853 has held that fraud if it is brought to the notice of the Court at any stage, will vitiate the entire proceedings including the decree itself but then the question of fraud should not only be pleaded but has to be proved by preponderance of probability before the Court where such suit is brought.
11. In the instant case, a specific issue was framed in the suit of the appellant as to-‘whether the ex parte decree which has been passed against the appellant is vitiated by fraud or not?’ In the suit, the trial court after recording the statement of the appellant and other witnesses came to a definite finding that there was no fraud in the instant case. This finding that there was no fraud in the instant case has been upheld by the appellate Court. Factually, the suit of the appellant, wherein he had challenged the passing of a decree against the respondent no.1 on the basis of fraud was dismissed therefore, it would not warrant entertainment of the second appeal as it does not entail any substantial question of law. It may be pertinent here to mention that the judgment which has been relied

upon by the appellant titled **Ram Chandra Singh Vs. Savitri Devi & Ors.** (2003) 8 SCC 319, to contend that the Court has inherent power to set aside an order/decreed obtained by practicing fraud upon the Court has no application to the present case for the simple reason that this ground was not only pleaded by the appellant in his suit and issue was framed, but also the evidence had been brought on record which did not support the case of the appellant of fraud having been committed. If that be the position, then the judgment which is sought to be relied upon by the appellant will hardly have any applicability to the facts of the present case.

12. In my considered opinion, the present appeal involves four round of litigations inasmuch as, the appellant was a party to the suit for specific performance which was filed by the respondent no.1 against the respondent no.2 and others in which the present appellant was made as defendant no.4. This suit for specific performance was contested by the present appellant inasmuch as he had chosen to file a written statement and disputed the claim of the respondent no.1 but despite having chosen to file the written statement, he remained absent and was further proceeded ex parte

and an ex parte decree was passed against the defendants 1 to 3 who were the parties to that suit.

13. So far as the present appellant is concerned, he was only a proforma party and therefore, no effective order was passed against him.
14. Thereafter, the decree was challenged by the appellant by way of an application under Order 9 Rule 13 CPC but the decree was not set aside and the application was dismissed. Thereafter, the appellant instead of filing an appeal against the dismissal order chose to file a fresh suit for declaration and perpetual injunction in respect of the land in question which was dismissed on merits. Further, judgment of trial court was upheld by first appellate court.
15. Since no appeal was preferred from the said dismissal order or setting aside the ex parte decree, therefore, the decree which had been passed by the competent forum/ADJ against the defendants in that case which also included the present appellant has become final and cannot be assailed as is sought to be done in the instant case.

16. Having regard to the aforesaid fact, I am of the view that no substantial question of law is arising from the present regular second appeal and, accordingly, the same is dismissed.

V.K. SHALI, J.

FEBRUARY 14, 2013
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