

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

+ **FAO No.71/2012 and C.M. Nos.17081/2010 (stay)**
&2039/2013 (stay)

% **1st April, 2014**

PARMINDER SINGH & ANR. Appellants
Through: Mr. Manjit Singh Ahluwalia,
Advocate.

VERSUS

VIRENDER PAL SINGH JOLLY Respondent
Through: Mr. Maninderjeet Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Order 43(1)(u) of Code of Civil Procedure, 1908 (CPC) impugning the order of the appellate court dated 23.8.2008 by which the appellate court set aside the order of the trial court dated 19.12.2006 which had allowed the application of the defendants/appellants under Order 7 Rule 11 CPC and rejected the plaint.

2. Respondent/plaintiff filed a suit for challenging the ex parte judgment and decree dated 27.11.1997 against him (in suit No.114/1993)and in favour of the defendants/appellants on the ground that the same was obtained by practicing fraud. The admitted facts however were that the

application filed by the respondent/plaintiff under Order 9 Rule 13 CPC seeking setting aside of the ex parte judgment dated 27.11.1997 was firstly dismissed on 23.2.2001. That order dated 23.2.2001 was however set aside by this Court in a revision application by remanding the matter back for recording evidence and thereafter deciding the application under Order 9 Rule 13 CPC. Trial court allowed the application under Order 9 Rule 13 CPC by the order dated 2.7.2002, however this Court in civil revision no.902/2002 set aside the order of the trial court and dismissed the application under Order 9 Rule 13 CPC. Respondent/plaintiff had filed an SLP before the Supreme Court but the same was dismissed. Therefore the ex parte judgment and decree dated 27.11.1997 became final.

3. The ex parte judgment and decree dated 27.11.1997 pertains to a suit for possession filed by the appellants/defendants against the respondent/plaintiff being suit No.305/1987. The suit property bearing no.125-C, Pocket A-2/B, Paschim Vihar, New Delhi had been allotted to the father of the appellants/defendants by the DDA vide allotment letter dated 10.1.1983. Possession of the same was taken from the DDA on 10.3.1984. Appellants/defendants' father had handed over keys of the flat in question to one Sh. Surjan Singh (brother-in-law) for looking after the flat. The father of the appellants/defendants died in unfortunate circumstances as he was

murdered while travelling in a train. The keys of the flat were handed over by Sh. Surjan Singh to the respondent/plaintiff to get repairs done. Respondent/plaintiff however illegally occupied the flat and since he refused to vacate, the suit for possession came to be filed. Respondent/plaintiff had relied upon fraudulent and fabricated documents being agreement to sell, power of attorney etc allegedly executed in his favour dated 28.9.1984 by the father of the appellants/defendants, and as per which respondent/plaintiff claimed ownership of the flat. As already stated above, this suit was ultimately decreed ex parte against the respondent/plaintiff vide ex parte judgment and decree dated 27.11.1997 and the application of the respondent/plaintiff under Order 9 Rule 13 CPC was dismissed till the Supreme Court.

4. The respondent/plaintiff did not rest there and filed objections in execution. These objections were dismissed by the executing court vide its order dated 3.6.2006 and appeal against the said order was also dismissed by the appellate court on 1.12.2006.

5. By the application filed by the appellants/defendants under Order 7 Rule 11 CPC in the present suit it was pleaded that the judgment in the earlier suit bearing no.305 of 1987 operated as *res judicata* against the respondent/plaintiff under Section 11 CPC taken with the fact that the suit
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was barred under Section 47 CPC inasmuch as even the objections filed by the respondent/plaintiff were dismissed and the appeal of the respondent/plaintiff against the order dismissing objections was also dismissed as per details already stated above. Trial court allowed the application under Order 7 Rule 11 CPC and held that the suit was barred by the provisions of Sections 11 and 47 CPC noting that no particulars of fraud were pleaded in the plaint.

6. The appellate court has allowed the appeal by the impugned judgment and dismissed the application of the appellants/defendants, inter alia by making the following observations on the aspect of fraud and Section 11 CPC:-

“7. I have seen the trial court records, impugned order, grounds of appeal and feel that the order of the Ld. Civil Judge with respect to the order u/o 7 Rule 11 CPC be set aside and file be sent back to the Ld. Trial Court for further trial as per law on the following grounds:

Firstly, so far as the order u/o.8 Rule 10 CPC is concerned, plaintiff/appellant is not registered. *Hence the order of the Ld. Civil Judge with respect to the application u/o 8 Rule 10 CPC is maintained.*

Secondly, the Ld. Civil Judge stated that the present suit is barred u/s. 41(a) of the Specific Relief Act. Section 41(a) of the Specific Relief Act provides as under:

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings.

This section only speaks about the injunction. Reasoning may be correct had the suit been filed only with respect to the injunction but the suit is for declaration as well as for injunction.

Thirdly, I have seen the prayer of the injunction in the original suit. Though the relief should be interim relief, the relief is worded in the absolute terms. Plaintiff is seeking in relief of injunction that till the suit is decided and disposed defendant be restrained from executing the decree in the previous suit and that is allowed. Hence the relief is not covered u/s 41(a) of Specific Relief Act.

Fourthly, so far as relief of declaration is concerned it is stated that the previous judgment/decreed has to be sought to be null and void on the ground of fraud. However, the fraud is not explained. Merely because the fraud has not been explained cannot be the ground for rejection of the plaint. If the particulars has not been given it could have been taken by examining the pleadings and then the Ld. Civil Judge could pass the appropriate order.

Fifthly, Order 7 Rule 11 provides as under:

Rejection of plaint-The plaint shall be rejected in the following cases:

- a) where it does not disclose a cause of action;**
- b) where the relief claimed is under-valued, and the plaintiff, on being required by the Court to so correct the**

valuation within a time to be fixed by the Court, fails to do so;

c) where the relief claimed is properly valued, but the plaintiff is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so.

d) Where the suit appears from the statement in the plaint to be barred by any law;

e) Where it is not filed in duplicate:

f) Where the plaintiff fails to comply the provisions of Rule 9:
Only ground (a) of Order 7 Rule 11 CPC is applicable in the present case. There is no finding that the order is based on Order 7 Rule 11 (a). So far as the relief of injunction is concerned that may be barred u/o. 7 Rule 11(d) but the reliefs of declaration are not barred u/o. 7 Rule 11(d) by virtue of Section 41 (a) of Specific relief Act.

Sixthly, it is well established and even noted by the Ld. Civil Judge that while dealing with application u/o. 7 Rule 11 CPC only plaint has to be seen but the order shows that the Ld. Civil Judge has travelled beyond the pleadings. It is stated in the order that the plaintiff has not stated the facts and concealed the facts with respect to the dismissal of the application and even dismissal of review application. If these facts were not stated in the plaint then how Ld. Civil Judge note these facts and from where. During the order the Ld. Civil Judge discussed about the res judicata and then it is stated by Ld. Civil Judge that the suit is not barred by res judicata even otherwise res judicata is not the ground u/o 7 Rule 11 CPC. That may be the ground on a separate application u/s. 11 of the CPC.

8. In view of the above, the appeal of the appellant is hereby allowed. The case is remanded back to the Ld. Trial Court for fresh trial as per law.”

7. In my opinion, the appellate court committed gross illegality inasmuch as one fails to understand as to how the appellate court has overlooked the mandate of Order 6 Rule 4 CPC which required that in any suit in which fraud is pleaded there have to be pleaded detailed particulars of the fraud. This is all the more so required in the present case because the suit was to nullify the earlier judgment and decree dated 27.11.1997 which operated as *res judicata* and to which proceedings the respondent/plaintiff was very much a party. No doubt, a suit can be filed alleging perpetuation of fraud, however, in cases such as the present, the plea of fraud cannot be easily used to overcome the bar under Sections 11 and 47 CPC especially when not only the application under Order 9 Rule 13 CPC was dismissed right till the Supreme Court but also objections filed by the respondent/plaintiff in execution of the judgment and decree dated 27.11.1997 were dismissed and even an appeal against that order dismissing objections was also dismissed.

8. Clearly therefore the impugned judgment of the appellate court is totally illegal and perverse to say the least. If the impugned judgment is allowed to stand, really respondent/plaintiff will profit from false litigation, and continue to illegally hold on to possession of the suit property, and of which respondent/plaintiff has been illegally in possession way back

from around the year 1997. The appellate court has passed the impugned judgment in a very cursory and mechanical manner without giving reasoning as to why particulars of fraud ought not to have been mentioned inasmuch as it is only after fraud is pleaded that evidence can be led with respect to the pleadings of fraud and in the absence of pleadings, no evidence can be led with respect to plea of fraud. In this case, the plea of fraud was clearly a malafide and dishonest plea to avoid handing over possession of the suit property to the appellants/defendants and prevent execution of the judgment and decree dated 27.11.1997 in favour of the appellants/defendants.

9. In view of the above, this appeal is allowed. Impugned judgment of the appellate court dated 23.8.2008 is set aside and the judgment of the trial court dated 19.2.2006 is sustained whereby the plaint of the respondent/plaintiff shall stand rejected under Order 7 Rule 11 CPC. Considering the facts of the present case, the appeal is allowed with costs of Rs.50,000/- because I find that the respondent/plaintiff is engaging in unnecessary false litigation and has been continuing to illegally occupy the suit property of which the appellants/defendants are the owners. Supreme Court in the case of *Ramrameshwari Devi & Ors. Vs Nirmala Devi & Ors. (2011) 8 SCC 249* has held it is high time that in certain litigations heavy costs must be imposed. I am also empowered to impose costs in terms of *FAO No.71/2012*

***Volume V of the Punjab High Court Rules and Orders (as applicable to
Delhi) Chapter VI Part I Rule 15.***

APRIL 01, 2014
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VALMIKI J. MEHTA, J.