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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **RFA(OS) No.73/2013 & CM No.10379/2013**

Date of Decision: 14th July, 2014

M/S AJS BUILDER PVT. LTD & ANR Appellants
Through Mr.Kuljeet Rawal, Adv.

versus

HARVINDER SINGH Respondent
Through Mr.Sudhir Nandrajog, Sr. Adv. with
Mr.H.S. Kohli, Adv.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE SUNIL GAUR

GITA MITTAL, J (Oral)

1. By way of the present appeal, the appellants have challenged the order dated 25th April, 2013 whereby his Review Petition no.193/2013 was dismissed. The appellants had thereby sought review of the judgment and decree dated 23rd January, 2013 decreeing CS(OS) No.3260/2011. A preliminary objection has been pressed with regard to the maintainability of the present appeal on behalf of the respondent. It is submitted that RFA(OS) No.34/2013 assailing the judgment & decree dated 23rd January, 2013, was unconditionally withdrawn, and, therefore, the present appeal challenging the review order is not maintainable.

2. A suit being CS (OS) No.3260/2011 was filed by Shri Harvinder

Singh (respondent herein) claiming under a registered sale deed dated 15th December, 2009 executed in his favour by M/s AJS Builder Private Limited (appellant no.1 in the present appeal arrayed as defendant no.2 in the plaint). In this sale deed, M/s AJS Builders Private Limited has claimed as follows:-

“Whereas the Vendor is the absolute owner and in possession of entire First Floor portion upto ceiling level along with a constructed portion over and above First floor (shown in RED color in plan annexed herewith), and Staircase from ground onwards (shown in Red color in plan annexed herewith), except Barsati and Open Terrace (Shown in YELLOW colour in plan annexed herewith) with common entrance, parking and easements attached thereto, (Shown in GREEN colour in plan annexed herewith) bearing part of Property No.3, Block No.88 and known as Municipal No.1-B/P-55-55A, along with proportionate undivided share/land rights in the land measuring 7685 Square feet i.e. 850 square yards approximately, situated in the abadi of Lady Harding Road, Gole Market, New Delhi-110001. It is now known as 8, Shaheed Bhagat Singh Marg, Gole Market, New Delhi-110001 (hereinafter called the said PROPERTY).”

3. This property was transferred by M/s AJS Builders Private Limited to Harvinder Singh for a sale consideration of Rs.2,25,00,000/- received by M/s AJS Builders Private Limited. We may usefully extract clause 1 & 2 of the registered sale deed which reads thus:-

“1. That in pursuance of the mutual settlement, the total sale consideration amount of Rs.2,25,00,000.00 (Rupees Two Crore and Twenty Five Lakhs Only) which has been received by the Vendor from the

Vendee, as per details given below:-

Cheque No.	Date	Amount (Rs.)	Drawn on
Receipt	04.03.09	76,40,000.00	
717817	24.03.09	25,00,000.00	ABN AMRO BANK
37412	30.03.09	40,00,000.00	ABN AMRO BANK
666731	05.06.09	20,00,000.00	ABN AMRO BANK
Receipt	11.12.09	45,60,000.00	
149201	15.12.09	18,00,000.00	

The receipt of which the Vendor hereby acknowledges and admits in the presence of the Sub-Registrar, New Delhi at the time of registration of this Sale Deed and the Vendor doth hereby sell, convey, & transfer all the rights, titles and interests of the said PROPERTY on to the VENDEE, who shall hereafter become the sole and absolute owner of the said PROPERTY with the proportionate rights of the Land underneath along with fixtures, furnitures and fittings and fittings of the said PROPERTY without any claim from the VENDOR or any other person in any manner whatsoever.”

“2. That the Vendor with its free-will and without any pressure hereby sells(s), convey(s), transfer(s) and assign(s) the above said portion in the name of the Vendee and the Vendee is free TO HAVE AND TO HOLD the said portion absolutely and forever with all its legal rights, title and interest.”

The receipt of the above amounts as being the sale consideration was acknowledged in Clause 1 of the sale deed dated 15th December, 2009. It may be noted that the sale consideration has not been paid in one day but over a period of time.

4. So far as possession is concerned, the appellant no.1 had stated thus in the sale deed:

“3. That the actual peaceful and physical possession of the said PROPERTY (Shown in RED and GREEN colour in the plan annexed herewith) has been handed over by the Vendor to the Vendee and the symbolic possession of portion A-2 (Shown in Red colour in the plan annexed herewith has been handed over by the VENDOR to the VENDEE.”

5. The appellant no.1 confirmed as title declaratory in Clause 6 thus:-

“6. That the Vendor hereby assures the Vendee that the said PROPERTY under sale is free from all sorts of encumbrances, burden, sale, Decree, Will, Gift, Revision, Writ, Appeal, Court Injunction, Stay Order, any Litigation of any kind, or any other kind of transfer etc. and there is no defect in the title of the said PROPERTY, if proved otherwise then the Vendee shall be bound to indemnify to the Vendee and the Vendor shall be bound to fulfil all such losses sustained by the Vendee as per prevailing rates of the PROPERTY at that point of time.”

6. The sale deed also contains the following terms:-

“10. That the Portion A-2 (Marked & shown in RED colour in the plan annexed herewith) is under tenancy of M/s Paradise Towers Pvt. Ltd. and the Vendee is entitled to receive rent from the tenant and take possession from the tenant after completion of tenancy period of earlier termination or otherwise.”

7. We may note that the sale deed contained all usual covenants including covenant in clause 7 that the dues, demands, taxes, bills like House Tax, Electricity Bills and other liabilities relating to the said portion of the property upto the date of execution of the sale deed has

been paid by the vendor and thereafter such dues shall be paid by the vendee. The sale deed also contained the covenant as clause 8 that the vendee shall have full right to get the above said portion mutated in his own name in the records of the N.D.M.C., L&DO, electricity and water departments and other department(s) at their own expenses and that the vendor shall be liable to sign on all such papers, in connection with the transfer of the same in the records of N.D.M.C.

8. In clause 11, the appellant no.1/AJS Builders Private Limited also made the categorical declaration to the following effect:-

“11. That the Vendor is left with no right, title or interest in the said PROPERTY, which is hereby conveyed by the Vendor to the Vendee, by means of this SALE DEED.”

9. As per the respondent (plaintiff in the suit), being harassed with the conduct of the defendant, a legal notice dated 14th May, 2011 was issued, apart from a communication in personal capacity on 16th May, 2011, terminating the tenancy of M/s Paradise Towers Private Limited (defendant no.1) w.e.f. 15th July, 2011 and demanding arrears of rent outstanding in respect of the property since 15th February, 2010.

It is an admitted position that no reply was sent by either the appellant or tenant-the defendant no.1 to this legal notice.

10. Finally on 15th November, 2011, the respondents filed CS (OS)

No.3260 of 2011 seeking the following reliefs:-

- “(I) recovery of arrears of rent of Rs.17,60,000/-;
- (II) recovery of possession of the tenanted premises;
- (III) recovery of pendent lite and future mesne profits with interest.”

11. It is to be noted that the plaintiff had asserted in the plaint at the time of sale deed dated 15th December, 2009, that it owned the constructed portion above the first floor, that is the second floor of the property, and that the same was in the possession of M/s Paradise Towers Private Limited as a tenant on a monthly rent of Rs.1,10,000/- and that the plaintiff was handed over constructive/symbolic possession thereafter. It was also asserted that M/s Paradise Towers Private Limited paid rent to the plaintiff for a period of two months but stopped paying rent thereafter and that shortly after the execution of the sale deed, the staff of M/s Paradise Towers Pvt. Ltd. started operating from the said tenanted portion.

12. The appellants were duly served with the summons in the suit and entered appearance before the court on the 25th January, 2012.

13. We find from the record placed before us that an application under Order 39 Rule 4 of the CPC being IA No.3241 of 2012 was filed by both the defendants. By an order passed on 21st February, 2012, notice was issued on this application.

Yet another application being IA No.8736 of 2012 was filed again

under Order 39 Rule 4 of the CPC by the defendant no.2 M/s AJS Builders Pvt. Ltd. only. On 8th May, 2012, IA No.3241 of 2012 the first application for vacation of injunction was withdrawn. On this date, the plaintiff was also enjoined by the learned Single Judge from obstructing the respondent no.2 from enjoying occupation and possession of the said property.

14. It is also on record that after the 8th May, 2012, no appearance was put in by M/s Paradise Towers Pvt. Ltd. appellant no.2/defendant no.1 in the suit proceedings before the learned Single Judge.

15. Despite repeated opportunities to the defendants to file written statement, they failed to do so. Finally by an order dated 21st August, 2012 of the Joint Registrar, the appellant's right to file written statement was closed.

This order has attained finality. No leave was sought by the appellant in accordance with law nor an appeal filed against the order of the Joint Registrar.

16. It is also on record that the plaintiff thereafter proceeded to file an application under Order 8 Rule 10 of the CPC being IA No.13245 of 2012 praying for a decree against the defendants who had failed to file the written statement. Notice of this application was accepted by the defendant no.2-M/s AJS Builder Pvt. Ltd. on 24th July, 2012.

17. Interestingly, the defendant failed to file a reply even to the

application of the plaintiff under Order 8 Rule 10 of the CPC. By an order dated 31st October, 2012, last opportunity for filing reply was granted to the defendants.

18. In this background, IA Nos.20819/2011 (of the plaintiff under Order 39 Rule 1 & 2 CPC; 8736/2012 (of the defendant no.2 under Order 39 Rule 4 CPC); 8739/2012 (of the defendant no.2 under Order 7 Rule 11 CPC & 13245/2012 (of the plaintiff under Order 8 Rule 10 CPC were listed before the court on the 23rd January, 2013. The learned counsel representing the appellants before us, put in appearance only on behalf of M/s AJS Builders Pvt. Ltd. (defendant no.2) before the learned Single Judge and sought an adjournment to move appropriate application along with its written statement. This prayer was objected on behalf of the plaintiff who pressed consideration of his application under Order 8 Rule 10 of the CPC.

19. The learned Single Judge considered the afore-noticed facts and the conduct of the said defendant and denied the adjournment which was prayed for and proceeded hearing in the afore-detailed applications which came to be decided by the impugned judgment dated 23rd January, 2013.

20. We may briefly note some of the reasons which weighed with the learned Single Judge in passing the judgment dated 21st January, 2013. The learned Single Judge considered the pronouncement of the Supreme Court reported at ***AIR 1999 SC 3381***(para 29) ***Balraj Taneja Vs. Sunil***

Madan (para 29) (which pronouncement was relied upon on behalf of the defendant no.2) and took the view that the facts which the defendants had not controverted in their application under Order 39 Rule 4 CPC which were also not controverted even before the learned Single Judge, were borne out from the documents on record on the basis whereof decree for ejectment under Order 8 Rule 10 of the CPC can be passed. The learned Single Judge also noted that the pointed query to the defendant no.2 as to whether even on such uncontroverted facts, Order 8 Rule 10 CPC cannot be invoked, could procure no answer. Inter alia, on facts the learned Single Judge noted the following:-

(i) The plaintiff's claim as landlord was based on a registered sale deed dated 15th December, 2009 executed by M/s AJS Builders Pvt. Ltd. (defendant no.2) in its favour. The execution and registration of this sale deed was an admitted fact.

(ii) By virtue of the sale deed, the title and notional possession of the tenanted portion stood transferred to the plaintiff. M/s Paradise Towers Pvt. Ltd. (defendant no.1) was described as a tenant therein.

(iii) The averments in the application under Order 39 Rule 4 CPC as well as the oral submissions to the effect that the said sale deed was in lieu of other transactions between the parties

and that no sale consideration as mentioned therein was paid, were directly in contravention of the contents of a duly executed and registered document which were inadmissible in evidence under Sections 91 and 92 of the Evidence Act.

(iv) The submission of learned counsel for M/s AJS Builders Pvt. Limited was that the plaintiff was required to prove attornment by tenant in his favour as well as payment of rent by the tenant to it. In this regard, the learned Single Judge has held that once the title in the property (in occupation of tenant) stands conveyed as by the registered sale deed in the present case, the coming into existence of the relationship of the landlord and tenant between the purchaser and the tenant in occupation of the property conveyed, is not dependent upon the attornment by the tenant of such purchaser as landlord.

(v) In para 14 of the judgment dated 23rd January, 2013, the learned Single Judge placed reliance on ***(2002) 6 SCC 1 Nalakath Sainuddin Vs. Koorikadan Sulaiman; (1997) 5 SCC 329 Mahendra Raghunathdas Gupta Vs. Vishwanath Bhikaji Mogul*** and ***(1988) 3 SCC 63 Mohar Singh Vs. Devi Charan***. Therefore, the question whether the tenant had paid any rent for two months or not as pleaded by the vendee, was held to be irrelevant.

(vi) The plea that M/s AJS Builders Pvt. Ltd. was in possession of the tenanted premises and the denial of the tenancy of M/s Paradise Towers Pvt. Ltd. was held to be diametrically opposite to the clear recital by M/s AJS Builders Pvt. Ltd. and the covenants in the registered sale deed dated 15th December, 2009 wherein the tenanted premises were described to be in the tenancy and possession of M/s Paradise Towers Pvt. Ltd. It was also specifically recorded in the sale deed that M/s AJS Builders Pvt. Ltd. has delivered constructive possession thereof to the vendee.

(vii) There was no denial in the application of M/s AJS Builders Pvt. Ltd. under Order 39 Rule 4 of the CPC that the rate of rent was Rs.1,10,000/- per month.

(viii) The registered sale deed was dated 15th December, 2009 and had been executed against receipt of a total sale consideration of Rs.2,25,00,000/-. It was against the logic that the sale consideration would be paid for a property part whereof was let out for a paltry sum as has been ascertained.

(ix) Control on M/s Paradise Towers Pvt. Ltd. and appellant no.1 M/s AJS Builder Pvt. Ltd. was with the same persons who were family members.

(x) M/s AJS Builders Pvt. Ltd. was claiming that it had no

title to the second floor which had been conveyed by the sale deed to the plaintiff. This being its stand, it was not open for M/s AJS Builders Pvt. Ltd. to contend that the vendee while asserting rights as landlord under the sale deed, was required to lead evidence to prove the rent asserted by it. The rental in any case was not disputed by the defendants/appellants.

(xi) There was no requirement of the plaintiff being called upon to lead evidence with regard to the determination of tenancy in view of the fact that the office copy of the legal notice dated 14th May, 2011 of the determination of the tenancy which bore the signatures of the counsel for the plaintiff; original postal receipt as well as the AD cards bearing signatures and acknowledgment return to the counsel, had been placed on record.

(xii) Placing reliance on the Division Bench pronouncement of this court in *Shri Ram Pistons and Rings Ltd. Vs C.B. Agarwal HUF* passed in RFA No.389/1999 on 11th December, 2008 and *International Building & Furnishing Co.Pvt. Ltd. Vs. Life Insurance Corporation of India* in LPA No.512/2012 on 18th July, 2012, it was held that institution of the suit for ejectment itself amounted to determination of the tenancy.

The suit had been filed on 15th November, 2011 and by

the 23rd January, 2013, when the matter was considered by the learned Single Judge, a period of more than one year had elapsed.

(xiii) The plaintiff had given up its claim for mesne profit and for all these reasons, it could be concluded that the tenancy stood legally determined entitling the plaintiff to decree for ejectment.

21. Premised on the above, the learned Single Judge decreed the suit for possession in favour of the respondent on the 23rd of January, 2013 and directed that a decree sheet be drawn up. In fact the learned Single Judge had granted the prayer made by the plaintiff in IA No.13245 of 2012 which was filed under Order 8 Rule 10 of the CPC.

22. Aggrieved by the above judgment and decree, M/s AJS Builder Pvt. Ltd. alone filed RFA (OS) No.34 of 2013. The appeal came up to be listed before the Division Bench of this court on 20th March, 2013 when upon the oral request of learned counsel, M/s Paradise Towers Pvt. Ltd. was transposed as the second appellant in the case. During the course of hearing of the aforesaid appeal, it was not pressed on behalf of the appellants and came to be withdrawn.

23. Inasmuch as the order recorded by this court on 20th March, 2013 is heavily relied upon by Mr. Sudhir Nandrajog, learned senior counsel for the respondent, to press the preliminary objection to the maintainability

of the present appeal, we may extract the relevant portion of the order in extenso which reads as follows:

“After some hearing, learned counsel for the appellants sought liberty to approach the learned Single Judge with a review application. In the event of the review application being filed within two weeks from today, it is agreed by counsel for the parties that the same shall be considered unhindered by the question of limitation.

The appeal is accordingly dismissed as withdrawn but in the above terms. ”

(Underlining by us)

24. Both the appellants before us filed a review petition under Section 114 read with Section 47 of the CPC seeking review of the judgment and decree dated 23rd January, 2013 which came to be registered as Review Petition No.193 of 2013. This petition was dismissed by the learned Single Judge by the order dated 25th April, 2013. This order passed in R.P. No.193 of 2012 has been assailed before us by way of the present appeal.

25. It appears that before the learned Single Judge, the review petitioners had sought to urge that their entire defence to the suit was contained in IA No.8739 of 2012 which had been filed under Order 7 Rule 11 of the CPC which ought to have been considered while passing the judgment dated 23rd January, 2013. We find that in the order dated 25th April, 2013, the learned Single Judge has noted that the judgment dated 23rd January, 2013 had been passed taking note of the assertions in IA No.8739 of 2012. In the order on the review petition, the learned

Single Judge has also noted that the defendants' fair statement that in fact there was no ground for the rejection of the plaint under Order 7 Rule 11 of the CPC, in the factual matrix of its defence as stated in the application.

26. While rejecting the review petition, the court has also noted that in a suit between the landlord and tenant (as was the suit before it filed by the respondent herein), the question of title was not required to be gone into. It also notes the further fact that the sale deed had been executed by the defendant itself. The execution and registration of the sale deed was admitted by the defendants.

27. So far as the present appeal is concerned, a preliminary objection has been pressed by Mr. Sudhir Nandrajog, learned senior counsel for the respondent herein. It is submitted that in view of the unconditional withdrawal of RFA (OS) No.34 of 2013 on 20th March, 2013, the judgment and decree dated 23rd January, 2013 has attained finality. Therefore, the present appeal laying a challenge to the judgment and decree dated 23rd January, 2013 or the order dated 25th April, 2013 dismissing the review petition are not maintainable. In support of this objection, reliance is placed on the judicial precedent reported at **2013 (135) DRJ 705 (DB) Govt. of NCT of Delhi & Ors. Vs. Mool Chand Sharma**. In this case, the question which arose for consideration was whether in view of withdrawal of earlier appeal filed by the

appellant, a second appeal challenging the order was maintainable or not. It was an admitted position that while withdrawing the earlier appeal, the appellant did not seek any permission from the court to file a fresh appeal against the said order in the event of the review petition which they were proposing to file being dismissed. The observations of the court in paras 4, 6, 9 & 11 which are relevant in this regard read thus:-

“4. The first question, which comes up for consideration is as to whether in view of the withdrawal of the earlier appeal filed by the appellants against the order dated 9.10.2002, a second appeal challenging the said order is maintainable or not. Admittedly, while withdrawing the earlier appeal, the appellants did not see any permission from the Court to file a fresh appeal against the order dated 9.10.2002, in the event of the review petition which they were proposing to file before the learned Single Judge being dismissed. The only liberty taken from the Court, while withdrawing the appeal, was to file a review application before the learned Single Judge. Order 23 Rule 1 of Civil Procedure Code, to the extent it is relevant for our purpose provides that where the plaintiff withdraws from a suit or part of a claim without the permission of the Court, he shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. The provisions contained in Order 23 Rule 1 of the Civil Procedure Code equally apply to the appeals preferred in terms of the said Code.

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6. The appeals to a Division Bench of this Court against the order passed by the learned Single Judge of this Court in exercise of his jurisdiction under Article 226 of the Constitution is governed by Clause 10 of Letters Patent Appeal. Though the provisions contained in the Civil Procedure Code have not been expressly made applicable to the Letters Patent, the principle contained therein would certainly apply inasfar as the effect of withdrawal of an earlier appeal is concerned. Therefore,

once the appeal preferred against the order dated 9.10.2002 was withdrawn by the appellants on 10.1.2003, without obtaining liberty to file a fresh LPA No.73/2007 Page 6 of 19 appeal against the said order, the second appeal challenging the very same order would not be maintainable.

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9. It would thus be seen that though the order granting the review was held to be judgment, no such view was taken with respect to an order refusing a review, the necessary implication being that an order refusing the review is not a judgment under Letters Patent.

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11. Order 47 Rule 1 of Code of Civil Procedure gives a discretion to the Court, to review a judgment/ order in the following circumstances: (a) a new and important matter or evidence has been discovered, which, despite exercising due diligence, was not within the knowledge of the review applicant or could not be produced by him when the judgment or order was passed; LPA No.73/2007 Page 12 of 19 (b) there is some mistake or error apparent on the face of the record; and (c) for any other sufficient reason. When the Court dismisses a review petition, it merely takes a view that no new important matter or evidence as contemplated in Rule 1 of Order 47 of the Code of Civil Procedure has been discovered, there is no mistake or error apparent on the face of the record and there is no other sufficient reason for reviewing of the judgment/order in question and, therefore, declines to exercise the jurisdiction vested in it to review its judgment/decreed or order. Such an order cannot be said to be an order deciding or adversely affecting, directly and immediately, any valuable right of the parties and, therefore, would not qualify as "judgment" within the meaning of clause 10 of Letters Patent, in terms of the decision of the Supreme Court in Shah Babulal Khimji (supra). Consequently, no appeal against an order dismissing the review application is maintainable either under Code of Civil Procedure or under Clause 10 of Letters Patent."

(Emphasis by us)

28. The judgment dated 9th April, 2013 passed in LPA No.114/2013 *Neelam Arya Vs. Din Mohd. (Deceased) & Ors.* is also pertinent wherein the court answered the same question thus:-

“4. As far as order dated 26.2.2009 passed in W.P(C) 2365/1982 is concerned, admittedly, the said order was challenged by the appellant by way of LPA No.217/2011, which came to be withdrawn on 7.3.2011. Admittedly, the appellant, while withdrawing the aforesaid LPA did not seek any permission from the Court to file a fresh appeal against the order dated 26.2.2009 in case the review petition which she proposes to file was dismissed. Having withdrawn the appeal without obtaining liberty to file LPA Nos.114/2013 & 181/2013 Page 4 of 13 a fresh appeal in the event of not succeeding in the review petition, the appellant is precluded from filing a fresh appeal questioning the very same order. Therefore, the appeal to the extent it assails the order dated 26.2.2009 is not maintainable.”

29. Mr.Kuljeet Rawal, learned counsel appearing for the appellants is unable to distinguish these judicial pronouncements or dispute the applicability of principles laid down therein.

30. It may be noted that M/s AJS Builders has set up a plea that it is not the owner of the premises, which admittedly have been tenanted to M/s Paradise Towers Pvt. Ltd. No other person has asserted a title to these premises. No objection has been laid by any person to the sale deed relied upon by the present respondents other than by M/s AJS Builders Pvt. Ltd.

31. It is stated at bar by Mr.Rawal, learned counsel for the appellants that he has filed a suit on behalf of M/s AJS Builders Pvt. Ltd. seeking cancellation of the sale deed.

32. The judgment dated 23rd January, 2013 has attained finality upon unconditional withdrawal of RFA (OS) No.34 of 2013 on the 20th March, 2013 and cannot be assailed by way of the present appeal.

33. So far as the order dated 25th April, 2013 dismissing the Review Petition No.193 of 2013 is concerned, this order does not qualify as a “judgment” within the meaning of the expression in Clause 10 of the Letters Patent and consequently, no appeal against this order lies.

34. In this background, it has to be held that the present appeal is not maintainable. The present appeal is accordingly hereby dismissed. No order as to costs.

(GITA MITTAL)
JUDGE

(SUNIL GAUR)
JUDGE

JULY 14, 2014
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