

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

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Date of decision: 08th July, 2014

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FAO (OS) No.521/2013

BUTNA DEVI

..... Appellant

Through: Mr. R.M. Sinha, Adv.

Versus

AMIT TALWAR & ORS.

..... Respondents

Through: Mr. Aman Mehta, Adv. for R-1.

CORAM:-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This intra-court appeal impugns the order dated 1st October, 2013 (of the learned Single Judge of this Court in exercise of Ordinary Original Civil Jurisdiction in CS(OS) No.1687/2006 filed by the appellant) of allowing the application of the respondent / defendant no.1 for amendment of the written statement.

2. The appeal was accompanied with an application for condonation of 12 days delay in filing thereof. Notice only of the application for condonation of delay was issued. Though a reply is purported to be filed on behalf of the respondent / defendant no.1 to the application for condonation of delay but is

not on record, being under objection, though rejoinder filed by the appellant / plaintiff thereto is on record.

3. Adjournment is sought on behalf of the arguing counsel for the respondent / defendant no.1. None appears for respondent / defendant no.3, the Sub-Registrar, Asaf Ali Road, Darya Ganj, Delhi and the respondent / defendant no.2 Citi Bank despite service; however they are not concerned with this appeal, being against the order allowing the application of the respondent / defendant no.1 for amendment of the written statement.

4. Having gone through the paper book, we were *prima facie* of the opinion that there is no merit in the appeal and for this reason, instead of acceding to the request of the counsel for the respondent / defendant no.1 for adjournment, we have heard the counsel for the appellant / plaintiff on the merits of the appeal without going into the question of delay of 12 days in filing thereof.

5. The appellant / plaintiff instituted the suit from which this appeal arises, for the reliefs of (i) declaration that the sale deed dated 4th August, 2006 registered with the office of the respondent / defendant no.3 Sub-Registrar, Asaf Ali Road, Darya Ganj, Delhi and executed by the plaintiff of property no.R-563, New Rajinder Nagar, New Delhi in favour of the defendant no.1 as

null and void “as the sale consideration mentioned in the sale deed..... has not been paid to the plaintiff as yet” AND IN THE ALTERNATIVE for a direction to the defendant no.1 to pay the balance sale consideration of Rs.30,88,249/- with damages of Rs.5,00,000/- and interest to the appellant; (ii) permanent injunction restraining the defendants from alienating, transferring or creating third party interest in the said property on the strength of the sale deed aforesaid; and (iii) permanent injunction restraining the defendant no.3 Sub-Registrar, Asaf Ali Road, Darya Ganj, Delhi from registering any documents of transfer with respect to the said property, pleading:

- a) that the appellant / plaintiff had agreed to sell the said property to the respondent / defendant no.1 for a total sale consideration of Rs.73,50,000/- out of which a sum of Rs.7,25,000/- was received by the appellant / plaintiff from the respondent / defendant no.1 at the time of Agreement to Sell and the balance Rs.66,25,000/- was to be paid at the time of registration of the sale deed;
- b) that the respondent / defendant no.1 at the time of registration of the sale deed paid a sum of Rs.35,36,751/- to the plaintiff in cash and the balance sale consideration of Rs.30,88,249/- vide cheque drawn on the

defendant no.2 Citi Bank and the total sale consideration shown in the sale deed was Rs.35,00,000/- only;

c) that however there was a typing error in the name of the appellant / plaintiff on the cheque aforesaid and the appellant / plaintiff was assured that a bankers cheque with the correct name of the appellant / plaintiff shall be handed over to the appellant / plaintiff within a day;

d) that the appellant / plaintiff thus retained physical possession of the property;

e) that however neither was another cheque for Rs.30,88,249/- handed over to the appellant / plaintiff nor the said amount otherwise paid;

f) that since the cheque amount of Rs.30,88,249/- had not been paid to the appellant / plaintiff, the registered sale deed deserves to be declared as null and void.

6. The suit was entertained.

7. The respondent / defendant no.1 filed written statement, not denying purchase of the property for the total sale consideration of Rs.73,50,000/- but

denying that the cheque for Rs.30,88,249/- was taken back and further pleading that though in pursuance of the sale deed, the possession of the property had been handed over to the respondent / defendant no.1 but the appellant / plaintiff on humanitarian grounds was allowed to reside in the property for some time and which she had failed to vacate and had filed the suit with *mala fide* intentions.

8. However the respondent / defendant no.1 subsequently filed an application for deposit of the said sum of Rs.30,88,249/- in this Court and which was allowed vide order dated 10th October, 2007 and the amount so deposited was ordered to be kept in fixed deposit.

9. The appellant / plaintiff applied for judgment on admissions but which application was dismissed vide order dated 20th August, 2009. FAO (OS) No.418/2009 preferred thereagainst was also dismissed vide order dated 27.09.2010. During the pendency of the said appeal, the appellant / plaintiff offered to deposit the amount of Rs.35,36,751/- received by the appellant / plaintiff from the respondent / defendant no.1 in this Court and which was permitted vide order dated 12th July, 2010 in the appeal and the amount so deposited was also ordered to be kept in a fixed deposit.

10. The appellant / plaintiff thereafter filed IA No.15749/2011 for amendment of the plaint, to delete the alternative prayer made for a direction to the respondent / defendant no.1 to pay the amount of Rs.30,88,249/- together with Rs.5,00,000/- and interest to the appellant / plaintiff. The said application was allowed vide order dated 14th February, 2012. No opportunity to file written statement to the amended plaint was given observing that since the amendment was of deletion only, no written statement to amended plaint was required to be filed.

11. On 1st August, 2012, the following issues were framed in the suit:

- "1. Whether the suit is liable to be dismissed for deficient court fee? (OPD)*
- 2. Whether in terms of Section 7 of the Court Fee Act, the plaintiff had to pay court fee on market value of the property, as admitted by her? (OPD)*
- 3. Whether the suit is liable to be dismissed for misjoinder of parties? (OPD)*
- 4. Whether the defendant No.1 collude with defendant No.2 or defendant No.3 as averred in the plaint? (OPD)*
- 5. Whether the plaintiff is entitled to a decree of declaration declaring the Sale Deed dated 04.08.2006 executed by the*

plaintiff in favour of defendant No.1 in respect of premises No.R-563, Rajinder Nagar, New Delhi as null and void? (OPP)

6. *Whether the plaintiff is entitled to a decree of permanent injunction against defendant No.3 restraining the said authority from registering any documents of transfer in respect of the suit property? (OPP)*

7. *Relief."*

12. The respondent / defendant no.1, prior to commencement of trial, filed IA No.4672/2013 for amendment of the written statement to incorporate a plea in the written statement that he reserved his right to file a counterclaim to pay the balance amount of Rs.30,88,249/- claimed by the appellant / plaintiff to be due towards sale consideration and for a direction to the appellant / plaintiff to hand over possession of the property to the respondent / defendant no.1 and to file a counterclaim for the relief of possession of the property.

13. The appellant / plaintiff opposed the said application but the same, vide the impugned order, has been allowed by the learned Single Judge, finding/observing/holding:

(A) that at the time of filing of the said application for amendment, trial had not commenced;

- (B) that the opposition of the appellant / plaintiff to the amendment making the counterclaim on the ground of the counterclaim being barred by limitation had no merit as the cause of action for filing the counterclaim accrued to the respondent / defendant no.1 on 14th February, 2012 when the appellant / plaintiff by amendment of the plaint deleted the alternative relief claimed of recovery from the respondent / defendant no.1 of Rs.30,88,249/- being the balance sale consideration; and,
- (C) the opposition of the appellant / plaintiff to the amendment on the ground that while allowing the application aforesaid of the appellant / plaintiff for amendment of the plaint, the respondent / defendant no.1 had not been held entitled to file an amended written statement thereto also had no merit since the Court at that time was only concerned with the right of the respondent / defendant no.1 to file a written statement to the amended plaint and not with the claim of the respondent / defendant no.1 for amendment of the written statement.

14. Finding that the claim of the appellant / plaintiff in the suit, for the relief of declaration of the registered sale deed as void is premised on the entire sale consideration having not been paid to the appellant / plaintiff, we at the outset enquired from the counsel for the plaintiff as to how the suit claiming the said relief is maintainable. Attention of the counsel for the plaintiff was invited to Section 55(4)(b) of the Transfer of Property Act, 1881 which *inter alia* provides that where the ownership of the immovable property has passed to the buyer before payment of the whole of the purchase-money, the seller is entitled to a charge upon the property for the payment of the purchase money remaining unpaid. It was put to the counsel for the appellant / plaintiff whether not the same was indicative of the right of the seller in such an event being only to recover the balance sale consideration and not to have the sale deed declared as void. Attention of the counsel for the appellant / plaintiff was also invited to ***Rajinder Vs. Harsh Vohra*** MANU/DE/3090/2009 and SLP(C) No.5977/2010 whereagainst was dismissed *in limine* on 12th March, 2012, ***Kaliaperumal Vs. Rajagopal*** (2009) 4 SCC 193, the judgment dated 17th February, 2011 of this Court in RFA No.104/2011 titled ***Rajinder Vs. Harsh Vohra, Rajinder Vs. Harsh Vohra*** MANU/DE/4158/2011 and ***Shashi Garg Vs. M/s. Shitiz Metals Ltd.*** MANU/DE/1112/2014, and as per all of which judgments, read with the

sale deed on record in the present case, the present suit does not appear to be maintainable.

15. The counsel for the appellant / plaintiff however contended that we, in this appeal, should not go into the question of maintainability of the suit from which this appeal arises.

16. We do not agree with the aforesaid proposition. This Court is not to act mechanically. Once, it appears to this Court, even if in appeal against an interlocutory order in the suit, that the suit itself is not maintainable, the Court would be entitled to go into maintainability of the suit, since in our opinion, if it were to be so, even the appeal would not be maintainable. It cannot be lost sight of that the Courts are today overburdened and keeping one frivolous proceeding alive is always at the cost of other deserving cases. We as such offered to the counsel for the appellant / plaintiff that we can give him time to address us on the aspect of maintainability of the suit.

17. However the counsel for the appellant / plaintiff was adamant and stated that the suit being not before us, the question of maintainability thereof cannot be gone into by us and the same if done would also deprive him of an opportunity of an appeal against the order if any in the suit.

18. The counsel for the appellant / plaintiff having not consented to the consideration of the aspect of maintainability of the suit by us and feeling constrained to otherwise go into the said question, we heard the counsel for the appellant / plaintiff on the appeal alone.

19. The counsel for the appellant / plaintiff has raised the same two arguments as urged before the learned Single Judge, in opposition to the amendment sought by the respondent / defendant no.1 of the written statement to incorporate the counterclaim i.e. of the counterclaim being barred by time and of the respondent / defendant no.1 being not so entitled owing to the learned Single Judge while allowing the application aforesaid of the appellant / plaintiff for amendment of the plaint (to delete the alternative prayer aforesaid) having observed that no amended written statement was required to be filed. The counsel for the appellant / plaintiff however did not address us as to how the counterclaim was barred by limitation.

20. As per the sale deed of the property admittedly executed and got registered by the appellant / plaintiff in favour of the respondent / defendant no.1:

- (i) the appellant / defendant no.1 as vendor, at the time of execution of the sale deed, absolutely assigned, conveyed and transferred all her rights of ownership and of interest in the property to the respondent / defendant no.1;
- (ii) the appellant / plaintiff handed over possession of the property sold to the respondent / defendant no.1;
- (iii) the appellant / plaintiff authorized the respondent / defendant no.1 to get the property mutated and transferred in his name on the basis of sale deed in the record of the authorities concerned;
- (iv) the appellant / plaintiff declared that the respondent / defendant no.1 shall after the execution of the sale deed hold, use and enjoy the property without any hindrance, claim or demand whatsoever from the appellant / plaintiff;
- (v) the respondent / defendant no.1 was to from the date of execution of the sale deed pay all dues with respect to the property.

21. Thus as per the said sale deed, the ownership of the property, on the execution of the Sale Deed passed from the appellant / plaintiff to the respondent / defendant No.1.

22. Though the counsel for the appellant / plaintiff has not addressed us on the Article of the Schedule to the Limitation Act which would be applicable but we may mention that the limitation for suits relating to immovable property is dealt with in Para V of the said Schedule and as per Article 65, limitation for institution of a suit for possession of immovable property based on title is 12 years commencing from the date when the possession of the defendant becomes adverse to the plaintiff. It is not the case of the appellant / plaintiff that she is in adverse possession. Rather the appellant / plaintiff claims that though she has sold the property vide registered sale deed to the respondent / defendant no.1 but the said sale deed is void for the reason of the sale consideration of Rs.30,88,249/- thereunder having not been paid by the respondent / defendant no.1 to the appellant / plaintiff. Thus, the question of commencement of the said period of limitation of 12 years does not arise. However even if we count the said period from the date of the sale deed of 4th August, 2006, the said period of 12 years had not expired on the date when the counterclaim was filed. The said period has not expired till date. We therefore fail to see as to how the

counterclaim of the respondent / defendant no.1 for possession of the property purchased from the appellant / plaintiff can be said to be barred by time.

23. The only other opposition to the right of the respondent / defendant no.1 to seek amendment of the written statement to incorporate a counterclaim therein is equally misconceived as rightly held by the learned Single Judge. The observation in the order dated 14th February, 2012, of the written statement to the amended plaint being not necessary for the reason of the amendment to the plaint being only of deletion of one of the reliefs claimed, can by no stretch of imagination be held as an order disentitling the respondent / defendant no.1 from claiming amendment of the written statement to incorporate a counterclaim if the respondent / defendant no.1 otherwise is entitled to such amendment or to maintain such counterclaim.

24. Though undoubtedly the counterclaim was sought to be filed after nearly seven years of the institution of the suit but considering the entirety of the facts, we do not consider the same also as a factor for refusing the same. As aforesaid, the relief sought by way of counterclaim of recovery of possession is within limitation; if not by way of a counterclaim, the respondent / defendant no.1 could always file separate suit for recovery of possession and since the

facts thereof would necessarily be intertwined with the claim of the appellant / plaintiff in the present suit, the same in all probability would have been tagged / consolidated with the suit from which this appeal arises, for adjudication. We thus do not feel that the appellant / plaintiff has been prejudiced in any manner from the delay in the respondent / defendant no.1 making the counterclaim for possession. It cannot also be lost sight of that the appellant / plaintiff, till 14th February, 2012, was herself claiming the relief in alternative of recovery of the balance sale consideration from the respondent / defendant no.1, treating the sale deed to be valid.

25. We therefore do not find any merit in the appeal and dismiss the same.

26. Again, for the reason of not burdening the Courts with trial of a suit if otherwise not maintainable, on the face of it, we request the learned Single Judge to consider the maintainability of the suit in the light of the observations made by us herein above.

27. We also burden the appellant / plaintiff with costs of this appeal of Rs.20,000/-. We may in this regard note that the appeal earlier filed by the appellant / plaintiff being FAO (OS) No.418/2009 was also found to be wholly misconceived and meritless and was dismissed with costs of Rs.25,000/-.

28. The suit file requisitioned by us while reserving the judgment, be returned forthwith.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

JULY 08, 2014
'gsr'