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

\+ **Date of Decision: 03.11.2015**

% **RSA 379/2015**

OM PRAKASH & ANR ..... Appellants

Through: Mr. Ankur Goel, Advocate.

versus

BIRBAL SINGH & ANR ..... Respondents

Through:

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

C.M. No.25696/2015

1. Exemption allowed subject to all just exceptions.

2. The application stands disposed of.

C.M. No.25697/2015

3. By this application, the appellant seeks condonation of 58 days delay in re-filing the appeal.

4. For the reasons stated in the application, the same is allowed.

5. The application stands disposed of.

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6. This is a second appeal preferred by the appellants/ plaintiffs to assail

the judgment & decree dated 25.05.2015 passed by the First Appellate Court, namely the learned ADJ-01 (Central), Tis Hazari Courts, Delhi in RCA No.16/2013 preferred by the appellants. The First Appellate Court dismissed the said first appeal, wherein the appellants/ plaintiffs had assailed the order dated 20.05.2013 passed by the Trial Court, namely the Civil Judge, Central-02, Tis Hazari Courts, Delhi, on an application under Order VII Rule 11 CPC rejecting the plaint of the plaintiffs/ appellants.

7. The plaintiffs/ appellants had filed the suit to seek a declaration and permanent injunction. The plaintiffs sought the declaration that the sale deed dated 24.07.2000 executed by Smt. Somwati @ Soumtee Devi in favour of the defendants be declared null & void. The claim of the plaintiffs was that late Smt. Somwati was their Aunt (Chachi). They claimed that late Smt. Somwati died issueless, and they were the heirs of late Smt. Somwati, as her husband late Sh. Lal Singh had predeceased her.

8. The claim of the plaintiffs was that late Smt. Somwati was earlier the owner of a plot admeasuring 250 sq. yds. Out of the said plot, she had sold area admeasuring 125 sq. yds. during the lifetime of her husband, and she remained the owner of 125 sq. yds. The plaintiffs further stated that late Smt. Somwati sold a portion admeasuring 50 sq. yds. out of the said land and thus, she remained the owner of 75 sq. yds. of land. The plaintiffs stated that late Smt. Somwati died issueless on 05.10.2004. The plaintiffs claimed that upon the demise of late Smt. Somwati, they succeeded to the portion in her occupation and ownership. The plaintiffs stated that they learnt of the impugned sale deed in favour of the defendants when they were summoned by the Court of Additional Senior Civil Judge Delhi in respect of an

application moved under Order XXII Rules 4 and 9 CPC by one Sh.Bharat Bhushan Suman in RCA No.69/2004. The plaintiffs stated that their Aunt did not inform them of the sale deed allegedly executed in favour of the defendants. Consequently, they filed the suit, as aforesaid, to seek a declaration that the sale deed dated 24.07.2000 in favour of the defendants was null & void. The defendants filed their written statement to contest the suit. Issues were framed and the matter went to trial.

9. It appears that the plaintiffs filed their evidence on affidavit towards examination-in-chief. Plaintiff No.1 Om Prakash filed the said affidavit dated 20.07.2009 before the Trial Court. Thereafter, the defendants moved an application under Order VII Rule 11 CPC raising several grounds to claim that the suit was barred by law. The defendants/ respondents claimed that the plaintiff had no locus standi to file the suit; that no cause of action had arisen in favour of the plaintiffs to file the suit; the suit was barred by limitation, and; that the suit for declaration, without seeking possession, was barred under Section 34 of the Specific Relief Act. The Trial Court allowed this application vide order dated 20.05.2013.

10. So far as the locus standi of the plaintiffs/ appellants was concerned, the Trial Court held that they had locus standi to file the suit, since they claimed themselves to be the nephew/ niece of the deceased late Smt. Somwati, and also that she did not leave any Class-I heir. The Trial Court, however, held that the plaintiffs had no cause of action in their favour. The Court held that though the plaintiffs had claimed that the sale deed in question was a result of fraud and misrepresentation – on the plea that late Smt. Somwati was aged, illiterate and sick, and that her signatures/ thumb

impressions had been obtained fraudulently, the plaintiffs had stated in paragraph 9 of the plaint that “it seems” that the defendants have played a fraud upon late Smt. Somwati. The Trial Court held that the plaintiffs were themselves not sure whether a fraud had been played upon late Smt. Somwati.

11. I may also observe that the plaint, apart from alleging fraud, did not contain any particulars of the alleged fraud, as required under Order VI Rule 4 CPC. The Trial Court further observed that the plaintiffs had claimed that they had not been informed of the sale deed in question by late Smt. Somwati – which means that they were not aware that the property had been sold by late Smt. Somwati, and consequently, they were not aware of the alleged fraud as well.

12. On the aspect of limitation, the Trial Court held that the suit was filed within limitation, as the plaintiffs had claimed to have acquired knowledge in 2007, and the suit had been filed in the year 2007 itself. I may observe that in the order of the Trial Court, the date of knowledge has been mentioned as 02.12.2004, which appears to be an obvious typographical error. The Trial Court also held that since the plaintiffs had not sought the relief of possession, the relief sought was barred by Section 34 of the Specific Relief Act.

13. The first appeal preferred by the appellants/ plaintiffs has been dismissed by the impugned judgment. The First Appellate Court has held that the suit was, in fact, also barred by limitation. To this extent, the First Appellate Court did not agree with the findings of the Trial Court.

14. The submission of counsel for the appellant is that the issue of limitation and lack of cause of action were mixed questions of fact and law, and the plaint could not have been rejected without going to trial. Learned counsel submits that the suit was not barred under Section 34 of the Specific Relief Act since the possession of the suit property was with the tenants and when the plaintiffs had demanded that the tenants attorn to them, they had asked the plaintiffs to establish their title in a Civil Court. Thus, it could not be said that the defendants were in possession of the suit property.

15. Learned counsel submits that instead of cross-examining the plaintiffs witness who had filed his affidavit by way of evidence towards examination in chief, the defendants moved an application under Order 7 Rule 11 CPC. It is submitted that the suit was not barred either for want of cause of action or under limitation, since the plaintiffs learnt of the execution of the sale deed only upon receiving the summons from the Court of Additional Senior Civil Judge in respect of an application moved under Order 22 Rule 4 and 9 CPC by one Sh. Bharat Bhushan Suman in RCA No.69/2004. This summons was received in the year 2007 and soon thereafter the suit was preferred.

16. Learned counsel submits that late Smt. Somwati had never informed the appellants that she had sold the suit property to anyone, much less the defendants. It is further submitted that even after the impugned sale deed had been executed, late Smt. Somwati continued in occupation of the suit property – which would not be the case, had the suit property been sold to the defendants.

17. Having heard learned counsel for the appellant, perused the Trial Court order and the judgment of the First Appellate Court and perused the evidence placed on record, I am of the view that there is no merit in the present second appeal. It does not raise any substantial question of law for consideration by this Court. Both the Courts below have returned concurrent findings of fact, inter alia, in relation to the lack of cause of action in favour of the appellant/plaintiffs. On the aspect of limitation, the findings returned by the Trial Court in favour of the appellant/plaintiff has been reversed by the First Appellate Court, and it has been held that the suit was barred by limitation and, in my view, rightly so.

18. Though the plaintiffs alleged a possible fraud by the defendants in the matter of execution of the impugned sale deed, it is pertinent that the plaintiffs were completely silent with regard to the nature and particulars of the fraud allegedly perpetrated. The pleading regarding fraud was premised only on the averment that late Smt. Somwati had never disclosed to the plaintiffs regarding the sale of the suit property to the respondents during her lifetime.

19. Order 6 Rule 4 CPC stipulates that in all cases, in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary, beyond such as are exemplified in the forms under the C.P.C., particulars (with date and items if necessary) shall be stated in the pleading. In the present case, far from detailing the particulars of the so-called fraud, the averments of the plaintiffs that a fraud had been committed by the defendants upon late Smt. Somwati was premised on their inference drawn

from their claimed ignorance of the impugned sale deed, and their plea that they were never informed of the execution of the sale deed by late Smt. Somwati during her lifetime. That, by itself, was wholly inadequate to support a plea of fraud as alleged by the plaintiffs. Such pleading, which was backed by a similar feeble statement on oath (in the form of an affidavit towards examination in chief of Shri Om Prakash – plaintiff No.1) could certainly not carry the plaintiffs home.

20. The relevant deposition made by plaintiff no.1 Sh. Om Prakash in his affidavit by way of evidence towards examination-in-chief are as follows:

> "2. *That the property No.L-2/14, Shastri Nagar, Delhi-52 was purchased by Sh. Lal Singh in the name of his wife Smt. Som Wati @ Soumtee Devi, who was house wife throughout her life, which has been built on the land admeasuring 250 sq. yds. out of which land admeasuring 125 sq. yds was sold by Smt. Som Wati @ Soumtee Devi during lifetime of her husband and remaining 125 sq. yds land with construction was retained by her. A certified copy of the Sale Deed in favour of Smt. Som Wati @ Soumtee Devi is Ex. PW-1/1.*
>
> *3. That again Smt. Som Wati @ Soumtee Devi sold built up portion on 50 sq. yds land out of 125 sq. yds land to the defendants singly or jointly during her lifetime, while remaining built up portion on 75 sq. yds land was retained by her. A certified copy of Sale Deed dated 24.07.2000 is Ex. PW-1/2.*
>
> *4. That the portion in ownership of Smt. Som Wati @ Soumtee Devi consists of 3 (Three) shops in possession of 2 (two) tenants 3 (three) residential rooms in possession of 2 (two) tenants besides a kitchen, temporary bath and latrine and open court yard.*
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> *5. That Smt. Som Wati @ Soumtee Devi expired on 05.10.2004 issueless while her husband Sh. Lal Singh was*

predeceased to her.

6. That after the death of Smt. Som Wati @ Soumtee Devi the deponent inherited her estate including the property No.L-2/14, Shastri Nagar on 75 sq. yards Delhi built on 75 sq. yards as her legal heirs being son and daughter of her brother in law (Jeth) namely Sh. Tota Ram.

…. …. …..

9. That the deponent were having cordial relations with her aunt namely Smt. Som Wati @ Soumtee Devi and on visiting terms and she never gave any clue of her intention of selling of the property to any one including the defendants or disclose to the deponent or any other relative till her death that she has sold her property to defendants on 24.07.2000. As per information and knowledge of the deponent Smt. Som Wati @ Soumtee Devi never executed any sale deed in favour of any one and especially in favour of the defendants.

10. That it seems that the defendants have played fraud upon Smt. Som Wati @ Soumtee Devi who was aged, illiterate and sick lady and fraudulently obtained her signature/ thumb impression on the alleged sale deed dated 24.07.2000 by misrepresentation, which is crystal clear from the fact that the alleged sale consideration was neither deposited in her bank account nor such huge amount was found from her belongings at the time of her death.

11. That the defendants cannot claim any ownership right over the built up portion on 75 sq. yds land, on the basis of alleged sale deed dated 24.07.2000 as the same has been obtained by fraud, misrepresentation and without payment of sale consideration to Smt. Som Wati @ Soumtee Devi and as such the sale deed dated 24.07.2000 is liable to be declared as null and void, nonest and without binding force".

(Emphasis supplied)

21. Thus, the plaintiffs witness did not even purport to disclose the

manner in which the fraud was allegedly played by the defendant upon late Smt. Somwati. There is absolutely no purpose in permitting the plaintiffs to proceed with their cause in the face of such deficient pleading and evidence, which cannot form the basis of a judgment and decree in their favour, setting aside the registered sale deed in favour of the defendants/respondents on the basis of a fraud in the execution of the impugned sale deed.

22. The submission of counsel for the appellant that the suit was not barred under Section 34 CPC also has no merit, for the reason that it is not the case of the appellant/plaintiff that the tenants had attorned to the plaintiffs. The plaintiffs, therefore, could not claim to be even in symbolic possession of the suit property. Admittedly, the plaintiffs were not in possession of any part of the suit property.

23. In ***Priyanka Vivek Batra v. Neeru Malik & Ors.***, 154 (2008) DLT 354, this Court, *inter alia*, observed as follows:

> "*F. As far back as in Sheoparsan Singh v. Ramanandan Prasad, AIR 1916 PC 78 it was said:*
>
> > *There is so much more danger in India than here of harassing and vexatious litigation that the courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation.*
>
> *G. The institution of the present suit brings to life the fears expressed more than a century ago. I fail to see what purpose will be achieved by the plaintiff by pursuing the present suit, when the plaintiff herself being out of possession of the properties is at this stage not suing for possession and as aforesaid, wants to do the same if successful in probate (though*

the permission under Order 2 Rule 2 CPC sought in plaint is not for relief of possession) I am at this stage not entering into the controversy whether the suit for declaration is maintainable for the reason of plaintiff having not sued for possession, in view of the proviso to Section 34 of Specific Relief Act. The spirit of law and scheme of procedure as enshrined in Section 34 Specific Relief Act and Order 2 Rule 1 CPC is that every suit as far as practicable be framed so as to afford ground for final decision. Even if the present suit is held to be maintainable, the same will not be the final decision in as much as the plaintiff will still have to sue for possession.

H. Shipping Corporation of India Ltd. v.. Machado Brothers, AIR2004SC2093 lays down that if the litigation, irrespective of the result will benefit neither of the parties to litigation should not be flogged like a dead horse. This Court in Maha Singh v. Shri Anand, 116(2005)DLT378 held that court is not an idle docile and mindless spectator powerless to bring frivolous litigation to an early end; the court is also not a slave of proceeding.

I. If the present suit is allowed to proceed the defendant No. 1 will be compelled to prove her title and all of which may be irrelevant and waste if ultimately the Will propounded by defendant No. 1 succeeds.

J. I am conscious that I have travelled beyond the scope of Order 7 Rule 11 of CPC, but I consider it essential to do substantial justice between the parties specially when the plaintiff is not likely to suffer any loss and all rights of plaintiff, if successful in her Will, are protected."

24. The aforesaid observations squarely apply to the facts of the present case. The appellants/ plaintiffs cannot establish fraud on the basis of their averments in the plaint and the evidence sought to be led in the affirmative.

Therefore, there would be no useful purpose of mindlessly proceeding with the suit, not only at the costs of, and to the inconvenience of the respondents, but also at the cost to the Courts infrastructure, time and effort, and inconvenience to other litigants having more genuine causes, who are waiting in the queue to have their rights determined.

25. On the aspect of limitation, it would appear that late Smt. Somwati survived for about four years after the execution of the impugned sale deed. The sale deed in question was executed by Smt. Somwati on 24.07.2000, and she died on 05.10.2004. During her lifetime, she never assailed the sale deed. The sale deed is a registered instrument. In the aforesaid background, limitation for filing the suit expired within three years of the execution of the sale deed, as the plaintiffs/appellants did not even plead any specific facts, apart from making a bald assertion, to claim that late Smt. Somwati was not aware of the execution and registration of the sale deed by her on 24.07.2000. The limitation having expired during the lifetime of late Smt. Somwati – on the expiry of three years from 24.07.2000, the same did not revive thereafter – either on the demise of Smt. Somwati, or when the plaintiffs/appellants claimed to have learnt of the execution of the impugned sale deed in the year 2007.

26. For all the aforesaid reasons, I find absolutely no merit in the present second appeal and the same is, accordingly, dismissed.

VIPIN SANGHI, J

NOVEMBER 03, 2015
B.S. Rohella /sr