

* **HIGH COURT OF DELHI AT NEW DELHI**

+ RSA 105/2012

MRIDULA BANSAL AND ANR Appellant
Through: Mr. Sanjay Dua with Mr. Uday Joshi,
Advocate.

versus

MCD AND ORS Respondent
Through: Mr. Ajit Kumar Singh, Advocate for
respondent No.2.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

ORDER

% **15.02.2016**

V.K. SHALI, J. (ORAL)

1. This is a Regular Second Appeal filed by the appellant against the order dated 13.03.2012 passed by Mr. J.P.S. Malik, ADJ, South District, Saket Court Complex, New Delhi, in RCA No. 15/2010 titled as *Mrs. Mridula and Anr. Vs. M.C.D. and Anr.*

2. The only substantial question of law, which arises for consideration is as to whether the learned Civil Judge could have passed the order dated 13.04.2009 under Order 7 Rule 11 CPC, dismissing the suit of the appellant under Order 7 Rule 11 CPC, which order has been upheld by the learned ADJ by the impugned order and, thus, both the orders suffer from perversity.

3. Briefly stated the facts of the case are that one Mridula Bansal, appellant No.1 and her husband Vidhya Bhushan Bansal, appellant No.2 filed a suit for mandatory injunction against the MCD, seeking a direction that it must demolish the alleged unauthorized construction purported to have been raised in Property No.M-12, Green Park, New Delhi. In this Smt. Nalini Tripathi was also made as a party. No relief was sought against Smt. Nalini Tripathi and Dr. Harish Chand Bansal.

4. The suit property belong to one P.L. Bansal, who had bequeathed the property to his wife Dropadi Devi. Dropadi Devi, his widow, had four sons namely; V.K. Bansal, Rajender Kumar Bansal, Vidhya Bhushan Bansal and Dr.Harish Chand Bansal. During her life time Dropadi Devi had purportedly made a gift of the entire ground floor and the rear portion on the terrace floor i.e. the third floor in favour of Kusum Bansal wife of the one of the sons V.K. Bansal and her grand son Vikram Bansal, who happened to be the son of Kusum Bansal and V.K. Bansal. Dropadi Devi thereafter had died on 27.04.2004. she had alleged to have made a Will with regard to the other portions of the property in favour of Rajender Kumar Bansal, Vidhya Bhushan Bansal and Dr. Harish Chand Bansal. Vidhya Bhushan Bansal and his wife Mridula Bansal one of the appellants herein and the plaintiffs before the trial court are purported to have purchased the rights of Kusum Bansal and Vikram Bansal in respect of ground floor and the rear portion

of terrace floor. It is after the purchase of the aforesaid portion of the property by them, that they filed a suit for mandatory injunction against the MCD making one of their brothers, Dr. Harish Chand Bansal as a party, who was alleged to have made unauthorized construction. Nalini Tripathi to whom a portion of the property was purported to have been sold by appellant was also made a party. The fact of sale to Nalini Tripathi has not been mentioned by them in the plaint.

5. Nalini Tripathi filed an application under Order 7 Rule 11 CPC for rejection of the plaint, which was allowed by the learned Civil Judge vide order dated 13.04.2009. In the application filed by Nalini Tripathi, it was alleged by her that Vidhya Bhushan Bansal and Mridula Bansal have sold their right, title or interest in the property in favour of Nalini Tripathi and thus, they were left with no right, title or interest and were not competent to maintain the suit. It was also stated that the cause of action is stated to have arisen on 5.11.2005, when the notice for removal of unauthorised construction was given and yet suit was filed belatedly. After inviting for the reply, the learned trial court was convinced with both these pleas of Nalini Tripathi and dismissed the suit by holding that the appellant did not have any locus standi to file the suit after having sold their interest to Nalini Tripathi. The construction having been raised by respondent No.2 Dr. Harish Chand Bansal much prior to the date of giving notice dated 5.11.2005, the suit was filed belatedly and in any case the unauthorised

construction having been known to the appellant earlier to the filing of the suit, the suit was barred by limitation as appellant had acquiesced. The learned trial court has also referred to few judgments of the apex court in *T. Arivandandam Vs. T.V. Satyapal (1997) 4 SCC 467* and *S.N. Bala Krishna Vs. George Fernandez 1969 (3) SCC 238* while observing that the suit has not been filed with due diligence.

6. The appellants feeling aggrieved have preferred an appeal, which was also dismissed by the learned ADJ, upholding the reasoning given by the learned Civil Judge and hence feeling aggrieved, filed the present Regular Second Appeal.

7. I have heard the learned counsel for the appellant as well as the learned counsel for the respondent. I have also gone through the record. The learned counsel for the appellant has contested the concurrent finding returned against him dismissing the suit and the learned counsel for the respondent has tried to justify the order by stating that the appellants having sold the interest in the property were precluded from filing a suit for mandatory injunction.

8. I have carefully considered the submissions and the only substantial question of law arises for consideration is whether the concurrent finding returned by the learned trial court is in consonance with law or in other words is the judgment erroneous. This court has no hesitation in holding that both the

orders dated 13.04.2009 and 13.03.2012 passed by the learned ADJ are not only erroneous, but also against the provisions of law and cannot be sustained by any reasoning. The reason for this is that for deciding an application under Order 7 Rule 11 CPC, all that the court is to consider are the averments made in the plaint and the documents relied upon by the plaintiff. Conversely meaning that while deciding the said application the court is not expected to take into consideration the defence of the defendants or look into the documents filed by them or to comment on the respective merits of the cases.

9. In the instant case, while allowing the application under Order 7 Rule 11 CPC, the order which can be passed is only one of rejection and not dismissal. The order of dismissal of the suit can be passed by the trial court judge only after framing of issues and permitting the parties to adduce their respective evidence if it is a question of fact or if it is a question of law then simply framing an issue with regard to the same after statement of the parties that they do not intend to produce any evidence. In the instant case, in the absence of these conditions all that the court could have done while exercising power under Order 7 Rule 11 CPC was rejection of plaint and not dismiss the same. The consequences of rejection are that the plaintiff can rectify the deficiency and file a fresh plaint as and when cause of action arises to bring the suit within the permissible limit.

10. In the instant case, the learned Civil Judge has while deciding the application of defendant No.3, respondent No.3 herein, not only taken into consideration the averments made in the written statement, but also relied upon the documents filed by the defendant No.3, as well as pleadings in another case for perpetual injunction allegedly filed by the appellant. It has been commented that the appellant herein has indulged in concealment of facts, though appellant has filed another suit against some private defendants or that the suit is barred by time, while as on the face of it there is no such bar attached to the suit. The concealment of fact stated to be is that appellants have sold his right title or interest, but this has not been stated by the appellant himself in the petition while as the respondent has gathered the information and then taken that as a ground for challenging the locus standi of the appellant to file the suit for mandatory injunction.

11. Similarly, with regard to the cause of action, the court has taken into consideration another plaint purported to have been filed by the appellants and those averments have been taken into account on the basis of the statement made by respondent No.3 and similarly with regard to the cause of action clause also, though the cause of action is stated to have been arisen on 05.11.2005 and 09.11.2005, while as the suit has been filed within three years from these two dates, yet the court has commented that the suit is barred by limitation. This kind of approach, which has been followed by the learned Civil

Judge is totally unwarranted while deciding an application under Order 7 Rule 11 CPC. Not only the learned Civil Judge has committed this mistake, but even an experienced ADJ has also fell into an error in upholding the order by not following the proper procedure by either recording the statement of the appellant under Order 10 CPC or by framing an issue and permitting the parties to adduce evidence.

12. For the above mentioned reasons, I feel that the concurrent order passed by the two courts below are not only factually incorrect, but also not in accordance with law and deserve to be set aside. The matter is remanded back to the trial court after setting aside the impugned order dated 13.04.2009, and the learned trial court shall decide the said application under Order 7 Rule 11 CPC afresh in accordance with law and if the suit is not liable to be rejected, then proceed with the same to dispose of, in accordance with the procedure prescribed under CPC. Let the parties appear before the learned ADJ, South District, Saket Court Complex, New Delhi, on 01.03.2016 at 2.30 P.M.

13. With these observations, the present appeal stands disposed of. Expression of any opinion hereinbefore may not be treated as an expression on merits.

V.K. SHALI, J

FEBRUARY 15, 2016 / n