

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

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Date of decision: 4th April, 2016

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RFA No.664/2015

RAM HAZOOR

..... Appellant

Through: Mr. Harish Mehra and Ms. Kanika Singh, Advs.

versus

SHYAM DULAREY & ANR

..... Respondents

Through: Mr. Dayanand Sharma, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The appeal impugns a judgment and decree of the Court of Additional District Judge (ADJ)-02, (NE) of dismissal of CS No.398/2014 Unique ID No.02402C0097312014 consequent to rejection under Order 7 Rule 11 of Code of Civil Procedure (CPC), 1908 of the plaint on the ground of claim therein being barred by Order 2 Rule 1 CPC on account of an earlier suit filed by the appellant/plaintiff. The appellant filed the said suit for recovery of possession of half i.e. 25 sq. yds. of property no. D-286 constructed over land *ad measuring* 50sq. yds. out of Khasra No.11/82, Village Karawal Nagar, ilaqa Shahdra, Delhi by demarcation of the said half, and for permanent injunction restraining the defendants from creating any third party rights in the property.

2. The earlier suit was filed by the appellant for mandatory injunction directing the respondent no.1 to hand over half of the house to the appellant and for permanent injunction restraining the respondent no.1 from selling the

said house without partition. The said suit was dismissed vide judgment dated 6th October, 2012 of the Court the Additional Senior Civil Judge, (NE), finding the appellant/plaintiff claiming to be a co-owner along with the respondent no.1 to be not entitled to the reliefs claimed of injunction against the other co-owner and also not finding any merit in the claim of the appellant/plaintiff of being the co-owner. The appellant appealed against the aforesaid judgment and decree and which appeal was disposed of by the Court of the learned ADJ-01, Karkardooma Courts, Delhi vide judgment dated 22nd January, 2014 though *inter alia* observing:-

“12. Without going much on the grounds urged, it is very clear that according to the very documents produced by the plaintiff, the defendant is also is one of the co-owners, though the Ld. Counsel for the defendant-respondent, contending that his client is the absolute owner. Be as it may, it is very clear that the suit property as per the documents produced by plaintiff himself go to show that the defendant is also the co-owner of the same.

*13. It is well settled that a co-owner cannot seeks an injunction against the other without choosing alternate and efficacious remedy of law. It is held in “**Puran Chand Sant Lal. Vs. Nitya Nand** AIR 1958 Punj. 460 (p.462)” that – “A co-owner is not entitled to an injunction restraining another co-owner from exercising his rights in the common property absolutely and simply on the ground of his co-ownership and without reference to the amount of damage to be sustained by the one side or the other from the granting or the*

withholding of the injunction.”Sec.41(h) of the Specific Relief Act mandates that an injunction cannot be granted when an equally efficacious relief can certainly be obtained by the usual mode of proceeding. In this case, the plaintiff could not have sought for injunctions when there is an equally efficacious alternate remedy is open to him. Ld. Counsel for the appellant contended that no partition case has been filed.

14. Grounds urged in appeal need not be looked into since appeal is being disposed of on the question of law. A suit for injunction simplicitor is not maintainable in view of Sect.41(h) of the Specific Relief Act.”

but also observing that after having gone through the Trial Court record it was not possible to conclude that the Trial Court committed any error in the judgment appealed against and ultimately passing the following order:-

“The appeal stands dismissed. The trial court judgment had decree dated 6.10.2012 stands affirmed. Parties to bear their own costs. Decree sheet be prepared accordingly. TCR be sent back with a copy of this judgment. The dismissal of the appeal be not read as taking away the rights of the parties which are open to them in law in the circumstances. File be consigned to the record room.”

3. It is thereafter that the appellant filed the suit from which this appeal arises, impleading therein, besides the respondent no.1, also the respondent

no.2 Smt. Phoolwati Devi wife of the respondent no.1 owing to the stand of the respondent no.1 in the earlier round aforesaid of litigation that it was the respondent no.2 who is the owner of the property.

4. Notice of this appeal was issued and the appeal admitted for hearing and considering that in the event of appeal succeeding, the suit will have to be remanded, fixed for today for hearing. The counsels for the parties have been heard and the Trial Court record perused.

5. One thing which strikes at the outset is that the respondent no.2, who according to the respondent no.1 is the owner of the property, was not a party to the earlier round of litigation. Thus the question of her invoking Order 2 Rule 2 does not arise. Identity of parties is necessary for invoking the said Rule. A cause of action is not an abstraction independent of the defendant. Thus, the decree of dismissal of suit as barred by Order 2 Rule 2 CPC against the respondent no.2 cannot be sustained on this ground alone.

6. It is the contention of the counsel for the appellant that the appellant was given specific liberty by the learned ADJ in first round of litigation to institute the suit from which this appeal arises.

7. Per contra, the counsel for the respondents not only supports the order of the learned ADJ but also controverts that any such permission was given. He contends that the permission could have been given by the Court of the Civil Judge only before which that suit had remained pending for long and not by the Court of Additional District Judge in appeal.

8. The counsel for the appellant in rejoinder has referred to *Shri Inacio Martins, Vs. Narayan Hari Naik* AIR 1993 SC 1756 and *Narashalli*

Kempanna Vs. Narasappa AIR 1989 Karnataka 50. The counsel for the respondents does not cite any judgment.

9. It has been held in a long stream of judgments noted by me in ***Harbans Singh Vs. M/s. Juggat Pharma*** MANU/DE/4787/2013 (SLP CC No.3057/2015 preferred whereagainst is found to have been dismissed on 20th February, 2015) that where the final judgment in a *lis* proceeds on the non-maintainability of the proceedings, the findings given on the other issues would not constitute *res judicata*. The learned ADJ in judgment in appeal arising from earlier suit already held the suit for injunction to be not maintainable, though also generally affirmed the findings of fact reached by the Civil Judge. It has but to be held that the final judgment of dismissal of *lis* is on the ground of non-maintainability thereof and the findings of fact would thus not constitute *res-judicata*. The contention of the counsel for the respondents that permission to sue could have been given only by suit court and not by appellate court is also erroneous. The powers of the appellate court are the same as suit court as reiterated in ***Vasant Ganesh Damle Vs. Shrikant Trimbak Datar***, (2002) 4 SCC 183.

10. Supreme Court also in ***Inbasagaran Vs. S. Natarajan*** (2015) 11 SCC 12 has had occasion to elaborate the law on Order II Rule 2 CPC in the context of a suit for injunction against the seller of immovable property and a suit for specific performance filed thereafter. It has been held that a suit for injunction filed with the cause of action of imminent threat of dispossession cannot under Order II Rule 2 of the CPC bar a subsequent suit for specific performance on the strength of agreement to sell and the cause of action for the two suits could not be said to be same.

11. Though the learned ADJ in the impugned order has vaguely referred to the claim of the appellant being barred by time also but on a perusal of the averments in the plaint and which alone have to be seen at the stage of Order 7 Rule 11 of the CPC, no case of the claim being barred by time is made out.

12. The appeal thus succeeds. The order of rejection of the plaint is set aside.

13. The parties to appear before the Court of the learned ADJ-02 (NE), Karkardooma Courts, Delhi on 25th May, 2016.

14. If the Court of the learned ADJ-02 (NE) has since been dysfunctional, the parties to appear before the District Judge (NE) on the said date.

15. The Trial Court record requisitioned in this Court be returned forthwith.

No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

APRIL 04, 2016

‘pp’..