

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

+ **RSA No. 255/2017**

% **13th November, 2017**

FIROZ AHMED Appellant
Through: Mr. R.R. Jangu, Advocate.

versus

RUSTAM AND ANR. Respondents

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 39034/2017 (for delay)

1. Though there is no reason to grant condonation of delay of 220 days in filing the appeal, since however I have heard counsel for the appellant on merits, this application is therefore allowed for that reason only.

The application stands disposed of.

RSA No. 255/2017 and C.M. Appl. No. 39035/2017 (for stay)

2. This Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (CPC) by the appellant/plaintiff no. 2 impugning the concurrent judgments of the courts below; of the trial

court dated 5.6.2012 and the first appellate court dated 5.11.2016; by which the suit filed for cancellation of the sale deed dated 12.11.1999 and the consequent mutation letter dated 16.12.1999 have been dismissed by the courts below.

3. Though a reading the plaint did not make it very clear that the appellant/plaintiff no.2 impugns the sale deed dated 12.11.1999 whether because the sale deed dated 12.11.1999 is of 52 sq. yards whereas it should be only for 35½ sq. yards under the agreement to sell dated 22.1.1999 pursuant to which the sale deed dated 12.11.1999 was executed or whether the sale deed dated 12.11.1999 is sought to be cancelled as a whole for the entire area mentioned therein, and which confusion had arisen because the appellant/plaintiff no.2 has made averments in the plaint with respect to the sale deed being executed for 52 sq. yards instead only for 35½ sq. yards in terms of an agreement to sell dated 22.1.1999, however counsel for the appellant/plaintiff no.2 clarifies and states that the suit is for cancellation of the entire area under the sale deed dated 12.11.1999.

4. At this stage itself, I may note that two plaintiffs, namely Sh. Rustam and Sh. Khalil Ahmed, had filed an earlier suit for specific performance against two defendants Md. Sayeed Ahmed and Sh. Feroz Ahmed (appellant herein) and in this suit for specific performance the two plaintiffs, Sh. Rustam and Sh. Khalil Ahmed had pleaded that they had entered into an agreement to sell with Md. Sayeed Ahmed/owner as regards of the suit property of 35 ½ sq. yards bearing nos. 2331-2332 consisting of four shops, one basement and one varandah on the ground floor, one room on the first floor with roof rights, in the property situated at Gali Dugdugi, Shah Kalan, Bazar Chitli Wabar, Turkman Gate, Delhi. This agreement to sell dated 22.1.1999 was entered into by the two plaintiffs Sh. Rustam and Sh. Khalil Ahmed with the defendant no. 1 in the said earlier suit for specific performance, namely, Md. Sayeed Ahmed. It was pleaded in the suit for specific performance that inspite of having entered into an agreement to sell on 22.1.1999, yet Md. Sayeed Ahmed thereafter executed a false sale deed dated 26.3.1999 in favour of defendant no. 2 in the said suit Sh. Feroz Ahmed (appellant herein). The sale deed dated 26.3.1999 was pleaded in the suit for specific performance of

the agreement to sell dated 22.1.1999, to be illegal and not binding upon the two plaintiffs Sh. Rustam and Sh. Khalil Ahmed of the said suit for specific performance. In this suit for specific performance an *ex-parte* decree was passed in favour of the two plaintiffs Sh. Rustam and Sh. Khalil Ahmed vide judgment dated 17.7.1999 as the two defendants in the said suit (including the appellant herein being the defendant no. 2 in the said earlier suit) failed to appear. Suit was decreed by the judgment and decree dated 17.7.1999, however, subsequently an application was filed by the defendant no. 1 Md. Sayeed Ahmed in the said suit under Order IX Rule 13 and that application was allowed by an order dated 30.5.2001. What is the present status of that suit for specific performance filed by Sh. Rustam and Sh. Khalil Ahmed against Md. Sayeed Ahmed and the present appellant Sh. Feroz Ahmed, is not found on the record of this case, but counsel for the appellant says that this suit has again thereafter been decreed and the appellant proposes to file an appeal against the judgment and decree dated 6.5.2012 passed decreeing the suit for specific performance.

5. In my opinion *de hors* the findings of the courts below, the present suit was not maintainable at all because appellant is very much a defendant in the earlier suit. In the earlier suit for specific performance there is challenge to the sale deed dated 26.3.1999 which the appellant claims is executed in his favour by Md. Sayeed Ahmed. That sale deed dated 26.3.1999 stands challenged on the ground that in favour of the plaintiffs in the said suit Sh. Rustam and Sh. Khalil Ahmed there exists a prior agreement to sell dated 22.1.1999. A prior agreement to sell prevails over a subsequent sale deed as per Section 19 of the Specific Relief Act, 1963. Therefore the entitlement under the agreement to sell dated 22.1.1999 whether it exists in favour of Sh. Rustam and Sh. Khalil Ahmed, and who are the two main contesting defendants in the present suit being defendant nos. 1 and 2, will be decided in the earlier suit for specific performance and simultaneously it will also be decided as to whether there exists any valid sale deed dated 26.3.1999 as claimed by the appellant herein in his favour. There cannot take place two simultaneous legal proceedings with respect to determination of same issues and it is noted that in law the decision in the earlier suit in fact will operate as *res judicata* against

the parties therein, including the appellant and who is a defendant in the earlier suit. In case it is held in the earlier suit that the appellant does not have in his favour a valid sale deed dated 26.3.1999, including for the reason that there exists a prior agreement to sell dated 22.1.1999 in favour of the two persons Sh. Rustam and Sh. Khalil Ahmed, the issues so in the earlier suit will operate as *res judicata*, and the same will bind the parties including the present appellant. Therefore a suit to question issues which will become *res judicata* in an earlier judicial proceedings will not lie by filing of the present suit.

6. When this appeal had first come up for hearing on 31.10.2017 appellant had not filed various documents, including plaint in the earlier suit for specific performance, the *ex-parte* judgment passed therein, etc and therefore the appellant was called to file all the relevant documents and pursuant to which appellant did file certain documents in terms of the list dated 6.11.2017 but the appellant deliberately did not file other documents as to the status of the suit for specific performance after setting aside of the *ex-parte* decree by the order dated 30.5.2001 allowing the application under Order IX Rule

13 CPC of the defendant no. 1 in the said suit namely Md. Sayeed Ahmed. It is only on a pointed query to counsel for the appellant that it has come out during the hearing in this Court that once again the earlier suit for specific performance has been decreed on 6.5.2012, wherein in that earlier suit the issue with respect to entitlement of the appellant with respect to the suit property on the basis of the sale deed relied upon by the appellant dated 26.3.1999 was/is already in question. Appellant, however has deliberately not filed the judgment and decree dated 6.5.2012 passed in that earlier suit, and it is only stated across the bar that today in November, 2017 an appeal is going to be filed against the judgment and decree passed way back on 6.5.2012. I fail to understand as to how a person who is well aware of an earlier suit for specific performance being decreed, and in which the issue already stands decided which is prayed for being decided in the present suit, did not file till now an appeal against the judgment and decree dated 6.5.2012.

7. In view of the aforesaid discussion obviously the present second appeal is completely misconceived, because the suit itself was completely misconceived.

8. No substantial question of law arises for entertaining this Regular Second Appeal and the same is hereby dismissed.

NOVEMBER 13, 2017

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VALMIKI J. MEHTA, J

