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

+ FAO(OS) 177/2017, CAV Nos.556 & 557/2017 &
CM No.21448/2017

% Date of decision : 30th May, 2017

**VIDUR IMPEX & TRADERS PVT LTD
& ORS**

..... Appellants

**Through : Mr. Manoj, Ms. Aparna Sinha
and Mr. M.T. Reddy, Advs.**

versus

TOSH APARTMENT PVT LTD & ORS Respondents

**Through : Mr. Jayant Bhushan, Sr. Adv.
with Ms. Anjali Sharma and
Ms. Geeta Mohanty, Advs. for
R-1.**

**Mr. Yakesh Anand and
Mr.Nimit Mathur, Advs. for R-
4 to 6.**

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

Caveat Nos.556 & 557/2017

1. Caveators are represented and have been heard. The caveats stand discharged.

FAO(OS) 177/2017

2. By way of the instant appeal, the appellants assail the order dated 28th April , 2017 passed by the ld. Single Judge rejecting I.A.No.7939/2016 in CS(OS)No.864/2014 filed under Order VI Rule 17 of the Code of Civil Procedure, 1908 by the six appellants who are stand to have been impleaded as defendant nos.3 to 8 in the suit. The respondent no.1 as plaintiff, had filed the plaint.

3. The facts giving rise to the present appeal are within a narrow compass. For expediency, we extract the facts as set out in the plaint :

“5. That Shri Pradeep Kumar Khanna, was the owner of the property bearing number 21, Aurangzeb Road, New Delhi. During his lifetime, Shri Pradeep Kumar Khanna, entered into an agreement to sell with the plaintiff on 13 September, 1998, and accordingly the plaintiff paid certain sums of money by way of part consideration to him. Thereafter, since Shri Pradeep Kumar Khanna, failed to execute the sale deed in favour of the plaintiff in terms of the agreement dated 13th September 1988, the plaintiff had filed a suit for specific performance, damages and injunction, in the year 1993, at Delhi High Court, being CS(OS) number 425 of 1993.

6. That in the said suit of the plaintiff, i.e. CS(OS) 425 of 1993, the High Court was pleased to restrain the defendants from transferring, alienating, or parting with possession, in any manner or create third party rights in respect of the property in question, vide order dated 18th of February , 1993, which was subsequently confirmed by this Court during the pendency of the said suit on 31st of January, 2000.

7. Thereafter, on 19th of February, 1997, Shri Pradeep Kumar Khanna, despite being in the knowledge of the said order of the Delhi High Court, and having complete notice of the same, and in utter and flagrant violation of the said order, purportedly executed six agreements for sale of the property in question in favour of the defendant numbers 3 to 8 for a total consideration of Rs.2.88 Crores. In furtherance of those agreements for sale, Late Shri Pradeep Kumar Khanna allegedly executed six registered sale deeds in favour of defendant numbers 3 to 8 on 30th May, 1997, and the details of the same are as under :-

- i. Registration No.3240, Addl. Book No. I, Volume No.9475 on Pages 76 to 98, in favour of Vidur Impex & Traders (P) Ltd.;
- ii. Registration No.3242, Addl. Book No. I, Volume No.9475 on Pages 122 to 144, in favour of M/s Panchvati Plantation Pvt. Ltd.;
- iii. Registration No.3241, Addl. Book No. I, Volume No.9475 on Pages 99 to 121, in favour of M/s Star Exim Pvt. Ltd.;
- iv. Registration No.3238, Addl. Book No. I, Volume No.9475 on Pages 30 to 52, in favour of M/s Haldi Ram Bhujia Bhandar Pvt. Ltd.;
- v. Registration No.3239, Addl. Book No. I, Volume No.9475 on Pages 53 to 75, in favour of M/s V.K.S. Finvest Pvt. Ltd.; and
- vi. Registration No.3243, Addl. Book No. I, Volume No.9475 on Pages 145 to 167, in favour of M/s Convenient Tours & Travels Pvt. Ltd.;

8. *The plaintiff submits that the aforesaid sale deeds were executed by Shri Pradeep Kumar Khanna, and the defendant numbers 3 to 8 despite knowing that there is an injunction order passed by the High Court of Delhi,*

operating in respect of the property in question.

9. *The plaintiff submits that the defendant numbers 3 to 8 after about 11 years of the execution of sale deeds in their favour, filed an application in the suit number 425/1993, being IA No.1861/2008 under Order I Rule 10 (2) CPC for impleadment as defendants in the said suit. They pleaded that by virtue of the agreements for sale and the sale deeds executed by Shri Pradeep Kumar Khanna, they have become absolute owners of the property in question and as such they are entitled to be impleaded as defendants in the suit filed by the plaintiff. The plaintiff had strongly objected to the said application of the defendant numbers 3 to 8 therein, on the ground the suit for specific performance had been filed because Shri Pradeep Khanna did not execute the sale deed in furtherance of agreement for sale dated 13th September, 1988. The plaintiff further took the plea therein that the defendant numbers 3 to 8 are not parties to that agreement therefore they do not have the locus to contest the suit. The Single Judge of Delhi High Court, on the original side, after hearing arguments on the said application filed by the defendant numbers 3 to 8 in Suit No.425/1993, dismissed the said application on 26th May, 2008. The relevant portion of the same are reproduced below :*

“The cumulative sequence of events noticed above leads this court to conclude that the vendor P.K. Khanna allegedly sold the properties in 1997. The applicants also claim as such. They were aware about the existence of this suit if not in 1999 at least from 2001 onwards, they will make parties in an application and subject to an injunction. There conduct in approaching, for, now seven years later, cannot be countenanced. That apart, as held in Kasturi’s case were completely alter the nature of the suit which was instituted in 1993 for specific performance of contract, of 1988.

There is no whisper of leave having been not been by the vendor, to this transaction. The records shows that the vendor was admittedly restrained by an injunction from parting with possession or creating third-party rights in respect of the suit property, on 18th of February, 1993. That order was subsequently conformed after hearing the vendor/P.K. Khanna i.e. first defendant on 5th of April, 1994. In view of the principles spelt out in Bibi Zubaida Khatoon and Surjit Singh accepting this application would defeat the ends of justice and undermine public policy.”

10. Being aggrieved by the said order dated 26th May, 2008, passed by the Learned Single Judge of Delhi High Court, the defendant numbers 3 to 8 preferred an appeal against the said order before the Delhi High Court, being FAO (OS) No.324 of 2008. The Division Bench of this Court dismissed the appeal of the defendant numbers 3 to 8 on 20th February, 2009.

11. Against the dismissal of the appeal by the Division Bench of Delhi High Court, the defendant numbers 3 to 8 had challenged the said order before the Hon’ble Supreme Court of India, vide Civil Appeal No.5918 of 2012 (arising out of SLP (C) No.11501 of 2009).

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(Emphasis by us)

4. It is noteworthy that by the judgment dated 21st August, 2012 reported at **(2012) 8 SCC 384 Vidur Impex and Traders Private Limited & Ors. vs. Tosh Apartments Private Limited & Ors.**, the Supreme Court of India rejected the appeal filed by the present appellants (referred to as defendant nos.1 to 3 above) *inter alia*

holding as follows:

“42. In the light of the above, we shall now consider whether the learned Single Judge and the Division Bench of the High Court committed an error by dismissing the appellants' application for impleadment as parties to Suit No. 425 of 1993. At the cost of repetition, we consider it necessary to mention that Respondent 1 had filed suit for specific performance of agreement dated 13-9-1988 executed by Respondent 2. The appellants and Bhagwati Developers are total strangers to that agreement. They came into the picture only when Respondent 2 entered into a clandestine transaction with the appellants for sale of the suit property and executed the agreements for sale, which were followed by registered sale deeds and the appellants executed agreement for sale in favour of Bhagwati Developers. These transactions were in clear violation of the order of injunction passed by the Delhi High Court which had restrained Respondent 2 from alienating the suit property or creating third-party interest. To put it differently, the agreements for sale and the sale deeds executed by Respondent 2 in favour of the appellants did not have any legal sanctity. The status of the agreement for sale executed by the appellants in favour of Bhagwati Developers was no different. These transactions did not confer any right upon the appellants or Bhagwati Developers. Therefore, their presence is not at all necessary for adjudication of the question whether Respondents 1 and 2 had entered into a binding agreement and whether Respondent 1 is entitled to a decree of specific performance of the said agreement. That apart, after executing the agreement for sale dated 18-3-1997 in favour of Bhagwati Developers, the appellants cannot claim to have any subsisting legal or commercial interest in the suit property and they cannot take benefit of the order passed by the Calcutta High Court for appointment of an arbitrator which was followed by an

order for appointment of Receiver because the parties to the proceedings instituted before that Court deliberately suppressed the facts relating to Suit No. 425 of 1993 pending before the Delhi High Court and the orders of injunction passed in that suit.”

5. Premised on the said pronouncement, Tosh Apartments Private Limited (respondent no.1 herein) filed CS(OS)No.864/2014 explaining the accrual of the *cause of action* in para 20 of the plaint in the following terms :

“20. The cause of action for filing the present suit first arose in favour of the plaintiff and against the defendants on 21st August, 2012, when the Hon’ble Supreme Court of India was pleased to dismiss the appeal filed by the defendant nos.3 and 8. It further arose in favour of plaintiff and against the defendants in view of the findings and observations passed by the Supreme Court of India regarding the sale deed/transactions that had taken place between the defendant nos.3 to 8 with Shri Pradeep Kumar Khanna. It further arose in favour of the plaintiff and against the defendants on 13th December, 2013, when the review petition filed by the defendant nos.3 to 8 was dismissed by the Supreme Court of India. It further arose in favour of the plaintiff and against the defendants on 12th November, 2013, when the plaintiff had issued a notice to the defendant nos.1 and 2, wherein the plaintiff had called upon the defendant nos.1 and 2 to delete the name of the defendant nos.3 to 8 from their records and to restore the name of the previous owner i.e. Shri Pradeep Kumar Khanna. It further arose in favour of the plaintiff and against the defendants when the defendant nos.1 and 2 had failed to delete the name of the defendant nos.3 to 8 from the records of defendant nos.1 and 2, and to restore the name of

Shri Pradeep Kumar Khanna to be the title holder of the suit property.”

6. *Inter alia*, respondent no.1/plaintiff sought the relief of declaration that the aforenoticed sale deed executed by Shri Pradeep Kumar Khanna in favour of the appellants/defendant nos.3 to 8 in the suit, be declared as null and void in view of the pronouncement of the Supreme Court of India which were detailed in the plaint. It is not disputed that the appellants contested the suit and they filed written statements. It appears that during the pendency of the suit, the appellant no.1 was able to compromise with the legal heirs of the deceased Pradeep Kumar Khanna resulting in a consent decree dated 1st September, 2015 in CS(OS)No.425/1993.

7. In view of this subsequent development, respondent no.1/plaintiff was permitted to bring the same on record. Respondent no.1/plaintiff herein filed I.A.7939/2016 under Order VI Rule 17 of the Code of Civil Procedure which was allowed by the Id. Single Judge by the order dated 28th April, 2017.

8. In November, 2015, appellants/defendant nos.3 to 8 filed I.A.No.23802/2015 under Order VII Rule 11 seeking rejection of the plaint on the ground that no cause of action for filing the suit having been made. It was also pleaded before the court that the plaint was barred by limitation for the reason that the plaintiff was seeking cancellation of the sale deeds dated 30th May, 1997 while the suit was filed on 6th March, 2014 and therefore, in terms of Article 59 of the

First Schedule to the Limitation Act, 1963, the plaint was hopelessly barred by limitation.

9. It is trite that so far as prayer of rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure is concerned, it has to be tested on *demurrer* and the assertions made in the plaint are to be treated as true for the purpose of the consideration of the application. The defence of the defendants cannot be looked at for such adjudication.

10. It is not disputed before us on the date of execution of the sale deeds which are the subject matter of challenge in the suit before the Id. Single Judge are concerned. The same came to be admittedly executed during the pendency of CS(OS)No.425/1993 despite the order of interim injunction dated 18th February, 1993 against Pradeep Kumar Khanna who was fully aware of the same.

11. In the judgment dated 21st August, 2012, the Supreme Court has noted the interdiction and prohibition against execution of the documents of transfer. *Inter alia*, to support the bar of limitation, the appellants before us would thus required be to establish the fact that respondent no.1/plaintiff in the suit was actually aware of the execution of the sale deed on the date when it was executed and thereafter. The effect of the several steps taken by either party in CS(OS)No.425/1993 would also required to be considered.

12. In fact, the Supreme Court of India has rejected all such contentions raised by the present appellant in the detailed judgment

noted above and clearly held that the agreements for sale and the sale deeds executed by Pradeep Kumar Khanna in favour of the present appellant “*did not have any legal sanctity*”. It has been further clearly declared that “*these transactions did not confer any right upon the present appellant*”. These findings bind the appellant.

13. So far as commencement of limitation in filing the suit is concerned or as far as plaint is concerned, it is clearly stated in para 20 of the plaint extracted above, that the same arose when the Supreme Court of India passed the judgment. It is not disputed that CS(OS)No.864/2014 has been filed within three years of the passing of the said judgment.

14. In the impugned order dated 28th April, 2017, the Id. Single Judge has noted the submission of the plaintiff/respondent no.1 herein, that after dismissal of the proceedings before the Supreme Court of India, he had filed proceedings before the Sub-Registrar seeking deletion of name of the appellants whose name has been entered in the record of the Sub-Registrar for the reason that the sale deeds now stood nullified by the order of the Supreme Court. No heed was paid to his request. The plaintiff's suit being CS(OS)No.425/1993 seeking performance against Pradeep Kumar Khanna (then represented through his legal heirs – defendant nos.9 to 11) was still pending. In CS(OS)No.425/1993, stay was operating in favour of the plaintiff/respondent no.1.

15. In view of the above, we are unable to agree with the contention

of Id. counsel for the appellants that the plaint was barred by time and that in the facts and circumstances of the case, Article 59 of the First Schedule of the Limitation Act would not come to the aid of the present appellants/defendant nos.3 to 8.

16. It also cannot be held in the present case that the plaint was without any cause of action given the averments of the plaint extracted above and the foregoing discussions.

17. For all these reasons, the challenge to the order dated 28th April, 2017 is completely devoid of any legal merit. The present appeal is completely frivolous and the appellant deserves to be burdened with punitive costs, which are quantified at Rs. 1,00,000/-. The costs shall be paid to the respondent no.1 within four weeks from today. The proof of payment shall be tendered before the Id. Single Judge. In case the appellant does not pay the costs which have been imposed today, the consequences arising upon non- payment of costs would enure to the appellant in the suit so far as their defence in the suit is concerned.

The appeal as well as all pending applications are hereby dismissed.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

MAY 30, 2017

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