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

% *Date of decision:* 02.02.2017

+ CM(M) 1191/2016

SANJAY GUPTA

..... Petitioner

Through Mr.I.P.Singh, Advocate

Versus

ARUN GUPTA

..... Respondent

Through Mr.Suhail Dutt, Senior Advocate with
Mr.K.K.Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

CAVEAT No.240240/2016

Since the learned counsel for the respondent has entered appearance,
the caveat stands discharged.

CM No.43306/2016 (exemption)

Allowed subject to all just exceptions.

CM(M) 1191/2016

1. By the present petition under Article 227 of the Constitution of India the petitioner seeks to impugn the order dated 18.7.2016 by which an application filed by the respondent/plaintiff under section 152 CPC seeking correction in a judgment and decree dated 13.8.2012 passed under Order 12 Rule 6 CPC was allowed. As a consequence of the correction, the Gift Deed dated 1.5.2009 which as per the original order was declared as null and void was also directed to stand cancelled.

2. The respondent had filed the suit for declaring the gift deed in question dated 1.5.2009 as null and void. The parties are real brothers. Thereafter the respondent moved an application under Order 6 Rule 17 CPC for adding the prayer for cancellation of the Gift Deed. The application was allowed.
3. On 13.8.2012 the suit was decreed under Order 12 Rule 6 CPC. However, the trial court while decreeing the suit took into account the unamended plaint ignoring the subsequent amendment which was allowed under Order 6 Rule 17CPC.
4. Against the decree dated 13.8.2012 the petitioner filed an RFA before this court which was dismissed on 24.5.2013. Against the judgment of this court dated 24.5.2013 a Special Leave Petition was filed in the Supreme Court which was also dismissed on 19.9.2014.
5. The case of the respondent is that immediately after the decree was passed on 13.8.2012, he has on 28.8.2012 sought rectification of the decree under section 152 CPC. The trial court has allowed the same by the impugned order dated 18.7.2016.
6. A perusal of the decree dated 13.8.2012 which was passed on an application under Order 12 Rule 6 CPC would show that the trial court has noted that the respondent has filed the suit for declaration that the gift deed dated 1.5.2009 executed in favour of the petitioner be declared null and void and further a decree of permanent injunction be passed against the petitioner not to dispossess the respondent from the suit property. It is manifest from the said observation in para 3 of the said order that the amended plaint has not been taken into account and what has been taken into account is only the un-amended plaint. In the amended plaint the petitioner had also sought

cancellation of the deed.

7. Further the petitioner has expeditiously within expiry of about 18 days from the passing of the decree moved an application for rectification. It is the respondent who has gone to the High Court and Supreme Court challenging the decree.

8. Learned counsel appearing for the petitioner has, however, submitted that the decree passed by the trial court got merged with the order of the higher court hence the trial court lost its jurisdiction to carry out any rectifications. He has relied upon the judgment of the Supreme Court in ***Gojer Brothers Private Limited vs. Ratan Lal Singh, (1974) 2 SCC 453*** to press the issue of doctrine of merger.

9. Section 152 CPC reads as follows:-

“152. Amendment of judgments, decrees or orders- Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

10. It is clear that any clerical mistake in the judgment from any accidental slip or omission may be corrected by the court at any time.

11. Even otherwise, the Gift Deed was executed by the respondent also. Where the executant seeks for declaration of the documents to be null and void, he is obliged to seek cancellation of the deed. Reference in this context may be had to the judgment of the Supreme Court in ***Suhrid Singh @ Sardool Singh v. Randhir Singh & Anr., 2010 (12) SCC 112***, where the court held as follows:

“7. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant

seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to 'A' and 'B' -- two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non- est/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B', a non- executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act.

8. Section 7(iv)(c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by Clause (v) of Section 7.”

12. Hence, the legal position is that where the executant of a gift deed seeks to avoid the gift deed, he has to sue for cancellation of the deed. As per above judgment of the Supreme Court both reliefs, i.e. relief of declaration that the deed is null and void and relief of cancellation of the

deed may have the same effect but the form is different and court fees is different. In view of the above and even otherwise, no prejudice is caused to the petitioner. The Gift Deed has been declared null and void. The cancellation of the deed is a consequential relief. The said relief was not granted by the trial court by over sight as it did not notice the amended plaint. No prejudice is caused to the petitioner.

13. The reliance of the petitioner on the doctrine of merger as stated by the Supreme Court in the case of *Gojer Brothers Private Limited vs. Ratan Lal Singh (supra)* is misconceived. Section 153 A CPC reads as follows:-

“153A. Power to amend decree or order where appeal is summarily dismissed.- Where an Appellate Court dismisses an appeal under rule 11 of Order XLI, the power of the court to amend, under section 152, the decree or order appealed against may be exercised by the court which had passed the decree or order in the first instance, notwithstanding that the dismissal of the appeal has the effect of confirming the decree or order, as the case may be, passed by the court of first instance.

14. Hence, where an appellate court has dismissed the appeal as in the present case, the court of first instance can continue to exercise powers under Section 152 CPC.

15. Petition is without merits and is dismissed. All pending applications if any also stand disposed of accordingly.

JAYANT NATH, J.

FEBRUARY 02, 2017/n