

\$~10

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

+ **FAO 386/2015**

MANGE RAM & ORS

..... Appellants

Through: Mr. Sanjay Verma, Mr. Jugnu Saini, Mr. Rajiv Takbi and Ms. Latika Basetiya, Advocates.

versus

KAILASH CHAND BANSAL (SINCE DECEASED) THR LRS & ANR

..... Respondents

Through: Mr. B.K.Sood and Mr. Sandeep Thukral and Mr. Harish Gaur, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

ORDER

% **10.08.2017**

1. After arguments, this appeal is disposed of on the statement of the counsel for the appellants/plaintiffs that this appeal as also the main suit be allowed to be withdrawn with liberty to the appellants to file an application under Order 9 Rule 13 CPC for setting aside the judgment and decree dated 13.7.1995 passed in Civil Suit No. 2007/1994 titled as ***Kailash Chand Bansal Vs. Tek Chand.***

2. I may note that appellants are the legal heirs of Sh. Tek Chand and against Sh. Tek Chand the judgment and decree dated 13.7.1995 was passed decreeing the suit for specific performance filed by the erstwhile defendant

of this suit Sh. Kailash Chand Bansal and who is now represented by his legal heirs as respondents.

3. It is noted that the subject suit filed by the appellants for setting aside the judgment and decree dated 13.7.1995 is on the basis that Sh. Tek Chand, predecessor-in-interest of the appellants was not served in the Civil Suit No. 2007/1994. In law, a decree passed is binding between the parties under Section 11 CPC and is set aside only in the most limited circumstances as per Section 44 of the Evidence Act but which is not a basis for upsetting the doctrine of *res judicata* under Section 11 CPC. Therefore, the present suit filed by the appellants was not maintainable because if their case is that their predecessor-in-interest Sh. Tek Chand, defendant in suit no. 2007/1994 was not served, then appellants had to file an application under Order 9 Rule 13 CPC for setting aside the ex parte judgment and decree dated 13.7.1995.

4. Accordingly, this appeal is disposed of as not pressed and the suit will also be treated as withdrawn but liberty is granted to the appellants to file an application under Order 9 Rule 13 CPC to set aside the judgment and decree dated 13.7.1995 passed in Civil Suit No. 2007/1994 titled as ***Sh. Kailash Chand Bansal Vs. Tek Chand.***

5. I may hasten to clarify that I am not expressing any opinion one way or the other on the merits of the application under Order 9 Rule 13 CPC which the appellants proposed to file. However, for the period for which the present suit filed by the appellants has remained pending, and till the date of the present order, appellants would be entitled to benefit of Section 14 of the Limitation Act for exclusion of the period for filing of the application under Order 9 Rule 13 CPC. It is however further clarified that appellants will have to explain the delay for not filing the application under Order 9 Rule 13 CPC from the date of passing of the decree dated 13.7.1995 or from the date of service of the defendant Sh. Tek Chand in the said civil suit no. 2007/1994, and again with respect to which this Court does not observe at all on merits, and which aspect alongwith related aspects will be decided by the concerned court where the application under Order 9 Rule 13 CPC is proposed to be filed by the appellants/legal heirs of Sh. Tek Chand, plaintiffs in the present suit. In such application which is proposed to be filed under Order 9 Rule 13 CPC the legal heirs of the erstwhile defendant Sh. Kailash Chand Bansal in this suit and plaintiff in civil suit no. 2007/1994, will have right to urge all defence of fact and law.

6. The appeal is accordingly disposed of with the aforesaid liberty and subject to the aforesaid observations.

VALMIKI J. MEHTA, J

AUGUST 10, 2017

ib