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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 04.11.2022

Pronounced on : 09.11.2022

+ CM(M) 903/2019 & CM APPL.27127/2019

B B JOSHI

..... Petitioner

Through: Mr. Jugal Wadhwa, Mr. Rishabh Wadhwa, Mr. Raghav Goyal, Mr. Prashant Sodhi, Mr. Rishab Bhalla and Mr. Harshit Sharma, Advs.

versus

M/S SHARMA FOUNDATION & ORS..... Respondents

Through: Mr. Mukesh Goel, Adv.

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER

09.11.2022

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1. This petition under Article 227 of the Constitution of India emanates from a suit which was originally instituted before this Court as CS (OS) 335/2012 (*Sharma Foundation & Anr. v. B B Joshi*) and which, consequent to enhancement of the pecuniary jurisdiction of Trial Courts, stands transferred to the Court of the learned Additional District Judge (the learned ADJ), where it was renumbered CS 12/17. Respondent 1 Sharma Foundation and Dr. P. Sharma were the plaintiffs in the suit and the petitioner B B Joshi was the sole defendant.

2. The petitioner is aggrieved by order dated 15th February 2019 passed by the learned ADJ, whereby an application under Order I Rule

10(2)¹ of the Code of Civil Procedure, 1908 (CPC), filed by Dr. Swasti Shrimali Vohra, Rajiv Nair and Dr. Manu Shrimali Sharma, Respondents 2 to 4 herein, has been allowed. By the impugned order, Dr. P. Sharma was deleted from the array of parties and, in his place, Respondents 2 to 4 have been permitted to be impleaded.

Facts

Plaint in CS (OS) 335/2012 (later CS 12/17)

3. Plaintiff 1 in CS(OS) 335/2012 was Sharma Foundation “through Chairman Dr. P. Sharma”. Dr. P. Sharma was separately impleaded as Plaintiff 2.

4. Though the recitals in the plaint do not specifically refer to Plaintiffs 1 and 2, the reference to “the plaintiff”, in the plaint, is apparently to Plaintiff 1 Sharma Foundation.

5. The factual recitals in the plaint may be summarised thus:

(i) The petitioner B B Joshi (“Joshi” hereinafter) entered into an Agreement to Sell dated 18th December 2006 with Respondent 1— Sharma Foundation, for sale of property

¹ 10. **Suit in name of wrong plaintiff. –**

(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) **Court may strike out or add parties. –** The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

situated in Khasra Nos. 204, 205, 206 and 209 situated at Nawada Pargana, Parwadoon, Dehradun, admeasuring 4575 sq. m. (the suit property) for a total sale consideration of ₹ 1.2 crores. Under the Agreement to Sell, which was executed at Delhi, Joshi was to sell the suit property to Sharma Foundation. Pursuant thereto, Sharma Foundation paid ₹ 60 lakhs to Joshi, towards earnest money, *vide* cheque dated 18th December 2006, which was encashed by Joshi on 21st December 2006. The Agreement to Sell envisaged Sharma Foundation opening a charitable hospital in the suit property, for which Joshi was obligated to obtain statutory permissions and complete other formalities within 16 months from the date of agreement, failing which Sharma Foundation was liable to be refunded the earnest money deposited by it along with interest @ 20% per annum.

(ii) The plaint alleged that Joshi failed to obtain the requisite permissions and, therefore, offered to return the earnest money paid by Sharma Foundation. Sharma Foundation accepted Joshi's offer. The earnest money was to be refunded by Joshi in one go, along with interest. Joshi delayed in refunding the money and, after great persuasion, refunded the money in instalments in part, to the extent of ₹ 25,98,500/-.

(iii) Thereafter, Joshi furnished, to Sharma Foundation, cheques dated 7th April 2010 for ₹ 10 lakhs, 14th April 2010 for ₹ 10 lakhs, 21st April 2010 for ₹ 10 lakhs and 30th May 2011 for ₹ 7 lakhs. At the request of Joshi, Sharma Foundation did not deposit the first three cheques dated 7th April 2010, 14th April 2010 and 21st April 2010. The fourth cheque dated 30th May

2011, when presented, was returned unpaid.

(iv) Joshi having thus failed to refund the earnest money paid by Sharma Foundation with interest, a legal notice dated 7th December 2011 was issued by Sharma Foundation to Joshi. The total amount payable by Joshi to Sharma Foundation, as computed in para 12 of the plaint, worked out to ₹ 95,23,500/-. As such, the plaint prayed for a decree, in favour of Sharma Foundation and against Joshi, of recovery to the extent of ₹ 95,23,500/- alongwith *pendente lite* and future interest @ 20% per annum.

Written statement

6. On or around 8th May 2012, Joshi filed his written statement by way of response to the suit instituted by Sharma Foundation. To deal with the limited issue in controversy in the present petition, it is not necessary to detail all the contentions advanced by Joshi in his written statement, and a brief reference thereto would suffice. Joshi contended that Sharma Foundation was required to sue for specific performance of contract and that, therefore, the plaint was barred by Section 41(h)² of the Specific Relief Act, 1963. The allegation that Joshi had failed to complete the necessary formalities or secured the requisite permission, in terms of the Agreement to Sell, was denied. The written statement also alleged that the plaint was liable to be dismissed under Order VII Rule 11³ of the CPC, as no breach of the

² 41. **Injunction when refused.** – An injunction cannot be granted –

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

³ 11. **Rejection of plaint.** – The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

Agreement could be attributed to Joshi. Additionally, it was alleged that the suit was barred by time, as the cause of action for recovery of money arose, as per the Agreement to Sell dated 18th December 2006, on 17th June 2008 and the suit had been filed after the expiry of three years from the said date, on 17th January 2012. Objections with respect to territorial jurisdiction and of the Agreement to Sell having been insufficiently stamped, were also raised. Additionally, para 8 of the Preliminary Objections in the written statement alleged thus:

“8. That the plaintiff no. 1 M/s Sharma Foundation is not a legal entity, competent to sue. The plaintiff no. 2, as per the plaint, is party to this suit, as alleged managing trustee of the plaintiff no. 1, but there is no resolution authorizing the plaintiff no. 2, to file the present suit. Moreover, no trust deed of the plaintiff no. 1 has been filed on the record. Hence the plaintiffs have no locus standi to file the present suit and the same, is not maintainable in the eyes of law.”

7. The “Preliminary Objections” in the written statement were followed by “Preliminary Submissions”. Para 2 of the Preliminary Submissions alleged that the suit was not properly instituted, as the plaintiffs had no *locus standi* to file the suit. The said paragraph merits reproduction thus:

“2. That the Suit is not properly instituted and the plaintiffs have no locus standi to file the present suit and as such the plaint is liable to be rejected at the outset. As per the plaint, the Plaintiff no. 1 M/s Sharma foundation, is allegedly a trust, however the plaintiffs have failed to file or produce the trust deed of the alleged

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- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;
- (e) where it is not filed in duplicate];
- (f) where the plaintiff fails to comply with the provisions of Rule 9;

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

M/s Sharma Foundation, and more over, no resolution authorising plaintiff No.2 has been filed by the plaintiffs herein. Therefore in the absence of any Trust Deed and/or resolution authorising Plaintiff No.2, to institute the present suit, the plaint is liable to be rejected at the outset under Order 7 Rule 11 CPC.”

8. Para 3 of the Preliminary Submissions again reiterated the objection of limitation, contending that the suit, being a suit for recovery of money, was required to be filed within three years of arising of the cause of action, which was the execution of the agreement dated 18th December 2006.

Other details of the proceedings in the suit

9. Summons were issued, in the suit, by the learned Joint Registrar of this Court on 10th February 2012. The delay in filing of written statement was condoned by order dated 14th September 2012, on which date the plaintiffs in the suit were given time to file replication and the parties were directed to file their documents as well as respective affidavits of admission and denial of each other's documents. On 8th March 2013, both sides sought permission to file additional documents. Permission as sought was granted, subject to the condition that the additional documents would be filed within four weeks.

10. Consequent to the permission granted by the learned Joint Registrar of this Court to file additional documents, the Trust Deed dated 7th May 1976 was placed on record under cover of an index dated 8th March 2013. Though Joshi objected to the placing of the said document without any accompanying application under Order VII Rule 14 of the CPC, the objection is obviously without substance as

the document was placed on record as per permission granted by the Court which was never challenged by Joshi. I may note that, even before me, though Mr. Jugal Wadhwa did faintly contend that the Trust Deed ought not to have been taken on record without an accompanying application for filing of additional documents, the contention was not seriously pressed.

11. On 1st October 2014, the following issues were framed by this Court in the suit:

- “(i) Whether the plaintiffs are entitled for a decree of Rs.95,23,500/-? OPP
- (ii) Whether the plaintiffs are entitled to interest, if so, at what rate and for what period ? OPP
- (iii) Whether the suit is barred by limitation? OPD
- (iv) Whether this Court has no territorial jurisdiction to entertain and decide the present suit ? OPD
- (v) Whether the defendant was legally entitled to forfeit the earnest money? OPD
- (vi) Whether the last payment on 17.10.2011 was made to the plaintiffs as the full and final settlement ? OPD
- (vii) Whether the suit is not maintainable in view of preliminary objection Nos. 1,2,3,6 and 7 ? OPD
- (viii) Whether the suit has not been filed by a proper person and plaintiff No. 2 is not duly authorised to institute the suit? OPD
- (ix) Relief.”

By the said order, a former Judicial Officer was appointed as the Court Commissioner to record evidence.

12. During the time the proceedings were pending before this Court, the evidence of Dr. P. Sharma as PW-1 was recorded on 16th

December 2014. Examination-in-chief, by way of affidavit dated 3rd November 2014, was filed by Dr. P. Sharma, and he was cross-examined, with respect to the said affidavit, on 16th December 2014. In his examination-in-chief, he proved the copy of the Trust Deed which was exhibited as Ex. PW-1/1. In cross examination, PW-1 Dr. P. Sharma asserted that Sharma Foundation was a charitable trust and that the Agreement to Sell dated 18th December 2006 (Ex. PW-1/2) was executed between the Trust and Joshi. He further confirmed that all the cheques issued by him and tendered by him in evidence were in the name of Sharma Foundation and not in his personal name. He further confirmed that, on that date, the trustees of Sharma Foundation were Shekhar Chand Jain, Man Singh and himself, and that the last occasion when the trustees of Sharma Foundation had changed was 4 to 5 years prior thereto. He also confirmed that apart from him, no other trustee of Sharma Foundation had been impleaded as plaintiff in the suit.

13. Other recitals in the cross-examination of PW-1 Dr. Sharma are not relevant for the purposes of the present petition.

14. After the aforesaid evidence of PW-1 Dr. Sharma had been recorded, on or around 27th May 2016, Respondents 1 to 3 filed an application under Order I Rule 10 of the CPC for being impleaded as petitioners in place of Dr. P. Sharma, who had expired, in the interregnum, on 24th April 2015. Paras 2 to 8 of the said application, which set out the grounds for seeking the said permission, read thus:

“2. That it is respectfully submitted that Plaintiff no.1 is a Trust duly registered. The Plaintiff no.2 Dr, P. Sharma had been the Chairman of Plaintiff no.1 and therefore, at the time of institution of present. Plaintiff no.1 has been shown to be represented through

Plaintiff no.2 and accordingly, Plaintiff no. 2 had also been impleaded in the present suit as Chairman of the Plaintiff no. 1 and not in his personal capacity.

3. That it is submitted that Chairman Trustee of Plaintiff no. 1 i.e. Plaintiff no.2 had expired on 24/04/2015. After the death of Plaintiff no. 2, a meeting of Surviving trustees and children of Late Sh. Parmanand Sharma had taken place on 16.05.2015. During the said meeting, Dr. Swasti Shrimali Vohra was appointed to act as Chairwomen Trustee of Sharma Foundation i.e. Plaintiff no. 1. In the said meeting, one of the Trustees of Plaintiff namely Shekhar Chand Jain expressed his inability to act as .Trustee and accordingly, Dr. Manu Shrimali Sharma was inducted as one of the Trustees.

4. That now the plaintiff no. 1 is having following Trustees on board namely.

1. Dr. Swasti Shrimali Vohra
2. Rajiv Nair
3. Dr. Manu Shrimali Sharma

5. That copy of the minutes of Meeting held on 16.05.2015 along with its true typed copy is attached with this application. It is pertinent to mention here that in the said meeting it was resolved unanimously to continue with the present proceedings and accordingly Dr. Swasti Shrimali Vohra.was authorised to sign, file and verify the pleadings etc. in this behalf.

6. That however, vide her letter dated 14.06.2015, Dr. Swasti Shrimali Vohra expressed her inability to continue as Chairman Trustee and therefore, in her place. Dr. Manu Shrimali Sharmi was appointed as Chairman Trustee.

7. That it is respectfully submitted that defendant is not allowing the present suit to proceed further on the ground of non-substitution of the Legal Heirs of plaintiff no.2 which is not the case because present suit is not being filed by any individual but by the Trust which is duly registered, thus, there is no question of abatement of the suit.

8. That it is respectfully submitted that present Trustees namely Dr. Swasti Shrimali Vohra, Sh. Rajiv Nair and Dr. Manu Shrimali Sharma are required to be impleaded as co-plaintiffs and the name of the plaintiff no.2 is required to be deleted. The amended memo of parties is attached with this application.”

As such, the application sought permission to implead Respondents 2 to 4 Dr. Swasti Shrimali Vohra, Rajiv Nair and Dr. Manu Shrimali

Sharma as Plaintiffs 2 to 4 in place of Plaintiff 2-Dr. P. Sharma.

15. The minutes of the meeting dated 16th May 2015, annexed with the aforesaid application under Order I Rule 10 of the CPC, filed by Respondents 2 to 4, was in the form of a hand-written note in a spiral register, and read thus:

“After the sudden demise of the Trustee Chairman, Dr. Parmanand Sharma on 24th April 2015 an emergent meeting of the Board of Trustees of the Sharma Foundation Trust was held on 16-05-2015 at A/19-A Kailash Colony, New Delhi, 110048.

The meeting was attended by,

1. Mr. Shekhar Chand Jain, Trustee
2. Mr. Rajiv Nair, Trustee
3. Dr. Swati Shrimali Vohra, Trustee
4. Dr. Manu Shrimali, Special Invitee
5. Mr. Mukesh M Goel, Advocate, Special Invitee

The Following proceedings and decision were taken:-

1. Dr. S.S. Vohra (daughter of Dr. P Sharma) and Dr. Manu Shrimali (son of Dr. P Sharma) reported that after the demise of their father his apartment and office were searched, however the records of the previous meetings of the Trust could not be located, it was unanimously decided to start the new minutes book.
2. It was also unanimously decided to continue the good work of the trust as desired by the SETTLOR in the Trust Deed dated 7th May 1976 as it was an irrevocable trust.
3. The Trustees decided to go with Dr. P Sharma's wishes and registered his daughter Dr. Swati Shrimali Vohra to take over the responsibilities of the trustee chairman with immediate effect.
4. After taking the Chair, Dr. S.S Vohra informed the Board regarding the ongoing litigation against Mr. B. B Joshi for the recovery of the Trust Money which he had obtained from the trust for the purpose of procuring land in Dehradun, for the purpose of establishing a Charitable Hospital but has failed to fulfill his obligation and also failed to return the money as per the terms of the agreement.
5. Mr. Mukesh Goel, Lawyer for the Sharma Foundation Trust

verified that the case had been filed at Delhi High Court in 2012 and was in final stages of the proceedings.

6. The Trustees decided to continue with the cases against Mr. B. B Joshi and Dr. Swati S Vohra Trustee Chairperson was now authorise to sign file , verify, appoint, sign affidavit, appear in court, give evidence, criminal complaint, revise and any and all other action which may be required and deemed necessary from time to time in the over matter.

7. Shri Shekhar Chand Jain expressed his inability to continue as a Trustee and suggested the name of Dr. Manu Shrimah, Son of Late Dr. P Sharma to be inducted as a Board Trustee, Br. Manu Shrimah agreed to shoulder the responsibility of the same.

8. The meeting ended with a vote of thanks to the Chair.”

16. The petitioner Joshi filed a reply, opposing the application under Order I Rule 10 CPC filed by Respondents 2 to 4. It was contended, as a preliminary objection, that the application had been filed under Order I Rule 10 CPC merely to avoid limitation. It was contended that the suit was filed by the plaintiffs, i.e. by Sharma Foundation and Dr. P. Sharma, in their personal capacity, and not as a Trust. As such, consequent on the death of Dr. P. Sharma, Respondent 1 would be required to implead his legal heirs/representatives under Order XXII Rule 3⁴ of the CPC and not the allegedly succeeding trustees of the trust. The application under Order I Rule 10 was, therefore, alleged to be a convoluted effort at avoiding the limitation applicable to applications under Order XXII Rule 3. Inasmuch as the time for filing an application under Order XXII Rule 3 which was 90 days, had expired much before the application under

⁴ 3. **Procedure in case of death of one of several plaintiffs or of sole plaintiff. –**

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

Order I Rule 10 was filed by Respondents 2 to 4, Joshi alleged that the suit had abated and that, therefore, the application was not maintainable.

17. A further preliminary objection, predicated on Section 73(a)⁵ of the Indian Trust Act, 1882, was also advanced by Joshi in his reply to the Order I Rule 10 application of Respondents 2 to 4. It was contended that, under Section 73, a new trustee could be appointed only in accordance with the procedure envisaged by the trust deed. The minutes of the meeting dated 16th May 2015 did not reflect compliance with the procedure envisaged by the Trust Deed dated 7th May 1976 for appointment of new trustees consequent on the death or discharged from office of the existing trustee. In this context, para 11 of the Trust Deed may be reproduced thus:

“11. If and so often as any of the Trustees of these presents shall die or become bankrupt or insolvent or desire to be discharged from or refuse or neglect or become incapable or unfit to act in the trusts of these presents or if it shall be desired to appoint an additional trustee or trustees than it shall be lawful-

For the Settlor during his life time and as long as he shall be a trustee of these presents:

and failing for him, for Smt. Vijay Sharma for the time being as long as she shall be a trustee of these presents:

and failing them, the surviving or continuing trustee or trustees for the time being:

and if there be no more surviving or continuing trustee than for the refusing or retiring trustee or trustees, if willing:

⁵ 73. **Appointment of new trustees on death, etc..** – Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is for a continuous period of six months absent from India, or leaves India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by:

(a) the person nominated for that purpose by the instrument or trust (if any), or ...

and failing them for the heirs, executors or administrators or the last surviving trustee:

to appoint a new trustee or new trustees in the place of the trustee or trustees so dying or becoming bankrupt or insolvent or desiring to be discharged or refusing or neglecting or becoming incapable or unfit to act in the trust, of these presents or to appoint an additional, trustee or trustees as the case may be:

Provided that after the death of the Settlor at least two of the trustees Shall always be descendants, (male or female) of the Settlor AND UPON reduced but so that the total number of Trustees shall not be more than seven or less than 3 and upon every such appointment of a new trustee or additional trustee under this clause the Trust Fund shall if and so far as the nature of the fund or other circumstances shall required or admit the transferred so that the same may be vested in the Trustees for the time being and every such new or additional trustees may as well before as after the said Trust Fund shall have been so vested in him act or assist in the execution of the Trusts and power of these presents and shall have the same powers, authorities and discretions as if he or she had been originally appointed a trustee of these presents:

PROVIDED ALWAYS that without prejudice to any other provisions of the law or Trustee of these presents shall stand discharged from his/her office as trustee on his/her centering his/her resignation of his/her office and on the same being accepted by the remaining trustees of these presents.

Provided Further that the Trustees for the time being will be at liberty to appoint additional trustees within the number mentioned above for such period or on such terms as to retirement and reappointment as the Trustees for the time being shall consider proper.”

18. The application under Order I Rule 10 was also contested on merits. Joshi contended that the Trust Deed dated 7th May 1976 did not reflect Dr. Swasti Shrimali Vohra to be a trustee of Sharma Foundation. At this juncture, I may note that, at the time when the aforesaid reply was filed by Joshi, to the Order I Rule 10 application of Respondents 2 to 4, the minutes of the meeting dated 16th May 2015 had apparently not yet been placed on record. They were placed on record subsequently and, before me, Mr. Jugal Wadhwa, learned

Counsel for Joshi, pointed out that the three persons who were reflected as trustees of Sharma Foundation, in the hand-written minutes of the meeting dated 16th May 2015, were not trustees of Sharma Foundation at that time. He points out that no document, indicating that Shekhar Chand Jain, Rajiv Nair and Dr. Swasti Shrimali Vohra were the trustees of Sharma Foundation on 16th May 2015 had been placed on record and that, in fact, the evidence of PW-1 Dr.P. Sharma in cross-examination, a mere five months prior to the said meeting having purportedly taken place, reflected that, on that date, the trustees of Sharma Foundation were Shekhar Chand Jain, Man Singh and Dr. P. Sharma. The minutes of the meeting dated 16th May 2015 did not reflect the name of Man Singh and reflected, instead, the names of Rajiv Nair and Dr. Swasti Shrimali Vohra as trustees of Sharma Foundation.

19. In view of the aforesaid, Joshi prayed, by his reply to the application of Respondents 2 to 4 under Order I Rule 10 of the CPC, that the application be dismissed.

20. Thereafter, by order dated 30th August 2016, the suit was transferred to the Court of the learned ADJ, where it is presently pending as on date.

21. The impugned order dated 15th February 2019, as already observed, allows the application of Respondents 2 to 4 under Order I Rule 10 CPC. The reasoning of the learned ADJ, in allowing the application, is to be found in paras 7 and 8 of the impugned order, which read thus:

“7. The last argument with respect to plaintiff no. 1 not being addressed as trust in the suit is taken up first. Perusal of the plaint shows that in the memo of parties M/s Sharma Foundation has been shown to be plaintiff no. 1 through chairman Dr. P. Sharma, though it is apparent from the perusal of the entire plaint that word "Trust" has not come, however, the affidavit of Dr. P. Sharma also shows that he is chairman of plaintiff no. 1. The documents filed along with plaint contains an original agreement to sell and purchase which clearly shows the name of M/s Sharma Foundation through its trustee chairman which clarifies the status of plaintiff no. 1. Further before the death of plaintiff no. 2 Dr. P. Sharma, copy of the trust deed has been placed on record alongwith a list which is dated 08.03.2013. Once the copy of the trust deed has come on record, the argument of learned counsel for defendant saying that the plaintiff no. 1 is not shown to be a trust is not at all tenable.

8. The copy of minutes of meeting dated 16.05.2015 have already been filed on record which are signed by one of the trustee namely Sh. Shekhar Chand Jain who has expressed his inability to act as chairman, and, therefore, Dr. Swasti Shrimali Vohra was appointed as chairman trustee. Though, plaintiff no. 2 has expired, however, minutes of meeting dated 16.05.2015 and 09.07.2015 clearly shows that constitution of trust have changed and the present trustee are Dr. Swasti Shrimali Vohra, Sh Rajiv Nair and Dr. Manu Shrimali Sharma. I do not find any harm in impleading all three trustees as plaintiffs alongwith plaintiff no. 1 in the memo of parties. It is clarified that though Dr. Swasti Shrimali Vohra, Dr Manu Shrimali Sharma are LR's of plaintiff no. 2, however, they have been impleaded in the present case in the capacity of trustee of plaintiff no. 1 M/s Sharma Foundation and not as LR of Dr. P. Sharma. Let Dr. P. Sharma is deleted from the array of parties. Therefore, application is allowed. Amended memo of parties be filed.”

22. A reading of paras 7 and 8 of the impugned order reveals that the learned ADJ has, in holding that the suit had been filed by Sharma Foundation as a Trust, relied on the following facts:

(i) The memo of parties in the plaint reflected Sharma Foundation to have been impleaded, as Plaintiff 1, through Dr. P. Sharma. Dr. P. Sharma was undisputedly the chairman of Sharma Foundation, as a Trust, at that time.

(ii) The affidavit of Dr. P. Sharma, accompanying the plaint, was also filed in his capacity as chairman of the Trust.

(iii) The Agreement to Sell dated 18th December 2006, which formed the basis of the cause of action in the plaint, was also executed between Joshi and Sharma Foundation “through its trustee Chairman Dr. P. Sharma”.

(iv) The placing of the Trust Deed on record, on 8th March 2013, consequent to obtaining permission from the Court in that regard, also indicated that the suit had been instituted by Sharma Foundation as a Trust.

23. In these circumstances, though the plaint did not expressly employ the expression “Trust” at any point, the learned ADJ was of the opinion that it was obvious that the plaint had been filed by Sharma Foundation as a Trust.

24. Having said that, the impugned order does not reflect any application of mind to the submission, in the reply filed by Joshi to the application under Order I Rule 10 of Respondents 2 to 4, that Dr. Swasti Shrimali Vohra was not shown as a Trustee of Sharma Foundation in the Trust Deed dated 7th December 1976. Further, the impugned order has not examined the issue of whether the induction of the new trustees, of whom the application sought impleadment in place of Dr. P. Sharma, was in accordance with the covenants of the Trust Deed.

25. Aggrieved by the impugned order, Joshi has filed the present

petition before this Court under Article 227 of the Constitution of India.

Rival Contentions

26. I have heard Mr Jugal Wadhwa, learned Counsel for the petitioner and Mr. Mukesh Goel, learned Counsel for the respondent, at length.

27. Mr. Wadhwa contends that the suit could not be said to have been filed by Sharma Foundation as a Trust. There was no assertion, anywhere in the plaint, which could justify such a presumption. Sharma Foundation was not referred to as a “Trust” anywhere in the plaint.

28. Mr. Wadhwa, in order to support this contention, draws my attention to Order XXXI Rule 2⁶ of the CPC which requires, in any suit against a trust, all trustees to be impleaded as defendants. Relying on the judgment of a Division Bench of this Court in **Golesh Kumar v. Ganesh Dass Chawla Charitable Trust**⁷, Mr. Wadhwa submits that this principle would also apply in the case of suits instituted by a trust. The suit, therefore, was not maintainable as filed, as necessary parties had not been impleaded. It was, therefore, liable to be dismissed. **Golesh Kumar**⁷ according to Mr. Wadhwa, holds that, in such a case, the plaintiff cannot seek to remedy the defect, which is fatal, by subsequently seeking to implead the trustees under Order I Rule 10 CPC, especially where, by the time such impleadment is sought, the

⁶ 2. **Joinder of trustees, executors and administrators.** – Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside India, need not be made parties.

⁷ 2006 SCC OnLine Del 487

suit has become barred by time by virtue of Section 21(1)⁸ of the Limitation Act, 1963.

29. He also invokes, in this context, Section 48⁹ of the Trusts Act and cites, in support of the said contention, the judgment of this Court in *Duli Chand v. Mahabir Prasad Charitable Trust*¹⁰ and *Atmaram Rachhodbhai v. Gulamhusein Gulam Mohiyaddin*¹¹ (by a Full Bench of the High Court of Gujarat).

30. Mr. Wadhwa reiterates the contention advanced in the reply of Joshi to the respondents' application, by submitting that Order I Rule 10 is no substitute for Order XXII Rule 3, which was subject to a strict limitation period. Once the proceedings had abated on account of non-impleadment of the legal representatives of Dr. P. Sharma within the period stipulated in Order XXII Rule 3, by virtue of Order XXII Rule 3(2) of the CPC, Respondents 2 to 4, submits Mr. Wadhwa, could not seek to revitalise the proceedings by moving an application under Order I Rule 10.

31. Mr. Wadhwa submits that the original trustees, whose names are reflected in the Trust Deed dated 7th May 1976, were never impleaded in the suit. At the very least, he submits that the original trustees ought to have been impleaded within three years of filing of the suit.

⁸ 21. **Effect of substituting or adding new plaintiff or defendant. –**

(1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

⁹ 48. **Co-trustees cannot act singly. –** When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

¹⁰ AIR 1984 Delhi 145

¹¹ 1972 SCC OnLine Guj 10

32. Drawing attention to para 7 of the impugned order, Mr. Wadhwa submits that the learned ADJ has not dealt with the aforesaid submissions of his client, though they were specifically urged before her.

33. Adverting to Section 21(1) of the Limitation Act and the proviso thereto, Mr. Wadhwa submits that no plea of bonafide mistake, as envisaged by the proviso, had been urged by Respondents 2 to 4 in their Order I Rule 10 application, as would justify permitting their impleadment in the suit at such a belated point of time.

34. Responding to the submissions advanced by Mr. Wadhwa, Mr. Mukesh Goel, learned Counsel for the respondent, places reliance on Section 13¹² of the Trusts Act, to contend that there was no absolute requirement, in law, for all trustees of the trust to be impleaded in a suit filed by the trust. He submits that, in the written statement filed by Joshi in May 2012, no attention to the fact that the suit was bad for non-joinder of parties, as all trustees had not been impleaded in the suit, had been advanced. On this fact, he submits that the judgment of the Division Bench of this Court in *Golesh Kumar*⁷ is clearly distinguishable. According to Mr. Goel, *Golesh Kumar*⁷ was a case in which, in the written statement filed by the defendants by way of response to the plaint, it had been specifically averred that the plaint was not maintainable as all trustees of the defendant trust had not been impleaded. Despite this objection having been taken in the written statement, the Division Bench noted that, for as long as five years, no

¹² **13. Trustee to protect title to trust-property. –**

A trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust-property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.

attempt was made by the plaintiff in that case to implead the trustees of the defendant trust. It was only after 5 years, when the limitation for filing the suit had expired, that the plaintiff sought to move an application under Order I Rule 10 to implead the trustees of the defendant trust. It was in those circumstances, submits Mr. Goel, that the Division Bench of this Court held that the inherent infirmity in the suit, to which the attention of the plaintiff had been invited in the written statement filed by way of response thereto, could not be sought to be cured at a belated stage, by way of an application under Order I Rule 10 CPC. In these circumstances, the Division Bench had held that the plaintiff before it could not be entitled to the benefit of the proviso to Section 21 of the Limitation Act. Mr. Goel submits that, in *Duli Chand*¹⁰, in fact the application under Order I Rule 10, to implead the trustees, was allowed even at the appellate stage. Mr. Goel also places reliance on the judgment of this Court in *Ram Kishan & Sons v. IILM Business School*¹³.

Analysis

35. From the rival contentions at the Bar, essentially two issues arise for consideration.

36. The first is whether the suit was filed by Sharma Foundation as a Trust. Mr. Wadhwa would contend that it was not, whereas the impugned order holds that it was. If the suit was not filed by Sharma Foundation as a Trust, but by Sharma Foundation and Dr. P. Sharma in their individual capacities, the sequitur would be that the demise of Dr. P. Sharma would require his substitution by his legal

¹³ 2010 SCC OnLine Del 2278

representatives under Order XXII Rule 3 of the CPC, and not his deletion from the array of parties and impleadment, in his place, of the allegedly succeeding trustees. The impugned order would, in that case, be liable to be set aside even on that score.

37. The second issue would arise only if the first issue is answered in the negative. In the event that the suit is treated as having been filed by Sharma Foundation as a Trust, then, undoubtedly, Order XXII Rule 3 would not apply consequent on the death of Dr. P. Sharma. In that event, the Court would have to consider whether Respondents 2 to 4 would be entitled to implead themselves in place of Dr. P. Sharma, under Order I Rule 10 of the CPC. Mr. Wadhwa would contend that, even if the suit were to be treated as having been filed by Sharma Foundation as a Trust, the application under Order I Rule 10 of the CPC would nonetheless, be required to be dismissed as (i) the suit itself was not maintainable as filed, as all the trustees had not been impleaded as required by Order XXXI Rule 2 of the CPC, (ii) by the time the application for impleadment of Respondents 2 to 4 was filed, the suit had, by virtue of Section 21 of the Limitation Act, become barred by time, (iii) no plea, to the effect that all the trustees in Sharma Foundation had not been originally impleaded in the suit due to a mistake made in good faith had been pleaded by Respondents 2 to 4 in their application under Order I Rule 10 and (iv) therefore, applying the law laid down in *Golesh Kumar*⁷, Respondents 2 to 4 were not entitled to be impleaded as trustees in the suit.

38. As I have already noted, the impugned order decides the first issue, i.e. the issue of whether the suit had been filed by Sharma

Foundation as a Trust, in the affirmative and, thereafter, straightaway proceeds to allow the deletion of Dr. P. Sharma as Plaintiff 2 in the suit and the impleadment of Respondents 2 to 4 in his place. As a result, the objections, in the reply filed by Joshi, to the impleadment of Respondents 2 to 4 on merits, assuming the suit had been instituted by Sharma Foundation as a Trust, have not been addressed by the learned ADJ.

Principles, vis-à-vis Article 227 of the Constitution of India

39. Apropos the jurisdiction vested in this Court by Article 227 of the Constitution of India, one may refer to the following passages in, *Sadhana Lodh v. National Insurance Co. Ltd.*¹⁴, *Garment Craft v. Prakash Chand Goel*¹⁵, *Puri Investments v. Young Friends and Co*¹⁶, *Estralla Rubber v. Dass Estate (P) Ltd.*¹⁷ and *Ibrat Faizan v. Omaxe Buildhome Pvt. Ltd.*¹⁸

*Sadhana Lodh*¹⁴

“7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision.”

(Emphasis Supplied)

¹⁴ (2003) 3 SSC 524

¹⁵ (2001) 8 SCC 97

¹⁶ 2022 SCC Online SC 283

¹⁷ (2001) 8 SCC 97

¹⁸ 2022 SCC Online SC 620

Puri Investments¹⁶

“14. In the case before us, occupation of a portion of the subject-premises by the three doctors stands admitted. What has been argued by the learned counsel for the appellant is that once the Tribunal had arrived at a finding on fact based on the principles of law, which have been enunciated by this Court, and reflected in the aforesaid passages quoted from the three authorities, the interference by the High Court under Article 227 of the Constitution of India was unwarranted. To persuade us to sustain the High Court's order, learned counsel appearing for the respondents has emphasized that full control over the premises was never ceded to the medical practitioners and the entry and exit to the premises in question remained under exclusive control of the respondent(s)-tenant. This is the main defence of the tenant. We have considered the submissions of the respective counsel and also gone through the decisions of the fact-finding fora and also that of the High Court. At this stage, we cannot revisit the factual aspects of the dispute. Nor can we re-appreciate evidence to assess the quality thereof, which has been considered by the two fact-finding fora. The view of the forum of first instance was reversed by the Appellate Tribunal. The High Court was conscious of the restrictive nature of jurisdiction under Article 227 of the Constitution of India. In the judgment under appeal, it has been recorded that it could not subject the decision of the appellate forum in a manner which would project as if it was sitting in appeal. It proceeded, on such observation being made, to opine that it was the duty of the supervisory Court to interdict if it was found that findings of the appellate forum were perverse. Three situations were spelt out in the judgment under appeal as to when a finding on facts or questions of law would be perverse. These are: —

- (i) Erroneous on account of non-consideration of material evidence, or
- (ii) Being conclusions which are contrary to the evidence, or
- (iii) Based on inferences that are impermissible in law.

15. We are in agreement with the High Court's enunciation of the principles of law on scope of interference by the supervisory Court on decisions of the fact-finding forum. But having gone through the decisions of the two stages of fact-finding by the statutory fora, we are of the view that there was overstepping of this boundary by the supervisory Court. In its exercise of scrutinizing the evidence to find out if any of the three aforesaid conditions were breached, there was re-appreciation of evidence itself by the supervisory Court.

16. In our opinion, the High Court in exercise of its jurisdiction under Article 227 of the Constitution of India in the judgment under appeal had gone deep into the factual arena to disagree with

the final fact-finding forum.”

***Estralla Rubber*¹⁷**

“7. This Court in *Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand*¹⁹ in para 12 has stated that the power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors. Reference also has been made in this regard to the case *Waryam Singh v. Amarnath*²⁰. This Court in *Bathutmal Raichand Oswal v. Laxmibai R. Tarte*²¹ has observed that the power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal and that the High Court in exercising its jurisdiction under Article 227 cannot convert itself into a court of appeal when the legislature has not conferred a right of appeal. Judged by these pronounced principles, the High Court clearly exceeded its jurisdiction under Article 227 in passing the impugned order.

***Garment Craft*¹⁵**

“15. Having heard the counsel for the parties, we are clearly of the view that the impugned order [*Prakash Chand Goel v. Garment Craft*²²] is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. [*Celina Coelho Pereira v. Ulhas Mahabaleshwar Kholkar*²³] The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to

¹⁹ AIR 1972 SC 1598

²⁰ AIR 1954 SC 215

²¹ AIR 1975 SC 1297

²² 2019 SCC OnLine Del 11943

²³ (2010) 1 SCC 217

ensure there is no miscarriage of justice.

16. Explaining the scope of jurisdiction under Article 227, this Court in *Estralla Rubber*¹⁷ has observed : (SCC pp. 101-102, para 6)

“6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this Article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.” ”

*Ibrat Faizan*¹⁸

“28. The scope and ambit of jurisdiction of Article 227 of the Constitution has been explained by this Court in the case of *Estralla Rubber*¹⁷, which has been consistently followed by this Court (see the recent decision of this Court in the case of *Garment Craft*¹⁵). Therefore, while exercising the powers under Article 227 of the Constitution, the High Court has to act within the parameters to exercise the powers under Article 227 of the Constitution. It goes without saying that even while considering the grant of interim stay/relief in a writ petition under Article 227 of the Constitution of India, the High Court has to bear in mind the limited jurisdiction of superintendence under Article 227 of the Constitution. Therefore, while granting any interim stay/relief in a writ petition under Article 227 of the Constitution against an order passed by the

National Commission, the same shall always be subject to the rigour of the powers to be exercised under Article 227 of the Constitution of India.”

40. A cohesive reading of the afore-extracted passages clearly indicates that this Court, exercising Article 227 jurisdiction, does not sit in appeal over the decision of the court below. Even errors in the order passed by the court below are usually immune from interference under Article 227, save and except where the error is manifestly perverse or is such as results in serious or irreparable prejudice to the party.

41. Article 227 does not confer appellate jurisdiction. Proceedings under Article 227 are not, therefore, proceedings in continuation of the suit. This Court cannot, therefore, while exercising jurisdiction under Article 227, decide issues which were not decided by the court below. Any such exercise, by this Court, would clearly breach the boundaries of Article 227 of the Constitution of India, and partake of the character of appellate jurisdiction.

42. If, therefore, an issue which was raised before the court below and which, according to the High Court exercising jurisdiction under Article 227, was erroneously not considered and decided, the only avenue open to the Article 227 court would be to direct the court below to decide the said issue. In so directing, of course, the court is required to act *ex debito justitiae*. Trivial, tangential or inconsequential issues, which may have been raised before the court below and left undecided, cannot, in exercise of Article 227 of the Constitution of India, be remanded to the court below for decision. If, however, an issue which touches the maintainability or the merits of

the application being decided by the court below, or is otherwise of pith and significance, has been left undecided, it would be appropriate to direct the court below to decide that issue. Once the court below decides that issue, needless to say, all remedies, aggrieved by either party with the said decision, would be open.

Was the suit instituted by Sharma Foundation as a trust?

43. I proceed now, to advert to the first issue which arises for consideration, which is whether the decision of the learned ADJ, to the effect that the suit had been instituted by Sharma Foundation as a Trust, invites interference under Article 227 of the Constitution of India. Having examined the material on record and applied my mind to the contentions at the Bar, I am inclined to answer the issue in the negative.

44. In order to support his contention that the suit had not been instituted by Sharma Foundation as the trust, Mr. Wadhwa sought to place reliance on Section 48 of the Trust Act read with Order XXXI Rule 2 of the CPC. He submits that, if the suit had, indeed, been instituted by Sharma Foundation as a Trust, all the trustees would have been made parties. He points out that there is no reference, anywhere in the plaint, to the fact that Sharma Foundation is a trust. Indeed, submits Mr Wadhwa, the word “Trust” is itself not to be found anywhere in the body of the plaint. The mere fact that Dr. P. Sharma has been shown, in the memo of parties in the plaint, as the Chairman of Sharma Foundation, submits Mr. Wadhwa cannot lead to a conclusion that the suit was filed by Sharma Foundation as a Trust.

Drawing attention to Order II Rule 1²⁴ and Rule 2(1)²⁵ of the CPC which requires the pleadings in a suit to aver all relevant and material facts, he submits that, in the absence of a specific pleading, in the plaint, to the effect that Sharma Foundation was suing as a Trust, the learned ADJ could not have arrived at that conclusion.

45. As already noted, the learned ADJ has held that the suit was instituted by Sharma Foundation as a Trust based on four factors. These are that (i) the memo of parties accompanying the plaint reflected Sharma Foundation as Plaintiff 1, through Dr.P. Sharma as its Chairman, (ii) the affidavit of Dr. P. Sharma, accompanying the plaint, was also filed by him as chairman of the Plaintiff 1-Trust, (iii) the Agreement to Sell, filed with the plaint, was also executed between Joshi and by Sharma Foundation as a Trust through its chairman Dr. P. Sharma and not by Sharma Foundation or Dr. P. Sharma in their individual capacities, and (iv) Sharma Foundation had itself placed, on record, the Trust Deed dated 7th May 1976.

46. Once the learned ADJ had relied on these factors, to hold that the suit had been instituted by Sharma Foundation as a Trust, this Court, under Article 227 would be crossing the legitimate boundaries of its jurisdiction if it were to subjectively examine the sufficiency of the said factors, as to arrive at the conclusion that the suit was instituted as a Trust. Once, applying her subjective satisfaction, the learned ADJ had regarded the aforesaid four factors as sufficient to

²⁴ 1. **Frame of suit.** – Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

²⁵ 2. **Suit to include the whole claim.** –

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

treat the suit as having been instituted by Sharma Foundation as a Trust, this Court, even if it were to regard the said facts as insufficient to arrive at the said conclusion, could not interfere with the order under Article 227 of the Constitution of India on that basis.

47. That said, even on merits, I am satisfied that the four factors which the learned ADJ took into consideration, to arrive at her conclusion, were more than sufficient to hold that the suit was indeed instituted by Sharma Foundation as a Trust. The capacity in which a plaintiff seeks to sue is entirely the prerogative of the plaintiff, as *dominus litis*. As such, it was entirely the prerogative of Sharma Foundation to decide whether to sue as a Trust or in its individual capacity. Whether Sharma Foundation sued as a Trust, or in its individual capacity, is necessarily to be discerned from the plaint, the cause of action and the case set up therein, and the documents filed with it.

48. Viewed thus, no exception, either on facts or in law, can be taken to the impugned order passed by the learned ADJ, insofar as it holds that the suit was instituted by Sharma Foundation as a Trust. As has been correctly held by the learned ADJ, the memo of parties clearly reflects Plaintiff 1 as Sharma Foundation through its chairman Dr. P. Sharma. If Sharma Foundation was suing in any capacity other than a trust, there was no occasion for it to sue through its chairman Dr. P. Sharma.

49. Nor, for that matter, was there any occasion to implead Dr. P. Sharma as Plaintiff 2, unless Sharma Foundation was suing as a Trust. The memo of parties filed with the suit, even by itself, therefore, indicates that the suit was filed by Sharma Foundation as a Trust.

This conclusion is additionally enforced by the fact that Dr. P. Sharma in his affidavit accompanying the plaint, also deposed as the Chairman of the Trust Sharma Foundation.

50. Even more pivotal, probably, is the fact that the very cause of action, in the plaint, pertained to the Agreement to Sell executed between Joshi and Sharma Foundation as a Trust. The opening recitals in the Agreement to Sell read thus:

“This Agreement to sell and purchase is executed at New Delhi on 18.12.2006 between SHRI B. B. JOSHI SON OF LATE SHRI H.D. JOSHI RESIDENT OF 32/5, CHANDER ROAD, DEHRADUN hereinafter called the first party of the first part/seller.

AND

M/S SHARMA FOUNDATION AT A-19, KAILASH COLONY, NEW DELHI-110048, *THROUGH ITS TRUSTEE CHAIRMAN DR. P. SHARMA* SON OF LATE SHRI PANDIT K.B. SHARMA C/O SHARMA NURSING HOME, A-19-A, KAILASH COLONY, NEW DELHI-110048, hereinafter called the second party of the other party/purchaser.”

(Italicised Supplied)

51. The Agreement to Sell having been executed between Joshi and the Sharma Foundation through its Chairman Dr P. Sharma, there can be no doubt, whatsoever, of the fact that the suit was instituted as a Trust, as the suit was predicated on the basis of the said Agreement to Sell.

52. These facts, even by themselves, according to this Court, are more than sufficient to indicate that CS (OS) 335/2012 was instituted by Sharma Foundation, before this Court, as a Trust.

53. Resultantly, the first issue is answered in the negative and in

favour of the respondent. The impugned order passed by the learned ADJ, to the extent it holds Sharma Foundation to have instituted the suit as a Trust is, therefore, upheld.

54. Mr. Wadhwa also sought to rely on Order XXXI Rule 2 of the CPC, in support of his contention that the suit had not been instituted by Sharma Foundation as a Trust. His contention is that, if the suit had indeed been instituted by Sharma Foundation as a Trust, the trustees would definitely have been impleaded as parties.

55. The submission appears, to me, with respect to Mr Wadhwa, lopsided, and effectively places the proverbial cart before the horse. It may be open to Joshi to contest the maintainability of the suit as originally instituted on the ground that all trustees had not been impleaded as parties. That issue, as would become presently apparent, is being left open for *de novo* consideration by the learned ADJ. The fact that all trustees of Sharma Foundation had not been impleaded in the suit as originally filed, cannot, however, be a basis to hold that the suit was not filed by Sharma Foundation as a Trust. As I have already held, the issue of whether the suit was filed by Sharma Foundation as a Trust or in its individual capacity, has to be decided on the basis of the averments in the plaint. On the basis of the said averments, read with the documents filed with the plaint, I am inclined to agree with the learned ADJ in her finding that the suit was indeed instituted by Sharma Foundation as a Trust.

56. That takes us to the second issue. Clearly, once it is held that the suit was instituted by Sharma Foundation as a Trust, there can be no question of Order XXII Rule 3 applying, consequent on the death of Dr. P. Sharma. The submission of Mr.Wadhwa that Order XXII

Rule 3 was the provision which would apply is, therefore, rejected.

57. It then remains to be considered, however, whether the learned ADJ was justified in straightaway allowing impleadment of Respondents 2 to 4 in place of Dr. P. Sharma. The decision to delete Dr. P. Sharma from the array of parties in the suit, cannot, of course, be questioned, as he had expired in the interregnum.

58. At the cost of repetition, the contentions raised by Mr. Wadhwa to question the impugned order, insofar as it permitted impleadment of Respondents 2 to 4 as trustees in the Sharma Foundation, in place of Dr. P. Sharma, may be enumerated thus:

(i) The Trust Deed dated 7th May 1976 does not reflect Dr. Swasti Shrimali Vohra, Mr. Rajiv Nair and Dr. Manu Shrimali Sharma as the trustees in Sharma Foundation.

(ii) The original trustees in Sharma Foundation had not been impleaded.

(iii) The suit, as instituted, was not, therefore, maintainable and was liable to be dismissed as such.

(iv) The request of Respondents 2 to 4, at a belated stage, to implead themselves in place of Dr.Sharma could not be entertain as

(a) the suit had, by then, become barred by time by virtue of Section 21 of the Limitation Act,

(b) if Respondents 2 to 4 were permitted to be impleaded, Section 21(1) of the Limitation Act would deem the suit to have been instituted by Respondents 2 to

4 only on the date when the impleadment was allowed,

(c) by then, the suit was barred by time, and

(d) Respondents 2 to 4 would not get the benefit of the proviso to Section 21 of the Limitation Act, as the application under Order I Rule 10 filed by them did not plead that the omission to implead all the trustees in the suit when it was filed was due to a mistake in good faith.

(v) Accordingly, applying the law laid down in **Golesh Kumar**⁷, the application under Order I Rule 10 could not have been allowed.

(vi) The alleged induction of Respondents 2 to 4 as trustees had not been made in accordance with Clause 11 of the Trust Deed.

(vii) The persons who had been named as trustees in the Resolution dated 16th May 2015 were not trustees of Sharma Foundation on that date. No material, to indicate that they were trustees of Sharma Foundation on 16th May 2015, had been placed on record by Respondents 2 to 4 with their application under Order I Rule 10.

(viii) Rather, the cross examination of PW-1 Dr. P. Sharma, on 16th December 2014, indicated that, on the date of cross examination, which was a mere five months prior to 16th May 2015, the trustees in Sharma Foundation were Shekhar Chand Jain, Man Singh and Dr. P. Sharma, with no reference either to Mr. Rajiv Nair or Dr. Swasti Shrimali Vohra. Man Singh was not shown as a trustee of Sharma Foundation in the minutes of

16th May 2015. Rather, Dr Swasti Shrimali Vohra and Rajiv Nair, who, as per the cross-examination of PW-1 Dr P. Sharma, were not trustees of Sharma Foundation a mere five months prior thereto, were shown as trustees.

(ix) As such, even on merits, the application by Respondents 2 to 4 under Order I Rule 10 did not bear out their claim as being trustees of Sharma Foundation on the date when the application was moved.

59. These are submissions of considerable weight, which require to be considered and decided on merits. Though all these submissions, in so many words, may not find place in the reply filed by Joshi to the application of Respondents 2 to 4 under Order I Rule 10, the *locus standi* of Respondents 2 to 4 to implead themselves as trustees, has been questioned, *inter alia* on the ground that the original trustees had not been impleaded and that there was nothing to indicate that the trustees, named in the minutes of meeting dated 16th May 2015 were actually trustees of Sharma Foundation. If they were not, the minutes of 16th May 2015 would be completely devoid of any legal sanctity.

60. Given the importance of these submissions and as they were advanced in considerable detail before this Court, and as Mr.Goel, for his part, also attempted to answer these submissions on merits, I am of the opinion that they merit serious consideration.

61. As these submissions have not, however, been addressed by the learned ADJ while passing the impugned order dated 15th February 2019, the decision of the learned ADJ, to the extent it straightaway permits impleadment of Respondents 2 to 4, as plaintiffs in the suit,

treating them as trustees in Sharma Foundation, cannot be sustained. It is accordingly set aside to that extent.

Conclusion

62. Resultantly, this petition is disposed of in the following terms:

(i) The finding, in the impugned order dated 15th February 2019 passed by the learned ADJ to the extent it holds CS(OS) 335/2012 as having been instituted before this Court by Sharma Foundation in its capacity as a Trust is upheld.

(ii) The submission of Mr. Wadhwa to the effect that Order XXII Rule 3 would be applicable, consequent on the death of Dr. P. Sharma, is rejected.

(iii) The learned ADJ is, however, directed to consider *de novo*, the issue of whether Respondents 2 to 4 would be entitled to be impleaded as Plaintiffs in CS 12/17, keeping in mind the various objections raised by Mr. Wadhwa in that regard, enumerated in para **58** *supra*.

63. For the above purpose, both sides are directed to appear before the learned ADJ on 22nd November 2022.

64. Given the intricacies of the issues involved, the learned ADJ may, if she/he deems it appropriate, call upon the parties to file written submissions in support of their respective stands.

65. The learned ADJ is requested to take a decision on the aforesaid

issues raised by Mr. Wadhwa and, therefore, decide, *de novo*, the application of Respondents 2 to 4 under Order I Rule 10 of the CPC, as expeditiously as possible, keeping in view the observations made hereinabove.

66. The petition is, therefore, partly allowed, with no orders as to costs.

C.HARI SHANKAR, J

NOVEMBER 9, 2022/kr



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