



\$~50

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

Date of decision: 21.12.2023

+ **CM(M) 1422/2023 & CM APPL. 45485/2019, 2256/2022 & 2257/2022**

SAROJ GUPTA & ANR

..... Petitioners

Through: Mr H.S. Phoolka, Sr. Advocate with
Ms Vidhi Gupta and Ms Surpreet
Kaur, Advocates

versus

SOM NATH SETIA & ORS

..... Respondents

Through: Mr Pawanjit S. Bindra, Sr. Advocate
with Mr Vinayak Marwah, Advocates
with LR. of R-1 in person
Mr Alakh Kumar, Advocate for R-2
and 3

%

CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. This petition impugns the order dated 07.06.2019 passed by Additional District Judge-01 (South) District Courts, Saket, New Delhi in RCA No. 89/2017 titled *Saroj Gupta & Anr. v. Som Nath Setia & Ors.*, ('First Appellate Court') whereby the First Appellate Court dismissed the regular first appeal filed by the Petitioner against the final judgment and



decree dated 24.07.2017 passed in CS No. 611896/2016 titled as ***Som Nath Setia vs. Ravi Setia & Ors.*** ('Trial Court').

2. Respondent No.1 was the original plaintiff. The Respondent Nos .2 to 5 were the original defendants before the Trial Court. The Petitioners herein contend that they have purchased the property i.e. A-13, Lok Sewa Cooperative Society Ltd. Geetanjali Enclave, New Delhi ('suit property') from Respondent Nos. 2 and 3 during the pendency of the suit proceedings.

2.1 The civil suit was filed by Respondent No.1 seeking relief of declaration, cancellation of documents and permanent injunction against Respondent Nos. 2 to 5.

3. The Petitioners herein had filed an application for impleadment before the Trial Court which was dismissed on 02.06.2016. The Petitioner, thereafter, preferred a first appeal under Order XLIII of Code of Civil Procedure, 1908 ('CPC') bearing no. 45194/2016 ('appeal Court') against the said order; however, the said appeal was disposed of as infructuous by the concerned appeal Court on 10.08.2017 in view of the fact that the suit itself stood decreed by the Trial Court on 24.07.2017.

3.1 In the aforesaid facts, the Petitioners herein preferred a regular first appeal under Section 96 of CPC against the judgment and decree dated 24.07.2017 passed by the Trial Court which was numbered as RCA No. 89/2017. The order dated 02.06.2016 dismissing the impleadment application was also duly challenged in the memorandum of appeal as per Section 105 of CPC.

3.2 The First Appellate Court, however, has dismissed the Petitioners appeal i.e., RCA No. 89/2017 in view of the Trial Court's order dated 02.06.2016.



4. It is noted at the outset that the Petitioners had initially instituted the present petition under Section 100 of CPC as a regular second appeal. The Respondent No.1 raised an objection with respect to the maintainability of the appeal and contended that the appropriate course would have been to file a petition under Article 227 of the Constitution of India. Accordingly, the present petition has been converted on 21.08.2023 and has been registered as CM(M) 1422/2023.

5. Learned Senior counsel for the Petitioners states that the Petitioners have stepped into the shoes of Respondent Nos. 2 and 3 having purchased the suit property vide registered documents dated 09.10.2009 for valuable consideration. He states that the Petitioners are entitled to be impleaded under Order XXII of CPC. He states that Petitioners are directly effected by the final judgment and decree of the Trial Court dated 24.07.2017 and are therefore, entitled to maintain the regular first appeal. He states that the Petitioners herein will be held bound by the aforesaid final judgment and decree dated 24.07.2017 and, therefore, they are entitled to maintain the appeal. He relies upon the judgment of Supreme Court in *My Palace Mutually Aided Cooperative Society vs. B. Mahesh and others; 2022 SCC OnLine SC 1063* to contend that the Petitioners can maintain the appeal since they are affected by the judgment and decree dated 24.07.2017 passed by the Trial Court.

6. In reply, learned Senior counsel for the Respondent No.1 states that the Petitioners herein are bound by the judgment and decree dated 24.07.2017 passed by the Trial Court. He contends that the Petitioners herein during the pendency of the suit had filed an application under Order 1 Rule 10 of CPC seeking their impleadment which was dismissed by the



Trial Court vide order dated 02.06.2016.

6.1 He states that earlier appeal bearing no. 45194/2016 was filed against the said order dated 02.06.2016 passed by the Trial Court under Order LXIII Rule 1 read with sections 104 and 151 of CPC, however, the same was disposed of as infructuous by the concerned appeal Court on 10.08.2017 due to the passing of the final judgment dated 24.07.2017 by the Trial Court.

6.2 He states that since the orders dated 02.06.2016 and 24.07.2017 passed by the Trial Court operate between the parties, the First Appellate Court in appeal bearing no. RCA No. 89/2017 has rightly dismissed the appeal preferred by the Petitioners herein.

6.3 He further states that Respondent Nos. 2 and 3 have already preferred an independent appeal first appeal against the judgment and decree dated 24.07.2017; and therefore, the Petitioners cannot maintain a separate appeal.

7. This Court has considered the submissions of the learned senior counsel for the parties and perused the record.

8. At the outset, it would be relevant to note Section 96 and Section 105 of CPC, which reads as under:

“96. Appeal from original decree.— (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed [ten] thousand rupees.

105. Other orders.— (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or



irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.”

(Emphasis supplied)

9. The Petitioners challenge to the order dated 02.06.2016 passed by the Trial Court dismissing their impleadment application was not decided by the concerned appeal Court in earlier appeal bearing no.45194/2016 on merits and was disposed of as infructuous vide order dated 10.08.2017.

10. The Petitioners in the memorandum of appeal filed against the judgment and decree dated 24.07.2017 (in RCA No.89/2017) have raised specific grounds for impugning the order dated 02.06.2016 of the Trial Court dismissing their impleadment application. The grounds raised for challenging the order dated 02.06.2016 are permissible as per Section 105 CPC. In these facts, the order dated 02.06.2016 has not become final and the First Appellate Court hearing RCA No. 89/2017 erred in dismissing the Petitioners appeal on this ground.

11. With respect to maintainability of the regular first appeal against the judgment and decree dated 24.07.2017 by a third party it would be relevant to refer to the pronouncements of the Supreme Court and this Court on this issue.

11.1 The Supreme Court in *My Palace Mutually Aided Cooperative Society* (supra) has categorically opined that persons who are not parties to the suit can maintain an appeal under Section 96 of CPC after seeking leave of the Court. The relevant portion of the judgment reads as under:

“29. The respondents in the present case had access to recourse under Section



96 of the CPC, which allows for appeals from an original decree. It must be remembered that the present matter was being heard by the High Court exercising its original jurisdiction. The High Court was in effect conducting a trial, and the final decree passed by the High Court on 19.09.2013 was in effect a decree in an original suit. As such, there existed a right of appeal under Section 96 of the CPC, for the respondents. **Though they were not parties to the suit, they could have filed an appeal with the leave of the Court as an affected party.** Section 96 of the CPC reads as under:

96. Appeal from original decree.

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

[(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject matter of the original suit does not exceed [ten thousand rupees.]

30. Sections 96 to 100 of CPC deals with the procedure for filing appeals from original decrees. A perusal of the above provision makes it clear that the provisions are silent about the category of persons who can prefer an appeal. But **it is well settled legal position that a person who is affected by a judgment but is not a party to the suit, can prefer an appeal with the leave of the Court.** The sine qua non for filing an appeal by a third party is that he must have been affected by reason of the judgment and decree which is sought to be impugned.

31. In the light of the above, it can be safely concluded any aggrieved party can prefer an appeal with the leave of the Court.

[Emphasis supplied]

11.2 The Supreme Court in ***V.N. Krishna Murthy and Anr v. Ravikumar and Others***, (2020) 9 SCC 501 as well opined that a stranger can be permitted to file an appeal if he falls within the category of aggrieved persons. The relevant portion of the judgment reads as under:

“13. We have considered the rival submissions made by the learned Counsel for the parties.



14. In the backdrop of above facts, the question which arises for our consideration is as to whether the appellants held the locus to question the judgment and decree passed by the Trial Court and whether the High Court was justified in rejecting their leave to appeal.

15. Section 96 and 100 of the Code of Civil Procedure provide for preferring an appeal from any original decree or from decree in appeal, respectively. The aforesaid provisions do not enumerate the categories of persons who can file an appeal. However, it is a settled legal proposition that a stranger cannot be permitted to file an appeal in any proceedings unless he satisfies the Court that he falls with the category of aggrieved persons. It is only where a judgment and decree prejudicially affects a person who is not party to the proceedings, he can prefer an appeal with the leave of the Appellate Court. Reference be made to the observation of this Court in **Jatan Kumar Golcha v. Golcha Properties (P) Ltd.** [(1970) 3 SCC 573]: (SCC p. 575, para 3)

“3. ... It is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the Appellate Court and such leave should be granted if he would be prejudicially affected by the Judgment.”

16. This Court in *State of Punjab v. Amar Singh* [(1974) 2 SCC 70] while dealing with the maintainability of appeal by a person who is not party to a suit has observed thus: (SCC p. 104, para 83)

“83. Firstly, there is a catena of authorities which, following the dictum of Lindley, L.J., Securities Insurance Co., In re [(1894) 2 Ch 410 (CA)] have laid down the Rule that a person who is not a party to a decree or order may with the leave of the Court, prefer an appeal from such decree or order if he is either bound by the order or is aggrieved by it or is prejudicially affected by it.”

(emphasis in original)

17. In *Baldev Singh v. Surinder Mohan Sharma* [(2003) 1 SCC 34] this Court held that an appeal Under Section 96 of the Civil Procedure Code, 1908, would be maintainable only at the instance of a person aggrieved by and dissatisfied with the judgment and decree. While dealing with the concept of person aggrieved, it was observed in paragraph 15 as under: (SCC pp. 39-40)

“15. ... A person aggrieved to file an appeal must be one whose right is affected by reason of the judgment and decree sought to be impugned.”



18. In *A. Subash Babu v. State of A.P.* [(2011) 7 SCC 616], this Court held as under: (SCC pp. 628-29, para 25)

“25. ... The expression “aggrieved person” denotes an elastic and an elusive concept. It cannot be confined that the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the complainant's interest and the nature and extent of the prejudice or injuries suffered by the complainant.”

19. The expression “person aggrieved” does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must, therefore, necessarily be one, whose right or interest has been adversely affected or jeopardized (vide *Shanti Kumar R. Canji v. Home Insurance Co. of New York* [(1974) 2 SCC 387] and *State of Rajasthan v. Union of India* [(1977) 3 SCC 592]).

20. In *K. Ponnalagu Ammani v. State of Madras* [1952 SCC OnLine Mad 300 : (1953) 66 LW 136] this Court laid down the test to find out when it would be proper to grant leave to appeal to a person not a party to a proceeding against the decree or judgment passed in such proceedings in the following words: (SCC OnLine Mad)

“Now, what is the test to find out when it would be proper to grant leave to appeal to a person not a party to a proceeding against the decree or judgment in such proceedings? We think it would be improper to grant leave to appeal to every person who may in some remote or indirect way be prejudicially affected by a decree or judgment. We think that ordinarily leave to appeal should be granted to persons who, though not parties to the proceedings, would be bound by the decree or judgment in that proceeding and who would be precluded from attacking its correctness in other proceedings.”

[Emphasis supplied]

11.3 Similarly, Division Bench of this Court in ***Bhisham Sawhney and Others v. Union of India and Other***, 1994 SCC OnLine Del 339 held that a third party can maintain an appeal with the leave of Court. The relevant portion of the judgment reads as under:



“4. It is well settled that a person who is not a party to a decree or order of the court may prefer an appeal from such decree or order if he is either bound by it or aggrieved by it or is prejudicially affected by it. But in such matters appeal can only be filed with the leave of the court. The party is required to follow this procedure. In an appropriate case where leave is sought the court may grant the same without notice to the other party. But in a case where there is some doubt with regard to the question as to whether the person who is not a party to a decree or order has at all been prejudicially affected by it, a notice may be necessary to be issued to the other party before deciding the question whether leave should be granted to the former for preferring the appeal from such decree or order and in that event it will be open to the latter to show that the former cannot have any genuine grievance as the determination does not prejudicially affect his interest. As a general principle no one can appeal from a decree, order or determination of the court unless he is a party to the action and his title or interest in the property is apparent on the face of the record and he seeks leave of the court to prefer an appeal.”

[Emphasis supplied]

12. In the facts of this case, admittedly the First Appellate Court has not considered the issue of maintainability of the appeal at the instance of the Petitioners herein on the tests mentioned in the judgments noted hereinabove. The First Appellate Court proceeded to dismiss RCA No. 89 of 2017 only by referring to the Trial Court's order dated 02.06.2016, without appreciating that the said order of the Trial Court itself has been impugned in the memorandum of appeal.

13. The impugned order passed by the First Appellate Court has resulted in the Petitioners being rendered remediless against the order dated 02.06.2016 despite having preferred the earlier appeal bearing number 45194/2016 and subsequently, the RCA No. 89 of 2017. The First Appellate Court failed to appreciate that the order dated 10.08.2017 was not passed by the earlier appeal Court on merits and therefore, cannot operate as res judicata.

14. The First Appellate Court has the jurisdiction to entertain the



challenge to the order dated 02.06.2016 passed by the Trial Court and by its impugned order dated 07.06.2019 the said Court has failed to exercise the said jurisdiction. Accordingly, the impugned order is not sustainable and is set aside with the direction that the First Appellate Court will simultaneously decide the Petitioners challenge to the order dated 02.06.2016 whereby the Trial Court dismissed its impleadment application and also, proceed to decide whether Petitioners are entitled to leave to challenge the final judgment and decree dated 24.07.2017; since these issues are intertwined and the challenge of the Respondent No.1 to both these issues is common.

15. It is only after the First Appellate Court grants leave to the Petitioners herein to maintain the regular first appeal, that their challenge to the judgment and decree dated 24.07.2017 passed by the Trial Court will be heard on merits.

16. Learned counsel for Respondent No.1 has contended that the Petitioners herein have entered into sale transactions with Respondent Nos. 2 and 3 during pendency of the proceedings before the Trial Court and therefore, are not entitled to participate in the proceedings.

17. The said objection of Respondent No.1 is left open and this Court is not expressing any opinion on the said objection. The effect of the said fact will be duly considered by the First Appellate Court while adjudicating the appeal of the Petitioners against the order dated 02.06.2016 and the application seeking leave to file the appeal.

18. With the aforesaid observations, order dated 07.06.2019 is set aside and the Regular First Appeal i.e., RCA No. 89/2017 is restored to its original Number.

19. The parties are directed to appear before the First Appellate Court on



29.01.2024. The Petitioners herein are directed to file an appropriate application before the First Appellate Court with this order for listing of the appeal from the said date.

20. With the aforesaid directions, the present petition is allowed. Pending applications also stand disposed of.

MANMEET PRITAM SINGH ARORA, J
DECEMBER 21, 2023/rk/ms
Click here to check corrigendum, if any