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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) 22/2024 and CM APPL. 9458/2024, CM APPL. 9459/2024, CM APPL. 9460/2024**

SHRI ARUN SANKHWAL

..... Appellant

Through: Mr. Akhil Sibal, Senior. Advocate
with Mr. Jagat Mehra, Mr. Madan
Gera, Ms. Asavari Jain and Mr.
Adityaraj Patodia, Advocates.

versus

SHRI ANOOP GUPTA & ANR.

..... Respondents

Through: Mr. Rajesh Yadav, Senior Advocate
with Mr. Anil Kumar Batra, Mr.
Manan Lohani and Mr. Devishah
Batra, Advocates.

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Date of Decision: 21st February, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ : (ORAL)

1. This appeal has been filed under Section 10 of the Delhi High Court Act, 1966 ('Act of 1966'), challenging the impugned order dated 8th November, 2023, passed in CS (OS) No. 137/2006, whereby the learned Single Judge of this Court, inter alia, dismissed the application being I.A. No. 7853/2023 seeking restoration of the suit (as dismissed vide order dated 06th July, 2022). The learned Single Judge however, vide the impugned



order restored the I.A. No. 7857/2008 filed by the defendants seeking interest at 24% per annum towards delayed payment of the remaining sale consideration amount of ₹ 2,74,89,000/-, by treating it as a counter claim; and directing the defendants to pay requisite court fee within two weeks. The learned Single Judge further allowed the I.A. No. 9429/2019 filed by the defendants and thereby granted a final opportunity to the defendants to tender their affidavit of evidence dated 8th July, 2019 within fifteen days.

2. The Appellant herein is the plaintiff and Respondent Nos. 1 and 2 are defendant nos.1 and 2 respectively.

3. The suit was filed by the Appellant herein seeking specific performance of the Agreement to Sell dated 05th September, 2005 ('ATS') with respect to 1st floor and 2nd floor and above of building constructed on Plot No. 7, Sunder Nagar, Market, New Delhi ('suit property'). The sale deed with respect to suit property was executed on 4th June, 2008 in pursuance to the order dated 19th May, 2008.

3.1. At this stage, the Respondents/defendants in terms of their submissions recorded in order dated 19th May, 2008, filed the I.A. No. 7857/2008, claiming interest on the balance sale consideration of ₹ 2.75 Crores, which was paid about two and a half years later from the time stipulated in the ATS i.e., from 5th September, 2005 to 4th June, 2008. The Appellant/plaintiff raised an objection to the maintainability of the said claim for interest in the present suit.

3.2. However, in view of the order dated 19th May, 2008, the Court held that the issue of maintainability of the claim of interest would be decided at the stage of final arguments after recording the evidence. Accordingly, the Court framed an issue on 9th July, 2008 i.e., *Whether the defendant no.1 is*



entitled to any interest, if so on what amount and at what rate and for what period? and further directed the Respondent No.1 to file an affidavit by way of examination-in-chief within two (2) weeks. However, the affidavit of evidence was filed on behalf of the Respondents only on 3rd February, 2009 and the I.A. No. 9429/2019 seeking filing of fresh evidence by way of affidavit was filed on 8th July, 2019, which was dismissed in default by the learned Single Judge on 06th July, 2022 and the matter was disposed of as satisfied.

3.3. In these circumstances, the Respondents herein filed I.A. No. 7853/2023 seeking restoration of the suit and recall of order dated 6th July, 2022 and I.A. No. 7854/2023 seeking condonation of delay of 242 days in filing the application for restoration of suit.

Submissions of the counsel for parties

4. At the outset, learned senior Counsel for the Appellant states that he has no objection to the suit being restored in terms of the prayer sought in I.A. Nos. 7853-54/2023 and parties being put back to their position as it stood on 6th July, 2022.

4.1. He states that however, the Court erred in restoring the I.A. No. 7857/2008 and treating it as a counter claim of the Respondents. He states that I.A. No. 7857/2008, already stood disposed by the predecessor of the learned Single Judge vide order 9th July, 2008, with an observation that the same has become infructuous. He states that in these circumstances, the said application could not have been allowed by the learned Single Judge on a date when it was not listed for adjudication and that too without hearing the Appellant.

4.2. He states that the Court further erred in allowing the I.A. No.



9424/2019 filed by the Respondents and thereby permitting the Respondents to tender their affidavit of evidence dated 8th July, 2019 ('fresh affidavit'), within fifteen (15) days.

4.3. He states that similarly, the I.A. No. 9424/2019 was dismissed in default on 6th July, 2022, and the same could not have been allowed by the learned Single without considering the submissions of the Appellant. He states that the Appellant has filed his reply to the said application and the same can be allowed by the learned Single Judge only after hearing the parties and considering the reply filed by Appellant. He states that the grant of permission to the Respondents to lead additional witnesses is contrary to the order dated 5th February, 2009, wherein the Respondents had undertaken to lead evidence of a single witness only.

4.4. He states that the aforesaid I.A. Nos. 7857/2008 and 9424/2019 were not listed on 8th November, 2023 and the impugned order had been passed without granting a hearing to the Appellant.

4.5. He states that the Respondents have not been diligent in the suit proceedings inasmuch as there was a delay of 242 days in filing the I.A. No. 7853/2023. He states that the Respondents filed I.A. No. 7854/2023 seeking condonation of delay alleging to delay to be on account of the counsel's fault. He states that, similarly, the I.A. No. 9424/2019 was filed after a lapse of thirteen years and the same being highly belated, couldn't have been allowed without hearing the Appellant.

5. In reply, learned senior counsel for the Respondents states that this appeal is not maintainable. He states that the impugned order is procedural in nature and no appeal is maintainable against it in terms of the provisions of Order XLIII Rule 3 of Code of Civil Procedure, 1908 ('CPC') or under



Section 10 of the Act of 1966 as it does not satisfy the parameters of a 'judgment'.

5.1. He states that the Respondents have already acted in terms of the impugned order and paid the court fees on the counter-claim.

Findings and Analysis

6. We have considered the submissions of the learned senior counsel for the parties and perused the record.

7. We have perused the orders dated 19th May, 2008, 9th July, 2008 and 6th July, 2022, passed in the suit proceedings. We find merit in the submissions of the Appellant that the impugned order, to the extent it restores I.A. No. 7857/2008 and issues directions for treating the same as a counter claim is beyond the reliefs prayed for by the Respondents in I.A. Nos. 7853-7854/2023 and therefore, could not have been granted. The relief of restoration of I.A. No. 7857/2008 and grant of further reliefs as recorded in paragraph 25 of the impugned order is also contrary to the earlier order dated 9th July, 2008, passed in the suit proceedings, which has attained finality as neither party had assailed the said order.

8. We accordingly set aside the directions in the impugned order at paragraph 25 restoring the I.A. No. 7857/2008 and further directing the pleadings therein to be treated as a counter-claim. Consequently, the Court fees deposited by the Respondents in furtherance of the impugned order is hereby directed to the refunded. The Registry is directed to issue a certificate authorising the Respondents to receive back from the Collector the full amount of Court-fee paid by it in respect of counter-claim.

9. We also set aside the direction issued at paragraph 23 of impugned order, whereby the relief of restoration of suit prayed for in I.A.No.



7853/2023 was declined; and hereby allow I.A. No. 7853/2023 filed by the Respondents seeking recall of the order dated 6th July, 2022 and for restoring the suit. Accordingly, the order dated 6th July, 2022, is set aside and the suit is restored to its original number. Needless to state with the restoration of the suit, all orders including orders dated 19th May, 2008 and 9th July, 2008 stand restored. As noted elsewhere in this order, the Appellant has consented to the I.A. No. 7853/2023 being allowed.

10. With respect to the objections raised by the Appellant to the directions issued at paragraph 26 of the impugned order in I.A. No. 9424/2019, whereby the Respondents were permitted to adduce additional evidence on the issue of interest, we may note that the Respondents list of additional witnesses and fresh evidence affidavit was filed in the suit way back on 9th July, 2019. By the impugned order, the said list of witnesses and fresh evidence affidavit has been permitted to be taken on record. The leave granted by learned Single Judge to the Respondents to lead additional evidence is discretionary in nature and does not merit any interference by this Court in its Appellate jurisdiction. It is also admitted by the parties that in the interregnum parties explored possibilities of mediation, which led to mutual adjournments. However, in view of the fact that the matter has remained pending at the stage of leading of evidence since the year 2008 and in view of the order passed by the Court earlier on 5th February, 2009, we deem it appropriate to direct the Respondents to pay cost of Rs. 30,000/- within one week to the Appellants for the delay in leading evidence.

11. Accordingly, the appeal is allowed to the aforesaid extent and the pending applications stand disposed of.

***Consequential directions***

12. The claim of the Respondents towards interest is for the period 5th September, 2005 to 4th June, 2008 and has been quantified at Rs. 1,81,42,740/- together with interest at 24% per annum from 4th June, 2008 till the date of payment, together with costs and litigation expenses. The said surviving claim in the suit is below Rs. 2 crores and therefore, the suit is below the pecuniary jurisdiction of this Court and is liable to be transferred to the concerned district court. Both learned senior counsel of the parties concede the said position in law.

13. Accordingly, it is directed that CS (OS) No. 137/2006, which is listed before the Joint Registrar on 28th February, 2024 shall be transferred to the concerned district court for being tried from the stage of recording of evidence by the Respondents.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

FEBRUARY 21, 2024/rhc/aa

Click here to check corrigendum, if any