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

Date of decision: 04.11.2024

+ RFA(OS) 20/2024, CM APPL. 30593/2024 –Stay, CM APPL. 47254/2024 –Stay & CM APPL. 56275/2024 –Dir. (Res.).

GEETA KATYAL & ANR.

.....Appellants

Through: Mr. Rajeev Saxena, Ms. Megha Saxena and Ms. Shreya Bhatnagar, Advs.

versus

MANAK PORTFOLIOS (P) LTD. AND ORSRespondents

Through: Mr. P.S. Bindra, Sr. Adv. with Mr. Gobind Malhotra, Mr. Gurpreet Singh, Ms. Namrata Malhotra, Mr. Lovish Sharma and Mr. Rakshit Pandey, Advs.

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+ RFA(OS) 22/2024 & CM APPL. 31386/2024 -Stay

GEETAKATYAL

.....Appellant

Through: Mr. Rajeev Saxena, Ms. Megha Saxena and Ms. Shreya Bhatnagar, Advs.

versus

SUDARSHAN GABARespondent

Through: Mr. P.S. Bindra, Sr. Adv. with Mr. Gobind Malhotra, Mr. Gurpreet Singh, Ms. Namrata Malhotra, Mr. Lovish Sharma and Mr. Rakshit Pandey, Advs. for R-3 to R-7

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

HON'BLE MR. JUSTICE SAURABH BANERJEE

SAURABH BANERJEE, J (ORAL)

1. These two appeals under Section 96 of the Code of Civil Procedure,



1908¹ read with Section 10 of the Delhi High Court Rules seek to assail the common judgment and decree dated 04.03.2024 passed by the learned Judge in CS (OS) 344/2019 and in CS (OS) 221/2022.

2. Vide the impugned judgment, the learned Single Judge has not only decreed the suit instituted by the respondents by allowing their application under Order XII Rule 6 in CS (OS) 344/2019, but has also simultaneously allowed the application under Order VII Rule 11 CPC of the respondents in CS (OS) 221/2022 and consequently dismissed the suit instituted by the plaintiffs/ appellants by holding the same as barred under the provisions of Order XXIII Rule 1(4) CPC as also under Order II Rule 2 CPC. In order to appreciate the rival contentions of the parties, we deem it necessary to begin by noting the brief factual matrix involved. For the sake of convenience we will refer to the parties as per their description in RFA (OS) 20/2024.

3. It emerges that one Sh. Amar Singh Gaba, deceased father of the appellant no.1 and father-in-law of the appellant no.2, was the original owner of a plot bearing no. 16, admeasuring 280.69 Sq. Yards situated at Manak Vihar, East Delhi-110 092². As per appellants, the said late Sh. Amar Singh Gaba entered into an Agreement to Sell dated 10.04.2009 qua the suit property with the appellant no.1.

4. Thereafter, by virtue of a duly registered Will dated 29.08.2016 the said late Sh. Amar Singh Gaba bequeathed the suit property to his surviving wife Smt. Sudarshan Gaba, mother of appellant no.1, who then vide a duly registered Sale Deed dated 15.12.2017 sold the suit property, to the respondent nos. 1 to 5 in RFA(OS) 20/2024.

¹ Hereinafter referred as "*CPC*"

² Hereinafter referred as "*suit property*"



5. The late Sh. Amar Singh Gaba then filed an eviction petition bearing RC/ARC/1279/2016 entitled “**Amar Singh Gaba v. Rajeev Katyal**” qua the suit property against the appellants, however, the same was subsequently withdrawn after his demise on 01.08.2017.

6. Prior to execution of the aforesaid Sale Deed, on 17.10.2017 the appellant no.1 instituted a civil suit bearing no. 767/2017 entitled “**Geeta Katyal v. Sudarshan Gaba and Ors.**” before the Court of learned ADJ, Karkardooma Courts, Delhi against the two remaining surviving legal representatives of late Sh. Amar Singh Gaba, namely Smt. Sudarshan Gaba (wife) and the respondent no.2 in RFA (OS) 22/2024 (second daughter), initially for specific performance of the said Agreement to Sell dated 10.04.2009 and for the registered Will of late Sh. Amar Singh Gaba dated 29.08.2016 being declared null and void and later by way of amendment declaration of the aforesaid Sale Deed dated 15.07.2017 as null and void was also sought.

7. However, the aforesaid civil suit bearing no. 767/2017 was withdrawn by the appellant no.1/ plaintiff on 15.04.2019 in the below terms recorded by the learned Trial Court:-

“Vide separate statement, plaintiff submits that she wishes to withdraw the present suit.

In view of the statement of plaintiff, present suit stands dismissed as withdrawn.

File be consigned to record room after due compliance.”

8. In the interregnum, on the basis of a complaint made by the director of respondent no.3, who was/ is one of the joint purchasers of the suit property through his company against the appellant nos.1 and 2, an FIR no. 152/2018 under Sections 420/ 467/ 468/ 471 and 120B of the Indian Penal



Code, 1860 was registered against them.

9. In Bail Application no. 1550/2018 filed by the appellant no.2 before this Court seeking anticipatory bail in the aforesaid FIR no.152/2018, this Court first on 06.07.2018 recorded as under:-

"3. Learned senior counsel appearing for the complainant submits that till date original agreement has not surfaced. Learned APP for the State also submits that the original document has not been produced till date in any proceedings between the petitioner and the erstwhile owner of the property. He submits that the witnesses to the said documents were called by the Investigating officer and they had disowned their signatures on the same. However, forensic examination of the document could not take place as the original had not been produced."

10. Then, on 10.12.2018 this Court also recorded in the very same Bail Application no. 1550/2018 of the appellant no.2 as under:-

"1. Petitioner seeks anticipatory bail in FIR No. 152/2018 under Sections 420/467/468/471/120B of the IPC registered at Police Station Anand Vihar.

2. Learned counsel for the petitioner submits that one of the allegations levelled against the petitioner are regarding use of alleged forged document for filing of suit for specific performance. He submits that he has instructions to withdraw the suit for specific performance and also to approach the complainant for the purpose of settlement.

3. Learned counsel for the respondent submits that respondent is also agreeable to mediation provided the petitioner withdraws the suit for specific performance.

4. Learned counsel for the parties pray that parties be referred to mediation."

11. Once again, on 18.02.2018 this Court further recorded in the very same Bail Application no. 1550/2018 of the appellant no.2 as under:-

"2. Learned Senior Counsel for the respondent/complainant submits that on 10.12.2018 the petitioner stated that he would be withdrawing the suit filed by him for specific performance. He submits that the petitioner instead of withdrawing the suit has only withdrawn a prayer of the suit and has been continuing the suit based on the same pleadings and the same forged documents. "

3. Learned counsel for the petitioner prays for time to take



instructions."

12. It was thereafter that after withdrawal of Civil Suit no. 767/2017 by the appellant no.1 before the Court of learned ADJ, Karkardooma Courts, Delhi that on 02.05.2019, this Court in Bail application no.1550/2018 of the appellant no.2 recorded as under:

- "1. Petitioner seeks anticipatory bail in FIR No.152/2018 under Sections 420/467/468/471/120B /PC, Police Station Anand Vihar.*
- 2. Subject FIR was registered on a complaint made by the complaint contending that the Agreement to Sell had been forged by the petitioner. Further, based on the Agreement to Sell, a suit for specific performance was filed by the wife of the petitioner. Petitioner is a witness to the said document.*
- 3. Pending the present proceeding mediation took place between the parties. Consequent to which wife of the petitioner has withdrawn- the suit filed by her seeking specific performance based on the said Agreement to Sell."*

13. It is thereafter that the respondent nos. 1 to 5 instituted the afore-mentioned suit CS (OS) 344/2019 seeking declaration, possession, mesne profit and permanent injunction against the appellants. Subsequently, the appellants also instituted the other afore-mentioned suit CS (OS) 221/2022 for partition, declaration and permanent injunction against the respondent nos. 1 to 5.

14. Before us, it is the appellants' case that the appellant no.1 withdrew the Civil Suit bearing 767/2017 before the learned ADJ, Karkardooma Courts, Delhi only on account of the ongoing settlement talks between the parties, wherein it had been agreed between the appellants as also the respondents in both the appeals that in case the appellant no.1 were to withdraw her suit, the respondents after re-developing the property, will transfer one floor in her name. It is further claimed that after the appellant no.1 withdrew her suit, the intentions of the respondents became dishonest



and they instead of honouring their assurance to the appellant no.1 filed a suit for declaration, possession and mesne profits being CS(OS) 344/2019.

15. As per appellants, it is in the above circumstances that the appellant no.1 alongwith her husband appellant no.2 was compelled to file the aforesaid suit i.e. CS (OS) 221/2022 which has been, wrongly, dismissed by the learned Single Judge by allowing the respondents' application under Order VII Rule 11, CPC. It is their case that simultaneously the suit filed by the respondents seeking declaration, possession and mesne profits in respect of the suit property from the appellants has been erroneously decreed partly by passing the decree of declaration and possession with the matter still pending consideration before the learned Single Judge for determination of mesne profits.

16. The appellants contend that while dismissing their suit, the learned Single Judge observed that once the appellant no.1 had withdrawn her earlier suit seeking specific performance as also challenging the registered Will dated 29.08.2016 in favour of Smt. Sudarshan Gaba alongwith the consequential Sale Deed dated 15.12.2017 executed by Smt. Sudarshan Gaba in favour of the five respondents herein, the appellant no.1 was estopped from now seeking partition qua the suit property being well aware that the same was owned by the late father of appellant no.1, who had already bequeathed it to Smt. Sudarshan Gaba by way of a registered Will and that the said Smt. Sudarshan Gaba had further sold the said suit property to the respondent nos. 1 to 5 herein.

17. Assailing the above findings before us, learned counsel for the appellants submits that while dismissing the suit preferred by the appellants the learned Single Judge has failed to appreciate that it was evident from the



record itself that the earlier Civil Suit bearing no. 767/2017 was withdrawn by appellant no.1 only on account of the assurances of an amicable settlement made by the respondents.

18. It is his plea that since it was a specific condition of the respondents that the settlement would be finalized only after the suit was withdrawn, on this ground alone the impugned judgment and decree are liable to be set aside. He further submits that the learned Single Judge also failed to appreciate that only if the parties were permitted to lead evidence that the appellants could have shown that the Will dated 29.08.2016 based on which Smt. Sudarshan Gaba had sold the property to the five respondents was a forged and fabricated document.

19. He further contends that the aforesaid aspect is apparently clear from the observations made in paragraph 65 of the impugned judgment itself. He therefore prays that merely because of the appellants under legal advice instead of seeking recall of the order dated 15.04.2019 withdrawing appellant no.1's earlier suit chose to file a fresh suit could not be a ground for learned Single Judge to dismiss the suit and that too under Order VII Rule 11 CPC or to allow the suit for declaration and possession preferred by the respondents under Order XII Rule 6 CPC.

20. He submits that under these circumstances, the learned Single Judge was incorrect in passing the impugned judgment and decreeing the suit instituted by the respondents under Order XII Rule 6 CPC when it was clear that the appellants had never admitted that the respondents were the rightful owners of the suit property.

21. He therefore prays that the impugned judgment and decree be set aside.



22. On the other hand, Mr. P.S. Bindra, learned senior counsel for the respondents supports the impugned judgment and submits that once it was an admitted position before the learned Single Judge that the earlier Civil Suit bearing No. 767/2017 instituted by the appellant no.1 seeking specific performance of the Agreement to Sell in her favour as also challenging the duly registered Will dated 29.08.2016 in favour of Smt. Sudarshan Gaba along with the duly registered Sale Deed dated 15.12.2017 in favour of respondents was withdrawn without seeking any liberty whatsoever, the appellants were rightly held not entitled to maintain a fresh suit in respect of the suit property which already stood bequeathed to Smt. Sudarshan Gaba and thereafter sold to the five respondents.

23. He then draws our attention to the order dated 15.04.2019 passed in Civil Suit no. 767/2017 whereby, the suit preferred by the appellant no.1 was withdrawn, as also to the order passed in Bail application no.1550/2018 dated 02.05.2019 wherein, there is no mention of any assurance given by the respondents. Furthermore, he contends that before the learned Single Judge, the appellants also tried to raise false, misconceived and an absolutely contrary plea that the suit Civil Suit no. 767/2017 was withdrawn by appellant no.1 due to some technical defects therein, which plea was rightly rejected by the learned Single Judge as it was found that there was no mention of any technical defect in the withdrawal order dated 15.04.2019.

24. He, therefore, contends that the learned Single Judge was correct in dismissing the appellants' suit and decreeing the suit preferred by the respondents.

25. Having heard the learned (senior) counsels for the parties, what emerges at the outset is that the reliefs qua the duly registered Will dated



29.08.2016 and the duly registered Sale Deed dated 15.12.2017 against the respondents claimed by the appellant no.1 in Civil Suit bearing no. 767/2017 as also by the appellants in CS (OS) 221/2022, being based on the same set of facts are similar in nature. So much so, the only difference *inter-se* the two aforesaid suits is that the appellants did not seek specific performance of an Agreement to Sell dated 10.04.2009 in the latter suit filed before the learned Single Judge though this relief was sought by the appellant in the earlier suit i.e. Civil Suit no.767/2017.

26. The fact that the appellant no.1 admittedly and willingly withdrew the prior Civil Suit bearing no. 767/2017 pending before the Court of learned ADJ, Karkardooma Courts, Delhi unconditionally is glaringly apparent from the order dated 15.04.2019 itself, which, the appellants have neither sought modification/ rectification/ amendment thereof nor challenged it before any Court of law. The same is thus final and binding upon the appellants.

27. In view of the aforesaid position as also in the wake of the provisions contained in Order XXIII Rule 1 (4)³ CPC, any one like the appellants, who had evidently not sought any permission (as required under Order XXIII Rule 1 (3)⁴ CPC) could not have instituted any fresh suit(s) seeking the similar relief(s) at any subsequent point of time. Admittedly, the appellants had never sought any permission for instituting the fresh/ subsequent suit CS

³ (4) Where the plaintiff
(a) abandons any suit or part of claim under sub-rule (1), or
(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

⁴ (3) Where the Court is satisfied,— (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of suit or part of a claim, It may, on such terms as it thinks fit grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.



(OS) 221/2022 before the learned Single Judge.

28. Be that as it may, today the appellants are rank outsiders qua the suit property having no (valid) document(s) in their favour qua their right/ title/ ownership thereof. Furthermore, the registered Will dated 29.08.2016 as also the registered sale deed dated 15.12.2017 being registered documents, are prima facie proof of their validity.

29. It is evident that it was only the appellant no.1 being one of the legal heir of Late Amar Singh Gaba, alone could have assailed the registered Will dated 29.08.2016 executed by the said Late Amar Singh Gaba whereby the suit property was bequeathed by him in favour of her mother, Smt. Sudershan Gaba. However, since the appellant no.1 already withdrew the said earlier suit Civil Suit no. 767/2017 without seeking any liberty whatsoever the challenge thereto by the appellant no.1 failed and the right in her favour did not survive anymore. The appellant no.1 having already withdrawn her challenge to the said Will in her earlier suit Civil Suit no.767/2017, the subsequent suit being CS(OS) 221/2022 filed alongwith her husband as co-appellant for assailing the very same Will was not maintainable.

30. Moreover, qua the appellants' plea that the learned Single Judge has failed to appreciate that the withdrawal of the earlier suit being Civil Suit no. 767/2017 by appellant no.1 was on the assurances given by the respondents to allocate her one floor after redeveloping the property, we are regrettably unable to agree with the said plea, particularly once the order dated 15.04.2009 vide which the earlier Civil Suit no. 767/2017 was withdrawn is silent qua any alleged assurance given to the appellants.

31. We, in any event, are bound by the plain language of the said order of



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withdrawal as it is not open for us or for that matter any Court to read into any withdrawal order, more so, as it is an order of simplicitor withdrawal.

32. We, therefore, have no hesitation in agreeing with the learned Single Judge that the suit being CS(OS) 221/2022 instituted by the appellants was not maintainable on account of the challenge in Civil Suit no. 767/2017 to the Sale Deed dated 15.07.2017 in favour of the respondents, having already been withdrawn, the suit for declaration and possession qua the suit property was liable to be decreed.

33. In view of the aforesaid analysis and reasonings, we find no reason to interfere with the observations and findings of the learned Single Judge in the impugned judgment.

34. The appeals alongwith the pending applications are accordingly dismissed.

**(SAURABH BANERJEE)
JUDGE**

**(REKHA PALLI)
JUDGE**

NOVEMBER 4, 2024/ns/ab