



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Judgment reserved on: 29 May 2024**
Judgment pronounced on: 13 August 2024
+ **C.R.P. 209/2019 & CM APPL. 41684/2019**

SUDERSHAN PATHAK Petitioner
Through: Dr. Amit George, Mr.
Rayadurgam Bharat, Mr.
Arkaneil Bhaumik, Mr.
Shashwat Kabi, Ms. Ibansara &
Ms. Suparna Jain, Adv. along
with petitioner-in-person.

versus

KRISHAN KUMAR (DEAD) THR. LRS Respondents
Through: Ms. Reena Jain Malhotra, Adv.

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

1. This Judgment shall decide the present civil revision petition filed by the petitioner/revisionist, assailing the impugned order dated 30.05.2019 passed by the learned Additional District Judge, North, Rohini Courts, Delhi¹, in RCA No. 44/18, whereby the petitioner's application under Order XXII Rule 9 read with Section 151 of the Code of Civil Procedure, 1908² seeking setting aside of the abatement, was dismissed.

FACTUAL BACKGROUND:

2. Briefly stated, the petitioner filed a civil suit for the recovery of earnest amount & damages amounting to Rs. 2,00,000/- with interest

¹ Trial Court



against the respondent, who was a property dealer/builder operating in Keshavpuram and Tri Nagar, Delhi. The respondent had proposed to sell a third-floor property with roof rights, measuring 92 square yards, located at 1533, Tota Ram Bazar Delhi³ to the petitioner. The property was purportedly fully constructed, inclusive of functional electricity and water connections. The agreed consideration for the property was Rs. 12,50,000/- and the petitioner pleaded that he had paid Rs. 1,00,000/- as earnest money on 18.02.2007. The respondent committed to completing the transaction and execute the registered sale deed on or before 31.05.2007.

3. It is further stated that the respondent claimed that the property was legal and constructed as per the Municipal Corporation of Delhi's (hereinafter, '**MCD**') building byelaws. However, it was later revealed that the construction was unauthorized and illegal, and that the concessions by the Supreme Court and the MCD only applied to the properties constructed before 2005 and not to the property in question.

4. During the pendency of the civil suit, it was revealed that the respondent had passed away on 24.09.2009. The petitioner sought to implead the respondent's legal representatives ['**LR**']. However, an application to implead the LRs was filed on 10.11.2010, followed by an application for condonation of delay on 8.12.2010, explaining the lack of knowledge about the respondent's death and the details of the LRs. The learned Trial Court *vide* order dated 02.08.2011, dismissed

² CPC

³ Property in question



both the applications i.e., to implead the LR's and the application for condonation of delay under Section 5 of the Limitation Act, 1963⁴.

5. On 30.08.2011, the petitioner filed an application under Order 22 Rule 9 CPC for setting aside the abatement of the suit besides another application under section 5 of the Act on 21.04.2012, both of which were dismissed *vide* order dated 10.04.2013. An appeal against the order dated 10.04.2013 was filed but was later withdrawn with liberty to file before the appropriate court.

6. But again on 05.12.2016, the petitioner challenged the orders dated 10.04.2013 and 02.08.2011 by filing MCA No. 15/16. However, on 18.04.2018, counsel for the petitioner withdrew the appeal with liberty to file before the appropriate court on the same cause of action. Subsequently, RCA No. 44/2018 was filed on 08.06.2018.

7. The grievance of the petitioner is that due to the respondent's fraudulent misrepresentation regarding the legality of the property construction and the subsequent procedural lapses and negligence of her former counsels, she has been unjustly denied the recovery of damages amounting to Rs. 2,00,000/- and the return of her earnest money.

8. Learned counsel for the petitioner contended that the order dated 02.08.2011, though not challenged by a revision petition, was rightly contested through an application under the Order 22 Rule 9 of CPC. The learned Trial Court, while passing the impugned order 30.05.2019, based its view on examination of two judgements i.e.,

⁴ Act



Mahendra & Ors. v. Lrs of Rawata Ram & Ann in S.B. Civil⁵ and Lallu Prasad Jaiswal v. Smt. Mantora Bai & Ors⁶. The relevant portion of the impugned order is reproduced below: -

“ In Mahendra's case (supra), application under Order 22 Rule 3 CPC was filed after two and half years of death of the sole plaintiff, same was treated as an application under Order 22 Rule 9 CPC and LRs were brought on record. Present case is distinguishable, as herein, the application initially filed under Order 22 Rule 4 CPC was dismissed and subsequently, fresh application under Order 22 Rule 9 CPC was filed and same was also dismissed. Therefore, the decision in Mahendra's case (supra) does not come to the aid of the appellant.”

“As regards decision in Lallu Prasad Jaiswal's case (supra), Hon'ble Court observed that with the dismissal of application under Order 22 Rule 3 CPC and under Order 22 Rule 9 CPC, provisions of Order 43 Rule 1(I).CPC were attracted. Facts of that case do not reveal that firstly an application under Order 22 Rule 3 CPC was filed and on its dismissal, application under Order 22 Rule 9 CPC was filed. The case is therefore, distinguishable on facts”

9. The learned Trial Court, upon reviewing MCA No. 15/2016, noted that the counsel for the petitioner-appellant had withdrawn the appeal on 18.04.2018 with the liberty to pursue any remedy under the law. Consequently, she should not have filed a fresh appeal challenging the orders dated 02.08.2011 and 10.04.2013. The appropriate remedy was to file a revision petition, which was not done even after the withdrawal of the initial appeal before the learned Additional District Judge (North West). Therefore, the present appeal was deemed not maintainable and was accordingly dismissed.

GROUND FOR CHALLENGE:

10. The petitioner argues that any omissions were due to the previous counsel's negligence, not the petitioner's fault. Clients

⁵ 2009 SCC OnLine Raj 518

⁶ 2016 SCC OnLine Chh 2437



should not suffer for their counsel's omissions, as affirmed in **“Suresh Chander, Kamlesh Sushma Vs. Mahesh Chand Ram Gupta & Ors.”**⁷. The petitioner contends that the learned Trial Court wrongly found a one-year delay in filing the application to implead the LRs of the deceased-respondent under Order 22 Rule 4 CPC to be fatal, overlooking that the delay was due to unavailability of the LRs' details and death certificate and not negligence and that the petitioner promptly filed the application under Order 22 Rule 4 CPC on 09.11.2010 after obtaining the details and death certificate. The learned Trial Court failed to consider this crucial aspect.

ANALYSIS & DECISION:

11. Having heard the learned counsels for the parties and on perusal of the record, unhesitatingly, this Court finds that the present revision petition is bereft of any merits. The reasons are not far to seek. It would be expedient to reproduce the provisions of Order XXII Rule 9 of the CPC, which provides as under:-

“9. Effect of abatement or dismissal.

(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, 1877 shall apply to applications under sub-rule (2).

Explanation- Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the

⁷ 2007 SCC OnLine Del 1072



cause of action in the suit which had abated or had been dismissed under this Order.”

12. Evidently, the respondent passed away on 24.09.2009, which fact was intimated to the petitioner and yet, an application to implead the LRs was filed on 10.11.2010, which is beyond the period of one year from the date of death. No sufficient cause was assigned by the petitioner and the learned Trial Court rightly dismissed the application.

13. That was not the end of the matter. The petitioner resorted to filing appeals one after the other, which were also dismissed. It is pertinent to mention that during the course of hearing, the LRs of the deceased-respondent offered to make payment of Rs. One Lac to the petitioner towards full and final settlement, which was adamantly refused by the petitioner despite being counselled by the learned Legal Aid Counsel, who stated that she wants vindication of her rights. I am afraid that this Court cannot grant any further reliefs to the petitioner.

14. Accordingly, the present revision petition is dismissed.

15. The pending application also stands disposed of.

DHARMESH SHARMA, J.

AUGUST 13, 2024

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