
(2006) 04 DEL CK 0148

In the Delhi High Court

Case No : Regular First Appeal No. 150 of 2006 and CM 3589 of 2006

Shri Kartar Singh Yadav

APPELLANT

Vs

Shri Suresh Chand Arora

RESPONDENT

Date of Decision : 27-04-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 23 Rule 1, Order 7 Rule 11
Limitation Act, 1963 — Section 5

Citation : (2006) 04 DEL CK 0148

Hon'ble Judges : Swatanter Kumar, J;S.L. Bhayana, J

Bench : Division Bench

Advocate : Vineet C. Sharma, for the Appellant; Ramesh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, J.—This Regular First Appeal is directed against the judgment and decree dated 17th August, 2004 passed by the Additional District Judge, Delhi vide which the learned trial court answered the issue of limitation, which was treated as a preliminary issue, holding that the plaint was liable to be rejected under Order 7 Rule 11 (d) of the CPC.

2. The facts giving rise to the present appeal are that Sh. Kartar Singh Yadav filed a suit against the defendant claiming that the defendant was the co- owner of property No. P-17, Green Park Extn., New Delhi comprising ground floor, first floor, second floor with a vacant and open terrace thereupon. It was represented to the plaintiff that on the basis of a family settlement, the defendant was co-sharer to the extent of 25% and he had exclusive rights on the terrace and being holder of a perfect title, he could sell the said property. On this premise, the parties entered into an agreement to sell dated 3.7.2000 selling the complete terrace rights to the plaintiff for a consideration of Rs. 6,15,000/- out of which a sum of Rs. 2,80,000/- was paid in cash and the remaining amount was paid by way of adjustment which defendant acknowledged vide receipt dated 31.7.2000.

The defendant executed various documents such as agreement to sell, will and affidavit. On 24.7.2000, the plaintiff purchased stamp paper of Rs. 22,400/- for execution of the sale deed but upon verification, it transpired that the family settlement dated 19.9.96 was not a registered document and could not be acted upon. Even the co-sharers had refused to act on the same. The defendant failed to seek consent of the other co-sharers for execution of the sale deed and the plaintiff agreed for cancellation of the deal subject to payment of Rs. 6,15,000/- already received by the defendant. An agreement dated 31.7.2000 was signed in this regard. The defendant failed to return the money. The plaintiff even filed a criminal complaint against the defendant for which an FIR was lodged being FIR No. 781/2000 on 29.9.2000 u/s 420/467, 468/471/506 IPC. The plaintiff even earlier filed a suit being Suit No. 230/01. After defendant was served in that suit, the plaintiff was advised that the suit was not maintainable in view of availability of more efficacious remedy including suit for specific performance. As such, the plaintiff withdrew the said suit. The defendant in collusion with the other co-sharer was attempting to sell the said property. The plaintiff learnt this in the second week of April, 2003. Although the plaintiff agreed for payment of interest @ 5% but because of the default committed by the defendant, the plaintiff filed the present for recovery of Rs. 8,73,043/- as well as for injunction. The suit was contested by the defendant and he raised various preliminary objections. The transaction was denied and it was stated that plaintiff gave some loan to the defendant and asked him to see at his residence in the evening. The plaintiff became friendly with the defendant. The two started drinking together and then various papers were got signed by the plaintiff from the defendant including the blank stamp papers. These papers were got signed under the pretext that the plaintiff wanted to get his son admitted in DPS, R.K. Puram, New Delhi and Kathuria School, Vasant Kunj, New Delhi and wanted to have an address in Delhi and asked for the help of the defendant. It is denied that the defendant ever gave representation that family settlement was registered and to show the ownership of the defendant in respect of the property in question he had produced any document.

3. During the pendency of the suit and in view of the objections taken by the defendant in his written statement, learned trial court vide its order dated 31.5.2004 framed the following preliminary issue:- Whether the suit is maintainable in view of preliminary objection No. 5 of the written statement?

4. While answering the said issue against the plaintiff and in favor of the defendant, the trial court held as under:

10. I have carefully considered the submissions and gone through the case law cited by the counsel for the plaintiff. I feel that the same is not applicable in the facts of the present case. The reason being that in that case previous suit was for permanent and mandatory injunction. The relief of mandatory injunction was directions to the defendant to implement agreement dt. 4/7/91 or to pay damages. That is why the said suit was construed as suit for specific

performance and it was held that the same was beyond pecuniary jurisdiction of Ld. Senior Sub Judge. In the present case the plaintiff had not claimed mandatory injunction in the previous suit. He simply claimed permanent injunction restraining the defendant from selling the roof of the house in question. That suit was very much within the jurisdiction of Ld. Civil Judge.

11. Apart from the above in the present case, the plaintiff has not pleaded that the earlier suit was beyond pecuniary jurisdiction of the Ld. Civil Judge, as was done in the case cited by the counsel for the plaintiff.

12. I am unable to persuade myself with the argument that withdrawal of the previous suit put the plaintiff as if the said suit was never filed. Equally without merit is the submission that not granting permission can at best be construed that the Ld. Civil Judge intended plaintiff to take remedy available without seeking condensation of the period consumed in the said proceedings. The plaintiff is trying to confuse two things, one limitation and the other bar of order 2 rule 2 CPC. The former has no role in order 2 rule 2 CPC.

13. Applying the law cited by counsel for the defendant to the facts of the present case there can be no escape from the conclusion that present suit is barred by order 2 R2 CPC. The issue is decided against the plaintiff and in favor of the defendant.

14. In view of my findings on aforesaid preliminary issue, the plaint is rejected u/o 7 R 11 (d) CPC being barred by law. Parties are left to bear their own cost. Decree Sheet be prepared accordingly. File be consigned to Record Room.

5. The above findings of the learned trial court are challenged in the present appeal by the appellant on the grounds that the findings recorded are contrary to the settled principles of law, the trial court has failed to take into consideration the documents placed on record and the provisions of Order 2 Rule 2 of the CPC had no application to the facts of the present case. It is also argued that under the provisions of Order 23 Rule 1 of the CPC, either the whole or part of the relief has to be granted or specifically denied and it cannot be fractioned for allowing either of the part. The contention is that provisions of Order 2 Rule 2 are not applicable wherein the court lacking the pecuniary jurisdiction and the two suits are based upon different cause of action. The first suit was based upon agreement to sell dated 24.7.2000 while suit No. 29/04 is based upon cancellation deed dated 31.7.2000. As such the finding of the trial court is erroneous in law. The present appeal is also barred by time. The appellant has filed an application being CM No. 3589/06 u/s 5 of the Limitation Act praying for condensation of 462 days" delay in preferring the present appeal. This application was also contested by the respondent who argued that a right has accrued to the non-applicant and in any case the appellant has shown no cause much less a sufficient cause for condensation of delay in filing the present appeal. It is stated in the application that the appellant had filed a revision against the impugned order within 90 days of the passing of the impugned order.

The impugned order was passed on 17th August, 2004. The revision was filed on 22.11.04. It is stated that the counsel for the appellant had inaugurated his new office at Lajpat Nagar and during the shifting, the clerk of the counsel took the above revision petition under objection and somehow misplaced the same. However, the appellant was told that the appeal was being listed. The clerk left the office of the counsel for the appellant and the appellant when enquired from previous counsel in the last week of November, 2005 about evasive reply of the clerk, the above file was tracked down immediately and the same was refiled on 7.12.2005. The present RFA was filed for the first time on 27.2.06.

6. According to the learned Counsel appearing for the appellant, the delay in filing the present appeal is to be condoned keeping in view the fact that the case is covered on merits by the judgment of the Supreme Court in the case of Gurinder Pal v. Jagmittar Singh 2005(3) Scale 326. The Explanation rendered by the applicant/appellant for condensation of delay is ex facie unbelievable. Even if we assume for the sake of arguments that the facts came to light of the appellant or his counsel in November, 2005, there is no justification or reason why the appeal was not filed for another period of three months, as already noticed the RFA was filed in February, 2006. It was known to the counsel for the appellant that the revision was not maintainable against the final decree and secondly that both the remedies i.e. the revision as well as the appeal had got barred by time on that date.

7. It may also be noticed that even the original revision petition was not filed within time. The judgment was passed on 17.8.2004 while the revision was filed on 22.11.2004. The certified copy was applied on 21.09.04 and was ready for delivery on 27.9.04. The revision ought to have been filed on or before 21.11.04. This by itself may not have been sufficient ground for declining condensation of delay but the subsequent conduct of the appellant and his counsel for nearly more than an year and a half has been entirely undesirable. The person whose suit has been dismissed is not expected to sit over his rights in this manner particularly when a definite right accrues in favor of the defendant. The provisions of Limitation Act can be liberally construed and applied provided a reasonable and sufficient cause is shown and the interest of justice would demand that the party should be permitted to invoke its remedy on merits. Reference in this regard can be made to a recent judgment of this Court in the case of Delhi Waqf Board v. Balbir Singh RFA 80/1982 decided on 20.03.2006.

8. In view of the above well-enunciated principles seen in the light of the averments made in this application, there is no reason for the court to show any indulgence to the applicant/appellant. In fact, the averments made in the application are vague and unsupported by any documentary evidence. In absence of specific averments supported by reasonable documents which would generally explain the delay, if not every day's delay in filing the appeal, the court cannot condone the delay as a definite right as accrued in favor of the other side. Consequently, we see no reason to condone the delay.

9. CM 3589/2006 is dismissed accordingly.

10. As we had heard the application for condensation of delay as well as the appeal on merits, we would even proceed to discuss the merit of the arguments addressed by the counsel appearing for the parties while challenging the impugned order.

11. The learned trial court in its judgment noticed that the withdrawal of the previous suit would mean that the suit had never been instituted and the subsequent suit would be hit by the provisions of Order 2 Rule 2 of the CPC. Taking this legal bar to be against the plaintiff, he rejected the plaint under Order 7 Rule 11 (d) and directed the decree to be passed. Besides that the present appeal is totally barred by time and as above noticed for condensation of which no proper cause has been shown, even on merits, the appellant hardly has any arguable case. Suit No. 230/01 was filed by the plaintiff against the defendant and in the paragraph 12 of the said plaint relating to cause of action, it was stated that "the plaintiff paid a sum of Rs. 6,15,000/- towards cost of roof and towards construction costs. The cause of action again arose when the plaintiff came to know that defendant showed him forged and fabricated documents. The cause of action further arose when the plaintiff refunded back his money and the defendant promised to return the same but failed to do so. The cause of action further arose on 1.7.2001 when the plaintiff came to know that the defendant is planning to sell, transfer, alienate or part with the possession of roof in question". In addition to these facts, in paragraph 6 of that plaint, the plaintiff had also stated that on 31st July, 2000 the plaintiff had asked the defendant to refund his money and the defendant accepted his guilt and apologized and promised to pay the entire amount within two months. He stated to have signed a letter agreeing to return Rs. 6, 15,000/-. Despite mentioning these facts in the plaint, he prayed only for the relief of injunction restraining the defendant from alienating, transferring or parting with the possession of the property No. P-17, Green Park Extension, New Delhi and no other relief was claimed. This suit was got dismissed as withdrawn and the plaintiff had made a request for filing a fresh suit for specific performance. Upon this application, the court had passed the following order:-

Counsel for the plaintiff states that he wishes to withdraw the present suit. Accordingly statement of plaintiff has been recorded. plaintiff has sought liberty to file fresh suit for specific performance. However in the facts and circumstances of the case, it is clarified that though the present suit is allowed to be withdrawn, but no order either refusing or granting any liberty to file a fresh suit for specific performance is passed and plaintiff has any such right under the law then he may do so, suit of the plaintiff thus stands dismissed as withdrawn. file be confined to the record room.

12. At this very stage, it is pertinent to note that the order of the court dated 27th August, 2001 was not challenged by the present appellant in any proceedings and in fact even in the present appeal, there is no challenge to the

said order. The subsequent suit filed by the plaintiff being suit No. 913/03 for recovery of money was also based upon the same averments and instead of filing a suit for specific performance for which the leave was sought, the suit for recovery was filed. As is clear from the order of the court dated 27th August, 2001, no liberty or permission was granted by the court to the appellant to file a suit for specific performance. The court had clearly stated that no order either refusing or granting any liberty to file a fresh suit for specific performance is passed. The plaintiff in that suit was directed to be controlled by the law in force. It was for the appellant to challenge that order if he was aggrieved from the said order. That order has attained finality and correctness of that has not even been questioned even in the present case. Once an order attains finality its consequences in law must follow. Firstly, even if for the sake of argument, it is believed that the order dated 27th August, 2001 intended to give any concession or permission to the appellant for brining a fresh suit then the leave has to be construed as granted. The leave was for filing a suit for specific performance and the suit for recovery even would become barred by time as according to the plaintiff, the amount was payable in the year 2000 itself.

13. The learned Counsel appearing for the appellant heavily relied upon the judgment of the Allahabad High Court in the case of Bharat and Others Vs. Ram Pratap and Others, to contend that in absence of specific order granting permission to file a suit, it cannot be construed that the prayer was refused. Firstly, the facts of that case are entirely different and have no application to the case in hand on known principles of ratio descendi. Furthermore, in this case, the court had specifically recorded in its order dated 27th August, 2001 that liberty is not granted. Once the language of the order is clear, it will be presumed that what is not specifically granted would be deemed to have been rejected. The plaintiff in the suit which he filed in the year 2001 had specifically referred to all circumstances or facts which gave him complete cause of action for suing the defendant for recovery of the amount. The appellant failed to ask for such a relief and made no attempt to seek permission of the court to bring a suit subsequently on the same cause of action.

14. We do not find any error in the approach of the learned trial court in rejecting the plaint and dismissing the suit under Order 7 Rule 11(d) of the Code as the subsequent suit being barred under the provisions of Order 2 Rule 2 of the CPC.

15. Consequently, we find no merit in this appeal. The same is dismissed while leaving the parties to bear their own costs.

16. The appeal and CM 3589/2006 are finally disposed of.