

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

+ **I.A. 6139/2005 and I.A. 9103/2005 in CS(OS) 543/2005**

% Reserved on: July 23, 2008
Decided on : August 13, 2008

JATINDER PAL SINGH Plaintiff
Through Mr. S.N. Kumar, Sr. Advocate with
Mr. K.B. Soni, Advocate

versus

GURPREET SINGH Defendant
Through Mr. Inder Bir Singh, Advocate

CORAM:

Mr. Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

% 13.08.2008

Mr. Justice S. Ravindra Bhat

1. This order will dispose of applications being I.A. 6139/2005 and I.A. 9103/2005, under Order VII Rule 11 Civil Procedure Code(CPC), for rejection of plaint.

2. The brief facts necessary for deciding the applications are that according to the plaintiff, the suit plot being a built up property of 2488 sq. yds. situated at F-67, Radio Colony, Delhi-110009 was purchased from one Mrs. Eva Fateh Masih through a sale deed dated 29.07.1954 by two brothers S. Harbhajan Singh and S. Pritam Singh. S. Harbhajan Singh was the father of defendants 4 to 7 and the S. Pritam Singh, his brother and father of defendant No.1. The suit further avers that S. Harbhajan Singh died on 10.08.1967, at the time he had bequeathed, through a Will dated 15.09.1964 his half share in the property equally in favour of the plaintiff and the second defendant.

3. The plaintiff claims that the Will of S. Harbhajan Singh was probated on 28.05.1971. However, a petition for revocation of the probate was filed. After contest, it was dismissed on 11.12.1998. The defendant No. 7, who was the petitioner seeking revocation filed an appeal before this Court. The appeal was later withdrawn on 30.10.2001. As a consequence, the plaintiff became entitled to 1/4th share in the entire property measuring 622 sq.yds. It is averred that in the meanwhile defendants 3 to 7 were impleaded as a legal heirs of S. Harbhajan Singh in a partition suit pending the lower court. According to the plaintiff, the suit was decreed on 21.01.1983 in his absence though he was a necessary party in view of the probate granted in 1971. It is

claimed that on coming to know about the proceeding, the plaintiff filed an application under Order I Rule 10(2) CPC on 02.09.1983 for being impleaded as a defendant in the above suit for partition; the application was allowed on 03.01.1986. It is alleged that the second defendant, Smt. Satnam Kaur, the other 1/4th owner of the suit property, never moved any application for her impleadment and expressed her election to abandon the rights in the property in the suit in various judicial proceedings. The plaintiff claims that the defendants 3 to 7 were aggrieved against the order dated 06.03.1986 impleading him in the partition suit. The revision petition was entertained and the trial court's order was subsequently stayed. It is claimed that on 28.03.2003, revision petition of the said defendants was dismissed.

4. The plaintiff claims that the preliminary decree made on 21.01.1983 is null and void, having been made in proceedings in his absence and in the absence of the other co-owner Smt. Satnam Kaur. The cause of action according to him arose on 10.08.1967 when S. Harbhajan Singh died and subsequently on 28.5.1971 when the Will was probated and 28.3.2003 when the Civil Revision No. 92/1986 was dismissed by this Court.

5. The defendants/applicants contend that the suit is not maintainable because the

preliminary decree has attained finality. It is also further argued that the plaintiff has concealed the fact that he has already filed a suit for declaration against the father of first defendant as well as other defendants before the Civil Judge. In that suit, the plaintiff sought a declaration that the preliminary decree, of the trial court is not binding on him. Learned counsel argued that the preliminary decree not having been challenged in appeal in any proceeding and having attained finality, the present suit is barred under Order VII Rule 11(d) CPC. It is also urged that the suit is barred under provisions of Order II Rule 2 and application of principles of constructive *res judicata*.

6. Learned counsel lastly contended that the suit for declaration was dismissed several times for non-prosecution and the plaintiff has repeatedly filed applications for its restoration and one such application is pending. It is contended, therefore, that the present suit is frivolous and vexatious, aimed at prolonging multifarious unnecessary litigation.

7. Mr. S.N. Kumar, learned senior counsel for the plaintiff argued that not being impleaded in the partition suit of 1971, the decree made in those proceedings is not binding upon the plaintiff. With the dismissal of the revocation petition, and withdrawal of appeal in 2001, by the contesting respondents, the plaintiff's rights crystallized.

Therefore, he is entitled to maintain the present suit and claim partition in respect of his 1/4th share. It is also urged that in such suits for partition, there is no period of limitation.

8. The preceding factual narrative discloses the suit property was purchased by two brothers S. Harbhajan Singh and S. Pritam Singh. S. Harbhajan Singh died in 1967. The petitioner claims through a bequest in a Will executed by S. Harbhajan Singh in 1964. The Will was probated in 1971. In the meanwhile, S. Pritam Singh, co-owner of the property, filed a suit against the family members and heirs of S. Harbhajan Singh i.e. defendants 3 to 7.

9. No doubt, the plaintiff was not impleaded in those proceedings. What is important to notice here is that the partition suit was decreed in favour of the plaintiff Pritam Singh so far as half share was concerned. The plaintiff here cannot dispute that Pritam Singh was entitled to such share. Therefore, the question of the plaintiff being a necessary party or otherwise was in a sense academic since Pritam Singh, the plaintiff in the earlier partition suit, never sought a share in excess of what he already had.

10. The defendant applicants have urged that the plaintiff filed a suit for declaration but did not choose to prosecute it diligently. Apparently, his application for

restoration of that suit is pending. The implication necessarily arising from such event is that the plaintiff was aware of his right and sought a declaration as to the legal status and his entitlement. At that stage, it was also open for him to claim a consequential relief of partition which he now seeks to agitate in the present proceedings. The Order II Rule 2 CPC enjoins every litigant to join all the causes of action and seek relief for one composite proceedings. The said provision reads as follows:

*“2. **Suit to include the whole claim**--(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*

*(2) **Relinquishment of part of claim**—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*

*(3) **Omission to sue for one of several reliefs**—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.*

Explanation—For the purpose of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

11. The provision in Order II Rule 2 has been held to contain a species of estoppel by pleadings, embodying one dimension of *res judicata*, precluding a litigant

from indulging in multifarious litigation, and compelling him to claim all reliefs in one suit. (see *N.V. Srinivasa Murthy vs. Mariyamma*, 2005 (5) SCC 548; *Shiv Kumar Sharma vs. Santosh Kumari*, 2007 (8) SCC 600 and *Kunjan Nair Sivaraman Nair vs. Narayanan Nair*, 2004 (3) SCC 277). It has been held that provision of Order VII Rule 11 CPC have to be used by the Court, vigilantly to nip frivolous, vexatious or suits which are patently not maintainable in the bud, and for that purpose, the Courts should consider the pleadings in a substantial and meaningful way. (Ref. *T. Arivandanan vs. T.V. Satyapal*, 1977 (4) SCC 467).

12. It is evident that when the plaintiff filed a suit for declaration, he was aware of his legal rights in respect of the suit property as well as the extent of his share, since the probate was granted in 1971 yet he did not choose to include the relief of partition. Now, even though there is no prescribed limitation for claiming partition, the provisions of Order II Rule 2 would squarely apply; the position clearer when the relief claimed is a declaratory one. The plaintiff has no-where disclosed about filing of the declaratory suit or its outcome. In the reply to the application filed for rejection of plaint, he is not denied that such suit was filed. He has also not produced any order of the trial court granting leave to file the present suit which relates to the same property and has intrinsic

connection in the suit and the issues that would arise before the Court. The declaration sought by the plaintiff necessarily involves inquiry and trial of questions relating to the share the plaintiff would be entitled to, in the suit property. Therefore, he should have sought leave under Order II Rule 2 CPC. In the absence of such an order, the present suit is clearly barred in law.

13. The ground of constructive *res judicata* urged in the opinion of the Court is not well founded. The plaintiff was admittedly not a party to the partition suit; he was later added. His claims in the pending proceedings are yet to be adjudicated. As far as the suit for declaration is concerned, there is no final decision on the merits. The question of constructive *res judicata* arises only when the parties to both proceedings are the same and there is a final decision by the Court on the merits. Such a situation has not arisen in this case.

14. In view of the above discussion, this Court is of the opinion that in the absence of leave or liberty under Order II Rule 2, the plaintiff could not have filed the present suit. Therefore, it is clearly barred under Order VII Rule 11. This order will not however be construed as precluding the plaintiff from taking such steps or remedies, if available in law, in other pending proceedings. All rights of the parties are expressly

reserved in that regard. The I.A. 6139/2005 and I.A. 9103/2005 are, therefore, allowed.

The plaint is accordingly rejected, in these terms. No costs.

DATED: 13.08.2008

S. RAVINDRA BHAT, J

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