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

+ **CS(OS) 758/2006**

Date of Decision: September 15, 2008

RENU CHHABRA Plaintiff
Through Mr.A.K.Mishra, Advocate.
versus

MCD Defendant
Through Mr.Vinod Sharma, Advocate for defendant
No.7.
Ms.Mansi Gupta for Ms.Smita Shankar, Advocate for
MCD.

% **15.09.2008**

CORAM:
HON'BLE 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

Mr. Justice S. Ravindra Bhat (Oral)

1. Counsel for the parties were heard at the stage of framing issues.

2. The plaintiffs are sons of late Shri H.P.Rajpal. According to the suit averments, the said Late Shri Rajpal was owner of property being No.24/1, West Patel Nagar, New Delhi (hereafter referred to as

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“the suit property”), which was purchased through a registered sale deed on 5.3.1973. It is averred that the said Late Shri Rajpal continued to manage the property as his own, since it was his self-acquired asset, till his death on 12.9.2004. The plaintiff No.2 alleges having maintained and looked after the property since 12.3.2001 as the legally constituted Attorney of his father. The owner/plaintiff’s father died on 12.9.2004.

3. The plaintiffs aver to a pending suit, i.e. 1573/1990 being filed by the defendant No.7 (renumbered as suit No.243/2004), pending before the Court of Shri Mahavir Singhal, Ld. Additional District Judge, Tis Hazari Courts, Delhi. That suit was filed against the plaintiff’s father, seeking specific performance of an agreement concerning in respect of the same suit property. The plaintiff in that suit alleged existence of an Agreement to Sell dated 5.9.1984. The plaintiffs further aver that they had moved the Court under Order 1 Rule 10 CPC before the Additional District Judge for deletion of names of defendants No.2 to 6 in those proceedings; they were along with the plaintiffs impleaded as the legal representatives of the deceased Shri Rajpal. However, that application was dismissed and the suit is pending adjudication.

4. The plaintiffs claim to be legatees in a registered Will dated 12.3.2001 executed by Late Shri H.P.Rajpal. The plaint avers inter alia as follows:-

“12. That from the aforesaid sequence of facts it is

clear that the suit property was purchased by the father of the plaintiffs and that the plaintiffs have acquired their right/interest over the said suit property in terms of the last registered testament and Will dated 12.03.2001 which was executed by their deceased father. The said Will came to the knowledge of the plaintiffs on 25.06.2005 when they received the letter from Shri Sudesh Khosla who had been keeping the original copy of the said Will. Thereafter, the plaintiffs had filed the petition for seeking probate in their favour before this Hon'ble Court. The plaintiffs had sent their notice dated 01.07.2005 to the defendant No.7 and defendant No.1 but nothing was done by them. The suit property is still in the illegal and unauthorized possession of the defendant No.7.

13. That the cause of action for filing the present suit had accrued in favour of the plaintiffs on 25.06.2005 when they became aware of the existence of the last registered Will and Testament dated 12.03.2001 which was executed by their father for declaring his intention to give the suit property to the plaintiffs after his death. The cause of action had further accrued against the defendant Nos.2 to 6 when they had opposed the application filed by the plaintiffs in the suit No.243 of 2004 wherein the plaintiffs had sought for the deletion of their names as the necessary parties in the said suit. The cause of action against the defendant No.1 has accrued when despite receiving the notice dated 01.07.2005, no action has been taken so far by the said authority. The cause of action against all the defendants are continuing even presently.

14. That the suit property is situated within the territorial jurisdiction of this Hon'ble Court and so this Hon'ble Court has got the necessary territorial jurisdiction to adjudicate on the issues involved in the present suit."

5. In view of the above allegations, the plaintiffs seek the following

reliefs:-

"1. Grant a decree of declaration in favour of the plaintiffs and against the defendant Nos.2 to 7 to the effect that the plaintiffs are the only owners of the suit property situated at 24/1, West Patel Nagar, New Delhi,

2. grant a decree of mandatory injunction against the defendant No.1 for directing them to cancel the documents relating to the mutation in favour of the defendant No.7 with respect to the suit property situated at 24/1, West Patel Nagar, New Delhi."

3. grant a decree of possession in favour of the plaintiffs and against the defendant Nos. 2 to 7 to the effect that the plaintiffs are the only owners of the suit property situated at 24/1, West Patel Nagar, New Delhi."

6. The defendant inter alia has objected to the maintainability of the suit on several grounds including limitation. Its counsel urges that the issues sought to be urged in the present suit, concerning validity and enforceability of the Agreement of 1984 and its binding effect, if any, upon the plaintiffs are subject matter of the trial in the pending suit before the Additional District Judge. It is submitted that the plaintiffs cannot claim any cause of action independent of what the original could have possessed. Learned counsel submits that the original defendants, their father in the said suit before the Additional District Judge, did not seek the declaration which they now seek.

7. Learned counsel submitted that all the questions and points to

be urged in the present suit have to be necessarily decided in the suit pending before the trial court.

8. It was submitted that as far as the validity of the Will upon which the plaintiffs rely and seek to derive title is concerned, is subject matter of a probate proceeding. In these circumstances, counsel urged that this suit cannot be entertained and should be rejected on the ground that the plaintiffs do not have any cause of action; it is urged, besides that the plaintiffs did not seek leave under Order 2 Rule 2 CPC.

9. It is evident from the above narrative that the plaintiffs claim to be owners of the property. They have impleaded defendants No.1 to 6 concededly for the reasons that they were necessary parties being other heirs. But, for this, their grievance in this suit is principally against the defendant No.7 who filed the suit in 1990 for enforcement of an Agreement to Sell, said to have been entered in 1984, with the predecessor-in-interest of the suit property, namely the plaintiffs' father.

10. Learned counsel did not, at any stage, dispute the defendant's assertion that the plaintiff's father, Late Shri H.P.Rajpal did not seek any declaration or make a counter-claim in the pending suit, by defendant No.7. This, in the opinion of Court, assumes some significance. Being heirs of the said defendant, the plaintiffs cannot set up a stand contrary to what their predecessor-in-interest had made in the trial court. However, as legal representatives impleaded in the said suit, the rights accruing to the

plaintiffs, would be necessarily reserved. They are entitled to urge all grounds; pleaded in the written statement, in those proceedings.

11. The suit discloses that the cause of action for filing the present suit is said to have arisen on 25.6.2005 when the plaintiffs became aware of the last registered Will and testament dated 12.3.2001. In the opinion of this Court, this does not in any way clothe the plaintiffs with the right to maintain a suit against the defendant No.7 so far as declaratory and injunctive reliefs are concerned. As regards the plaintiffs' disputes with the other defendants, the Will would be gone into the probate proceeding pending on the file of this Court. In the circumstances, the plaintiffs have not been able to show how and when any cause of action arose independently in the present suit, as far as defendant No.7 is concerned. Even assuming cause of action arose in favour of the plaintiffs, the averments disclose that they were aware that the Agreement to Sell had been executed much earlier. However, they did not take any step within the time permissible under the Limitation Act to obtain the declaratory and injunctive reliefs sought here. The third fatal infirmity to this suit, in the opinion of the Court, that since the same facts would have to be gone into, or at least some part of the cause of action in this suit as well as the pending suit overlapped, leave had to be necessarily sought from the trial court under Order 2 Rule 2 CPC. Concededly that course was not adopted.

12. For the above reasons, the suit cannot be proceeded as it does

not discloses a cause of action as far as plaintiffs concerned; it is also barred by limitation and provisions of Order 2 Rule 2 CPC. These observations made, in the course of this order, would, however, not preclude the plaintiffs from taking such defences and urging such pleas as are available to them in law and on the merits of the case, in the pednign suit before the trial court as defendants or LR's of late Shri H.P.Rajpal or in the pending probate proceeding. All rights in that regard are hereby reserved.

13. CS(OS) 758/2006 and pending applications are accordingly rejected. No costs.

S. RAVINDRA BHAT,J

SEPTEMBER 15, 2008
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