

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

+ **IA No.9236/2006 in CS [OS] NO.778/2006**

#Mr.Ashok Khanna

..... Plaintiff

! Through: Mr. Vijay Gupta, Advocate

Versus

\$ Mr. Kapil Khanna

.....Defendant

^ Through: Mr.R.C.Nangia, Advocate

CORAM:-

* **HON'BLE MR. JUSTICE S.N. AGGARWAL**

1. Whether reporters of Local paper may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

S.N.AGGARWAL, J (ORAL)

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* This is an application filed by the defendant seeking dismissal of the present suit as barred by provisions of Order 2 Rule 2 CPC.

Mr.Nangia, learned counsel appearing on behalf of the defendant has contended that the plaintiff who is the real brother of the defendant had earlier filed a suit being CS(OS) No. 4/2006 and had claimed partition in respect of one of the properties left by his deceased father Shri Amir Chand

Khanna bearing Flat No.86, Maitri Apartment, Mayur Vihar, Phase-1, Delhi-91. The said suit was filed by the plaintiff in December 2005 after about seven years of the demise of his father that took place on 12.11.1998.

The present suit being CS(OS) No. 778/2006 has been filed by the plaintiff against the defendant for rendition of accounts and permanent injunction and this suit was filed on 3.5.2006 i.e after about five months of the filing of the earlier suit. In Para 5 of the present suit, the plaintiff has stated that his deceased father Shri Amir Chand Khanna at the time of his death had left the following estate:

- “(i) Half share in flat No.86, Maitri Apartment, Mayur Vihar, Phase-1, Delhi-110091.
- (ii) Business assets including the goodwill in the firm M/s.Wazir Chand & Brothers or any other firm namely Khanna Halftone Company.
- (iii) Tenancy rights in respect of commercial premises at 4923, Hauz Qazi, Delhi-110006.
- (iv) Ancestral property at 1915, Kali Masjid, inside Turkman Gate, Delhi-110006.
- (v) Jewellery worth Rs.20 lacs.
- (vi) Life Insurance claim of Rs.10 lacs in respect of the policies issued by LIC Unit # 115, Connaught Circus Branch, New Delhi.”

Though in Para (a) of the plaint at Page 16 of the present suit the plaintiff has prayed for rendition of accounts in respect of the entire estate of his deceased father as detailed in Annexure A to the suit. However, the said Annexure A has not been annexed with the plaint of the present suit. Mr.Gupta, learned counsel appearing on behalf of the plaintiff says that the

Annexure A mentioned in the prayer clause is on account of some inadvertent error.

Be that as it may, the contention of Mr.Nangia is that the relief of rendition of accounts was very much available to the plaintiff even on the date the first suit being CS(OS) No. 4/2006 was filed. The contention of Mr.Nangia is that since the plaintiff omitted to seek rendition of accounts from the defendant in respect of the estate left by his deceased father, the plaintiff is now precluded from filing the present suit in view of provisions contained in Order 2 Rule 2 CPC.

The provisions of Order 2 Rule 2 CPC are extracted below:-

“Order 2 Rule 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.”

For applicability of the aforementioned provisions contained in Order 2 Rule 2 CPC what is to be seen by the Court is whether the relief claimed by the plaintiff in the later suit was available to him when the earlier suit was filed by him regarding the cause of action that accrued to him at that point of time. The father of the parties admittedly died on 12.11.1998. The cause of action as stated by the plaintiff in the first suit was the death of his parents and so is the cause of action stated in the present suit. It shall be relevant to refer to the paragraphs of the plaint in

both the suits which deals with the cause of action. Para 16 of the plaint of the earlier suit which deal with cause of action reads as under :-

“That the cause of action has arisen to bring the present suit against defendant No.1 when the father of the plaintiff & defendants namely Sh. Amir Chand Khanna died intestate on 12.11.1998. It further arose when the mother of plaintiff & defendants also passed away intestate on 08.08.1999 leaving behind the plaintiff & defendants as the successors. It further arose from time to time when defendant No.1 had been claiming succession of the property on the basis of a will which have never seen the light of the day. It further arose from time to time when defendant No.1 had been attempting to bargain for more share in the suit property on the basis of will which was never shown to any of the parties to the suit. It further arose from time to time when the half portion of the suit premises continues to remain in exclusive possession of the plaintiff and when defendant No.1 was trying to negotiate in order to gain possession of the same. It lastly arose when on 21.12.2005, it is learnt by the plaintiff that defendant No.1 was trying to sell the whole suit property and that brokers used to come to the premises to see the premises & negotiate with defendant No.1 in a surreptitious manner. It further arose when defendant No.1 was not willing to give any share to defendant No.2 in the half share which is in occupation of defendant No.1 and he is driven by greed to sell off the whole property as the plaintiff is settled in Canada and visits Delhi not often. Cause of action is a continuing one, hence this suit.”

Para 15 of the plaint of the present suit which deals with cause of action reads as under:

“That the cause of action has arisen from time to time when defendant has been assuring the plaintiff to render the accounts and furnish the up to date status of all the estate of Late Sh.Amir Chand Khanna. It further arose when defendant tried to deal with the property 86, Maitri Apartments, Mayur Vihar, Phase-1 Delhi exclusively and for which the plaintiff was compelled to file suit no.CS(OS) No.4 of 2006 on 02.01.2006. It

further arose when the defendant for the first time disclosed the existence of the alleged will dated 12.01.1994, which is ex-facie illegal, forged & inadmissible. It further arose from time to time when defendant started to claim himself to be the sole successor of the entire estate of the deceased on the basis of said alleged will. The cause of action lastly arose when in spite of notice dated 01.02.2006 which was served upon the defendant and the defendant had failed to even respond to the said notice and failed to render accounts or update the status of the estate of Late Sh.Amir Chand Khanna, HENCE THIS SUIT."

In both the suits i.e the earlier suit as well as in the present suit, relief of permanent injunction prayed for by the plaintiff is common. The dispute between the parties who are real brothers is regarding their alleged right in the properties left by their father Shri Amir Chand Khanna at the time of his death on 12.11.1998. The plaintiff was very well aware when he filed the earlier suit in December, 2005 that he may also be entitled to have right in respect of other properties left by his deceased father as mentioned in Para 5 of the plaint of the present suit. He chose not to claim any right in respect of the said properties except the suit property which form part of the subject matter of the earlier suit because to his own showings the defendant had been claiming exclusive right in the said properties on the basis of a duly registered Will dated 12.1.1994 left by his deceased father in his favour. A perusal of the plaint of the earlier suit would show that the plaintiff was aware of the fact that his brother being the defendant was claiming his right in the properties left by his father on the basis of his

registered Will dated 12.1.1994. It appears that the plaintiff deliberately omitted to claim relief with regard to the said properties while he filed the earlier suit for partition in respect of Mayur Vihar property only and for that reason, he is now precluded from filing the present suit in view of statutory provisions contained in Order 2 Rule 2 CPC.

In view of the above, the instant application succeeds and the present suit of the plaintiff is dismissed as barred by provisions of Order 2 Rule 2 CPC.

Since the suit has been dismissed, the interim order passed by this Court on 4.9.2006 is also vacated.

This suit stands disposed of accordingly.

IA No. 371/2007

In view of order of even date passed by this Court on IA No. 9236/2006, the instant application has become infructuous and is disposed of accordingly.

FEBRUARY 18, 2008
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S.N.AGGARWAL, J