

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

+ **RFA No. 792/2002**

% **30th November, 2011**

PANKAJ KUMAR GUPTA

..... Appellant

Through : Mr. M.C. Dhingra and
Ms. Shobhaa Gupta, Advocates.

versus

PREM PRAKASH GUPTA

..... Respondent

Through : None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 31.8.2002 decreeing the suit of the respondent/plaintiff for possession and injunction with respect to the suit property forming part of the premises bearing No. 47/35, Punjabi Bagh, New Delhi.

2. I may note that the appellant/defendant did not file any written statement in the suit nor he led any evidence and neither the witness of the

respondent/plaintiff (i.e. plaintiff) was cross-examined. The appellant/defendant was duly served in the suit, but he failed to put in appearance. He only appeared at the stage of final arguments in the suit and prayed to be heard from the stage of final arguments only, and the same was permitted.

3. The brief facts of the case are that the property being 47/35, Punjabi Bagh, New Delhi was purchased by a partnership firm of M/s Prakash Oil Marketing Company vide a sale deed dated 9.1.1968. The partnership consisted of four partners namely Sh. Om Prakash, Sh. Surinder Kumar, Smt. Champa Devi (mother of the plaintiff) and Sh. Prem Prakash (the present plaintiff/respondent). The partnership was dissolved by dissolution deed dated 31.5.1972 and pursuant to which the subject property came to the share of the present plaintiff/respondent and the mother-Smt. Champa Devi. Smt. Champa Devi expired on 13.5.1994 leaving behind a registered Will dated 8.10.1987 (registered on 14.10.1987) whereby Smt. Champa Devi bequeathed her half share in the subject property to the respondent/plaintiff, who therefore became the complete owner of the property, he already being 50% owner by virtue of the dissolution deed dated 31.5.1972. The property was mutated in the name of respondent/plaintiff who permitted his son, i.e. appellant/defendant to reside in the suit property. However, after the

marriage of the appellant/defendant there were differences in the family. The respondent/plaintiff alleged that the appellant/defendant became arrogant and disobedient and started mis-using the license given to reside in the suit property. It was also alleged that the appellant/defendant started harassing the respondent/plaintiff along with his wife and the life of the respondent/plaintiff and his wife and their elder son was made miserable. The appellant/defendant then instituted a suit for partition in the original side of this Court being suit No. 2653/1995 claiming a share in the suit property. The respondent/plaintiff served a legal notice dated 21.3.2001 terminating the license of the appellant/defendant and thereafter filed the subject suit for possession.

4. The respondent/plaintiff appeared in the witness box and proved his case in the affirmative. The dissolution deed dated 31.5.1972 was exhibited as Ex.PW1/2. The Will of Smt. Champa Devi is exhibited as Ex.PW1/3. The site plan and portion in possession of the appellant/defendant was exhibited as Ex.PW1/5. The carbon copy of the legal notice was exhibited as Ex.PW1/7. The trial Court, therefore, decreed the suit by holding the respondent/plaintiff to be the owner of the property and consequently directed the appellant/defendant to handover the possession of the portion of the property in his possession and which is marked in red and yellow colours

in the site plan, Ex. PW1/5.

5. Learned counsel for the appellant argued before this Court that there was already a suit for partition filed by the appellant/defendant, and in which suit, while dismissing the application filed by the defendant No.1 in that suit, and who is the respondent herein (plaintiff in the present suit), a Division Bench of this Court in FAO (OS) No. 288/2001 vide order dated 24.8.2001 observed that nothing contained in the order of the learned Single Judge dated 25.1.2001 would prejudice the appellant/defendant herein at the stage of final determination of the issues in the suit, and who was the plaintiff in the said suit. The relevant portion of the order of the Division Bench reads as under:-

“...Only grievance of the learned counsel for the appellant is that certain observations have been made in the order under appeal whereby the plaintiff/appellant has been non-suited qua the right asserted by him in the suit on the basis of Section 8 of Hindu Succession Act (claim regarding ancestral property). It is certified that observations contained in the order under appeal are only for the purposes of deciding the application under Order 7 Rule 11 of the CPC and are not by way of any final adjudication on the issue. Such observation will not come in the way of the plaintiff/appellant at the stage of final, determination of the issues involved in the suit.”

I really fail to understand how the observations of the Division Bench can help the appellant/defendant in this case. The application under Order 7

RFA No.792/2002 Page 4 of 6

Rule 11 CPC which was filed by the defendant No.1 in that suit (respondent/plaintiff herein) was dismissed by learned Single Judge and if certain observations were made by the Division Bench, surely those observations were only with regard to the interim order, and they have no reflections on the merits of the case. There is no decision on merits in the said suit for partition giving any right in the suit property to the appellant/defendant and therefore, the observations of the Division Bench in the order dated 24.8.2001 will not have effect so as to disturb the impugned judgment in this case by which the respondent/plaintiff was held to be the complete owner of the property.

6. At this stage, I may refer to the provision of Section 11, Explanation I, of the Code of Civil Procedure, 1908 which reads as under:-

“11. Res judicata -- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.”

A reading of the explanation shows that certain issues can be issues

between the parties in separate litigations and even if such an issue is decided in a later suit against a particular person, then, such issue will operate as *res judicata* in the first suit pending between the parties. Therefore, pendency of the first suit for partition filed by the appellant/plaintiff cannot have the result of dismissing or staying the present suit under Section 10 CPC, and which has been decreed by the trial Court as per the impugned judgment.

7. In view of the above, the trial Court has rightly decreed the suit of the respondent/plaintiff for possession as the respondent/plaintiff proved his case and the appellant/defendant failed to appear and contest, file any pleading, lead any evidence or cross-examine the respondent/plaintiff.

8. In view of the above, there is no merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

VALMIKI J. MEHTA, J.

NOVEMBER 30, 2011

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