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

% *Date of Decision: 24th October, 2011*

+ **RFA(OS) 47/2007**

ASHOK SINGH LODHI Appellant
Through: Mr.Sugriva Dubey, Advocate

versus

PRATAP SINGH & ORS Respondents
Through: Mr.Astender Kumar, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE S.P.GARG

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

PRADEEP NANDRAJOG, J. (Oral)

1. Vide impugned order dated 2.7.2007, suit being CS (OS) No.113/2005 filed by the appellant has been dismissed on account of the bar under Order 9 Rule 8 read with Order 9 Rule 9 CPC and additionally on account of concealing relevant facts.

2. Reason why impugned order has been passed is that appellant/plaintiff had filed a suit for partition with respect to the same property in respect whereof CS(OS) 113/2005 was filed. In said suit, appellant filed an application to withdraw the suit praying that liberty be granted to file a fresh suit in the Court of competent jurisdiction.

3. The said application was dismissed on 7.2.2005 and thereafter nobody appeared on behalf of the appellant, resulting in the said suit being dismissed in default of appearance on 10.2.2005.

4. Concealing aforesaid facts, CS(OS) 113/2005 was filed on the same allegations as were made in the previous suit and the view taken by the learned Single Judge is that a co-joint reading of Order 9 Rule 8 and Order 9 Rule 9, bars second suit on the same cause and additionally for the reason the appellant/plaintiff has not disclosed truthful facts.

5. On the issue of non-disclosure of relevant facts, suffice would it be to state that it is a wrong impression that every kind of suppression would debar a party to obtain relief from a Court.

6. Where the suit relates to discretionary jurisdiction of the Court, for example, a decree for injunction or a decree for specific performance of an agreement to sell, conduct of the party would be relevant. The reason is that a Court would be justified in refusing to exercise its discretionary jurisdiction in favour of a person who pollutes the stream of justice by washing dirty hands in the stream of justice.

7. But where the remedy does not relate to a discretionary jurisdiction of the Court, suppression of a fact may have no bearing on the relief to be granted.

8. As regards the fact that the earlier suit seeking partition was dismissed in default and thus no second suit would lie, suffice would it be to state that the effect of Order 9 Rule 8 is

that a fresh suit on the same cause of action is barred but as held in the decision reported as 1959 PLR 264 Manohar Lal Vs. Onkar Das & Ors., this would not apply to a suit for partition. The reason is that as long as jointness of possession and unity of title continues, the cause of action continues.

9. Following observations in the said decision need to be highlighted:-

“Apart from the above, the Court trying the previous suit did not proceed to enforce the agreement and did not dismiss the suit on the basis of the same. The case had been adjourned to 21st February 1947 when the plaintiff did not appear and the Court proceeded to dismiss the suit in default under the provisions of Order IX, Rule 8, Civil Procedure Code. There can be no doubt that an order under Order IX Rule 8, Civil Procedure Code, cannot amount to res judicata for the simple reason that the suit cannot be deemed to have been heard and finally decided by means of this order. The only effect of an order passed under Order IX, Rule 8, Civil Procedure Code, is that a fresh suit based on the same cause of action is barred by the provisions of Order IX, Rule 9, Civil Procedure Code. It has, however, been repeatedly held that a suit for partition dismissed for default under Order IX, Rule 8, Civil Procedure Code, does not bar a subsequent suit for partition. The reason is that the right to enforce a partition is a continuous right which is a legal incident of 'a joint tenancy and which enures so long as the joint tenancy continues: See in this connection Bisheshar Das v. Ram Prasad, Madhura Gramani v. Sesha Reddy and Thayyan v. Kannikan-dath Kizhe Purakkal. The learned counsel for the respondents contended that his clients having denied the joint status of the parties in the previous suit it must be deemed that the joint status came to an end. We are afraid we cannot accept such a

curious contention. The plaintiff alleged in the previous suit that the property was joint and relies on the same joint tenancy in the present suit. He will obviously be entitled to a decree for partition if it is found that the property claimed to be joint by him is actually joint and the suit will obviously fail if it is proved that this allegation made by him is untrue. For the purposes of deciding this issue it has to be assumed that the plaintiff's suit is for partition of a certain joint property which was joint at the time of the previous suit and continues to be joint up till now. The plaintiff in the previous case applied for restoration of his suit but his application was dismissed on the ground that he had failed to establish sufficient cause for his non-appearance in Court. In First Appeal from Order No.2 of 1949 the order of the trial Court refusing to restore the suit was affirmed by Soni J. on 7th October, 1949. This, however, does not affect the decision in the present case, as for all intents and purposes, it is being assumed that the previous suit was dismissed in default under the provisions of Order IX, Rule 8, Civil Procedure Code. The present suit being for partition of the property cannot be deemed to be barred by the provisions of Order IX, Rule 9, Civil Procedure Code, for the reasons given above. The previous order dated 21st February 1947 cannot bar the present suit either on the ground of res judicata or on the ground of estoppel and the finding of the trial Court on issue No.2 is obviously erroneous so far as the claim of partition is concerned."

10. We are informed that the earlier suit filed in the Court of District Judge Delhi was subsequently got revived and withdrawn in view of the subsequent suit being filed.

11. The appeal is accordingly allowed. Impugned judgment and decree dated 2.7.2007 is set aside. CS(OS) 113/2005 is restored for adjudication on merits.

12. At this stage, learned counsel for the respondents states that before the suit was dismissed on account of being held to be barred under Order 9 Rule 8, an ex-parte preliminary decree was obtained by the appellant and counsel prays that since the same was obtained without serving the defendants the preliminary decree may be set aside.

13. We cannot set aside the preliminary decree declaring share of the parties in the suit property as prayed by learned counsel for the respondents, but would observe that upon restoration of the suit the respondents would be free to move an application praying that the ex-parte preliminary decree obtained needs to be set aside.

14. No costs.

15. Dasti.

PRADEEP NANDRAJOG, J.

S.P.GARG, J.

OCTOBER 24, 2011
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