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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.630/2010

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8th November, 2011

SHRI VINOD KUMAR & OTHERS Appellants
Through: Mr. V. Shukla, Advocate.

VERSUS

SHRI JAI CHAND Respondent
Through: Mr. Anand Prakash, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers 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?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 24.4.2010 which dismissed the suit on account of non-joinder of necessary parties. The relevant observations, in this regard, of the trial Court read as under:-

“Before proceeding ahead, here it is necessary to mention that plaintiff no.1 has not joined his mother, his one brother and three sisters as parties to the present suit. Now the question arises whether the mother and other brother and sisters of the plaintiff were necessary party. On this score it is found that as

per Hindu Succession Act 1956 the widow of Hindu male died intestate entitled for her share being class I legal heir and even the widow of pre deceased son is also considered to be class I legal heir. There is no material on record that the mother of plaintiff no.1 has relinquished her share in favour of anybody. Further, the remarriage of female does not bar her from taking her share from the family of her earlier deceased husband. There is no provision in the Succession Act even India Succession Act in this regard that the widow on the remarriage loses her right in the share of her deceased husband's property. Hence, mother of plaintiff no.1 was necessary party.

Regarding the other brother and sisters of plaintiff no.1 it is found that first it has not been proved on record that they were adopted by their step father and moreover even at adoption by their father they do not lose their right vested in them prior to their adoption, as per provision of Section 12 of Hindu Adoption and Maintenance Act. Hence, in these eventualities the mother and other brother and sisters of plaintiff no.1 are also necessary party to the present suit, but they were not joined. The plaintiff has claimed the share to the tune of 3/4th share in property in question and also seek declaration to the effect that they are owner of the property no.3/4th. But as discussed above, plaintiff no.1 has not joined his mother and his other brother and sisters. Therefore, the partition in the present manner would be futile due to non joining of mother, brother and sister of plaintiff no.1. Accordingly, plaintiffs are not entitled for decree of declaration to the tune of 3/4th share, as prayed. The issue is accordingly decided in favour of the defendant and against the plaintiffs."(underlining added)

2. The facts of the case are that the suit property being land measuring 222 sq. yards out of khasra No.637 min plot No.22, Rama Block, Bhola Nath Nagar, Shahdara, Delhi was owned by one Sh. Gainda Ram, who was grandfather of plaintiff No.1. Sh. Gainda Ram was having four children i.e. father of plaintiff Nos.1, 2 and 3 and defendant. The suit for partition, declaration and injunction was filed as the defendant

appeared to have sold $\frac{1}{2}$ share of the property though the defendant was stated to have only $\frac{1}{4}$ th share in the property. The subject suit therefore inter-alia prayed for a decree of declaration with respect to the plaintiffs being $\frac{3}{4}$ th owner of the property and for restraint against the defendant from selling, parting with possession, transferring the property and also for partitioning of the property to the extent of $\frac{1}{4}$ th share to each of the parties to the suit.

3. The basic reliance of the respondent/defendant in the suit was on a Will of Sh. Gaiinda Ram dated 21.10.1985. It was the defence of the respondent/defendant that by virtue of the Will the respondent/defendant had become the owner of the property and that the respondent/defendant had already sold the property. In the written statement, it was pleaded that plaintiff No.1 is not the only son of late Sh. Ratan Lal and apart from plaintiff No.1, there are other sons and daughters of late Sh. Ratan Lal son of Gaiinda Ram who were alleged not to have been made parties to the suit.

4. After pleadings were completed, the trial Court framed the following issues:-

- “1. Whether the plaintiff have no right, title or interest in the suit property? OPD
2. Whether the plaintiff is entitled to a decree of partition, as prayed for? OPP
3. Whether the plaintiff is entitled to a decree of declaration, as prayed for? OPP

4. Whether the plaintiff is entitled to a decree of perpetual injunction, as prayed for? OPP
5. Relief.”

A reference to the aforesaid issues framed show that it is obvious that the respondent/defendant though had taken up a plea of non-joinder of other legal heirs of late Sh. Ratan Lal, however, they did not seek framing of an issue on this aspect. Therefore, since no issue was framed the plaintiffs were not put to the notice of the suit being liable to be dismissed for non-joinder of necessary parties.

5. The trial Court by the impugned judgment held that respondent/defendant failed to prove the Will of Sh. Gaiinda Ram but it however dismissed the suit because while dealing with issue No.3 of declaration it was held that the plaintiffs had not joined the necessary parties being legal heirs of late Sh. Ratan Lal to the suit. The relevant portion has already been reproduced above.

6. Learned counsel for the appellants has very strenuously contended that the object of framing an issue is to put a person to notice that the case would be argued/decided on such basis and since no such issue was framed the appellants/plaintiffs were taken by surprise on the suit being dismissed on such issue which was not framed. It was argued that once the plaintiffs were held entitled to a share in the property, then, if other persons were also entitled to share, such persons could have

been suo moto added as parties to the suit in exercise of powers under Order 1 Rule 10(2) CPC which gives Court powers to suo moto add and delete parties.

7. On the contrary, learned counsel for the respondent argued that the trial Court rightly dismissed the suit on account of non-joinder of necessary parties. Learned counsel for the respondent also relied upon a decision of learned Single Judge of this Court in the case of ***Rajo Devi (Smt.) Vs. Delhi Development Authority 2010 VIII AD (Delhi) 592.*** Paras 10 and 11 of this judgment are relied upon and the same read as under:-

“10. Order 1 Rule 9 of the Code is the statutory provision for mis-joinder and non-joinder of parties. It reads as follows:-

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

Provided that nothing in this rule shall apply to non-joinder of a necessary party.”

11. This provision mandates that no suit shall be defeated by reason of mis-joinder and non-joinder of the parties. However the proviso clarifies that nothing in this rule will apply to non-joinder of a necessary party. Therefore, care must be taken to ensure that the necessary party is before the Court, be it the plaintiff or the defendant, otherwise, the suit or the proceedings will have to fail. Necessary party is a party whose presence is necessary in order that the decree if passed in the proceedings can become an effective decree. Such a person should be bound by the result of the action and the question to be settled and where such a question in the action cannot be effectively and completely settled unless he is a party; in such an eventuality the suit is liable to be dismissed. However, the

Court in a given case may permit the plaintiff to amend the suit by impleading the necessary party.”

8. In my opinion, the arguments as raised by the counsel for the appellants merit acceptance. It cannot be disputed that no issue was framed with regard to the suit being liable to fail on account of non-joinder of necessary parties. The appellants/plaintiffs were therefore taken by surprise in having the suit dismissed for non-joinder. In fact, once the Will of Sh. Gairda Ram was disbelieved as was set up by the respondent/defendant, the suit for partition ordinarily had to be decreed. Those persons who are not parties to the suit, and who are entitled to the share in the property ought to have been made parties to advance the cause of justice and bring the litigation to an end by virtue of Order 1 Rule 10 (2) CPC which reads as under:-

“Order 1 Rule 10(2) Court may strike out or add parties.- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose present before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”(underlining added).

A reading of the aforesaid provision shows that every Court has ample powers to add a plaintiff or defendant whose presence is necessary to enable the Court to completely adjudicate upon the

questions involved in the suit. It is not necessary for a party to make an application under this provision and the court can suo moto exercise powers to further the ends of justice. Since some of the parties who were entitled to share on partition were already before this Court, and if the Court was of the opinion that other parties needed to be added, the Court ought to have adopted the procedure prescribed under Order 1 Rule 10 (2) CPC. There is no question of any prejudice to the existing respondent as the Will set up by him was held to have been not proved. In the interest of justice, therefore, the only course of action was to direct the appellants/plaintiffs to add the legal heirs of late Sh. Ratan Lal as either the plaintiffs or the defendants in the suit.

9. The decision of ***Rajo Devi (supra)*** relied upon by the respondent/defendant has no application to the facts of the case inasmuch as in the said case the main party/necessary party to the suit was Delhi Administration/Union of India inasmuch as the allotment of plot with respect to which relief was claimed was cancelled by the Delhi Administration/Union of India and a specific issue with respect to non-joinder of Delhi Administration/Union of India was framed. This issue has been set out in para 6 of the report. Therefore, the plaintiff in that case was put to notice by framing of an issue with respect to the effect of non-joinder of necessary party, and which is not so in the facts of the present

case as no issue to the effect of non-joinder of necessary parties was framed.

10. In view of the above, the impugned judgment is set aside. I exercise my powers under Order 1 Rule 10 (2) CPC and add the legal heirs of Sh. Ratan Lal, pre deceased son of Sh. Gainda Ram, as defendants in the suit. In case, the plaintiffs are successful in getting them impleaded as plaintiffs, such persons can also be added as plaintiffs, in case the plaintiffs so want. In case the legal heirs of late Sh. Ratan Lal are added as defendants to the suit, then, the trial Court will issue notice to such persons before proceeding further in the suit. In case, there is any contest to the suit of the appellants/plaintiffs by the newly added defendants being the legal heirs of late Sh. Ratan Lal, then such persons will be entitled to file the written statement and whereafter the trial Court will proceed to hear and dispose of the suit in accordance with law. The appellants/plaintiffs will file the amended plaint adding the other legal heirs of late Sh. Ratan Lal as parties within a period of four weeks of the first date fixed before the competent Court which will hear and dispose of the suit in accordance with law.

11. Parties to appear before the District Judge, Karkardooma Courts, Delhi on 14.12.2011, who will thereafter mark the suit for decision to a competent Court. Appeal is allowed and disposed of

accordingly, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J.

NOVEMBER 08, 2011

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