

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

% *Date of Judgment: 25.11.2011*

+ **CM(M) No. 1034/2008 and CM Nos. 12859/2008 & 12860/2008**

MEWA RAM & ORS. Petitioner s
Through: Mr. R.K. Sharma, Advocate.

Versus

SMT. ANITA AND ORS. Respondents
Through: Mr. Anil Kr. Gupta and Chetan
Sharma, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1. The order impugned before this court is the order dated 18.07.2008 vide which the preliminary issue which reads as under:

“Whether the plaint of the plaintiff is barred by res judicata? OPD”

had been decided in favour of the plaintiff; court had recorded a finding that the present suit is not barred by resjudicata.

2. First suit i.e the Suit No. 149/2004 had been filed by Smt. Anita against the defendants of whom defendant No. 1 is her brother-in-law; defendant No. 3 is her sister in law (wife of defendant No. 2) and defendant No. 2 was her father-in-law’s

brother. This was a suit for permanent injunction. Her contention was that a family settlement dated 10.01.1998 had been arrived at between the sons of Sewa Ram (father-in-law of the plaintiff) and in terms of that settlement House No. 115 Karkardooma Village, Karkardooma, Delhi-110092 (Suit property) was to be shared between Rajender (husband of the plaintiff) and Bhup Singh (her brother-in-law) and Madan (other brother-in-law of the plaintiff) was given portion of the property at Gher bearing No. 170, Karkardooma Village, Karkardooma, Delhi-110092. This settlement of 10.01.1998 was in fact an interse settlement between three sons of Sewa Ram. Rajender one of the three sons is the deceased husband of the plaintiff Anita. The prayer made in this first suit was that the defendants should not encroach upon the property of plaintiff of which she is an owner. She was claiming this ownership in terms of the family settlement dated 10.01.1998 pursuant to which she allegedly was a part owner being the wife of deceased Rajender and also entitled to a share in the property of Bhup Singh who had died issueless on 09.03.2003.

3. This suit had been dismissed on 29.10.2005. While dismissing the suit, the court had noted that the plaintiff has not been able to establish any legal right in the suit premises; the

family settlement dated 10.01.1998 had been examined; court held that the sons of Sewa Ram themselves were not entitled to any share in the suit property and the plaintiff deriving title only through Rajender (deceased husband) and Bhup Singh i.e. the sons of the Sewa Ram, the question of the plaintiff having a right and interest in the suit property did not arise. In this judgment the court had returned a finding that no rights had accrued in favour of Sewa Ram; Bhup Singh his son also has no interest in the suit property. The claim of the plaintiff which was based on the share of Bhup Singh was thus negated. This suit had been dismissed.

4. The second suit i.e the present suit has been filed by the plaintiff Anita seeking partition and possession of the same suit property i.e. House No. 115 and House No. 116 and also Gher No. 170 situated at Karkardoom Village, Karkardoom, Delhi-92. Her contention in the present suit is that the defendants in the present suit are her father-in-law's brother namely Mewa Ram, his son Rajender and her brother-in-law Madan. Her contention is that she is the widow of Rajinder who was the son of Sewa Ram and she has thus inherited a share in the property of Sewa Ram being the widow of his pre-deceased son; partition has according been claimed. In para 5 of the plaint the interse settlement arrived at

between her husband and his brothers on 10.01.1998 has also

been adverted to. The prayer made in the present plaint is that she is entitled to a decree of partition in this suit property alongwith damages and mesne profits.

5. The issue about the maintainability of the present suit had been raised by the defendants; their contention being that this suit is barred under the principle of res judicata and more so by the principle of constructive res judicata as contained in Explanation IV of Section 11 of the Code of Civil Procedure. Relevant would it be to extract the said provision; Section 11 Explanation IV is as follows:-

"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 IV-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

6. This argument did not find favour with the Trial Court who had dismissed this plea of the defendant.

7. Impugned order clearly suffers from an illegality. The essential ingredients for the applicability of Section 11 of the Code had not been appreciated in the correct perspective. An issue which is directly and substantially an issue in an earlier suit between the same parties cannot be tried as a issue in a subsequent suit. Constructive res judicata is essentially contained in explanation IV to Section 11. In the instant case it is clear that the first suit had been filed by the plaintiff claiming her title and interest in the suit property on the basis of a family settlement executed inter se between her husband and his two brothers; contention being that she had derived her title in the suit property in lieu of the share of her brother-in-law Bhup Singh (who had died issueless), son of Sewa Ram. Judgment of the First Court dated 29.10.2005 had held otherwise; noting that Sewa Ram himself had no title in the suit property and as such the plaintiff who has claimed through him and her brother-in-law Bhup Singh is not entitled to any relief.

8. The second suit was based on the premise that her father-in-law Sewa Ram having died and she being the widow of his pre-deceased son was entitled to a share in the suit property; her claim for partition was made. Doctrine of res-judicata is clearly

applicable; the question of right title, and interest of Sewa Ram

already having been decided in the first suit, it could not have been taken up as an issue in the second suit.

9. Impugned judgment holding otherwise suffers from an infirmity; impugned order is set aside; suit is dismissed.

INDERMEET KAUR, J

NOVEMBER 25, 2011

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