

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

+ **CS(OS) 1351/2002 & CS(OS) 1013/2004**

% **31st August, 2012**

+ **CS(OS) 1351/2002**

SURESH SRIVASTAVA Plaintiff
Through: **Mr. N.K.Khetrapal, Adv.**

versus

SUBODH SRIVASTAVA AND ORS. C+ F+ Defendants
Through: **Mr. Alok Kumar with**
Mr. Neeraj Gupta, Adv. for D-1.
Mr. Vimal Srivastava, Adv. for D-2.

&

+ **CS(OS) 1013/2004**

SUBODH BHUSHAN SRIVASTAVA Plaintiff
Through: **Mr. Alok Kumar with**
Mr. Neeraj Gupta, Adv.

versus

SURESH SRIVASTAVA & ANR. Defendants
Through: **Mr. N.K.Khetrapal, Adv.**

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?
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Yes.
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VALMIKI J. MEHTA, J (ORAL)

IA No.7098/2011(u/O.12 R.6 CPC)

1. This application under order 12 Rule 6 CPC has been filed by the defendant no.2 in a suit for partition with respect to the suit property bearing no.C-194, Vivek Vihar, New Delhi-95. The property is constructed on two floors i.e. ground floor and first floor and is situated on a plot of land admeasuring 220 sq. yds. There were originally four parties to the suit. Plaintiff and the defendants no. 1 and 2 are brothers, the defendant no.3 was the father of the plaintiffs and defendants no. 1 and 2, who expired admittedly intestate during the pendency of the suit. The plaintiff supports the application of the defendant no.2. The application is only opposed by the defendant no.1.

2. As per the plaint though the suit property stood in the records of the DDA in the name of the defendant no.1, however, all the parties to the suit i.e. the brothers and the father had entered into an agreement on 27.9.1978 recording the fact that the different parties had invested different amounts in this property and therefore this property is a joint property of all the parties. The agreement dated 27.9.1978 was followed by two other documents, one being a family settlement dated 3.2.1994 in which it is stated

that all the parties have a 1/4th share in the suit property, and an affidavit of the defendant no.1 of the same date to the same effect.

3. Defendant no.1 has filed reply to the present application reiterating the stand in the written statement. In the written statement, the following defences are raised, and which are the defences which have been argued before me, and in addition an aspect that the suit requires trial after framing of issues on 30.8.2005 and therefore the application under Order 12 Rule 6 CPC should be dismissed. The defences which have been raised by the defendant no.1, contesting non-applicant, in his written statement are as under:-

- i) The agreement dated 27.9.1978 was got signed in good faith from the defendant no.1 because of representation made by the plaintiff that the same will help for house tax purposes.
- ii) The family settlement dated 3.2.1994 cannot be looked into in law because it amounts to a partition deed, and therefore in the absence of the same being stamped and registered, no rights can be created thereunder. Similar is the stand even with respect to the earlier agreement dated 27.9.1978.

- iii) The suit property stands in the name of the defendant no.1 and therefore without a properly stamped document rights in an

immovable property cannot be transferred by means of the documentation dated 27.9.1978 and 3.2.1994.

4. Before proceeding ahead, I must note that the execution of the documents dated 27.9.1978 and 3.2.1994 is not denied by the defendant no.1. The issue is only of alleged misrepresentation and of legal ineffectiveness of such documents.

5. In order to appreciate the plea of misrepresentation as urged by the defendant no.1, it is necessary to reproduce para 6 of the preliminary objections in the written statement of the defendant no.1 and which reads as under:-

“6. The plaintiff is an Income Tax Practitioner. He completed his law studied in 1969 or thereabout. He started his taxation practice in 1970. The other parties to the suit had faith in the plaintiff. The plaintiff handled the financial affairs of Defendant No.1. It was on his advise and representation that it was convenient to execute certain documents which were required for property tax and other purposes, that documents included (a) alleged deed of agreement dated 27.9.1978 (b) alleged family settlement deed of 3.2.1994 (c) alleged affidavit of 28.12.1994 and (d) letter to DDA for transfer of suit property in the joint name of parties were executed.

That the alleged documents were got prepared by the plaintiff and have been filed by him alongwith the plaint. The said documents were signed by the answering defendant on the representation of the Plaintiff that they were required for property tax and other taxation matters and there was never any intention to transfer or to share the title of the suit property with any other party to this suit.

It was on the asking of the Plaintiff on the alleged reasoning of tax benefit that the Defendant No.1 wrote a letter to the Delhi Development Authority for including the Plaintiff's name and the names of Defendants No.2 and 3 in the title papers of the suit property. However, the said matter was never followed up and the title continues to be vested in the answering defendant exclusively."

6. The plea of the defendant no.1 therefore is that he signed the agreement dated 27.9.1978 in good faith for property tax purpose. It must be however noted that the defendant no.1 has not taken up a stand in the written statement that he never had with him even a photocopy or copy of this agreement dated 27.9.1978. Similarly in the written statement it is not stated that the defendant no.1 did not have copies of the family settlement dated 3.2.1994. Therefore, from the date of execution of these documents i.e. from 27.9.1978 and 3.2.1994, copies of these documents are very much with the defendant no.1.

7. Let us now examine the contents of the documents dated 27.9.1978 and 3.2.1994. So far as the agreement dated 27.9.1978 is concerned, it mentions the factum with respect to the different brothers having invested different amounts in the suit property and therefore the property is declared as a joint property of all the parties to the agreement. This document further specifically provides that the transfer in the name of the different brothers as on that date i.e 27.9.1978 was not possible because
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there are amounts outstanding to DDA. The agreement recites that when it will be possible, the house would be transferred in the joint names of all the parties. The agreement further provides that the defendant no.1 will not be entitled to sell, mortgage or dispose of etc the suit property and nor any portion of the property will be given on rent without the consent of other parties to the suit.

8. So far as the family settlement deed dated 3.2.1994 is concerned, the said family settlement crystallizes the shares of each of the parties as $1/4^{\text{th}}$, inasmuch as the earlier document dated 27.9.1978 only mentions the property as a joint property without specifying the specific shares of each of the parties.

9. At this stage, I must before proceeding ahead deal with the contention raised on behalf of the defendant no.1 that once issues have been framed, and there is a plea of misrepresentation, trial must necessarily take place, and the suit cannot be disposed of by applying the provisions of Order 12 Rule 6 CPC. In my opinion, this argument which is raised on behalf of the defendant no.1 is wholly misconceived inasmuch as for disposing of the present application under Order 12 Rule 6 CPC, I am proceeding on the basis that there has been misrepresentation upon the defendant no.1. The

question is that even if there is a misrepresentation upon the defendant no.1, **CS(OS) 1351/2002 & CS(OS) 1013/2004**

yet, is the trial necessary? I must note that this plea of invalidity of the documents dated 27.9.1978 and 3.2.1994 has been raised for the first time after filing of the present suit and through the written statement of the defendant no.1 in the year 2002. From 1994 till 2002, the family settlement deed dated 3.2.1994 has never been challenged or endeavoured to be set aside in any legal proceedings. Article 59 of the Limitation Act, 1963 is relevant at this stage to show that challenge to the documents dated 27.9.1978 and 3.2.1994 was clearly time barred as on the date of filing of the written statement by the defendant no.1. I may note that judgment will also result in dismissal of the connected suit being CS(OS) 1013/2004 where the defendant no.1 is the plaintiff in that suit for possession against the plaintiff and defendant no.2 in this suit and who are the defendants in that suit.

Article 59 of the Limitation Act, 1963 reads as under:

	Description of suit	Period of limitation	Time from which period begins to run
59.	To cancel or set aside an instrument or decree or for the rescission of a contract	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.

10. As per the aforesaid Article 59, if a person seeks cancellation of CS(OS) 1351/2002 & CS(OS) 1013/2004

a document, he must file a suit within three years of having knowledge of the document which is sought to be cancelled. I have already stated above that the defendant no.1 is very much aware of the execution of the documents dated 27.9.1978 and 3.2.1994 from above very dates inasmuch as the documents are admittedly signed by the defendant no.1, copies of such documents are with him and the only stand is of alleged misrepresentation. Besides the fact that CS(OS) 1013/2004 is being decided by this judgment and in which suit the defendant no.1 is the plaintiff, in law in a partition suit, every person is both a plaintiff and a defendant. A person is a plaintiff to the extent of the share which comes to him and is a defendant to the extent of the remaining shares of the others. The defendant no.1 cannot by means of the written statement or the suit CS(OS) 1013/2004 seek cancellation of the documents of the year 1994 in the year 2002. Such a challenge in the year 2002 is clearly barred by time as per the Article 59 of the Limitation Act, 1963.

11. The Hon'ble Supreme Court in the case of ***Prem Singh & Ors. vs. Birbal & Ors., 2006 (5) SCC 353***, has dealt with the provisions of Section 31 of the Specific Relief Act, 1963 and Article 59 of the Limitation Act, 1963. Section 31 of the Specific Relief Act, 1963 provides the entitlement to seek cancellation of the documents. The Supreme Court in **CS(OS) 1351/2002 & CS(OS) 1013/2004**

the case of *Prem Singh (supra)* has held that there are two types of documents; one is a void document and the second is a voidable document. So far as the void documents are concerned, for such documents there need not be filed any suit for cancellation under Section 31 of the Specific Relief Act, 1963, however so far as the voidable documents are concerned such documents have to be got cancelled as per Section 31 of the Specific Relief Act, 1963. Since the plea of the defendant No.1 is that the documents in question to which he is a party were got signed on misrepresentation, the documents are therefore only voidable and not void, the defendant no.1 was therefore bound to seek cancellation of such documents within three years as per Article 59 of the Limitation Act, 1963 so that no rights could flow from these documents. Having not so done the agreement dated 27.9.1978 and the family settlement dated 3.2.1994 achieve finality, subject to issues of registration and stamping.

12. Of course, I would agree with the counsel for the defendant that the agreement dated 27.9.1978, is bad for want of stamping and registration inasmuch as the effect of such document is to extinguish the right of the defendant no.1 in the suit property, and create rights in favour of the other parties to the suit in the suit property, however, this argument will not sustain so far as the family settlement deed dated 3.2.1994 is concerned. In **CS(OS) 1351/2002 & CS(OS) 1013/2004**

order to appreciate that the family settlement deed is in fact a settlement deed and not a partition deed, I would like to reproduce the relevant paras of the family settlement deed, which read as under:

“That it is mutually agreed upon by the party of the first part that he has only a limited un-specified 1/4th share in the above said property and Sh. Ishwar Dayal Srivastava is also having un-specified 1/4th share in the above said property and Sh. Vinod Bhushan Srivastava is also having 1/4th un-specified share in the above said property and Sh. Suresh Kumar Srivastava is also having 1/4th share un-specified in the above said property.

That it is mutually agreed upon between the parties to this agreement that the above mentioned property is a joint property in the name of all the above mentioned members of the family and shall continue remain so and in the event of sale, mortgage and disposing off in any other manner the above said property, the consent of all the four members of this agreement is necessary and no member of this agreement can never dispose-off, sale or mortgage the above said property with the consent of all the other signatories to this family agreement.”

13. A reading of the aforesaid paras of the family settlement deed shows that there is no specific language that it is only and only by virtue of the family settlement deed dated 3.2.1994 that the rights have been created. The language of the document shows mentioning of existing rights. For example, in the first part aforesaid, the expression used is “he has only a limited un-specified 1/4th share” this is a language by reference to the past transactions and not of creating rights under the subject document dated

3.2.1994. Even in the next para, the language is “that the above mentioned property is a joint property in the name of all the above mentioned members of the family and shall continue to remain so”. Once again this language is a reference to an existing state of affair and not for a new state of affair coming into existence by virtue of the family settlement dated 3.2.1994.

14. The Supreme Court in the judgment reported as ***Roshan Singh and Ors. Vs. Zile Singh, AIR 1988 SC 881*** has held the following document to be a family settlement:-

“Today after discussion, it has been mutually agreed and decided that house rihashi (residential) and the area towards its West which is lying open i.e., the area on the back of the rihashi (residential) house has come to the share of Chaudhary Pooran Singh Zaildar.

2. House Baithak has come to the share of Chaudhary Soonda. The shortage in area as compared to the house rihashi and the open area referred to, will be made good to Chaudhary Sunda from the field and gitwar in the Eastern Side.

3. Rest of the area of the field and gitwar will be half and half of each of co-sharers. The area towards West will be given to Chaudhary Pooran Singh and towards East will be given to Chaudhary Soonda.

4. Since house rihashi has come to the share of Chaudhary Pooran Singh, therefore, he will pay Rs. 3,000/- to Chaudhary Soonda.

5. A copy of this agreement has been given to each of the co-sharers.

Sd/- (in Hindi)
Pooran Singh Zaildar

D/3-8-1955
L. T. I.
Ch. Soonda.”

aforesaid judgment to be a family settlement, a fortiori the family settlement deed dated 3.2.1994 in the present case is a family settlement.

15. I must at this stage state that Courts have repeatedly observed that family settlements which settle the disputes between the parties, bring family peace, and therefore peace in the community must be endeavoured to be upheld and not to be set aside. I think this rationale squarely applies in the facts of the present case. That a family settlement is not required to be stamped or registered is now well settled law and reference can be made to the celebrated judgment in the case of ***Kale & Ors. Vs. Dy. Director of Consolidation & Ors. AIR 1976 SC 807.***

16. The up-shot of the above discussion is as under:-

i) The challenge by the defendant no.1 to the family settlement deed dated 3.2.1994 is barred as per Article 59 of the Limitation Act, 1963 read with the judgment of the Supreme Court in the case of ***Prem Singh (supra)***. Once the challenge to the same is barred, even if we take the case of misrepresentation, as urged, true, yet, the document being the family settlement deed dated 3.2.1994 is final.

ii) Once the family settlement deed dated 3.2.1994 is final, each of the parties will have a 1/4th share in the suit property.

(iii) Since the father Sh.Ishwar Dayal Srivastava has died, and
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admittedly intestate, the three brothers who are now the remaining three parties to the suit will have a $\frac{1}{3}^{\text{rd}}$ share each in the suit property.

17. I must note that the legislative intendment behind the Order 12 Rule 6 CPC is to see that there should not be unnecessary delay in the conclusion of the suit once certain admitted facts emerge on record which can lead to disposal of the suit. The stand of the defendant no.1 that the parties must necessarily undergo rigours of a trial and tribulations of decades of litigation has to be undergone by the plaintiff and defendant no.2, is an argument, I reject in limine in view of the intendment of Order 12 Rule 6 CPC.

18. In view of the above, application under Order 12 Rule 6 CPC is allowed. Suit of the plaintiff is decreed for partition by passing of preliminary decree declaring that each of the plaintiff and the defendants no. 1 & 2 have a $\frac{1}{3}^{\text{rd}}$ undivided interest in the suit property. Let the preliminary decree be drawn up accordingly.

19. Let the parties now file suggestions with respect to either physical partitioning of the property or if according to them the property has to be sold, then, mode in which the property is to be sold, and in what manner.

20. List for further direction on 27th November, 2012.

21. The dates of 10.1.2013 before the Joint Registrar and 11.9.2012 before the Court stand cancelled.

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22. In view of the detailed judgment passed by me in CS(OS) No.1351/2002 allowing the application under Order 12 Rule 6 CPC, since it is held that all the three sons of Sh.Ishwar Dayal Srivastava and who are the parties in the CS(OS) No.1351/2002 would be 1/3rd owners of the suit property, the present suit of Sh.Subodh Bhushan Srivastava is liable to be dismissed, more so because Article 59 of the Limitation Act, 1963 will squarely apply to Sh.Subodh Bhushan Srivastava's case who is the plaintiff in this case. The suit is accordingly dismissed in terms of the judgment in CS(OS) No.1351/2002. Decree sheet be prepared.

23. The date of 10.1.2013 before the Joint Registrar stands cancelled.

VALMIKI J. MEHTA, J

AUGUST 31, 2012

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