

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

%

Date of decision: 29th August, 2013

+

RFA No.392/2010

**S. JASKIRAT SINGH @ PRINCE
KHURANA & ANR.**

..... Plaintiffs

Through: Mr. Umesh Kumar, Adv.

Versus

**S. DALIP SINGH (DECEASED)
THROUGH LR.s. & ORS.**

..... Respondents

Through: Mr. Vinod Wadhwa & Ms.
Vipasha Singh, Advs. for R-4.
Mr. R.S. Sahni, Adv. for R-
5,6,9&10.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 04.02.2010 (in Civil Suit No.428/2008) of the Court of Additional District Judge-03 (North), Delhi dismissing the suit filed by the two appellants / plaintiffs, (a) for partition of property No.2429, Tilak Street, Chuna Mandi, Paharganj, New Delhi; (b) for permanent injunction restraining the respondents / defendants from dispossessing the appellants / plaintiffs from the portion of the property in their occupation and / or dealing with the said property; and, (c) for rendition of accounts of the business carried

on from Shops No.1 and 3 of Market Nos.646-647, Fancy Cloth Market, Main Bazar, Paharganj, New Delhi, as barred by Section 11 of the CPC. The appeal also impugns an order of the same day dismissing the application filed by the appellants / plaintiffs under Order 6 Rule 17 of the CPC.

2. Notice of the appeal was issued and the Trial Court record requisitioned. The appeal was admitted for hearing on 20.09.2011 and ordered to be listed in due course. Application for early hearing was filed by the respondent No.4 Harmit Singh claiming himself to be a senior citizen and the appeal was accordingly given priority and ordered to be listed in the regular matters of the Senior Citizens. An application under Order 41 Rule 27 has been filed by respondent No.4 which is pending consideration.

3. Though the appeal is listed in the category of regular matters but the counsel for the appellants / plaintiffs started by saying that first the application under Order 41 Rule 27 CPC has to be disposed of and he is ready for arguments thereon only. Upon being told that such applications, as per the established law, are to be heard along with the appeal only, though he has given a narration of the facts of the case,

however stating that some of the respondents are still unserved with the notice issued of the application of the respondent No.4 under Order 41 Rule 27 of the CPC.

4. The counsel for the respondents No.5,6,9 and 10 states that the respondent No.5 is the main contesting respondent and the other respondents are not interested.

5. However when after further perusing the impugned judgment / order, some query was raised to the counsel for the respondents No.5,6, 9 and 10, he states that he has neither brought the judgments on which he needs to rely, nor has inspected the file and also seeks adjournment. Upon it being enquired from him as to why the application for early hearing was made if none of the counsels are interested in addressing arguments for early disposal of the appeal, he states that the application for early hearing was filed not by him but by respondent No.4.

6. Upon the counsel for the respondent No.4 being asked to address, he states that he has nothing to say as the respondent No.4 is the father of the two appellants and is supporting the appellants / plaintiffs.

7. The aforesaid shows that though priority in hearing was claimed and given, over the appeals of the year 2004 onwards pending before this Court, but neither of the parties are interested in addressing arguments.

8. Be that as it may, since the impugned judgment has been read, it is not deemed appropriate to adjourn the matter and the records have been perused.

9. The appellants / plaintiffs, in the suit from which this appeal arises, claimed partition of the property pleading that the said property was purchased by their grandfather Sh. Dalip Singh (against whom the suit was filed) from the claim amounts received with respect to the properties left in Pakistan by late Sh. Jawahar Singh being the father of Sh. Dalip Singh, and great-grandfather of the appellants / plaintiffs, and the appellants / plaintiffs thus had a right since their birth in the said properties. The same is the position of the other claim in the suit, for accounts with respect to the business.

10. The learned Additional District Judge by the impugned judgment held the claim for partition of the appellants / plaintiffs to be barred by Section 11 of the CPC for the reason of the judgment in a suit filed by the

grandfather of the appellants / plaintiffs Sh. Dalip Singh against the father of the appellants / plaintiffs Sh. Harmit Singh, respondent No.4 in this appeal, for possession of the portion of the said property in occupation of the respondent No.4 and in which suit the respondent No.4 herein had taken a defence of being in occupation of the property as owner for the reason of the property having been acquired through ancestral funds and which defence of the respondent No.4 was not believed and a decree for possession passed in favour of Sh. Dalip Singh grandfather of the present appellants / plaintiffs and against the father of the appellants / plaintiffs i.e. the respondent No.4 herein.

11. The learned Additional District Judge has further reasoned that the said judgment had attained finality till the Supreme Court and the issue of the property being not ancestral in the hands of Sh. Dalip Singh had thus attained finality. It was further held that the additional contention of the appellants / plaintiffs, that the said decree was obtained in collusion and by playing a fraud upon the Court, did not come in the way of applicability of the principle of *res judicata* because the appellants / plaintiffs, in the suit from which this appeal arises, had not claimed the relief of declaration of the decree in the earlier suit to be null and void but

had simply claimed partition. It was yet further held that the suit filed by the appellants / plaintiffs was based on the same facts which had already been decided in the suit for possession filed by Sh. Dalip Singh and was thus barred by provisions of Section 11 of the CPC.

12. Finding the bar of Section 11 of the CPC to be applicable, only between the same parties or between the parties under whom they or any of them claim or litigating under the same title, it was enquired from the counsel for the respondents No.5,6, 9 and 10 as to how the appellants / plaintiffs, who were admittedly not a party to the earlier suit filed by the grandfather Sh. Dalip Singh against respondent No.4 herein, could be said to be litigating under the same title or claiming under their father.

13. The counsel for the respondents No.5,6,9 and 10 instead of replying to the said question, states that the appellants / plaintiffs were fully aware and participating in the earlier suit though not parties thereto. Upon further enquiry, he states that he is not ready and again seeks adjournment.

14. I am unable to hold that the claim of the appellants / plaintiffs, in the suit from which this appeal arises, was under their father respondent

No.4 herein or that the appellants / plaintiffs were litigating under the same title under which their father had litigated in the earlier suit.

15. I have enquired from the counsels as to when the father of Sh. Dalip Singh died. The counsel for the appellants / plaintiffs states that Sh. Jawahar Singh, father of Sh. Dalip Singh died in Pakistan in the year 1944. The counsel for the respondents No.5,6,9 and 10 though states that Sh. Jawahar Singh died in Pakistan but is unable to either admit or controvert the year of death of Sh. Jawahar Singh.

16. If Sh. Jawahar Singh has died in the year 1944 i.e. prior to the coming into force the Hindu Succession Act, 1956 and the suit property can be traced to the funds of Sh. Jawahar Singh, then the suit property would be ancestral in the hands of Sh. Dalip Singh and in which the appellants / plaintiffs being the grandsons of Sh. Dalip Singh (who is stated to have died on 13.07.2008) would have a right by their birth. Such rights of the appellants / plaintiffs are in accordance with the ancient Hindu laws as applicable prior to the coming into force of the Hindu Succession Act in the year 1956 and though the share of the appellants / plaintiffs in the property would be from the branch of their father but the mere fact that their share would be out of the branch of their father would

not make their said right as through their father or under the same title as their father, the respondent No.4 herein.

17. The learned Additional District Judge did not consider the aforesaid aspect and the judgment is totally bereft of any discussion in this regard. However I find the said aspect to have been raised at the time of hearing of the application in the suit (from which this appeal arises) under Order 39 Rules 1 and 2 of the CPC and the order dated 03.10.2006 thereon to have rejected the contention of the counsel for the respondents No.5,6, 9 and 10 to the said effect and having held that the grandsons acquire right by birth and their right does not flow through their father. I may notice that FAO No.324/2006 preferred to this Court against the said order dated 03.10.2006 was allowed on 08.05.2007 *inter alia* on the ground that the suit filed by the appellants / plaintiffs *prima facie* was in abuse of the process of the law and citing certain judgments holding that if the predecessor in interest was party to the suit / proceedings involving the same property, the judgment therein binds his successor in interest. However the said principle, as aforesaid, is not applicable to rights under the ancient Hindu law where the rights of the grandsons to the ancestral property are independent of the rights of their father. Moreover, this

Court at that stage was not concerned with the aspect of applicability of Section 11 of the CPC and thus I do not consider myself bound by the said judgment dated 08.05.2007 in FAO No.324/2006.

18. A Full Bench of the Lahore High Court in ***Lala Maha Deo Vs. Ranbir Singh*** AIR 1944 Lahore 220 held that a Hindu son does not claim under his father within the meaning of Section 11 of the CPC inasmuch as a son in a joint Hindu family becomes entitled in his own right on birth. To the same effect is the judgment in ***(Kintali) Chandramani Prushti Vs. Jambeswara Rayagaru*** AIR 1931 Mad. 550.

19. Moreover, the suit as aforesaid was primarily for two reliefs i.e. for partition of property No. 2429, Tilak Street, Chuna Mandi, Paharganj, New Delhi and for accounts of business being run in Shops No.1 and 3 of Market Nos.646-647, Fancy Cloth Market, Main Bazaar, Paharganj, New Delhi. I do not find any discussion in the impugned order holding the suit for accounts to be barred by Section 11 and the counsel for the respondents No.5,6, 9 and 10 is also unable to tell as to how the suit for the said relief of accounts could be said to be barred under Section 11 owing to the earlier judgment.

20. The counsel for the respondents No.5,6, 9 and 10 has handed over copy of a judgment dated 16.07.2013 in CS(OS) No.982/2009 titled ***S. Harmit Singh Vs. S. Ravinder Singh*** of this Court dismissing the suit filed by the father of the appellants / plaintiffs respondent No.4 herein claiming partition of property No. 2429, Tilak Street, Chuna Mandi, Paharganj, New Delhi as well as the shops aforesaid. However admittedly the appellants / plaintiffs were not party to the said suit also.

21. I am therefore unable to uphold the judgment and decree holding the suit from which this appeal arises to be barred by Section 11 of the CPC.

22. As far as the challenge to the order of the same day of dismissing the application of the appellants / plaintiffs for amendment of the plaint is concerned, the appellants / plaintiffs wanted to, a) implead the Union of India, Regional Settlement Commissioner and Commissioner of MCD as parties to the suit; b) seek declaration qua the ownership of the property; c) to challenge the *inter se* arrangements entered into between the heirs of Sardar Dalip Singh with respect to the properties.

23. The counsel for the respondents No.5,6, 9 and 10 interjects at this stage and states that this application was never argued before the Trial Court.

24. On that concession alone of the counsel for the respondents No.5,6, 9 and 10, the order rejecting the amendment, though in favour of the said respondents, is liable to be set aside and is so set aside.

25. Accordingly, the appeal succeeds.

26. The judgment and decree holding the suit to be barred by Section 11 of the CPC is set aside; similarly the order rejecting the application of the appellants / plaintiffs for amendment of the plaint is set aside and the application for amendment is remanded to be considered afresh by the learned Additional District Judge.

27. I may however clarify that the observations aforesaid are on the basis of the averments in the plaint and thus would not come in the way of the Additional District Judge, if of the opinion that the suit is liable to be summarily dismissed on some other ground, to consider the said aspect.

28. The counsels for the respondents having not argued, no order as to costs.

29. Decree sheet be drawn up.

30. The Trial Court file be returned forthwith to the District Judge (North), Delhi. The parties to appear before the Additional District Judge-03 (North), Delhi or any other Additional District Judge before whom the suit is marked, on 8th October, 2013.

RAJIV SAHAI ENDLAW, J

AUGUST 29, 2013
'gsr'..