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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(OS) 376/2010 & IA No.11349/2011 (u/O 39 R-4 CPC)

VIBHA KAPUR

..... Plaintiff

Through: Mr. Kishore M. Gajaria & Mr. Piyush
Sachdeva, Advs.

versus

M.R. KHULLAR & ORS

..... Defendants

Through: Mr. S.S. Jauhar & Mr. Prabhjit
Jauhar, Advs.

AND

29+ CS(OS) 1855/2011, IAs No.12125/2011 (u/O 39 R-1&2 CPC),
17016/2011 (u/O 7 R-11 CPC) & 15320/2012 (u/O 39 R-10 CPC)

MULK RAJ KHULLAR

..... Plaintiff

Through: Mr. S.S. Jauhar & Mr. Prabhjit
Jauhar, Advs.

versus

ANIL KAPUR & ORS

..... Defendants

Through: Mr. Kishore M. Gajaria & Mr. Piyush
Sachdeva, Advs.

AND

38+ CS(OS) 1838/2012 & IA No.11479/2012 (u/O 39 R-1&2 CPC)

VIBHA KAPUR & ORS.

..... Plaintiffs

Through: Mr. Kishore M. Gajaria & Mr. Piyush
Sachdeva, Advs.

versus

M.R. KHULLAR & ORS

..... Defendants

Through: Mr. S.S. Jauhar & Mr. Prabhjit
Jauhar, Advs. for D-1&2.
Mr. M.C. Sharma, Adv. for Mr. J.S.
Arya, Adv. for D-5.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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23.04.2013

CS(OS) 376/2010

1. The suit is ripe for framing of issues. Though two other suits being CS(OS) No.1855/2011 & CS(OS) No.1838/2012 between the same parties and pertaining to the same properties are pending consideration and it is informed that pleadings in CS(OS) No.1838/2012 are not complete as yet but it is not deemed expedient to adjourn the framing of issues in this suit as on a *prima facie* reading of the plaint in this suit, the plaintiff is not found to be having a share asserting which this suit for partition has been filed.

2. The counsel for the plaintiff has as such been asked to address on the said aspect

3. The defendant no.1 is the father of the plaintiff. The defendants no.2&3 are the brother and mother of the plaintiff.

4. The plaintiff has sued for partition of the following properties:

- "1. Property bearing No.B-93, Maya Puri Industrial Area, Phase-I, New Delhi-110064.*
- 2. Property bearing No.A-64, Vasant Vihar, Poorvi Marg, New Delhi.*
- 3. One Flat in Vasant Vihar, New Delhi (details of which are exclusively with the defendants) in the name of Uma Khullar.*
- 4. Property bearing No.B-1/4, Pusa Road, New Delhi ad-measuring 2000 sq. yds. approx.*
- 5. All Bank Accounts standing in the name of defendant no.1, defendant no.2 and defendant no.3 being maintained by them in HDFC Bank and YES Bank. (Details to be furnished by the defendants)."*

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5. The plaintiff in the plaint has pleaded, a) that the property No.B-93, Maya Puri Industrial Area, Phase-I, New Delhi was allotted to her grandfather Sh. Beharilal Khullar vide Lease Deed dated 20.09.1966; b) that at the time of such allotment, the grandfather and father were carrying on business in partnership in the name and style of M/s Rajko Sanitations; c) that the said partnership was dissolved on 31.03.1968 and the goodwill of the said business was taken over by the father who thereafter carried on the said business; d) that the plaintiff got married in 1978; e) that at the time of her marriage, the father entered into an oral partition with his children including the plaintiff and gave the said property to the plaintiff and assured her that necessary documentation will be got done; f) however there were several tenants in the said property and the father giving the excuse of the tenants having not vacated, kept on postponing the documentation; g) that the plaintiff has also come to know that the father has already sold two portions of the said property; h) that the father, immediately after marriage of the plaintiff, had also handed over vacant possession of portion of the said property to the plaintiff and the plaintiff and her husband have been in possession of the said portion since then and have been carrying on their business therein through the vehicle of a company in which the plaintiff and her husband have 90% shares and the defendants have 8% shareholding.

6. With respect to the remaining properties, it is the case of the plaintiff that the grandfather owned few shops at Hauz Qazi and at Gali Haquim Baqa, Delhi which the father has disposed of and utilized the proceeds thereof for purchasing the said properties.

7. It is thus the plea of the plaintiff that all the properties aforesaid having been procured by the grandfather and having been inherited by the father from the grandfather or having been procured by the father from sale proceeds of the properties left by the grandfather, are ancestral properties in which the plaintiff has an equal legitimate share.

8. The plaint does not even disclose the year of demise of the grandfather. The counsel for the plaintiff after obtaining instructions from the husband of the plaintiff present in Court states that the grandfather died in the year 1994.

9. From the averments in the plaint, the case of the plaintiff is of the father having inherited all the properties aforesaid from the grandfather and thus the plaintiff having a share therein.

10. Upon enquiry as to how the aforesaid creates a share or right in favour of the plaintiff, the counsel for the plaintiff first draws attention to Section 14 of the Hindu Succession Act, 1956 and contends that the property inherited by a female, as the plaintiff is, becomes her absolute property. Reliance in this regard is placed on *Jose Vs. Ramakrishnan Nair Radhakrishnan* AIR 2004 Kerala 16. However upon being asked as to whose heir the plaintiff is claiming to be, the counsel states that the plaintiff is the heir of her grandfather.

11. Upon attention of the counsel being drawn to Section 8 of the Hindu Succession Act, 1956 and to Class-1 heirs as specified in the Schedule thereto, the counsel is unable to show that a granddaughter is an heir of a male Hindu during the lifetime of her father.

12. Faced with the aforesaid, the counsel for the plaintiff refers to Section 6 of the Hindu Succession Act, 1956.

13. However Section 6 of the Act deals with devolution of interest in coparcenary property. The present plaint is on a misconception of law that in the property inherited by a male from his father, his children acquire a share or right by birth. Though that may have been the position under the ancient Hindu law but was changed vide the Hindu Succession Act as far back as in the year 1956. The entire case law in this respect has been discussed in judgment dated 30.01.2013 in CS(OS) No.823/2010 titled *Neelam Vs. Sada Ram* and as such need is not felt to reiterate the same here.

14. The grandfather of the plaintiff from whom the father of the plaintiff is stated to have inherited the properties died much after the coming into force of the Hindu Succession Act and the question of the plaintiff getting any share during the lifetime of her father does not arise.

15. The judgment in *Jose* supra cited by the counsel for the plaintiff is a case where Section 14 of the Act was applicable and in the facts of the present case when the question of applicability of Section 14 does not arise, there is no question of the said judgment having any relevance.

16. The counsel for the plaintiff has not been able to raise any other argument to show any right and title of the plaintiff.

17. As far as the plea of family settlement or oral partition at the time of marriage of plaintiff is concerned, not only is the same a bald plea without any document whatsoever but even otherwise in law, a family settlement or

oral partition can be only between persons who have a share or a pre-existing right or antecedent right in the property and a partition or family settlement cannot be a medium for transfer or creation of any rights in immovable property from the one having title thereto to another who has no title whatsoever thereto. In the present case, in view of the legal position enunciated above, the plaintiff had / has no right in the property and thus the question of there being any settlement or partition does not arise and such settlement or partition cannot be given any cognizance in law. Not only so, there was no and there could be no conflict or dispute at the time of marriage of the plaintiff for a settlement to be arrived at. The Division Bench of this Court recently in *Madhur Bhargava Vs. Arati Bhargava* MANU/DE/0397/2013 has discussed the legal position in this regard.

18. The counsel for the defendants has also invited attention to prayer (d) of the plaint where the plaintiff is seeking a declaration of gift under an oral settlement at the time of her marriage, of the property No.B-93, Maya Puri Industrial Area, Phase-I, New Delhi in her favour and invites attention to *Mathai Samuel Vs. Eapen Eapen (Dead) by Lrs.* VIII (2012) SLT 620 laying down that there can be no oral gift. The counsel for the plaintiff however states that he had earlier made a statement that he is not pressing the case of an oral gift.

19. Once the plaintiff is not found to have any share or right in the property, the question of the plaintiff being entitled to a decree for partition or any other ancillary reliefs does not arise.

20. The only relief which thus survives in the suit is of permanent injunction restraining the defendants from interfering with the peaceful use

and enjoyment of the plaintiff of portion of property No.B-93, Maya Puri Industrial Area, Phase-I, New Delhi.

21. The counsel for the defendants states that the defendants have already taken legal recourse to recover possession of the said portion from the plaintiff and will not disposses the plaintiff forcibly.

22. Binding the defendants to the aforesaid statement, the suit insofar as for the said relief also, does not survive.

23. The suit being thoroughly misconceived is dismissed, however without any costs in the hope that good sense will prevail upon the plaintiff and the plaintiff will not pursue any such misguided course of action.

24. Decree sheet be drawn up.

CS(OS) 1838/2012

25. This suit has been filed by the plaintiff in CS(OS) No.376/2010 supra, her husband and by the company through whose vehicle the plaintiffs are carrying on business in property No.B-93, Maya Puri Industrial Area, Phase-I, New Delhi for various reliefs qua property No.B-93, Maya Puri Industrial Area, Phase-I, New Delhi.

26. It has been enquired from the counsel for the plaintiffs that since the plaintiff in CS(OS) No.376/2010 has been held to be not having any right in the property, what is the right of the plaintiffs herein for the said reliefs.

27. The counsel for the plaintiffs states that the defendant no.1 father has obtained Conveyance Deed of freehold rights in the land underneath the property by misrepresentation to the defendant no.6 DDA and the defendant no.1 has in this manner got two Conveyance Deeds of freehold rights in his favour.

28. Even if that be so, once the plaintiffs have been found to be not having any right, title and interest or share in the property, the plaintiffs would have no locus to make a grievance with respect thereto. If the defendant no.1 has committed any illegalities, it is open to the plaintiffs as a citizen to complain with respect thereto and which complaint is for the authorities concerned to deal with.

29. Thus the suit for the reliefs (a) to (f) in the plaint for the reasons as given in the order aforesaid in CS(OS) No.376/2010, is found to be not maintainable.

30. The plaintiffs have in prayer paragraphs (g) and (h) of the plaint, sought to restrain the defendants from disconnecting the electricity and water supply to the premises.

31. The counsel for the defendants no.1&2 states that the said defendants having taken a legal recourse in CS(OS) No.1855/2011 against the use by the plaintiff of a portion of the said property, the said defendants will not interfere in the electricity and water supply to the portion in occupation of the plaintiffs till the necessary orders in that regard are obtained in CS(OS) No.1855/2011 already filed.

32. In view of the aforesaid statement, the suit qua reliefs (g) and (h) need not be put to trial.

33. However, the plaintiffs have sought the relief against disconnection of water supply against defendant no.5 DJB also. It is explained that on the complaint of the defendant no.1, the defendant no.5 DJB initiated action against the plaintiffs and qua which, there is an interim order in this suit.

34. The counsel for the defendant no.1 has explained that the plaintiffs have illegally obtained two water connections qua the portion in their use and which is not permissible in law and on complaint being made, one of the connections has already been cut off and the other illegal connection is being used.

35. Needless to state the counsel for the plaintiffs controverts the aforesaid.

36. As far as the disputes between the plaintiffs and the DJB are concerned, the same need not be gone into in this suit. The plaintiffs, if aggrieved by the order of DJB, shall have recourse thereagainst. It is however clarified that anything contained herein shall not come in the way of the DJB taking action in accordance with law. It is further clarified that none of the allegations of the defendant no.1 in the pleadings or as recorded herein shall influence the decision if any of the DJB qua the water connection in the portion of the plaintiffs.

37. With the aforesaid observations and binding the defendants no.1 & 2 to their statement recorded above, this suit is disposed of.

CS(OS) 1855/2011

38. The father of the plaintiff in CS(OS) No.376/2010 supra, in this suit seeks mandatory injunction directing the defendants i.e. the daughter and her husband to remove themselves from the portion of property No.B-93, Maya Puri Industrial Area, Phase-I, New Delhi in their occupation and to restrain the defendants from creating any hindrance in ingress or egress of the plaintiff of the said property; claim for *mesne profits* and damages for use and occupation is also made.

39. The defendants are defending the suit claiming right in the property which right as aforesaid has been held to be non-existent. The only defences of the defendants to this suit which survive are as to the maintainability of the suit for mandatory injunction, valuation and limitation.

40. Though limitation is a mixed question of law and fact but the defendants having set up a claim of lawful title, and which has been negated, it will have to be seen whether the defendants are entitled to invoke Articles 65 and 66 of the Schedule to the Limitation Act. Thus it is felt that no evidence is required in this respect also.

41. Accordingly, on the pleadings of the parties, the following issues are framed:

- (i) Whether on the pleadings in the plaint, a suit for mandatory injunction is maintainable? OPP
- (ii) Whether the suit claim is within time? OPP
- (iii) Whether the suit has been properly valued for the purpose of Court Fees and jurisdiction and if not, to what effect? OPD
- (iv) Whether the plaintiff is entitled to *mesne profits* / damages for use and occupation and if so, at what rate? OPP

42. No other issue arises or is pressed.

43. Issue no.(i) to (iii) do not require any evidence.

44. If the plaintiff is found entitled to the relief of mandatory injunction, an inquiry to *mesne profits* shall be ordered.

45. List for arguments on the issues on 18th September, 2013.

IA No.12125/2011 (u/O 39 R-1&2 CPC)

46. The order dated 08.08.2011 is made absolute till the decision of the suit, the application is disposed of.

IA No.17016/2011 (of the defendants u/O 7 R-11 CPC)

47. An issue on the objection raised having been framed, the application is infructuous and is disposed of.

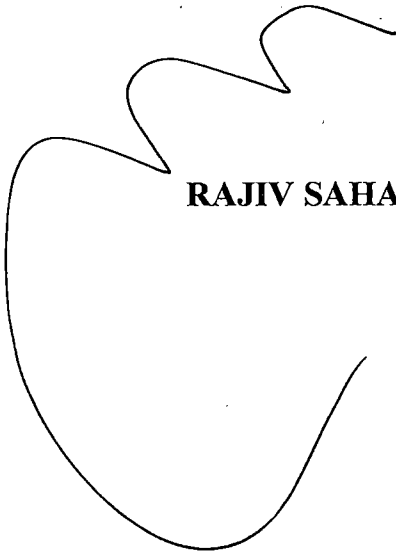
IA No.15320/2012 (u/O 39 R-10 CPC)

48. The issues in the suit having been framed and on which no evidence is required and the matter having been posted for arguments, it is not deemed expedient to deal with this application at this stage.

49. The application is disposed of with liberty to the plaintiff to apply again if the defendants are found delaying addressing arguments on the issues framed.

APRIL 23, 2013

'gsr'..



RAJIV SAHAI ENDLAW, J