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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS (OS) 578/2013 & IA No. 5074/2013 (u/O 39 R 1 & 2)

BRIGADIER BHOLESHWAR CHOPRA

..... Plaintiff

Through: Mr. P.K. Rawal, Advocate.

versus

A.N. CHOPRA AND OTHERS

..... Defendants

Through: Mr. Satish Aggarwala and Mr. Anish Aggarwala, Advocates for D-2 & 3.

CORAM: JUSTICE S. MURALIDHAR

ORDER

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07.09.2016

IA No. 4679/2015 (under Order VII Rule 11 CPC)

1. This is an application under Order VII Rule 11 CPC filed by Defendant Nos. 2 and 3 seeking a rejection of the plaint.

2. The background to the present application is that the accompanying suit has been filed by Brigadier Bholeshwar Chopra, the Plaintiff, seeking *inter alia* partition of the property at C-34, Rajouri Garden, New Delhi (hereafter the 'suit property') by metes and bounds and for a declaration that the gift deed executed by Defendant No. 1, the father of the Plaintiff in favour of Defendant No. 2, the Plaintiff's sister, is null and void.

3. The Defendants in the suit are Shri A.N. Chopra, the Plaintiff's father (Defendant No. 1), Smt. Devika Dawe, the Plaintiff's sister (Defendant No.

2), Shri Shanker Chopra, the Plaintiff's brother (Defendant No.3) and late Shri Mahesh Chopra, the Plaintiff's deceased brother (Defendant No. 4) through his wife Mrs. Parvati Chopra [Defendant No. 4(a)] and his daughter Aparna Chopra [Defendant No. 4(b)].

4. The basis of the suit is that according to the Plaintiff, the suit property is an ancestral property in which he has a right by birth. The case of the Plaintiff is that the property in question was actually the property of his late grandfather, Shri Rai Bahadur B.N. Chopra, who had purchased the suit property along with certain other properties for his three sons of which Defendant No. 1 was the youngest.

5. In the plaint, it is disclosed that the Plaintiff had filed earlier suit No. 663 of 2012 in the Court of the Additional District Judge, Tis Hazari Courts for permanent injunction against the Defendants to restrain them from dispossessing the Plaintiff who claimed to be in possession of two rooms and a garage situated at the rear portion of the suit property. During the pendency of the suit, Defendant No. 1 expired and the amended memo of parties was filed to indicate this fact on 20th March, 2014.

6. The present application has been filed by Defendant Nos. 2 and 3 essentially raising the following objections:

(i) the suit is barred under Section 4 of the Benami Transactions (Prohibition) Act, 1988.

(ii) the suit is barred under Order II Rules 2 and 3 CPC in view of the pendency of the Suit No. 663 of 2012 between the same parties in

respect of the same property. That suit after the filing of the present one was withdrawn by the Plaintiff without any liberty being granted to file the present suit.

7. This Court has heard the submissions of Mr. Satish Aggarwala, learned counsel for the Applicants/Defendant Nos. 2 and 3 as well as Mr. P.K. Rawal, learned counsel for the non-Applicant/Plaintiff.

8. At the outset, Mr. P.K. Rawal, learned counsel for the Plaintiff submitted that he had with him ready an application under Order VI Rule 17 CPC and he should be permitted to seek amendment of the plaint and consideration of this application under Order VII Rule 11 CPC should be deferred till such time.

9. It is seen that the application IA No. 4679 of 2015 under Section VII Rule 11 CPC has been pending since long. Notice in this application was issued on 5th March, 2015. In any event, there is no question of deferring the consideration of this application any longer. Moreover, the settled legal position is that when an application is filed under Order VII Rule 11 CPC, it should be heard on priority basis.

10. At the outset, it requires to be noticed that it is not denied even by the Plaintiff that CS No. 83 of 2014 (old No. 663 of 2012) was filed by the Plaintiff for possession of a portion of the suit property. While that suit was pending when the present suit was filed. On 14th November, 2014, a statement was made on behalf of the Plaintiff before the learned Additional District Judge ('ADJ') in the said suit that the Plaintiff wishes to withdraw

the suit as he had filed the present suit in this Court. The learned ADJ on 14th November 2014, after recording the above statement, then listed that suit for 17th November, 2014. On that date since none was present for the parties the following order passed by the learned ADJ (West/Delhi):

“17.11.2014

Present: None.

In view of the statement of learned counsel for Plaintiff recorded on 14th November 2014, suit is dismissed as withdrawn. However, as regards the liberty as sought, it would be more appropriate for the Plaintiff to seek the said liberty before Hon’ble High Court as it is the Hon’ble High Court which is already stated to be seized of the second suit.

File be consigned to record room."

11. There was no question for this Court granting liberty in respect of the withdrawal of the above suit. Such liberty should have been applied for before the concerned Court and granted by it. It appears that the Plaintiff herein filed an application in the said suit seeking review of the order dated 17th November, 2014. However, no attempt was made to have that application decided. The resultant position as of today is that the said suit, CS No. 83 of 2014, stands dismissed as withdrawn simpliciter in terms of the above order without any liberty to the Plaintiff to file a fresh suit.

12. The above suit filed by the Plaintiff concerns the very property which forms the subject matter of the present suit. The Plaintiff was already aware in that suit of the stand of the Defendant No.2 that the property in question

was the self-acquired property of Defendant No. 1 and not an ancestral property. The Plaintiff was also aware that the property had been gifted to Defendant No.2 by Defendant No.1. It is not stated by the Plaintiff that an application under Order II Rule 2 CPC was filed by him in that suit. In any event, even if such application was filed, no order appears to have been passed thereon by the concerned Court. With no liberty granted to the Plaintiff at the time of withdrawal of the said suit, to file a fresh suit, the present suit is barred under Order II Rule 2 CPC thus attracting Order VII Rule 11 (d) CPC.

13. For the aforementioned reasons, the plaint is rejected. The suit and the pending application are dismissed.

S. MURALIDHAR, J

SEPTEMBER 07, 2016

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