

\$~21

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

+ **CS(OS) 255/2016 and I.A. No.6521/2016 (stay)**

MS INDU BALA

..... Plaintiff

Through: **Mr. K.B. Soni, Advocate with Mr.
S.N. Kumar, Advocate.**

Versus

KRISHNA KUMAR GUPTA AND ANR

..... Defendants

Through

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

ORDER

% **23.05.2016**

1. Plaintiff-sister has filed this suit for partition against her brother-defendant no.1. Defendant no.2 is the son of another sister of the plaintiff who has since expired. Schedule-1 to the plaint mentions the suit properties, and which are also otherwise stated in paras 5, 10 and 11 of the plaint, and this Schedule is reproduced as under:-

“ **SCHEDULE-1**

1. H.No.1990, 1991/1, 1990/4 were self acquired property of late Sh. Shyam Sunder Lal the father of the plaintiff. Upon his demise in the year 1945, Smt. Leela Wati the mother of the plaintiff managed it as a family property. Subsequently she handed over the same to Sh. Krishan Kumar Defendant No.1 on his attaining majority.

CS(OS) No.255/2016

page 1 of 8

2 ✓

2. H. No. 1992. Property was purchased by Smt. Leela wati mother of the plaintiff in the year 1931.

3. An agricultural land and property at Garh Road, Garh Mukteshwar (UP) as an ancestral property.

4. H. No.A-3, Ashok Vihar, Phase-I, Delhi purchased in the year 1981 after commercialization of ancestral property.

5. An agricultural land approximately 6 acres near Subzimandi, Sikandra, Agra UP.

6. A built up property approximately 2200 sq. yds purchased after commercialization of whole property in the mid 1990 bearing No.14/2 Mandi Sayeed Khan, Agra, UP.”

2. Plaintiff seeks partition of the properties of the father who died in the year 1945 and the mother who died in the year 1979. Father therefore died about 70 years back and mother died about 37 years back. The plaint contains indirect reference in para 15 of the property not being in possession of the plaintiff or the defendants and therefore Registry has raised an objection that the suit only for partition without paying *ad valorem* court fee will not lie. It is noted that the plaint does not contain pleadings with respect to which property is in possession of whom i.e the parties to the suit or to third persons, and also as to whether the ownerships of such third persons are challenged or admitted.

3. In my opinion, the suit is liable to be dismissed on account of many incurable defects and complete lack of pleadings for making a cause of action in law complete. The reasons are as under:-

(i) So far as property nos.3 and 5 mentioned in the Schedule are concerned no details of the survey numbers, area etc are mentioned and hence the said averments do not cause existence of a legal cause of action qua imaginary properties in view of Order 7 Rule 3 of Code of Civil Procedure, 1908 (CPC) which requires specific description of the property by reference to municipal numbers or survey numbers. I have had an occasion to examine this aspect in the recent judgment in CS(OS) No. 683/2007 titled as *Mrs. Saroj Salkan Vs. Mrs. Huma Singh and Ors* decided on 5.5.2016 and held that suit in such cases for properties with incomplete details is liable to be dismissed.

(ii) The suit is lacking material particulars of a cause of action on applying Order 6 Rule 4 CPC because it is not enough to state as to that a parent was an owner of a particular immovable property, because it is necessary to state the details of how the ownership of the property was of the parent, inasmuch as an immovable property by virtue of Section 17(1)(b)

4

of the Registration Act, 1908 can only be owned by a registered title deed. Even this aspect I have discussed in detail in the case of *Mrs. Saroj Salkan (supra)* and held that it is the duty of the plaintiff under Order 6 Rule 4 CPC to give sufficient particulars/details of documents by which title is claimed to exist in a particular person and if in the plaint, not complete, but some reasonable particulars are given then the same be supported by filing the appropriate documents with respect to properties which are the subject matter of the suit. The plaint curiously lacks in necessary averments as to details of how any of the parent was the owner of the immovable suit properties. Therefore, in the absence of details as to the ownership of the properties of either of the parents, and plaintiff simply saying that plaintiff does not have details, cannot mean that a legal cause of action exists and which is mandatorily required to be pleaded. A cause of action should automatically not be deemed to be pleaded on account of the plaintiff not wanting to do necessary homework and get the details of ownerships of the immovable properties.

(iii) Also, para 11 of the plaint refers to a purchase in the year 1981 of property bearing H. No.A-3, Ashok Vihar Phase-I, Delhi, but admittedly the

5

father died in the year 1945 and the mother died in the year 1979 i.e prior and therefore I fail to understand as to how a property of the year 1981 can be the property of a parent who died earlier. Also, in law if it is averred that the property is purchased out of the funds of the property left behind by the parents, then, plaint has to have particulars which are mandatorily complete i.e complete chain of facts and movement of funds with respect to its amounts etc should be mentioned so that the property purchased after the death of the parents is necessarily related only and only to the funds of the properties of the parents which are said to be sold. Plaint is conspicuous by silence on this point.

(iv) It is settled law that suit for partition will only lie if suit properties are in possession of family members or members of a hindu undivided family or joint/co-owners. If properties or parts thereof are in possession of third party strangers, then a suit for partition cannot lie and it is necessary that with respect to parts of the properties in possession of third parties, it has to be stated as to whether such persons are holding under the parties to the suit or independent of the parties to the suit, and in case the properties are held by means of title claims then such persons to whom properties have been

transferred must be added as parties to the suit by seeking cancellation of their deeds on the basis of which title would be found to be existing in them. Plaintiff gives no description at all as to how any of the properties are pleaded and shown in possession only of family members, and in fact indirect averments have been made that properties are in possession of third party strangers. It was therefore necessary for the plaintiff, qua each of the properties, to state as to who is in possession (of whole or part) thereof and on the basis of which claim of title etc and which aspects are once again conspicuous by absence in the plaint.

Related to this aspect is that if third person strangers are found to be in possession of the whole or part of any of the suit properties, then, plaintiff will have to pay court fee by claiming possession of those portions which are in possession of third party strangers. The plaint para 15 refers to the property purchased in partnership with the son-in-law of the defendants but it is not mentioned what are the details of this Choudhary house, the son-in-law is of which defendants i.e defendant no.1 or defendant no.2 and if the son-in-law is of the defendant no.1, then, how are rights claimed, if any, in Choudhary house.

(v) The suit is also barred as per the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as 'Benami Act') which provides that if an immovable property stands in the name of a particular person, that person is the exclusive owner thereof unless the case falls in the exceptions contained in Section 4(3) of the Benami Act; exceptions being existence of HUF and the property having been purchased in fiduciary capacity. None of these two exceptions are pleaded, much less by detailed facts, and therefore, the suit plaint clearly is barred by the Benami Act.

4. At this stage, counsel for the plaintiff states that plaintiff seeks to withdraw the suit with permission to file a suit wherein all the defects which are mentioned above are duly rectified and the new suit plaint will contain inter-alia complete causes of action giving details as to by which title documents immovable properties fell to the parents, in whose possession are such properties, detailed description being given including municipal numbers and survey numbers, how the suit would not be barred by the Benami Act etc etc.

5. Accordingly, the suit is allowed to be withdrawn with liberty as aforesaid to file a suit provided that plaintiff ensures that none of the

aforesaid discrepancies pointed out exists in the fresh suit to be filed and the present order will be mentioned and filed in the fresh suit which the plaintiff proposes to file after removing the aforesaid defects so that a plaint has causes of actions as required by law.


VALMIKI J. MEHTA, J

✓ **MAY 23, 2016**

Ne

CS(OS) No.255/2016

page 8 of 8