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

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Date of decision: 06.09.2016

+ CM(M) 865/2016

RAJ ROOP (SD) THROUGH LRS & ORS. Petitioners
Through Mr.S.K.Bhaduri, Advocate

versus

JITENDER SINGH & ORS. Respondents
Through None.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

CM No. 32183/2016(exemption)

Allowed subject to all just exceptions.

CM(M) 865/2016 & CM Nos.32184-187/2016

1. By the present petition, the petitioners seek to impugn the order dated 08.06.2016 passed by the trial court dismissing the application of the petitioners under Order VII Rule 11 CPC read with Order II Rule 2 CPC seeking rejection of counter claim filed by the respondents.
2. The brief background facts of the case are that the petitioners filed a suit for decree of partition and separate possession of the share of the plaintiffs in respect of the property being Khasra Nos.474/2, 473/2 and 472/2, total measuring 1 Bigha 18 Biswas comprising in Khata Nos.418/158 situated in Extended Lal Dora Abadi of Village Chhawla, Delhi. Other connected reliefs are also sought.

3. The defendants/respondents filed a written statement pointing out that there are 8 residential plots jointly allotted to the predecessors-in-interest of the parties, the details of which are as follows:

- “a. Plot comprised in Khasra No.457(0-18)
 - b. Plot comprised in Khasra No.458(0-12)
 - c. Plot comprised in Khasra No.459(0-17)
 - d. Plot comprised in Khasra No.460(0-16)
 - e. Plot comprised in Khasra No.472(0-09)
 - f. Plot comprised in Khasra No.473/1 min(0-10)
 - g. Plot comprised in Khasra No.474/2 (0-19)
 - h. Plot comprised in Khasra No.473/3 min (0-02)
- Total ad-measuring 6 bigha 3 biswas.”

4. The defendants/respondents further stated that the said plots have already been partitioned physically by metes and bound with the consent of all co-owners by their predecessors in 1973 though the said partition has not been recorded in the revenue records. They also filed a counter claim reiterating the contention in the written statement and further stating that the petitioners have deliberately not included the property forming part of Khasra Nos.457, 458, 459, 460 and 474/3. They further claimed in the counter claim that the petitioners tried to change the nature and the character of the property bearing Khasra No.460. They further urged that till the disposal of the present suit inasmuch as the respondents are shown as co-owners, none of the parties have any right to raise any construction over the land of the above Khasras. In the counter claim the respondents/defendants sought a decree for permanent injunction to restrain the petitioners from

demolishing or raising any construction over the land bearing Khasra No.460 situated in Extended Lal Dora Abadi of Village Chhawla, Delhi.

5. The suit of the plaintiffs was dismissed on 14.10.2014 on the ground that the petitioners had not sought partition of all the properties which fell in the common pool.

6. Against the said judgment and decree dated 14.10.2014 passed by the trial court, an RFA was filed by the petitioners before this court wherein this court vide order dated 16.09.2015 remanded the matter back permitting the petitioners to file an amended plaint.

7. It may be noted that so far as the counter claim filed by the respondents is concerned, the court on 14.10.2014 noted that no date was given for proceeding with the claim since it was not pressed for the time being.

8. In the amended plaint now filed, the petitioners have taken the stand that the parties are joint owners of the property as falling under Khasra Nos.472/2, 473/2, 474/2 & 474/3 and also in respect of Khasra Nos. 457, 458, 459 & 460 respectively. Further, total area of the land in Khasra Nos.457 to 460 is approx. 3150 sq.yds. and out of which it is urged that the petitioners are in possession of the 1575 sq.yds. of land and defendants are in possession of remaining 1575 sq.yds. It is further stated that the property being part of Khasra Nos.457 to 460 is already partitioned long back.

9. The respondents/defendants had filed a fresh counter claim stating that without prejudice the contention that all the 8 properties in question have already been partitioned in 1973, as the petitioners denied the above said oral partition, it has become necessary that all the 8 plots be partitioned wherein the plaintiffs have 1/3rd share, defendant Nos.1 to 4 have 1/3rd share

and defendant Nos.5 to 8 have 1/3rd share. The counter claim hence seeks partition of the land forming part of Khasra Nos.457, 458, 459 & 460.

10. The petitioners hence filed the present application under Order VII Rule 11 CPC read with Order II Rule 2 CPC seeking rejection of the counter claim filed by the respondents. It was contended that the cause of action of the two counter claims are common. It was open to the respondents to have claimed relief of partition in the earlier counter claim which they did not do and hence, in view of Order II Rule 2 CPC the present counter claim is barred.

11. The learned counsel for the petitioners has reiterated the above contention and has relied upon the judgment of this court in *Deepa Dua v. Tejinder Kumar Muteneja*, 2013 (137) DRJ 653/(MANU/DE/2821/2013) and the judgment of the Supreme Court in the case of *M/s Virgo Industries (Eng.) Pvt. Ltd. v. M/s Venturetech Solutions Pvt. Ltd.*, 2013 1 SCC 625/(MANU/SC/0731/2012).

12. Order II Rule 2 CPC reads as follows:

“2. Suit to include the whole claim.-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he

omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation-For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

13. The Supreme Court in *M/s Virgo Industries (Eng.) Pvt. Ltd.* (supra) elaborated the above provisions as follows:

“9. Order 2 Rule 1 requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2 Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order 2 Rule 2 CPC makes it clear that he shall not afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order 2 Rule 2(2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the court is contemplated by Order 2 Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the court had been obtained....”

14. Relevant portion of the judgment in the case of *Deepa Dua v. Tejinder Kumar Muteneja* (supra) as relevant here reads as follows:

“14. Reference may be had to the judgment of the Bombay High Court in the case of *Mohammad Khalil Khan vs. Mahbub Ali Mian*,

1949 (51) BOMLR 9 wherein para 61 the court held as follows:-

“61. The Principles laid down in the cases thus far discussed may be thus summarised:

(1) The correct test in cases falling under Order II Rule 2, is “whether the claim in the new suit is in fact founded upon a cause of action from that which was the foundation for the former suit.” (Moonshee Buzloor Ruheem v. Shumsunnissa Begum, *supra*.)

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. (Read v. Brown, *Supra*.)

(3) If the evidence to support the two claims is different, then the causes of action are also different. (Brunsden v. Humphrey, *supra*.)

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical. (Brunsden vs. Humphrey, *supra*.)

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. (Musst. Chandkour vs. Partab Singh, *supra*). This observation was made by Lord Watson in a case under Section 43 of the Act of 1882 (corresponding to Order II Rule 2), where the plaintiff made various claims in the same suit.”

15. In the present case, the trial court dismissed the application of the petitioners holding that both the counter claims are based on different cause of action.

16. In my opinion, the two counter claims are based on different cause of action. It is the contention of the respondents in the first counter claim that all 8 plots have been partitioned by an oral partition in 1973. Based on these averments, it was urged that as the petitioners have filed the suit not

accepting the partition and hence they did not have a right to carry on any construction in a particular plot being Khasra No.460 and hence sought relief of permanent injunction to restrain the petitioners from demolishing/raising any constructions over the Khasra No.460. The cause of action or the foundation of the said case in the said counter claim was the additional construction being carried out by the petitioner which they could not carry on.

17. After the suit was remanded back and pursuant to the filing of amended plaint alongwith amended written statement, a fresh counter claim has been filed. Herein it is stated that as the petitioners are not agreeing to the fact that in 1973 all 8 plots were partitioned by oral partition. By the counter claim, the respondents seek a decree for partition of Khasra Nos.457, 458, 459 and 460 which according to the petitioners have already been partitioned. The cause of action or foundation here is that the claim based on co-ownership of the said property, and the relief is partition.

18. Even otherwise, I may note that when the suit of the petitioners was dismissed for the first time on 14.10.2014, the trial court had noted the submission that the respondents are not proceeding with the counter claim for the time being. It was not a withdrawal of the counter claim. It is implicit in the manner in which the order is stated that the liberty was taken to file a fresh counter claim. Hence, there are no reasons to differ with the view of the trial court.

19. The present petition is accordingly dismissed. All the pending applications are also disposed of.

JAYANT NATH, J.

SEPTEMBER 06, 2016/v