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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ C.R.P. No.35/2016, CM No.7366/2016 (for stay), CM No.7367/2016,
CM No.7368/2016 (both for exemption) and CM No.7369/2016 (for
condonation of 5 days delay in re-filing).
PRAKASH CHAND Petitioner

Through: Mr. Manoj Lohat, Adv.
versus

KAPIL & ORS Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **11.07.2017**

1. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order (dated 28th October, 2015 of the Additional District Judge) of dismissal of an application preferred by the petitioner / defendant under Order VII Rule 11 of the CPC.
2. Though this petition came up first before this Court on 29th February, 2016 but has been adjourned on several dates on the request of the counsel for the petitioner.
3. I have enquired from the counsel for the petitioner the stage of the suit from which this Revision Petition arises.
4. The counsel for the petitioner states that the suit is pending at the stage of respondents' / plaintiffs' evidence.
5. The suit from which this petition arises was filed for declaration that a compromise decree to which the fathers of the respondents / plaintiffs, and who were impleaded as defendants to the suit, were party, is null and void and for further declaration that the plaintiffs are the co-owners / co-sharers in possession of the property.

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6. The petitioner / defendant applied under Order VII Rule 11 of the CPC on the grounds that the suit was barred by Section 47 and Order XXIII Rule 3A of the CPC and which grounds have been rightly rejected by the learned Additional District Judge observing that since the plaintiffs were not a party to the earlier suit qua decree wherein relief was claimed, the said provisions did not bar the plaintiffs.

7. The counsel for the petitioner / defendant before this Court today has urged that on the averments in the plaint the plaintiffs did not disclose any right to the property.

8. As per the averments in the plaint, the property belonged to paternal grandfather of the plaintiff and the earlier suit for partition qua decree wherein relief was claimed in the suit was between the natural heirs of the paternal grandfather of the plaintiffs. The plaintiffs in the plaint have merely stated that the suit property was their ancestral property and since they were not parties to the earlier suit for partition, they were not bound by the decree therein.

9. *Prima facie* it appears that the plaintiffs on the said averments did not disclose any right in the property to maintain the suit for setting aside the earlier decree for partition or for being declared as co-owners / co-sharers of the property. Reference in this regard can be made to series of the judgments in *Commissioner of Wealth Tax, Kanpur Vs. Chander Sen* (1986) 3 SCC 567 and *Yudhishter Vs. Ashok Kumar* (1987) 1 SCC 204 by the Supreme Court and thereafter repeatedly by this Court in *Master Daljit Singh Vs. S. Dara Singh* AIR 2000 Delhi 292, *Neelam Vs. Sada Ram* 2013 SCC OnLine Del 384, *Harvinder Singh Chadha Vs. Saran Kaur Chadha* 2014 SCC

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OnLine Del 3413 (DB), *Sunny (Minor) Vs. Raj Singh* (2015) 225 DLT 211, *Mukesh Kumar Vs. Pavitra* 2016 SCC OnLine Del 4907 and *Surender Kumar Vs. Dhani Ram* AIR 2016 Del 120.

10. However admittedly the said ground was not raised by the counsel for the petitioner / defendant in the application under Order VII Rule 11 of the CPC though he states that such an objection has been taken in the written statement.

11. Without urging the said ground in the application under Order VII Rule 11 of the CPC, no error can be found in the order of the Additional District Judge.

12. I have considered the option of issuing notice and considering the said aspect before this Court but on further consideration I am of the view that it may not be proper for this Court in exercise of its revisional jurisdiction, when there is no finding of the Trial Court on the said aspect, to adjudicate the same.

13. The Revision Petition is thus dismissed with liberty to the petitioner / defendant to file another application under Order VII Rule 11 of the CPC for urging the said and any other ground which may be available and which application shall be decided by the Suit Court in accordance with law.

No costs.

RAJIV SAHAI ENDLAW, J

JULY 11, 2017
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