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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(OS) 99/2016**

SH BALJINDER SINGH Plaintiff
Through Mr.Raman Gandhi, Advocate.

versus

SH SADHU SINGH & ORS Defendants
Through Ms.Sonali Malhotra and Mr.Amit
Sanduja, Advocates for D-4 to D-7.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

ORDER
% **21.04.2017**

CS(OS) 99/2016 & I.A.No.4827/2017 (u/O 39 Rules 1 and 2 CPC)

Present suit is a suit for declaration, which the plaintiff claims in his favour and against defendant seeking a decree declaring that the preliminary decree passed in an earlier suit CS(OS) No.303/2008 dated 16.7.2013 followed by final decree dated 18.11.2015 be set aside.

Record discloses that in CS(OS) No.303/2008 a settlement had been arrived at inter se Balwant Singh and his legal heirs. Balwant Singh is stated to be the grandfather of the present plaintiff. Balwant Singh had four sons. The father of the plaintiff namely Sadhu Singh was represented as party in CS(OS) No.303/2008.

On the first date of hearing i.e. on 29.02.2016 this Court had noted that the plaintiff who is the son of defendant no.1 had remained

away from these proceedings and only after passing the decree he had now filed the present suit seeking setting aside the preliminary decree dated 16.7.2013 and the final decree dated 18.11.2015. This is on the premise that the grandmother of the plaintiff namely Sant Kaur had left a will dated 22.02.1996 in his favour. Admittedly, a probate petitioner qua the said will has been preferred by the plaintiff which was not pending on the date when this suit was filed. This has been noted in the order dated 29.02.2016. During the pendency of this suit an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure has been filed seeking certain interim directions.

On advance notice, learned counsel for the defendant has put in appearance. Her submission is that this application is not maintainable. Additional submission is that the suit is in fact liable to be dismissed.

This Court notes that after the decree had been passed in the aforementioned suit i.e. CS(OS) No.303/2008 an execution petition has been filed by the decree holder for the execution of the decree. The present plaintiff had filed certain objections thereto. These objections were under Order XXI Rule 58 of the Code. These objections stood dismissed vide a speaking order of this Court in Ex.P.58/2016 on 08.02.2017. Copy of that order is on record. The merits of the controversy between the parties had also been discussed while disposing of those objections under Order XXI Rule 58 of the Code.

Learned counsel for the plaintiff submits that he has been constrained to file the present application under Order XXXIX Rule 1 and 2 of the Code pursuant to the dismissal of his objections on

08.02.2017 as he has now been left with no remedy against the dismissal of these objections but to file the present suit. The present application is well maintainable. This position is disputed by the defendants.

Under Order XXI Rule 58 (5) of the Code where objections are dismissed under Order XXI Rule 58 the party may file a separate suit. Admittedly, this suit had been filed on 11.02.2016 which was prior to the date of the dismissal of the objections of the plaintiff which had been dismissed on 08.02.2017. This suit is thus definitely not within the ambit of Order XXI Rule 58(5) of the Code as has been pleaded by the plaintiff.

Learned counsel for the plaintiff submits that the only remedy now available to him would be to file a separate suit against the dismissal of his objections under Order XXI Rule 58 CPC.

At this stage, learned counsel for the plaintiff under instructions from his client states that he would be withdrawing this suit but liberty be granted to him to pursue any other legal remedy which is available to him in law. This suit is dismissed as withdrawn. Liberty is granted to the plaintiff to pursue any other legal remedy available to him under law. No order as to costs.

INDERMEET KAUR, J

APRIL 21, 2017

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