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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 24.01.2017

FAO(OS) 300/2016 & CM 38860/2016

KUSUM BANSAL & ANR

..... Appellants

versus

VISHNU KUMAR GUPTA & ORS

..... Respondents

Advocates who appeared in this case:

For the Appellants	: Mr A.K. Singla, Sr. Adv. with Mr Rahul Shukla
For the Respondents	: Mr Harish Malhotra, Sr. Adv. with Mr Rajender Agarwal
For the Respondent no.1	: Mr Vijay Kr. Wadhwa

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

J U D G M E N T

BADAR DURREZ AHMED, J (ORAL)

1. The present appeal has been filed by defendant nos. 1&2 being aggrieved by the order dated 16.09.2016 passed in CS(OS) 40/2016. The said suit was filed by the respondent nos. 1&2. By virtue of the impugned order dated 16.09.2016 issues have been framed and certain directions have been given with regard to the manner of conduct of the trial.
2. Three points have been raised by the appellants. The first point is that the learned Single Judge could not have directed the treatment of issue no.1

as a preliminary issue as the same was not in line with the provisions of Order 14 Rule 2 of the Code of Civil Procedure, 1908 ('CPC'). The second point urged by the learned counsel for the appellants was that the onus of issue no.2 could not have been placed on the defendant nos. 1&2, that is, the appellants herein. The third point raised by the learned counsel for the appellants pertains to the directions given by the learned Single Judge that the defendant nos. 1&2 (the appellants herein) should lead evidence first. This was, of course, based on the premise that the onus of the main issue was on defendant nos. 1&2.

3. The learned counsel for the respondents submitted that the issues have been correctly framed and the onus of the issues has been correctly placed on the respective parties. It was submitted that no interference with the impugned order was called for.

4. Before we proceed with the examination of the rival contentions, it would be appropriate if we set out the issues which were framed by the learned Single Judge. They are as under:-

“(I) Whether the unregistered Memorandum of Partition dated 11th May, 1990 is capable of making the defendant No.1 absolute owner of the property? OPD-1&2

(II) - Whether the Memorandum of Partition dated 11th May, 1990 and two Receipts of the same date of Rs.2 lakhs each purported to be executed by the plaintiffs have

been executed by the plaintiffs or the signatures thereon are not of the plaintiffs? OPD-1&2

(III) Whether the suit claim is within time? GPP

(IV) Whether the suit claim is barred by time for the reason of the plaintiffs having acquiesced to the Memorandum of Partition and Receipts dated 11th May, 1990? OPD-1&2

(V) Whether the suit is not properly valued for the purposes of court fees and jurisdiction and if so, to what effect? OPP

(VI) Relief.”

5. By way of background, we may point out that in the suit filed by the respondent nos. 1&2, *inter alia*, a decree of declaration in their favour and against the defendants was sought whereby the Memorandum of Partition dated 11.05.1990 and two Receipts dated 11.05.1990 were sought to be declared as illegal, null and void and of no effect and not binding upon the respondent nos. 1&2. *Inter alia*, a prayer was also made seeking a decree of declaration, in favour of the respondent nos. 1&2 and against the defendants, that the gift deed dated 26.11.2012 executed by the defendant no.1 in favour of the defendant no.2 was illegal, null and void and of no effect insofar as it related to the plaintiffs’ alleged 2/3rd share in the property No. 12/18, East Punjabi Bagh, New Delhi- 110026. A prayer was also made for a preliminary decree of partition declaring the plaintiff nos. 1&2 (respondent

nos. 1&2 herein) as owners of 1/3rd share each in property no. 12/18, East Punjabi Bagh, New Delhi- 110026, and that the balance 1/3rd share belonging to either defendant no.1 or defendant no.2 and for a Local Commissioner to suggest a mode of partition and to divide the property subsequently by *metes and bounds* in terms of the preliminary decree.

6. From this it is evident that suit was essentially one for declaring the Memorandum of Partition and the two Receipts as being illegal, null and void and for declaring the gift deed also being illegal, null and void and for a decree of partition. Other reliefs were also claimed but in essence this was the nature of the suit.

7. It is in this context that the issues have been framed by the learned Single Judge after examining the pleadings.

8. The first point that we need to address is the question as to whether issue no.1 could at all be treated as a preliminary issue. Order 14 Rule 2 of the CPC reads as under:-

“2. Court to pronounce judgment on all issues.- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may

be disposed of on an issue of law only, it may try that issue first if that issue relates to—

- (a) the jurisdiction of the court, or
- (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue. “

9. On a plain reading of the said provision, it is evident that judgment has to be pronounced by the court on all issues, notwithstanding the fact that the case may be disposed of on a preliminary issue. This is, of course, subject to the provisions of Sub-Rule (2) of Rule 2 of Order 14 which clearly indicates that where issues, both of law and of fact, arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first. But, this is also subject to a further condition that the issue must relate to either:-

- (a) the jurisdiction of the court, or
- (b) a bar to the suit created by any law for the time being in force.

In the present case the first alternative clearly does not apply because there is no issue relating to the jurisdiction of the court. In our view, even the second alternative is not attracted. The issue must not only be one of law but, it must also relate to a bar to the suit created by any law for the time being in

force. In the present case it is the plaintiffs (respondent nos. 1&2 herein) who are insisting that issue no.1 be tried as a preliminary issue. It is somewhat incongruous for them to say so because then they would have to say that the issue relates to a bar to a suit which has been filed by them. This would be akin to cutting the very branch on which one is sitting. In our view, therefore, the issue no.1 as framed cannot be regarded as a preliminary issue as it does not fall within either of the two categories of issues mentioned in Order 14 Rule 2 (2) of the CPC.

10. Order 14 Rule 2 of the CPC was the subject matter of interpretation before the Supreme Court in the case of **Foreshore Co-operative Housing Society Limitd v. Praveen D. Desai:** (2015) 6 SCC 412. In that case the Supreme Court noted the difference brought about by the amendment to Order 14 Rule 2 and observed as under:-

“37. Order 14 Rule 2 of the Code of Civil Procedure as it existed earlier reads as under:

“2. Issues of law and of fact.- Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.”

38. A comparative reading of the said provision as it existed earlier to the amendment and the one after amendment would clearly indicate that the consideration of an issue and its disposal as preliminary issue has now been made permissible only in limited cases. In the unamended Code, the categorisation was only between issues of law and of fact and it was mandatory for the court to try the issues of law in the first instance and to postpone the settlement of issues of fact until after the issues of law had been determined. On the other hand, in the amended provision there is a mandate to the court that notwithstanding that a case may be disposed of on a preliminary issue, the court has to pronounce judgment on all the issues. The only exception to this is contained in sub-rule (2). This sub-rule relaxes the mandate to a limited extent by conferring discretion upon the court that if the court is of opinion that the case or any part thereof may be disposed of “on an issue of law only”, it may try that issue first. The exercise of this discretion is further limited to the contingency that the issue to be so tried must relate to the jurisdiction of the court or a bar to the suit created by a law in force.”

(underlining added)

11. It is, therefore, clear that under the provision as it exists today there is a mandate to the court that, notwithstanding the fact that the case may be disposed of on a preliminary issue, the court has to pronounce judgment on all issues. The only exception is contained in Sub-Rule (2), which relaxes the mandate to a limited extent by conferring discretion upon court that if court is of the opinion that the case or any part thereof could be disposed of on a issue of law only it may try the issue first. This discretion is, as pointed

out by the Supreme Court, further limited by the fact that the issue of law must also relate to either the jurisdiction of the court or a bar to the suit created by a law in force. In the present case neither of these two situations exist. As such the normal rule would have to be followed and that is that the court has to pronounce judgment on all issues. Therefore, the learned Single Judge's direction that issue no.1 be tried as a preliminary issue cannot be sustained and the impugned order to that extent is set aside.

12. Insofar as the question of onus with regard to issue no.2 is concerned, after hearing the counsel of the parties, we are of the view that the said issue be re-formulated as under:-

“ Whether the Memorandum of Partition dated 11.05.1990 and the two Receipts of the same date of Rs. 2 lakh each are null and void and of no effect as they are not said to have been executed by the plaintiffs? OPP.”

13. Finally, we come to the third aspect which has been raised by the learned counsel for the appellants and that pertains to the direction in paragraph 18 of the impugned order requiring the defendant nos. 1&2 (appellants herein) to lead evidence first. In view of the direction given by us on the first two aspects and the change of the onus on issue no.2 after the same has been re-framed, it becomes clear that it is the plaintiffs who are to

lead evidence first. As such, the plaintiffs shall file their affidavits by way of Examination-in-Chief of all the witnesses within eight weeks from today.

14. The learned counsel for the respondent nos. 1&2 states that there are certain admissions in the written statement which have been filed on behalf of the defendant nos. 1&2 (appellants herein) on the basis of which he may seek a judgment on admission. He requests that it may be clarified that this order would not come in the way of moving an application under Order 12 Rule 6 of the CPC. The learned counsel for the appellants submits that there are no admissions which would entitle the respondent nos. 1&2 to seek a judgment on admissions. We are not examining these aspects because they are not before us. If and when such an application is made, the learned Single Judge shall independently consider the same and pass an appropriate order in accordance with law. The rest of the order remains intact.

15. The appeal is partly allowed as above.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

JANUARY 24, 2017

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