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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **RFA(OS) 39/2017, CM APPL. 25411/2017 and CM APPL. 27756/2017**

PARMOD KUMAR JAIN Appellant

Through: Mr Tanmaya Mehta, Adv.

Versus

SATISH JAIN AND ORS Respondents

Through: Appearance not given.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE DEEPA SHARMA

ORDER

% **23.08.2017**

1. The appellant, who is not a party in CS(OS) No.462/2017 instituted by his brother the respondent no.1, is aggrieved by a preliminary decree passed on 04.05.2017 and has filed the present appeal stating *inter alia* that he is adversely affected by the said order.

2. It is submitted by Mr Mehta, learned counsel for the appellant that the learned Single Judge has passed a preliminary decree of partition, in a suit instituted by his brother/respondent No.1, apportioning therein the shares of the parties to the captioned suit, in respect of an immovable property situated at 14, Alipur Road, Civil Lines, New Delhi, as material information has been withheld from the Court to the effect that the appellant herein, being a sibling of the respondent No.1 has also laid a

claim to a fraction of share in respect of a part of the 25% share in the suit property. As a result, the Court has erroneously proceeded to declare the respondent No.1 (plaintiff in the suit) as the owner of the entire 25% share to the detriment of the appellant. He states that subsequent to the said suit for partition being instituted by the respondent No.1 on 14.09.2016, the appellant has instituted a separate suit for declaration, cancellation of Gift Deed and permanent injunction, registered as CS(OS) No. 182/2017, wherein he has averred that he is entitled to a share within the 25% share of the suit premises that has now been apportioned exclusively in favour of the respondent No.1, under the preliminary decree.

3. We have enquired from learned counsel for the appellant as to whether the appellant had taken any steps to seek impleadment in CS(OS) No. 462/2016. The reply is in the negative. We have next enquired as to whether the appellant has filed a stay application along with the suit instituted by him against the respondent No.1 and others for seeking interim protection *qua* the fractional share claimed by him in the suit premise. Learned counsel concedes that no such steps have been taken by the appellant on an assumption that the doctrine of *lis pendens* shall apply.

4. We have also asked learned counsel for the appellant to state as to whether any steps were taken by the appellant to seek consolidation of CS(OS) No. 462/2016 instituted by the respondent no.1 with CS(OS) No. 182/2017, instituted by him, to avoid passing of any contradictory orders, to which again, the reply is in the negative. In other words, the predicament that the appellant finds himself in, is of his own making.

5. In such circumstances, we are not impressed by the submission of learned counsel for the appellant that even if the appellant is not a party in the suit proceedings in which the preliminary decree has been passed, he can still approach the Appellate Court directly for seeking leave to file an appeal. We are not inclined to grant leave to the appellant to assail the preliminary decree passed in the suit instituted by respondent no.1 as we are of the opinion that he had instituted a suit for partition prior in time, claiming *inter alia* 25% exclusive share in the suit premise, and as a vigilant litigant, the appellant ought to have taken immediate steps on his own, to seek impleadment the said suit to protect his interest or in the alternative, applied to the Court for consolidation of both the suits

6. Having failed to exercise his rights by opting for either of the aforesaid two courses available to him, the appellant's plea that irrespective of the above, the present appeal ought to be entertained against the impugned order dated 04.05.2017, is found to be devoid of merits. Instead, it is deemed appropriate to grant liberty to the appellant to approach the learned Single Judge in CS(OS) No.462/2016 and apprise it of the institution of his suit and the scope thereof and raise a grievance against the preliminary decree passed to the extent of 25% share in the suit premises apportioned exclusively in favour of the respondent No.1 (plaintiff in the suit) on the ground that he is legally entitled to claim a fraction of the said share, along with his other siblings. This is not to foreclose the option available to the appellant of seeking appropriate interim orders in the pending suit instituted by him against the respondent No.1 herein and others, so as to safeguard his

interest. However, the present appeal, as filed is not maintainable and is accordingly disposed of along with the pending applications.

HIMA KOHLI, J

DEEPA SHARMA,

AUGUST 23, 2017/bg

