

\$~38

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ C.R.P. 174/2017 & CM No.28280/2017 (for stay)
UDAY YADAV (SINCE DECEASED) NOW REPRESENTED BY
HIS LEGAL HEIRS Petitioners
Through: Mr. R.S. Kela & Mr. Bharat Gupta,
Advs.
Versus
NEHA DEVI & ORS Respondents
Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

%

09.08.2017

1. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order [dated 27th July, 2017 in Civil Suit No.9963/2016 of the Court of Additional District Judge (ADJ)-06, West District, Tis Hazari Courts, Delhi] of dismissal of the application filed by the petitioners, being the legal representatives of the deceased defendant no.1, for rejection of the plaint at the stage when the suit was pending for evidence of the defendants.
2. The counsel for the petitioners / legal representatives of the defendant no.1 has been heard.
3. The respondents / plaintiffs no.1 to 3 have instituted the suit from which this petition arises, for partition of property ad-measuring 250 sq. yds. bearing No.WZ-225, village Madipur, New Delhi, claiming that the said house was inherited by their father from his own father and that after the

demise of their father in the year 1994, the respondents / plaintiffs no.1 to 3 had inherited a share in the said property and which was being denied to them. Besides the deceased defendant no.1 whose heirs the petitioners are, the respondents no.4 and 5 being the other natural heirs of the deceased were impleaded as the defendants.

4. The deceased defendant no.1 contested the suit *inter alia* pleading that the father had left behind other properties also and which had not been included in the suit.

5. Issues were framed in the suit and respondents / plaintiffs no.1 to 3 concluded their evidence and the suit posted for evidence of the defendants.

6. It is at that stage that the application under Order VII Rule 11 of the CPC was filed, contending that the respondents / plaintiffs no.1 to 3 being daughters of the deceased did not have any share in the property as the daughters were given the share only by the amendment of the year 2005 to the Hindu Succession Act, 1956 and the father of the respondents / plaintiffs no.1 to 3 having died prior thereto in the year 1994.

7. The learned ADJ has dismissed the application reasoning that the issues were framed in the suit nine years earlier to the filing of the application on 16th April, 2008 and that no preliminary objection to the said effect had been taken in the written statement of the petitioners / defendants.

8. Though undoubtedly the learned ADJ in the impugned order has not dealt with the plea on which the rejection of the plaint was sought and which is the plea urged by the counsel for the petitioners / defendants before this

Court also with reference to *Prakash Vs. Phulavati* (2016) 2 SCC 36, but the said fact alone would not make the order liable to be set aside if otherwise it is to be found that the application of the petitioners / defendants under Order VII Rule 11 of the CPC has no merit.

9. This is yet another case of confusion by the legal fraternity of the difference between ‘ancestral property’ and ‘coparcenary property’. In fact, the counsel for the petitioners / defendants also on being asked of the nature of the property subject matter of the suit, states that the same is ancestral property. I have enquired from the counsel for the petitioners / defendants, whether not any property inherited by a person from his father would qualify as an ‘ancestral property’ in common parlance. However, merely because a property is inherited by a person from his own father, does not make the same as coparcenary property. After the coming into force of the Hindu Succession Act, 1956, the succession by a male of a property from his father, is in his personal individual capacity and not along with his sons, as was the position under the ancient Hindu law. Notwithstanding the said change having been brought about more than half a century ago, the mistake under which the application under Order VII Rule 11 of the CPC was filed, continues to be committed including by practitioners of law.

10. No doubt, the advocate for the respondents / plaintiffs no.1 to 3 also suffers from such misconception and has in the plaint, at different places, described the property as an ancestral property, joint family property and at one place also described the respondents / plaintiffs no.1 to 3 as coparceners; but on a reading of the plaint as a whole and meaningfully, it can by no

stretch of imagination be said that the claim of the respondents / plaintiffs no.1 to 3 for partition is as coparceners. Their claim is merely on the premise that the property of which partition was sought belonged to their father and upon the demise of the father, they being the daughters, have also inherited a share in the property.

11. Though at the stage of Order VII Rule 11 of the CPC, the reference to anything other than the plaint is not called for but now that the suit has been pending (I am told since the year 2007) for long, in hindsight, it can also be noticed that it is not the plea of the petitioners / defendants themselves that the property is a coparcenary property. The petitioners / defendants along with the petition have filed their written statement at page 53 of the paper book and on a perusal thereof, no such plea can be found. It is not the case of the petitioners / defendants that any issue also to the said effect has been framed. It is thus not as if the petitioners / defendants themselves are understanding the property to be a coparcenary property, for it to be said that the parties have gone to trial on that basis.

12. The petition is totally misconceived and is liable to be dismissed.

Dismissed

13. The counsel for the petitioners / defendants at this stage states that the cost imposed on the petitioners / defendants of Rs.10,000/- while dismissing the application be waived.

14. The petitioners / defendants, by filing the application, having delayed the disposal of the suit which is already more than 10 years old. No interference with the order of the costs is required. Rather, further costs need to be imposed on the petitioners / defendants for wasting the time of this Court also with the misconceived petition. However on request of the counsel for the petitioners / defendants, I refrain from imposing further costs.

RAJIV SAHAI ENDLAW, J

AUGUST 09, 2017
'gsr'..