

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 484/2018.**

% 9th October, 2018

DR. ASHOK SINGHAL Appellant

Through: Mr. Manu Nayar, Ms.
Maitreyee Joshi and Mr. Chetan
Kakkar, Advocates
(9811146073)

versus

DR. INDER KUMAR GUPTA & ORS. Respondents

Through: R-1 in person.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure 1908 (CPC), is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 20.09.2017 by which the trial court, during the course of leading of evidence, has dismissed the suit by *suo moto* framing a preliminary issue and holding that the suit as filed is not maintainable in the present form.

2. At the outset, I would like to note that a preliminary issue cannot be framed by a court when the preliminary issue is not a

preliminary issue which falls under Order XIV Rule 2 CPC. An issue can be a preliminary issue only if two conditions are satisfied and these are, firstly, that the issue is a legal issue and secondly, the issue affects the jurisdiction of the court. In the present case, none of these two aspects of the issue either being a legal issue or the issue being one of jurisdiction, have been decided by the trial court by making any such observations and these aspects are the *sine qua non* under Order XIV Rule 2 CPC. The trial court has only dismissed the suit as not maintainable in the present form by holding that the two subject plots cannot be merged into one plot, and that the suit for partition should not have been filed as one suit for partition, but two separate suits for partition for two separate plots had to be filed. The two separate plots are owned by different brothers i.e. appellant/plaintiff and respondent no.3/defendant no.3 owned one plot of 250 sq. yds., and the respondent nos.1 and 2/ defendant nos.1 and 2 owned the adjacent plot of 350 sq. yds.

3. The facts of the case are that the subject suit for partition was filed by the appellant/plaintiff pleading that the four brothers purchased two adjacent plots of 250 sq. yds. and 350 sq. yds.

Appellant/Plaintiff and respondent nos.1 to 3/ defendant nos. 1 to 3 are real brothers and children of Dr. Wilyati Ram Gupta. The case of the appellant/plaintiff was that the plot of 250 sq. yds. was purchased by the appellant/plaintiff and respondent no.3/defendant no.3 and the adjacent plot of 350 sq. yds. was purchased by the respondent nos.1 and 2/ defendants nos. 1 and 2. However, a construction was jointly made on adjoining both the plots by the four brothers, and it was agreed by all the brothers that on total construction made on the two plots together, the same would be owned by each of the four brothers in the ratio of $1/4^{\text{th}}$ each. Accordingly, the suit property which is said to be bearing no. G-25, Amar Colony, Gokulpur, Shahdara, Delhi situated on a plot of 600 sq. yds. was sought to be partitioned by the following prayer clauses:-

- “i) That a Preliminary decree for partition of the joint property No.G-25,Amar Colony, East Gokulpur, Shahdra, Delhi shown in the annexed site plan may be passed in favour of the plaintiff against the defendant and the plaintiff's share be separated;
- ii Hon'ble court may be further pleased to Appoint a Local Commissioner to submit a Report to divide the property by metes and Bounds and also in terms of order XX Rule 12 CPC to determine the mense profits and/or damages for unauthorized use and occupation of the premises in suit payable by the defendant to the plaintiff from the date of the institution of the present suit till the date on which the defendant hands over to the plaintiff the actual physical vacant possession of the premises in suit;

- iii. Grant to the plaintiff against the defendants a final decree of partition of the joint property No.G-25, Amar Colony, East Gokulpur, Shahdra Delhi shown in the annexed site plan in terms of the report of the Local Commissioner appointed in terms of prayer clause (ii) above.
- iv. That consequently a Decree of possession in favour of plaintiff of his share as per final decree of partition of the joint property No.G-25 Amar Colony, East Gokulpur, Shahdara Delhi.
- v. Grant to the plaintiff against the defendant No.1 a decree of Future Mesnes profits in terms of the report of the Local Commissioner appointed in terms of prayer clause (ii) above;
- vi. That a decree of permanent injunction be passed in favour of plaintiff and against defendant number 4 and 5 restraining them from making any payment of rent/charges in respect of joint property No.G-25 Amar Colony, East Gokulpur, Shahdra Delhi to defendant No.1 in respect of the partition in their possession.
- vii. A decree of rendition of account be passed in favour of plaintiff and against defendant number directing defendant No.1 to render true accounts of the amounts of charges received by him from defendant number 4 and 5.
- viii. That a Final decree of Recovery in terms of the share of plaintiff be passed thereafter.
- ix. A decree of future mesne profit at the rate of Rs.20,000/- per month from the date of filing of the suit till the time the share of the plaintiff in respect of the property in question is delivered to him the passed against defendant No.1 in the interest of justice.

Grant to the plaintiff against the defendant such other or further relief (s) including costs of this suit as this Hon'ble Court may deem fit, expedient and/or appropriate."

4. Whether the decision is on a preliminary issue or on an application under Order VII Rule 11 CPC, the contents of the plaint have to be deemed to be correct. It cannot be argued while deciding a

preliminary issue or an order VII Rule 11 CPC issue that the contents of the plaint are false and therefore, the suit be dismissed.

5. In the present case, whether or not the four brothers being the appellant/plaintiff and the respondent nos.1 to 3/defendant nos.1 to 3 agreed to have a joint construction by merging the two plots, and, thereafter, each of the parties to have a 1/4th share each in the construction made, is a disputed question of fact which requires trial, and which can only be decided at the stage of final arguments after all the parties have led evidence. Such a factual issue cannot be decided as a preliminary issue and in fact, the trial court has exceeded its jurisdiction by *suo moto* framing a preliminary issue during the stage when evidence was being led, and that too an issue which does not fall within the purview of Order XIV Rule 2 CPC because the issue is a factual issue and not a legal issue, much less being an issue of jurisdiction of the court.

6. The respondent no.1/defendant no.1 appears in person and seeks to argue the case on merits. Unfortunately, this Court cannot give a lecture in law to the respondent no.1/defendant no.1 that

he cannot argue his case on merits for having the suit dismissed because that stage will come after the complete evidence is led by the parties and the suit is decided at the stage of final arguments.

7. In view of the aforesaid discussion, the trial court has committed a gross illegality in dismissing the suit as being not maintainable by observing that the two plots could not be joined and that two separate suits for partition had to be filed i.e. one suit for partition be filed for 250 sq. yds. between the appellant/plaintiff and respondent no.3/defendant no.3 and another suit for partition as between the respondent no.1/defendant no.1 and the respondent no.2/defendant no.2 as regards the 350 sq. yds. plot, inasmuch as whether or not there was an agreement between the four brothers and whether or not the construction was jointly made by the four brothers with their funds, and whether or not therefore in terms of an agreement each of the parties have 1/4th share respectively, all these factual aspects and factual issues will be decided at the stage of final arguments after evidence is led by the parties.

8. This appeal is allowed. Impugned judgment of the trial court dated 20.09.2017 is set aside. This judgment however is not a

reflection on merits of the cases of the respective parties and which merits in the suit, as also all the relevant issues in the suit, will be decided by the trial court at the stage of final arguments after parties have led evidence.

9. Parties to appear before the District and Sessions Judge, North East District, Karkardooma Courts, Delhi on 13.11.2018, and the District and Sessions Judge will now mark the suit for disposal to a competent court in accordance with law.

OCTOBER 09, 2018/ib

VALMIKI J. MEHTA, J