

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

% **Date of decision: 10th April, 2018.**

+ **CS(OS) 326/2016**

ASHWANI KUMAR **Plaintiff**

Through: Mr. Mohit Singh, Adv.

Versus

SANTOSH SOLANKI **Defendant**

Through: Mr. Prag Chawla, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff instituted this suit for recovery of Rs.3.20 crores with interest, pleading

- i) that the defendant is the sister of the plaintiff;
- ii) that the father of the parties was the owner of property No.C-163, Surajmal Vihar, Delhi and died on 14th July, 1993 leaving besides the plaintiff and the defendant as his son and daughter, Smt. Premwati as his widow and Anil Kumar as another son;
- iii) CS(OS) No.761/2006 was filed by Anil Kumar, brother of the parties, for partition of the aforesaid property;
- iv) that during settlement talks in the course of CS(OS) No.761/2006, the plaintiff expressed intention to purchase 1/4th undivided share of the defendant in the aforesaid property and defendant agreed to receive the sum of Rs.3.20 crores in lieu of her 1/4th share in the property; accordingly an amount of Rs.3.20 crores

was paid by the plaintiff to the defendant and CS(OS) No.761/2006 was disposed of and the plaintiff was declared to be the absolute owner of the property since Smt. Premwati and Sh. Anil Kumar had already executed a Relinquishment Deed dated 16th October, 2012 in favour of the plaintiff;

v) that the plaintiff, in the year 2014, applied to the Delhi Development Authority to get the property mutated in his name and learnt that the defendant did not have any share in the property as she had already relinquished her share in the property in favour of the mother Premwati by executing a registered Relinquishment Deed dated 28th February, 1997 and after execution whereof the defendant was not left with any share in the property and for which share the defendant had received Rs.3.20 crores from the plaintiff;

vi) that the defendant concealed the factum of execution of the Relinquishment Deed dated 28th February, 1997 from the plaintiff and by representing herself to be having 1/4th share in the property received a sum of Rs.3.20 crores from the plaintiff.

2. The suit was entertained and summons thereof ordered to be issued.
3. The suit was listed last on 20th March, 2018 but it transpired that though the replication of the plaintiff to the written statement purported to have been filed by the defendant was on record but the written statement was not on record. Though the counsel for the defendant did not appear on 20th March, 2018 but it was enquired from the counsel for the plaintiff on that date that since the defendant had received Rs.3.20 crores from the plaintiff in CS(OS) No.761/2006, how the present suit is maintainable and

whether not the suit is barred by Order XXIII Rule 3 of the CPC and the remedy if any of the plaintiff is thereunder only. On request of the counsel for the plaintiff for adjournment to enable him to study, the suit was adjourned to today and since the plaintiff had not filed complete documents of CS(OS) No.761/2006 and the orders of that suit filed were found to be disjointed, the file of CS(OS) No.761/2006 was also called for today.

4. The file of CS(OS) No.761/2006 has been received and the counsel for the defendant appears. However, Mr. Mohit Singh, Advocate appears for the plaintiff and states that Mr. Sudhir Nagar, Advocate for the plaintiff is an Advocate on Record and is in the Supreme Court and seeks passover.

5. The matter, if passed over, is unlikely to reach again and would amount to an adjournment derailing the hearing commenced on 20th March, 2018 and detailed order passed on that date. Mr. Sudhir Nagar, Advocate having sought adjournment on 20th March, 2018 to answer what he should have considered prior to the institution of the suit, should have either ensured his presence today or briefed Mr. Mohit Singh, Advocate who is appearing on his behalf.

6. The file of CS(OS) No.761/2006 has been perused and the same discloses i) the plaintiff herein to be the defendant no.1 in the said suit; ii) the plaintiff herein to have in his written statement in that suit pleaded that his brother Anil Kumar who had instituted that suit was suffering from mental weakness; iii) the plaintiff herein in his written statement to have not denied the share of the defendant herein, who was the defendant no.3 in that suit, in the property; iv) the plaintiff herein as defendant no.1 in that suit to have on 2nd May, 2013 contended that the suit be decreed declaring each of

the parties to be having 1/4th share in the property and his advocate to be representing Smt. Premwati also; the plaintiff in that suit viz. Anil Kumar to have supported the said request; only the defendant herein who was the defendant no.3 in that suit having not conceded thereto; v) this Court to have on 2nd May, 2013 recorded the statement of the plaintiff herein, consenting to a preliminary decree for partition of the property being passed declaring all the four parties to the suit including the defendant herein to be having 1/4th share each in the property; vi) a preliminary decree for partition having been passed on 2nd May, 2013 *inter alia* declaring the defendant herein to be having 1/4th share in the property; vii) it having been further contended by the plaintiff herein on 2nd May, 2013 in that suit that the property is incapable of being divided by metes and bounds and the parties should be permitted to make *inter se* bids; viii) the plaintiff herein to have on 23rd May, 2013 in that suit having offered to purchase the share of the defendant herein for Rs.3.20 crores and which offer was accepted by the defendant herein on 29th May, 2013; ix) that plaintiff herein to have also disclosed in that suit on 29th May, 2013 that the plaintiff and the defendant no.2 in that suit viz. Anil Kumar and Premwati had already executed and registered a Relinquishment Deed dated 16th October, 2012 of their respective share in the property in favour of the plaintiff herein; x) this Court to have on 29th May, 2013 having enquired from the counsel for the plaintiff herein that how can the said Relinquishment Deed be taken note of in the light of a preliminary decree for partition declaring the said Sh. Anil Kumar and Smt. Premwati also to be having 1/4th share in the property; xi) the plaintiff herein having paid Rs.32 lacs to the defendant herein towards earnest money for purchase of 1/4th undivided share of the defendant herein

in the property for a consideration of Rs.3.20 crores; xii) the preliminary decree for partition passed in that suit having been modified on 12th September, 2013 on application being IA No.14939/2013 of the plaintiff herein declaring the plaintiff herein to be having 3/4th share and the defendant herein to be having 1/4th share in the property; xiii) the plaintiff herein having paid the balance consideration to the defendant herein before the Court on 12th September, 2013 and the defendant herein having undertaken to execute and register documents of transfer of her share in favour of the plaintiff herein and a final decree for partition having been passed in that suit on 12th September, 2013 declaring the plaintiff herein as the sole owner of the property; xiv) the defendant no.2 in that suit viz. Premwati having thereafter filed IA No.2638/2015 for recall of the final decree for partition averring that she had been defrauded and had not executed the Relinquishment Deed dated 16th October, 2012; and, xv) the said application having been dismissed on 11th February, 2016.

7. A reading of the order dated 11th February, 2016 in CS(OS) No.761/2006 shows that while the plaintiff herein on 12th September, 2013 obtained modification of the preliminary decree for partition on the basis of a Relinquishment Deed dated 16th October, 2012 but in reply to the application of the defendant No.2 Premwati placed on record another Release Deed executed by Premwati in his favour on 7th February, 2014. The plaintiff herein on 11th February, 2016 was represented by the same advocate who is representing the plaintiff in this suit. This Court vide order dated 11th February, 2016 in CS(OS) No.761/2006 dismissed the application of Premwati for recall of the final decree for partition reasoning that Premwati did not deny the execution of the Release Deed dated 16th

October, 2012 and had also not instituted any proceedings for cancellation thereof. It was further reasoned that Premwati did not deny the execution of the second Release Deed dated 7th February, 2014 also.

8. In the present suit, none of the aforesaid facts have been disclosed and the copy of the Release Deeds of the years 2012 and 2014 both stated to have been executed by Premwati have also not been disclosed. It is inexplicable as to why, after the execution of the first Release Deed, need for a second Release Deed of Premwati was felt as Premwati after execution of the first Release Deed would be left with no rights in the property to be released under the second Release Deed. In the absence of the plaintiff having placed either of the two Release Deeds before this Court, it cannot also be understood whether what was released by Premwati in favour of the plaintiff was her 1/4th share only or also the 1/4th share which the defendant herein is claimed to have released in favour of the Premwati.

9. Be that as it may, the aforesaid confirms what was put to the counsel for the plaintiff on 20th March, 2018, that the present suit is barred by Order XXIII Rule 3 of the CPC. As long as the preliminary decree for partition and the final decree for partition in CS(OS) No.761/2006 exist, declaring the defendant to be having 1/4th share in the property and declaring the plaintiff herein to have purchased the said share from the defendant herein, the plaintiff cannot be permitted to recover back the consideration paid by him to the defendant in CS(OS) No.761/2006 for purchase of defendant's share in the property. The remedy, as aforesaid, of the plaintiff if any is by

seeking modification of the decree in CS(OS) No.761/2006 only and not otherwise.

10. Resultantly, the suit fails and is dismissed as not maintainable and barred by law.

11. The counsel for the plaintiff has been asked to handover the advance copy of the written statement received from the defendant and in response to which the replication was filed and the said copy is taken on record.

12. I refrain from imposing any costs on the plaintiff for abusing the process of the Court and for wasting the time of the Court.

13. A copy of this judgment be also placed in the file of CS(OS) No.761/2006.

APRIL 10, 2018
'gsr'

RAJIV SAHAI ENDLAW, J.

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