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

Date of Decision: 19.09.2018

+ **FAO(OS) 141/2018**

RAJIV OBERIO

..... Appellant

Through: **Mr. Raghvendra Singh, Advocate**

versus

JATINDER OBERIO & ANR

..... Respondents

Through:

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

RAJENDRA MENON, CHIEF JUSTICE (ORAL)

CM APPL. 38432/2018 (*condonation of delay in filing*)

For the reasons stated in the application, delay of 20 days in filing the appeal is condoned.

The application stands disposed of.

CM APPL. 38433/2018 (*condonation of delay in re-filing*)

For the reasons stated in the application, delay of 21 days in re-filing the appeal is condoned.

The application stands disposed of.

FAO(OS) 141/2018

1. This appeal by the appellant calls in question judgment dated 30.05.2018 passed in CS(OS) 140/2012 rejecting an application being IA No.7671/2018 filed by the appellant. Appellant and respondent No.1 are brothers and claimed to be joint owners and in joint possession of a property

bearing No.L-10, Kalkaji, New Delhi.

2. It is stated that the immoveable property is a dwelling house belonging to the undivided family. It is further averred that late Shri Gulshan Oberoi, father of the appellant and respondent No.1 had purchased the property on 12.10.1970 and had been living there since then. Late Shri Gulshan Oberoi expired on 17.02.2000 and the appellant, his mother and other family members claimed to be the Class-I legal heirs. On 08.08.2000 mother and daughter of late Shri Gulshan Oberoi released their shares in the immoveable property in favour of wife of late Shri Gulshan Oberoi.

3. On 29.10.2007 wife of late Shri Gulshan Oberoi executed a gift deed of her share jointly in favour of appellant and respondent No.1. It seems that certain dispute has arisen with regard to the property between the brothers and therefore on 15.11.2011 respondent No.1 filed a suit for partition by metes and bounds through appointment of a local commissioner. Summons were issued and status quo was directed to be maintained until further orders on 18.01.2012.

4. Respondent No.2 on 05.07.2013 filed an application under Order 1 Rule 10 CPC seeking impleadment as a defendant in the partition suit on the ground that he has purchased defined portions of the suit property from respondent No.1 by two sale deeds executed on 02.05.2011 and an agreement to sell executed on 20.05.2011. He also claimed possession of the property. On 12.02.2015 a counter claim filed by the present appellant was admitted by the Court and thereafter on 30.05.2016 a preliminary decree declaring the rights and interests of all the parties in the partition suit filed. Plaintiffs were awarded 50% share in the undivided property and the remaining 50% share in the undivided suit property fell in the name of

defendant No.1 – Shri Rajiv Oberoi. Thereafter a final decree and judgment was passed on 29.11.2017 as is evident from Annexure-3. However, on the ground that despite admitting the counter claim on 12.02.2015, the same was not adjudicated upon, IA No.7671/2018 was filed under Section 151 CPC and the same having been rejected with costs of Rs.2 lac, the present appeal filed by the appellant under Section 10(1) of the Delhi High Court Act, 1966.

5. Learned counsel for the appellant at length pointed out that the counter claim was filed well within time and it was not considered by the learned Court and therefore there is an error and the right of the appellant based on the counter claim was not adjudicated while passing of the the final decree.

6. We have considered the submissions made and we find that while considering the same averments that were made before the learned Single Judge, the learned Single Judge has taken note of each and every aspect of the matter and the law relating to deciding a counter claim after its admission in a proceeding. The learned writ Court goes on to discuss the same. The conduct of the counsel for the appellant when the preliminary decree was passed, the final decree was passed and their silence till filing of IA No.7671/2018 after a period of two years and the conduct of the appellant and his counsel in sitting quiet over the counter claim and not bringing it to the notice of the Court at an appropriate stage when the matter was being heard. The learned appellate Court from para 12 onwards has adverted to consider all these questions and from para 25 onwards upto para 28 deals with the issue in the following manner:

“25. I have perused the Counter-Claim and do not find any case under Section 22 of the Hindu Succession Act or Section 44 of the Transfer of Property Act to have been pleaded. In fact, Section 22 of the Hindu Succession Act requires an application to be filed for determining the price for purchase of the property or part of the property and which step was not taken. It is quite evident that the plea of Section 22 of the Hindu Succession Act and Section 44 of the Transfer of Property Act has been taken now for the first time in a mala fide attempt to not allow the matter to attain finality.

26. In fact, I had on 29th November, 2017 enquired the position of the second floor of the property from the parties and the parties had informed that the plaintiff and the defendant No.1 had jointly, prior to the institution of the suit, sold the said second floor and half of the terrace above the second floor and which is also contrary to the argument being now urged of induction of a stranger into the property causing inconvenience. Moreover, once the applicant/defendant No.1 agreed to the sale of the property as recorded on 29th November, 2017, the question of inconvenience does not arise.

27. The application is thus not only found to be mala fide but the applicant/defendant No.1 has also wasted time of the Court today and the application is dismissed with exemplary costs of Rs.2 lakhs to be deducted out of the share of the applicant/defendant No.1 in the sale proceeds of the property and to be deposited with the Delhi High Court Advocates Welfare Trust.

28. A copy of this order be forwarded to plaintiff and other defendants in suit as well as to Delhi High Court Advocates Welfare Trust, to ensure compliance.”

7. From the aforesaid it is clear that even though a counter claim was filed but it was not prosecuted or canvassed at the time of hearing before the final decree was passed and even the objections raised with regard to the implications of Section 22 of the Hindu Succession Act or Section 44 of the Transfer of Property Act have not been pleaded specifically in the counter

claim. After considering all these aspects of the matter, particularly, the default on the part of the appellant in not bringing to the notice of the Court the pendency of the counter claim and not pressing it at an appropriate stage, the learned Single Judge has rejected the application. In our considered view the learned Court in doing so has not committed any error. The appellant and his counsel are themselves to be blamed for this act of their in permitting the Court to proceed with the matter without insisting upon the decision of the counter claim. Accordingly, finding no ground to interfere with the matter, we dismiss the appeal.

8. Accordingly, the appeal stands dismissed.

CHIEF JUSTICE

V. KAMESWAR RAO, J

SEPTEMBER 19, 2018/ns