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

Reserved on : 19th March, 2018
Date of decision : 15th May, 2018

+ **RFA 428/2017 & CM APPL.15921/2017**

BEENA@ VEENA BHARDWAJ Appellant
Through: Mr. Ravi Dev Sharma, Advocate (M-9873205388).
versus

SUSHMA SHARMA & ORS. Respondents
Through: Mr. Praveen Goswami, Advocate (M-9899442929).

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This appeal impugns order dated 21st February, 2017 passed by the Learned Additional District Judge dismissing the suit of the Plaintiff under Order VII Rule 11 read with Order II Rule 2 of the Code of Civil Procedure, 1908 (*hereinafter*, 'CPC').

The brief facts are:

2. Mr. Anand Bhardwaj and Mr. Nitya Nand Sharma were brothers. Mrs. Veena Bhardwaj, wife of Mr. Anand Bhardwaj and Mr. Nitya Nand Sharma jointly purchased property bearing No. F-4/100, Subhash Vihar, Delhi-110053 measuring 200 Sq Yards. Mr. Nitya Nand Sharma is no more. His family is in possession of his share of the property. As per the plaint, the following are the portions occupied by the two families:

*“4. That the plaintiff along with her husband and Late Sh. Nitya Nand Sharma, husband of the defendant raised construction on the plot in question measuring 200 Square yards and the plaintiff raised the construction in rear portion measuring about 94 Sq Yards. That about 30 Sq. Yards land in front portion remained open for constructing shops as and when required. And Sh. Nitya Nand Sharma was given the remaining part in the front portion. The plaintiff was given the back portion with an understanding that she be entitled for a shop in the front side and that is why she has been given less share and back portion. The site plan relied upon by the plaintiff and the Defendant No.1 in the earlier suit is **Annexure-"P3" & "P4"** respectively.”*

3. Thereafter, relying upon a family settlement dated 9th July, 1995, the plaintiff filed the suit for partition praying for the following reliefs:

“(a) Pass an order restraining the defendants to create any third party interest in the suit properties.

(b) Pass a preliminary decree of partition in respect of the suit property (30 Square Yards) open portion of property bearing number F-4/100, Subhash Vihar, Delhi-110053 and in the alternative if the family settlement dated 09/07/1995 is not stands proven in the eyes of law, the partition of the entire property bearing number F-4/100, Subhash Vihar, Delhi- 110053 measuring 200 Sq. Yards thereby holding that the plaintiff is entitled to 1/2 share therein;

(c) Appoint a local commissioner to ascertain the mode of partition of the suit properties;

(d) Pass a final decree of partition thereby separating the 1/2 share of the plaintiff in the suit properties by metes and bounds and to put the plaintiff in such partitioned 1/2 portion;

(e) Award cost of the proceedings; ”

4. Thus, the stand of the Plaintiff is that all parties ought to be made to abide by the family settlement and if not, both families ought to be declared as owners of 1/2 share of the suit property. An application under Order VII Rule 11 CPC and Order II Rule 2 CPC came to be filed in the suit. The contentions in the applications were that two earlier suits, one for declaration and permanent injunction and the second one for a simple declaration, had been dismissed and accordingly, the third suit would not lie.

5. The Trial Court dismissed the present suit, both under Order VII Rule 11 and under Order II Rule 2 of the CPC. The said order is assailed in this appeal. Arguments were heard on behalf of the parties.

6. It is not in dispute that two earlier suits were filed by the Plaintiff. Suit No.151/2013 was a suit for declaration which was withdrawn by the Plaintiff. However, liberty was granted to file a fresh suit. The said order dated 1st July, 2014 reads as under:

“At joint request the matter is taken up since both the counsel for the parties are present.

It is stated by Ld. Counsel for plaintiff that plaintiff wants to withdraw the present matter. He has been instructed to withdraw the present matter on behalf of plaintiff. Statement of Ld. Counsel for plaintiff at bar recorded separately. In view of statement of Ld. Counsel for plaintiff, present matter is dismissed as withdrawn with liberty as prayed.

File be consigned to Record Room.”

7. Thereafter, Suit no.161/2016 was filed seeking a declaration of ownership of half portion of 30 sq. yds. of the suit property without any relief for partition of the open space. The said suit was dismissed by a

speaking order of the Trial Court on 31st May, 2016 with the following observations:

“However, the suit of the plaintiff is liable to be rejected u/o 7R 11 (d) Code of Civil Procedure, 1908 for the following reasons;-

1. Suit is barred by proviso to section 34 of Specific Relief Act which provides that no court shall make any declaration, where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so.

The present case is with respect to the declaration ownership of half portion of 30 sq yards of open space, without any relief for partition of the said open space. It may be noted that the plaintiff has not stated in the plaint whether he is seeking declaration with respect to the corner half portion of the 30 sq yards of open space (bound by road on two sides) or whether he is seeking declaration with respect to the other half portion of 30 sq yards of open space. The site plan filed by the plaintiff depicts the entire 30 sq yards of the vacant plot in red colour and as such the relief of declaration is not with respect to specific half portion of that 30 sq yards of open space. In order to decide as to which portion of 30 sq yards is owned by the plaintiff, the court would be required to partition the property by metes and bounds and for the said purpose it is necessary that a suit for partition is filed by the plaintiff, instead of a mere suit for declaration and permanent injunction.

The plaintiff has stated in para 4 of the plaint that partition took place in 1995, but he has nowhere stated in plaint as to which half portion of 30 sq yards open space came to the share of plaintiff as per the partition of 1995 and mere past agreement that the property would be divided in half in future, does not amount to partition, as the said agreement does not divide the property by metes and bounds. Moreover, in the

present case, even the said oral partition has been contested by the defendant and the defendant has submitted that the said 30 sq yards of open space during partition came to the share of defendant and there was no agreement that the said 30 sq yards would be divided equally among the parties in future.

2. Further suit is barred by section 41 (h) of Specific Relief Act (which provides that no injunction shall be granted by the court when equally efficacious relief can be obtained by the plaintiff by any other usual mode of proceeding.

In the present case as stated earlier, the equally efficacious remedy, (rather the only remedy) available to the plaintiff is to file a suit for partition of 30 sq yards of the property as per the share of plaintiff and defendant, alongwith relief of declaration and injunction. However, in absence of relief of partition, the suit is not maintainable for mere declaration and injunction u/s 41(h) of Specific Relief Act read with proviso to section 34 of Specific Relief Act.

3. It may be noted that a suit for partition would also affect the valuation of the suit for the purpose of jurisdiction, as in a suit for partition the valuation would have to be done with respect to the entire 30 sq yards of the property, which is subject matter of partition and the valuation for the purpose of jurisdiction would have to be carried out as per section 3, 8 & 9 of the Suit Valuation Act read with Volume 1 Chapter 3 Part C Rule 8(b) of Delhi High Court Rules, further read with section 7(v) of Court Fees Act and rules under Volume 1 Chapter 3 Part D of Delhi High Court Rules.

Accordingly in the opinion of the court, the present suit for mere declaration and injunction with respect to a property which as per the plaint is undivided, is not maintainable in its present form and is specifically barred by section 41(h) and proviso to section 34 of Specific Relief Act. 1963.

ORDER

Accordingly the suit is rejected U/O 7 R 11 (d) of Code of Civil Procedure, 1908.

File be consigned to Record Room after due compliance."

8. A perusal of the above order reveals that the 30 sq. yds. for which declaration was sought is a part of the same suit property, subject matter of the present appeal. The parties in the said suit were identical. The suit was dismissed as being barred both under Section 34 of the Specific Relief Act, 1963 (*hereinafter, 'Specific Relief Act'*) and Section 41(h) of the Specific Relief Act. Thus, the said dismissal was on merits. The said order was not challenged by the Plaintiff and has, thus, attained finality.

9. Under these circumstances, the question that arises is as to whether the present suit is maintainable and whether the Plaintiff is entitled to seek enforcement of the family settlement, or partition in the alternative.

10. A perusal of the plaint reveals that the Plaintiff claims to be in occupation of 94 sq. yds. out of the 200 sq. yds. property. The family settlement allegedly relied upon, recognizes that both parties shall enjoy their respective shares of the suit property along with 30 sq. yds., which is a vacant part of the suit property. Interestingly, the family settlement was not pleaded in either of the two earlier suits instituted by the Plaintiff in respect of the same suit property. The site plan attached with the plaint shows that the plot appears to have been divided in a manner that the Plaintiff is in occupation of one part of the property i.e. 94 sq. yds. and the Defendant is in occupation of a lesser area. The 30 sq. yds. is depicted as a vacant plot. One of the reliefs in the plaint is the division of the property half and half by

metes and bounds. In para 9 of the plaint, the Plaintiff seeks partition of the 30 sq. yds. property.

11. The admitted dimension of the plot is only 200 sq. yds and it is also admitted that Plaintiff is in occupation of 94 sq. yds which is merely 6 sq. yards short of 50 % which is the Plaintiff's share. The partition of the vacant part of 30 sq. yds. by 50-50 would result in the Plaintiff coming into possession of 111 sq. yds. of the property leaving the Defendant who is an equal owner of the property with only 89 sq. yds. Moreover, the same relief of partitioning of the 30 sq. yds. property into half and half, was already sought in suit no. 161/2016 which was rejected. The same relief cannot be sought in an indirect manner in the present suit.

12. Even on a broad understanding of the manner in which the parties have been living, the 30 sq. yds. vacant plot falls on the side of the Defendant's property. Any partitioning of the said plot would lead to disturbance in the peace and harmony in the family.

13. The Plaintiff having not disclosed or relied upon any family settlement in the earlier two suits and seeking the same relief as sought in the previous suit, is not entitled to maintain the prayer in the present suit. The Defendant has relied upon order dated 20th July, 2016 passed by a Learned Single Judge of this Court in W.P 5680/2016 wherein the Plaintiff sought demolition of a boundary wall which was being constructed on the 30 sq. yds. vacant space. The said order reads as under:

“Status report has been filed by respondent no.1 wherein it is stated that the boundary wall of property bearing No.F-100/4, Subhash Vihar, Bhajanpura, Delhi (measuring 30 sq. yards) has since been booked

on 22.6.2016 and a show cause notice as to why action be not taken had already been issued.

Learned counsel for respondent no.1 under instruction informs this Court that part demolition has been effected. Next date for demolition is 26.7.2016 and demolition will be carried in accordance with law.

In view of the aforesaid undertaking furnished by respondent no.1 no further orders are called for.

Needless to state that the respondent will take action in accordance with law.

Petition disposed of."

14. From the above order, it is clear that the Plaintiff has been in continuous litigation in respect of the 30 sq. yds. The Defendant submits that the plot was purchased in 1978 and until the death of the two brothers, all parties were enjoying peaceful possession of the property, however, post the demise of the two brothers, the families have been in litigation over the said 30 sq. yds. space. The Plaintiff having already failed in one attempt ought not to be permitted to re-agitate the same issue again and again. The Plaintiff is in enjoyment of 94 sq. yds. of the property which is almost 50 % of the property. Even in equity, the Plaintiff is not entitled to any relief.

15. The Counsel for the Plaintiff relies upon an Agreement to Sell, dated 28th July 2000, entered into between the Defendant Sushma Sharma and her husband Nityanand Bhardwaj wherein the property falling in the share of the Defendant is described as under:

Built up Property 85 Sq. Yards
East: House of Beena Bhardwaj
West: Vacant Plot
North: Other Property
South: Gali

Vacant Property 15 Sq. Yards
East: House N.N. Bhardwaj
West: Road
North: Plot of Beena Bhardwaj
South: Gali

On the basis of the above description, it is submitted by the Plaintiff that part of the 30 sq. yds. ought to be given to the Plaintiff.

16. The above said description contained in the said document is actually not accurate as the portion claimed to be in the possession of the Defendant is only 70 sq. yds. and not 85 sq. yards as described. Thus the description in this document reveals the actual share of the Defendant and not what is in actual possession. The Plaintiff already has 94 sq. yards and hence cannot get an additional 15 sq. yds., as described in the said document. This document cannot be construed as an admission of the respective rights of parties.

17. The Plaintiff's counsel relies upon ***Suresh Kakkar & Anr. v. Mahender Nath Kakkar & Ors. 158 (2008) DLT 58***, to submit that unless and until the pleadings in the earlier suit are placed on record, the objection under Order II Rule 2 of the CPC cannot be upheld.

18. Firstly, the Plaintiff had an obligation to file the plaint of the earlier suit in the subject suit and having not done so, she cannot take advantage of her own wrong. The order dated 31st May, 2016 is quite clear as to the scope of the earlier suit. The Plaintiff could have also filed a copy of the earlier plaint in response to the application under Order VII Rule 11 of the CPC. The Trial Court has taken severe umbrage to the statement of the Plaintiff in para 11 of the plaint that no other suit was pending that was filed on the same issue. In the said paragraph, there is no mention of suit no.151/2013. Accordingly, the Trial Court had dismissed the application under Order XXXIX Rule 1 and 2 and on 17th February, 2017 and dismissed the suit on 21st February, 2017. No error can be found with the judgment of the Trial Court. The Plaintiff having instituted both the earlier suit and the present

suit, cannot be seen to argue that a copy of her own earlier plaint ought to have been filed, for entertaining the defendant's objection under Order II Rule 2 of the CPC. That would result in the Court taking an over-technical approach. The earlier plaint is well within the knowledge of all parties as also the Court as the reliefs claimed therein form part of the impugned order. Even otherwise, the admitted position is that the Plaintiff is in occupation of 94 sq. yds. and is enjoying almost 50% of the 200 sq. yds. property. Viewed at from any angle, the Plaintiff is not entitled to relief. There is no error in the impugned order.

19. The appeal is accordingly dismissed. All pending applications are also disposed of.

PRATHIBA M. SINGH, J.
JUDGE

MAY 15, 2018/Rahul