

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

+ **RFA No. 906/2016**

% **13th December, 2018**

TARA CHAND GAUR

..... Appellant

Through: Mr. Arvind Bhatt, Advocate
with Mr. Kuber Giri, Advocate
(M. No.9810354101).

versus

SATISH CHAND SHARMA & ANR.

..... Respondents

Through: Ms. Amrit Kaur Oberoi,
Advocate (M. No.9899347698).

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

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 09.09.2016 by which the trial court has dismissed the suit for partition by deciding three preliminary issues against the appellant/plaintiff. The three

preliminary issues pertained to the bar of limitation to filing of the suit, proper court fee not having been paid and the necessary parties, being the sisters of the appellant/plaintiff, not joined as parties.

2. The facts of the case are that the subject suit for partition was filed for the property no. J-111A, Main Road 4th Pusta, Kartar Nagar, Delhi-110053 which was said to have been owned by the mother of the appellant/plaintiff, Smt. Angoori Devi. Smt. Angoori Devi is also the mother of the two defendants in the suit. It was pleaded in the plaint that Smt. Angoori Devi expired intestate and she left behind three sons and four daughters. The suit was only against two sons because the appellant/plaintiff pleaded that the sisters, i.e. daughters of Smt. Angoori Devi, had given up their shares in favour of the three brothers being the three parties to the present suit. Accordingly, the appellant/plaintiff claimed the relief of partition, injunction etc.

3. It is trite that when a preliminary issue is decided, the same is decided by taking the contents of the plaint as correct. At the stage of decision of the preliminary issue, parties have not led their evidence and the suit is not decided at the stage of final arguments,

after all the parties have led their evidence on disputed questions of fact. It is therefore to be seen that whether the suit could have been dismissed by taking three issues of limitation, deficiency of court-fee and non-joinder of necessary parties as preliminary issues.

4. So far as the aspect of non-joinder of necessary parties being sisters of the parties, counsel for the appellant/plaintiff states that appellant/plaintiff be allowed to join the sisters as the defendants in the suit though it is pleaded that the sisters have relinquished their shares in favour of the brothers. It is argued that even if the sisters were not added, the suit could not have been dismissed because it was only if the appellant/plaintiff after leading evidence had failed to prove the relinquishment by the sisters, only then the appellant/plaintiff would have failed in the suit for partition, otherwise, the trial court would have at the stage of final arguments, after evidence was led, held that the relinquishment has been proved by the sisters and therefore they were not necessary parties. In any case, now since the appellant/plaintiff admits that the four sisters will be added as defendants to the suit, it is ordered accordingly, and the appellant/plaintiff will now file before the trial court on remand of the

suit, an amended memo of parties alongwith the amended plaint, and notices will now be issued to the four sisters of the parties who would also be the defendants in the suit.

5. So far as the issue of limitation is concerned, the trial court has committed a complete illegality in holding that the limitation for filing a suit for partition is three years from the date the cause of action arose. A partition suit is a suit by which a person claims his share in an immovable property. With respect to such a suit, limitation will be a period of 12 years as per Article 65 of the Limitation Act, 1963 and this period of limitation will commence when the defendants in the suit plead and prove that they have denied the title of the appellant/plaintiff in the suit property earlier than 12 years from filing of the suit for partition. Therefore, this aspect is a disputed question of fact as to whether or not the respondents/defendants will or will not prove that they have denied the title of the appellant/plaintiff 12 years prior to the filing of the suit. Once there is a disputed question of fact, the contents of the written statement cannot be taken as proved at the stage of deciding the preliminary issue, inasmuch as and as already stated above, a

preliminary issue is decided not at the stage of final arguments after the parties have completed their evidence, but on admitted facts arising from the record. Therefore, this finding of the trial court is set aside that the suit was barred by limitation inasmuch as this issue of limitation is a disputed question of fact and could only have been decided at the stage of final arguments after all the parties had led evidence.

6. So far as the third aspect of the court-fee having not been paid is concerned because the appellant/plaintiff has only affixed a court fee of Rs. 20/-, once again, the trial court has erred in holding that since the appellant/plaintiff had valued the suit at Rs. 1 crore, and he was not in possession of the suit property, therefore, the appellant/plaintiff was liable to pay court-fee on his 1/3rd share. In law, when a partition is sought by a co-owner, court-fee which is payable is a fixed court-fee in terms of Schedule II, Article 17 (vi), of the Court-fees Act, 1870 inasmuch as every co-owner is either in actual physical possession of whole or part of the property or in law has to be taken in deemed possession or constructive possession of the co-owned property. If a defendant is a co-owner who is in actual

physical possession of the complete property, even then, the possession of one or more such co-owners who are defendants in possession, the possession is for and on behalf of all co-owners including the plaintiff(s), and whether there exists exclusive possession of the respondents/defendants and the same acts as an ouster of the plaintiff(s) is a question of fact, and only when this question of fact is proved by the respondents/defendants by leading evidence, it can be held that the appellant/plaintiff was not in possession, physical or constructive, of the suit property, so that court-fee is payable for the 1/3rd share as claimed by the appellant/plaintiff. In fact, this issue of court-fee is very much inter-linked with the issue of limitation because the appellant/plaintiff is not in possession, and both are factual issues which will have to be proved by the respondents/defendants that the appellant/plaintiff was not in physical possession of the suit property and ouster has been proved against the appellant/plaintiff by respondents/defendants after leading evidence.

7. In view of aforesaid discussion, this appeal is allowed. Impugned Judgment of the trial court dated 09.09.2016 is set aside. The appellant/plaintiff will implead the sisters as defendants in the suit

and file amended memo of parties, as also the amended plaint before the trial court. It is held that issue of limitation and requirement of filing *ad valorem* court-fee being factual issues will be decided at the stage of final arguments after parties have led evidence.

8. Parties to appear before the District & Sessions Judge, North East, Karkardooma Courts, Delhi on 23rd January, 2019 and the District & Sessions Judge will now mark the suit for disposal to a competent court in accordance with law and the observations made in the present order.

DECEMBER 13, 2018
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VALMIKI J. MEHTA, J

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