

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

% **Date of decision: 1st November, 2019**

+ **CS(OS) 190/2019**

NASEEMA

..... Plaintiff

Through: Mr. Rukhsar Ahmad, Adv.

Versus

MUNAVVAR ALI & ORS.

..... Defendants

Through: Mr. Saurabh Jhamb, Adv. for D-1&6.
with defendant No.1 in person.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit for partition of two immovable properties i.e. (1) property no. D-23, Main Road Brahampuri, Chauhan Banger, Delhi 110053 admeasuring 334 sq. yrds. and (2) property no. C-98/34, Khasra No. 189, Gali No.1, Main Road Brahampuri, Chauhan Banger, Delhi – 110053 measuring 180 sq. yrds, claiming that the said two properties belonged to the father and mother of the plaintiff and the five defendants.

2. The suit came up first before this Court on 3rd April, 2019 when summons thereof were ordered to be issued and the plaintiff as well as the defendants were restrained from alienating, encumbering or parting with possession of the two properties and from demolishing, constructing or carrying out works of any nature whatsoever over the said properties. The said *ex parte* order was made absolute after the appearance of the defendants, on 21st August, 2019.

3. The plaintiff in the present suit seeks “half the share of brothers” in the father’s property and “equal shares to brothers” in the mother’s property.

4. The defendants no. 1 and 6 filed a written statement *inter alia* pleading that the present suit is not maintainable because an earlier suit filed by the plaintiff, for partition of both the properties of which partition is claimed in the present suit, claiming 1/7th share in each of the two properties, is pending consideration before the Court of Shri Brijesh Kumar Garg, Additional District Judge, District North-East, Karkardooma Courts, Delhi.

5. The defendants no. 2 to 5 also in their written statement took the same plea.

6. The suit came up for framing of issues on 21st August, 2019, when though the counsel for the defendants no. 1 and 6 contended that the suit was barred by Section 10 of the CPC, but finding that none of the defendants had placed before this Court the pleadings in the earlier suit, it was held that without the pleadings in the earlier suit, the said aspect could not be adjudicated and on the pleadings of the parties, the following issues were framed in the suit:

(I) Whether late Sh. Abdul Ali, father of the plaintiff and the defendants, was the owner of built up property bearing No. D-23, Main Road Brahampuri, Chauhan Banger, Delhi admeasuring 334 sq. yds.?
OPP

(II) Whether defendant no.1 Munavvar Ali is the owner in his own right of 74 sq. yds. in property no. D-23, Gali No.16, Chauhan Banger, Brahampuri, Main Road, Delhi and the said property is not open to partition? OPD-1

(III) Whether the previously instituted suit for partition of the properties for partition of which the present suit has been filed, is pending and if so, the effect thereof? OPD-1 to 6

(IV) Whether the plaintiff, for reasons pleaded, has no share in the estate of her father? OPD-1 to 6

(V) Whether the father of the parties has gifted any of the properties owned by him to the defendant no.1 and if so, to what effect? OPD-1

(VI) What are the shares, if any of the respective parties in property no. D-23, Gali No.16, Chauhan Banger, Brahampuri, Main Road, Delhi, whether admeasuring 334 sq. yds. or admeasuring 260 sq. yds. and in property No.C-98/34, Khasra No.189, Gali no.1, Main Road, Brahampuri, Chauhan Banger, Delhi admeasuring 100 sq. yds.? OPPr

(VII) Relief.

and the parties relegated to evidence.

7. The defendant No.1 has now filed IA.No.15174/2019 under Section 151 of the CPC seeking stay of this suit and has alongwith the application filed certified copies of the pleadings and orders in the earlier suit and which disclose the plaintiff herein alongwith the defendants no. 2 to 5 herein to have filed the suit pending in the District Court, for partition of both the properties of which partition is sought in the present suit, claiming 1/7th share therein.

8. The counsel for the plaintiff appears on advance notice.

9. None appears for the defendants no. 2 to 5.

10. For the reason of the facts stated hereinbelow, need to call for a reply

from the plaintiff to the application does not arise.

11. The counsel for the plaintiff on inquiry, why the second suit for partition was filed, states that the defendants no. 2 to 5 herein, without authority of the plaintiff, have included the plaintiff herein as a plaintiff in the earlier suit and the plaintiff herein nowhere joined in instituting the previous suit and did not sign any pleading or vakalatnama therein. It is also stated that the plaintiff, on learning of the previous suit, has appeared therein and sought time to file requisite applications. It is further argued that the District Court does not have pecuniary jurisdiction to entertain the suit pending before it.

12. The question, whether the previously instituted suit, purporting to be on behalf of the plaintiff, was indeed filed by the plaintiff or not and /or whether the Court where the previously instituted suit is pending has pecuniary jurisdiction to entertain the suit or not, have to be decided in the previously instituted suit only and cannot be made subject matter of the present suit. All that can be said is that as long as the suit previously instituted by the plaintiff for the same reliefs as claimed in this suit is pending consideration, the present suit is not maintainable and had the factum of pendency of the previously instituted suit been known to the court on the date when this suit came up for admission, the suit would not have even been admitted.

13. Even if the Court where the previously instituted suit is pending does not have pecuniary jurisdiction, on the plaintiff taking the said plea, the plaint therein would be returned with permission to file before this court and it is that suit which would be entertained.

14. As far as the plea, of the plaintiff of having not joined in institution of the previously instituted suit, is concerned, even if the plaintiff had not joined as plaintiff therein, would have been impleaded as a defendant and the position would have been the same i.e. that during the pendency of one suit for partition, a second suit for partition of the same properties does not lie.

15. In a suit for partition, each party enjoys the same status i.e. of plaintiff as well as the defendant and it is immaterial whether impleaded as a plaintiff or as a defendant. Reference, if any required, may be made in this regard to ***Chandra Mohan Ramchandra Patil & Ors. Vs. Bapu Kayappa Patil (Dead) & Ors.***, (2003) 3 SCC 552; ***Mahender Kumar Lamba Vs. Satender Prakash Lamba***, 2006 SCC OnLine Del 1124; and, ***Om Prakash Vs. Amit Chaudhary & Ors.***, 2019 SCC OnLine Del 9311.

16. For this reason, even though the counsel for the plaintiff, after being unsuccessful in his arguments, now seeks time to file reply to the application, need to accede to the said request is not felt. The remedies if any of the plaintiff are in the previously instituted suit. This court can only grant liberty to the plaintiff to, in the event of previously instituted suit coming to an end without adjudication, for any reason whatsoever, and in which case the law permits the plaintiff to file fresh suit, to so file a fresh suit for partition.

17. The application thus succeeds and is disposed of.

18. In view of the aforesaid facts, there is no need to stay the proceedings in the present suit inasmuch as the relief claimed in this suit is identical to that claimed in the previously instituted suit purported to be on behalf of

plaintiff and adjudication of previously instituted suit would decide not merely some of the issues but all issues in the present suit, making the present suit not maintainable. This suit, on the date of filing thereof, was not maintainable.

19. The suit is dismissed with liberty aforesaid.

20. No order as to costs.

21. The date fixed of 29th November, 2019 before the Joint Registrar is cancelled.

NOVEMBER 01, 2019
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RAJIV SAHAI ENDLAW, J.

