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IN THE HIGH COURT OF DELHI AT NEW DELHI

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FAO(OS) 221/2019 & CM APPLs. 37247 and 37249 of 2019

DEVINDER KUMAR DIWAN & ORS.

.....Appellants

Through: Mr. Sanjay Poddar, Senior Advocate
with Ms Mini Pushkarna, Ms Swagata
Bhuyan and Mr Shiva Pandey,
Advocates.

versus

RAJNI KAPUR & ORS.

..... Respondents

Through: Mr Jasmeet Singh and Ms Tejaswini,
Advocates for R-1 & 2.
Mr Govind Kumar and Ms Smriti
Kataria, Advocates for R-3.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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28.11.2019

Dr. S. Muralidhar, J.:

1. This appeal is directed against an order dated 29th April, 2019, passed by the learned Single Judge in IA Nos. 17420/2018 and 17421/2018 in CS (OS) No.647/2018.

2. The three Appellants herein were Defendant Nos.1, 2 and 4 in the aforementioned suit. The Respondent Nos. 1 and 2 herein were the Plaintiffs. The aforementioned suit was filed seeking the partition of property number B-1, East of Kailash, New Delhi.

3. It must be noticed at the outset that the Defendant No.2 in the suit i.e. Mr.

Mohinder Kumar Diwan has not joined as an Appellant, but has been impleaded as the Proforma Respondent No.3, supporting the Appellants.

4. The two Plaintiffs and four Defendants are siblings. They are the children of late Mr. H.R. Diwan, in whose favour, an Agreement to Sell *qua* the aforementioned suit property was executed on 10th January, 1978 by one Mr. Jagan Nath Jaju, who was originally allotted the plot by the Delhi Development Authority ('DDA') by a perpetual lease deed dated 28th February, 1973.

5. After the pleadings were complete in the suit, it was listed for framing of issues. On behalf of the Plaintiffs, ten draft issues were proposed. On behalf of the Defendant Nos. 1, 3 and 4, five draft issues were proposed. The learned Single Judge recorded that counsel for the Defendant No.2 made a statement that he was supporting the Defendant Nos. 1, 3 and 4.

6. Without discussing each of the issues as proposed, the learned Single Judge proceeded to discuss the merits of the case and in paras 6 to 8 observed as under:

“6. The Agreement to Sell, being in the exclusive name of the father of the parties, the Power of Attorney in favour of defendant no. 3 was in aid and pursuance thereto and the rights in the property would be deemed to be of the father of the parties and not of defendant No.3.

7. The land underneath the property continues to be leasehold. The defence of the defendants no.1, 3 and 4 is, (i) that the ground floor and first floor of property was constructed with the joint efforts and funds of the father as well as defendants no.1 to 3; and, (ii) that a family settlement was entered into between the

father and defendants no. 1 to 3 whereunder different portions of the property fell to the share of defendants no. 1 to 3 with the father being left with only the right of residence in the property.

8. The Agreement of Purchase of the property being in the name of the father of the parties, the plea of the defendants no.1 to 3, of having contributed along with father to construction of the property would not vest the defendants No. 1 to 3 with any rights in the property and the property would remain of father. There is thus no need to frame any issues in this respect qua which there is bar by law. Similarly, the question whether post the family settlement the second floor was constructed by defendant no. 1 with his own funds and the defendant no.1 has thereafter sold it is of no avail. Thus, the only issue which arises is with respect to the family settlement inasmuch as if the father in his lifetime has divested himself of any right in the property, on his demise, the plaintiff would not inherit any right.”

7. Thereafter, the learned Single Judge in para 9 of the impugned order framed the following issues:

“9. i) Whether the father of the parties as exclusive owner of the property could have in law divested himself of the property in favour of his sons i.e. defendants no.1 to 3 without a registered document? OPD

ii) If the above issue is answered in favour of the defendants, whether there was any family settlement as alleged and if so to what effect? OPD”

8. Further, the learned Single Judge clarified in para 11 (two consecutive paras are both numbered 11) as under:

“11. It is made clear that no issue with respect to the shares of parties has been framed since if the above issues are decided against the defendants it is not in dispute that the parties would have 1/6th share each in the house. On the contrary if the

aforesaid issues are decided in favour of the defendants, the plaintiffs would have no share.

11. It has also been informed that the defendants, in admission and denial of documents, have admitted a number of documents in which according to the counsel for the plaintiffs the defendants have admitted to the property being a joint property. It is also informed that the defendants no. 1 to 3 have obtained a Relinquishment Deed from defendant no. 4 of undivided share in favour of defendants no. 1 and 2.”

9. The learned Single Judge in the impugned order noted that admission/denial of documents had taken place and he considered it appropriate to hear counsel on Issue No.1 with reference to the admitted documents before listing the suit for trial, which according to the learned Single Judge, would arise in the event that Issue No.1 is decided against the Plaintiffs.

10. The grievance of the Defendants in the suit, i.e. the Appellants and Respondent No.3 herein, is that the learned Single Judge has expressed a final view that the father of the parties was the exclusive owner of the suit property, when it had been pleaded by the Defendants that they had, in fact made a contribution in the construction of the suit property. It is submitted that the observation of the Single Judge that there was “no need to frame any issues” in respect of the aforesaid contributions as it was barred under law, was made without specifying the law under which it would be barred. The rights of the Defendants flowing from Section 51 of the Transfer of Property Act, 1882, and the specific pleas in relation to the family arrangement dated 28th January, 1984, on which both parties were relying, were not even taken note of, in rendering the above findings.

11. Mr. Sanjay Poddar, learned Senior Counsel appearing for the Appellants/ Defendants, in support of his contentions placed reliance on the decisions in *Pratima Sinha v. Shashi Kumar Narain Sinha (2004) 13 SCC 599*, *Alka Gupta v. Narender Kumar Gupta (2010) 10 SCC 141* and *Sejal Glass Limited v. Navilan Merchants Private Limited (2018) 11 SCC 780*. His submission was that the impugned order, to the extent that it renders a finding on some of the critical issues in the partition suit ought to be set aside and the matter must be sent back to the learned Single Judge for framing issues afresh.

12. Mr. Jasmeet Singh, learned counsel appearing for the Respondent Nos. 1 and 2 / Plaintiffs, drew the attention of the Court to the relinquishment deed executed by the Appellant No.3/Defendant No.4 in favour of the Appellant Nos. 1 and 2 (Defendant Nos. 1 and 3), of her 1/6th share in the suit property. He submitted that inasmuch as this document dated 1st December, 2014 was placed by the Plaintiffs themselves on record, it amounted to a clear admission that each of the siblings was entitled to 1/6th share of the suit property. He referred to the averments in this regard in the written statement filed by the Defendants, and particularly para 31 thereof.

13. While the first part of para 31 of the written statement does make a reference to the above relinquishment deed, in the remaining part it is averred that such a relinquishment deed is required by the DDA for conversion of property from leasehold to freehold and that the Plaintiffs, in order to prolong the matter, raised a demand for money in lieu thereof. It is

stated how the application in that regard has been pending since 2012 with the DDA. Further, since the demand of money by the Plaintiffs did not get fructified, the present suit was filed.

14. Whether the above averments amount to a clear admission by the Defendants in the manner suggested by the Plaintiffs, that each of the sibling is entitled to 1/6th share, is a matter that is to be examined upon framing an issue in that regard.

15. The Court is of the view, after considering the submissions of learned counsel for the parties, that indeed the learned Single Judge appears to have foreclosed some of the contentious aspects of the partition suit at the initial stage by the impugned order, without framing issues in that regard and permitting parties to lead evidence in support of their respective cases.

16. The finding in para 8 of the impugned order that with the agreement of the purchase of the property being in the name of the father of the parties, the plea of Defendant Nos. 1 to 3 that they contributed, along with the father, to the construction of the property, “would not vest the Defendants 1 to 3 any rights in the property and the property would remain of the father”, is one such finding which ought not to have been rendered at the admission stage without any evidence being led by the parties.

17. The law in this regard has been settled by the Supreme Court in the cases referred to hereinbefore. In *Pratima Sinha v Shashi Kumar Narain Sinha* (*supra*), the Supreme Court was considering a case where the trial Court

dismissed the suit on a preliminary ground without framing issues under Order XIV Rule 1 of the Code of Civil Procedure ('CPC'). In para 9, it was observed as under:

“10...We are of the view that the Subordinate Judge should have framed the issues arising out of the pleadings in accordance with the procedure of Order 14 Rule 1 of the Civil Procedure Code. After framing all the issues, if the trial Judge is of the view that any of the issues raised would dispose of the suit either wholly or in part then the Judge can on the basis of the provisions of the suit either wholly or in part then the Judge can on the basis of the provisions of Order 14 Rule 2 decide such issue. The Subordinate Judge not having followed this procedure, we do not think that it would be appropriate to uphold the decision of the Subordinate Judge.”

18. In *Alka Gupta v Narender Kumar Gupta* (*supra*), the Supreme Court explained in para 27 as under:

“27. Code of Civil Procedure is nothing but an exhaustive compilation- cum-enumeration of the principles of natural justice with reference to a proceeding in a court of law. The entire object of the Code is to ensure that an adjudication is conducted by a court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court. There are no short-cuts in the trial of suits, unless they are provided by law. A civil suit has to be decided after framing issues and trial permitting the parties to lead evidence on the issues, except in cases where the Code or any other law makes an exception or provides any exemption.”

19. Thereafter, it enumerated the circumstances under which the civil suit could under the CPC be dismissed without a trial. One of the circumstances was set out in para 28 (d) as under:

“(d) Dismissal under Order 14 Rule 2(2) where issues both of law and fact arise in the same suit and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only and it tries such issue relating to jurisdiction of the court or a bar to a suit created by any law for the time being in force first and dismisses the suit if the decision on such preliminary issue warrants the same.”

20. The Supreme Court clarified that where summons had been issued for settlement of issues, a summary course could be adopted only by the parties when their pleaders are present and none of them objects to such a course. In para 30, it was explained as under:

“30. But where the summons have been issued for settlement of issues, and a suit is listed for consideration of a preliminary issue, the court cannot make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, without a trial and on that basis dismiss a suit. A suit cannot be short-circuited by deciding issues of fact merely on pleadings and documents produced without a trial.”

21. More recently, in *Sejal Glass Limited v. Navilan Merchants Private Limited* (*supra*), the Supreme Court has reiterated that Order XIV Rule 2 CPC vests discretion in the Court to deal with an issue of law, which could be tried as a preliminary issue and further stated that “this provision would apply after the issues are struck i.e. after written statement is filed”.

22. In light of the legal position explained, the Court is unable to sustain the impugned order dated 29th April of the learned Single Judge in I.A. Nos.17420/2018 and 17421/2018 in CS (OS) No.647/2018 and accordingly sets it aside. Both the aforementioned IAs will now be placed before the learned Single Judge for directions on the date that the suit is next listed, for

framing/striking issues afresh. Brief reasons may be given by the learned Single Judge in the event any of the issues proposed by the parties is not accepted.

23. The appeal is disposed of in above terms. The pending applications are also disposed of. No costs. The record of the suit be returned forthwith.

S. MURALIDHAR, J.

TALWANT SINGH, J.

NOVEMBER 28, 2019

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