* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 10th October, 2019.

\+ **CS(OS) 479/2016 & IA No.14077/2019 (u/O XIV R-5 CPC)**

NEELAM & ORS .... **Plaintiffs**

Through: Mr. Rakesh Tiku, Sr. Advocate with Mr. Rajesh Dabas and Mr. Lokesh Bhardwaj, Advocates

Versus

PRADEEP BIRMAN & ORS ..... **Defendants**

Through: Mr. Ashok Drall and Mr. Chirag Madan, Advocates for R-1
Mr. Ajay Shanker, Advocate for R-2
Mr. Vipin Jai and Mohammad Nausheen Samar, Advocates for R-3
Mr. Dhirandar Mathur, Advocate for R-4 & R-9

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff No.1 Smt. Neelam, for herself and as mother and natural guardian of her son Master Anshul impleaded as plaintiff No.2, instituted this suit against her husband Pradeep Birman and the Managers of Punjab National Bank, Village Paprawat, Delhi and Punjab National Bank, Najafgarh Road, Nangloi, Delhi, for the reliefs of (i) declaration that 2/3rd share equal to Rs.2,17,00,000/- out of the total amount of Rs.3,26,00,000/- lying in the account in the joint name of plaintiff No.1, Neelam and her husband defendant No.1 Pradeep Birman with the Punjab National Bank, Village Paprawat and Najafgarh Road, Delhi belongs to the two plaintiffs; and, (ii) for mandatory injunction directing the said banks to, from the said

accounts, pay the said sum of Rs.2,17,00,000/- to the plaintiffs.

2. The suit came up first before this Court on 22nd May, 2014 as IPA No. 19/2014 and which IPA was allowed and the suit registered on 16th September, 2016.

3. The counsels state that there was an interim arrangement directing the banks to keep the remaining balance amount i.e. Rs.1,35,00,000/- in the subject accounts in the form of FDR and the said amount is still lying with the banks in the fixed deposit account.

4. Pleadings were completed and vide order dated 24th July, 2017, the following issues were framed in the suit:

> *"i) Whether the suit is barred by Section 8 of the Hindu Succession Act? (OPD-I)*
>
> *ii) Whether the plaintiff is entitled to a declaration and a decree in his favour and against the defendant No.1 declaring him 2/3rd shareholder from a total amount of Rs.3,26,00,000/- of the grand-father of defendant No.1 pursuant to sale of land in the year 2010? (OPP)*
>
> *iii) Whether the plaintiff is entitled to the mandatory and/or permanent injunction in respect to the claim in issue No.(ii)? (OPP)*
>
> *iv) Relief."*

and the parties relegated for recording of evidence.

5. I.A. No. 731/2018 was filed by Bhagwani Devi, Krishan Kumar, Ashok Kumar, Kamlesh, Mukesh Devi and Ritu, being the grandmother, sister, uncles and aunt of defendant No. 1 Pradeep Birman for impleadment in the suit and which was allowed by the Joint Registrar vide order dated 2nd

April, 2018.

6. The plaintiff preferred O.A. No. 65/2018 against the said order of the Joint Registrar and which came up before this Court on 14th November, 2018, when the following order was passed:-

1. *This Chamber Appeal, being O.A.No.65/2018 along with IA No.8338/2018 for condonation of delay of ten days in filing thereof, preferred by the plaintiffs against the order dated 2nd April, 2018, is for consideration.*
2. *The counsel for the plaintiffs/appellants has been heard.*
3. *Vide order dated 2nd April, 2018, the application of Smt. Bhagwani Devi, Shri Krishan Kumar, Shri Ashok Kumar, Ms. Kamlesh and Ms. Mukesh, for impleadment in this suit, was allowed.*
4. *The counsel for the plaintiffs/appellants has argued, (i) that the appellant/plaintiff no.1, who is the mother of her minor son appellant/plaintiff no.2, has filed this suit against her husband defendant no.1 (who is the father of the appellant/plaintiff no.2), for declaration that 2/3rd share equal to Rs.2,17,00,000/- out of the total amount of Rs.3,26,00,000/- transferred to the joint account of the appellant/plaintiff no.1 and the defendant no.1, by the grandfather of the defendant no.1, belongs to the plaintiffs/appellants and the plaintiffs/appellants are entitled thereto and seeking a direction to the defendants no.2&3 banks, in which the said amount is now lying, to pay the share of the plaintiffs/appellants; (ii) that the grandfather of the defendant no.1, on sale of one of the ancestral properties, had distributed the sale proceeds equally to his two sons and to the plaintiffs/appellants and the defendant no.1, by way of gift; (iii) that the defendant no.1 has remarried and attempted to transfer the said monies in which he had only 1/3rd share to his other accounts, resulting in the plaintiffs/appellants filing this suit; (iv) that the defendant no.1 is contesting the suit, claiming that the monies belong to him only and*

further claiming that the property which the grandfather had sold and sale proceeds whereof were so distributed, was the self acquired property of his grandfather and the plaintiffs/appellants have no share therein; (v) that the applicants, whose application under Order I Rule 10 of the Code of Civil Procedure, 1908 (CPC) has been allowed, are grandmother, uncles and aunts of the defendant no.1, who claim that the property, sale proceeds whereof were deposited in the joint bank account of the plaintiffs/appellants and the defendant no.1, was ancestral property and they also have a share in the sale proceeds thereof; and, (vi) however the claim of the plaintiffs/appellants in the plaint in the present suit is of the grandfather of the defendant no.1 having gifted the amount of the sale proceeds and thus the applicants who have been ordered to be impleaded have no locus to be impleaded in the present suit and are neither necessary nor proper parties.

5. *Though the counsel for the plaintiffs/appellants has argued that the grandfather of the defendant no.1 had gifted the monies aforesaid to the plaintiffs/appellants and the defendant no.1, but the counsel for the plaintiffs/appellants upon being asked to show the plea of gift in the plaint, has been unable to do so. On the contrary, in paras 4 &5 of the plaint, the plaintiffs/appellants have claimed entitlement to the said monies on the basis of same being the share of the plaintiffs/appellants in the said monies. The question of the plaintiffs/appellants having a share in the said monies would arise only if the property had the character of a Hindu Undivided Family (HUF) property. Else, the question of the plaintiffs/appellants, being the wife and son of the defendant no.1, having a share therein would not arise.*

6. *I have thus enquired from the counsel for the plaintiffs/appellants, whether not the reliefs claimed in the suit are in the nature of seeking partition and if it is so, why would the applicants who have been ordered to*

be impleaded, not have a share in the property of which partition is sought.

7. *The counsel for the plaintiffs/appellants states that he has not filed the present suit and the plaint was drafted by some other advocate and thus has this lacuna. He also states that the appellant/plaintiff no.2 has also filed a suit for partition which is pending before the Dwarka Courts.*

8. *On enquiry, whether the appellant/plaintiff no.2 in the suit for partition has included the sale proceeds aforesaid, the answer is in the negative. On the contrary it is stated that the partition suit also has some lacunas.*

9. *I have also enquired from the counsel for the plaintiffs, whether the grandfather of the defendant no.1 had given the amounts to the two sons also along with their wives and children, and what is there to show that the monies received in the account were by way of gift.*

10. *The counsel for the plaintiffs/appellants states that that will be decided during evidence.*

11. *Evidence is not to be led on matters which are not subject matter of pleading. Moreover, issues have been framed in the present suit on 24th July, 2017 and no issue, of the amount being a gift, has been framed. On the contrary, the issues also are on the basis of the plaintiffs/appellants having a share in the sale proceeds of the property, treating the property to be of HUF.*

12. *The counsel for the plaintiffs/appellants states that he may have to apply for amendment of issues.*

13. *Suits which are not maintainable cannot be kept pending in the hope that someday they will be amended to be maintainable.*

14. *It has further been enquired from the counsel for the plaintiffs/appellants, that considering that the nature of the claim in the present suit is of partition, why should the said claim be also not tried in the substantive*

partition suit stated to be pending.

15.The counsel then states that he has appeared for the first time on the last date only.

16.Though the suit itself appears to be misconceived, but on request of the counsel for the plaintiffs/appellants, list on 27th November, 2018.

7. Thereafter, the plaintiffs filed IA No. 1039/2019 for amendment of the plaint to incorporate the following pleas in the plaint:-

> *"5. That Shri Ram Singh grandfather of defendant no.1 in 1971 by virtue of registered sale deeds dated 17.9.1971 had jointly purchased agriculture land measuring 197 Kanal 37 Marla (having 1/2 share) in Village Harsaru, Teh. Gurgaon, Haryana. The said property was his self acquired property and subsequently vide sale deed dated 19.11.2010 Shri Ram Singh had sold the aforesaid land and had received Rs. 10,01,56,250/- as sale consideration through cheque apart from that he had also received certain amount in cash.*
>
> *5A. That the aforesaid sale consideration received by Shri Ram Singh was gifted by him in three separate shares to his sons and their family i.e. Krishan Kumar and Ashok Kumar and since his third son Late Jagbir Singh, who had pre-deceased him, therefore, his share was gifted to defendant no.1, plaintiff no.1 and plaintiff no.2 and for this purpose a joint account of plaintiff no. 1 and defendant no. 1 was also opened in defendant no.2 bank in January, 2010 only. It is stated that the aforesaid gift was made by Shri Ram Singh in a Panchayat held in his village i.e. Kharkhari Rond, wherein he had also invited his relatives. That in the said panchayat held in November, 2010, after the sale of the land and receipt of the sale consideration, Shri Ram Singh gifted*

Rs.3.26 crore each to Shri Krishan Kumar and his family and to Shri Ashok Kumar and his family and Rs.3.26 crore was given to plaintiffs and defendant no.1 out of which plaintiffs no.1 and 2 have 2/3rd Share.

5B. That out of the total amount of Rs.3.26 crore gifted to plaintiffs and defendant no.1; Rs.2,78,79,166/- was deposited through cheque/draft/pay order on 26.11.2010 with defendant no.2 i.e. Punjab National Bank, Branch Paprawat, Delhi in the joint account no. 3081000100080922 and the balance amount was paid in cash which was kept by defendant no.1. That, thereafter, the defendant no.1 without the knowledge of plaintiffs had withdrawn/transferred around Rs.75 lakhs from the aforesaid joint account to his personal account bearing account no.3081000100923795 which was opened on 21.10.2011 in his individual name.

5C. That after transfer of around Rs.75 lakhs to his individual account bearing no. 3081000100923795 the defendant no.1 has withdrawn around Rs.25 lakhs from the aforesaid account till 9.12.2011 and is misusing the same on womanizing and liquor despite the fact that the plaintiffs have equal share in the said amount gifted to them equally by Shri Ram Singh."

8. The aforesaid application for amendment of the plaint came up before this Court on 16th May, 2019, when after the Senior Counsel appearing for the plaintiffs had been heard at length, he withdrew the application with liberty to take appropriate pleas in the replication to the written statement of newly impleaded defendants. Accordingly, IA No. 1039/2019 was dismissed as withdrawn with liberty in accordance with law.

9. The Senior Counsel for the plaintiffs on 16th May, 2019, under instructions, also withdrew the Chamber Appeal being OA No. 65/2018, which was dismissed as withdrawn.

10. The plaintiffs now, in the replication to the written statement of the newly impleaded defendants, have taken the plea of the monies with respect to which the relief of declaration and injunction is claimed in this suit, having been gifted by the grandfather of defendant No.1, to the defendant No. 1 and the two plaintiffs in equal share.

11. The Senior Counsel today appearing for the plaintiffs states that the plaintiffs have yesterday filed an application for amendment of the issues framed on 24th July, 2017 but which has not been listed and states that the proceedings be adjourned for the said application to come on record.

12. Finding that though the suit, as far as back on 14th November, 2018 was found to be not maintainable, but acceding to the requests of the plaintiffs, adjournment was granted and the plaintiffs thereafter have been adopting some strategy or the other to keep the suit alive, adjournment has been refused and counsel for the plaintiff has been asked to hand over a copy of the application in the Court. The application is taken on record and be got numbered.

13. The plaintiffs in the said application seek framing of the following additional issues:-

> "Whether Late Ram Singh had gifted the suit am amount of Rs. 3.26 crores to plaintiffs and defendant No.1, if so to what effect. OPP".

"Whether the defendant No.4 to 9 are entitled for any suit amount or other amount? OPD".

14. The Senior Counsel for the plaintiff has been heard on the application for amendment of the issues. He has referred to ***Anant Construction (P) Ltd. Vs. Ram Niwas*** 1994 SCC OnLine Del 615 where it has been held, (i) replication is a pleading of plaintiff in answer to defendant's plea; (ii) a replication to written statement is not to be filed nor permitted to be filed ordinarily, much less in routine; a replication is permissible in three situations; firstly, when required by law; secondly, when a counter claim is raised or set off is pleaded by defendant; thirdly, when the Court directs or permits a replication being filed; (iii) Court would direct or permit replication being filed when having scrutinized plaint and written statement, the need of plaintiff joining specific pleading to a case specifically and newly raised in written statement is felt; a mere denial of defendant's case by plaintiff needs no replication; (iv) subsequent pleadings are not substitute for amendment in original pleadings; (v) a plea inconsistent with the pleas taken in original pleadings cannot be permitted to be taken in subsequent pleadings; and, (vi) a plea which is foundation of plaintiff's case or essentially a part of cause of action of plaintiff, in absence whereof the suit will be liable to be dismissed or the plaint liable to be rejected, cannot be introduced for the first time by way of replication.

15. In my opinion, the judgment cited is against, rather than in favour of the plaintiffs. In fact, I have enquired from the Senior Counsel for the plaintiffs, whether the plaintiffs filed any replication to the written statement of the defendant No. 1, originally impleaded in the suit and in the said

replication take any such plea.

16. The Senior Counsel for the plaintiffs states that no such plea or explanation of gift was contained in any of the replication earlier filed prior to the framing of issues on 24th July, 2017.

17. The same lets the cat out of the bag. The plea, of the monies in the bank account with respect to which the suit has been filed, being a gift, is an afterthought. The plaintiffs, after finding during the hearing of 14th November, 2018 that on the basis of the claim made in the suit as originally filed, the share, even if any of the plaintiffs would stand substantially reduced, with the newly impleaded defendants also having a share on the basis of the claim made by the plaintiffs, now want to change the basis of their claim and want to set up an entirely new case, inconsistent with that originally filed.

18. Though the Senior Counsel for the plaintiffs has contended that what is stated in the replication to the written statement of the newly impleaded defendant is merely by way of explanation, but from the following paragraphs of the plaint it is evident that the claim of the plaintiffs for share in the monies was on the premise of monies being the sale proceeds of ancestral properties in which the plaintiffs also had a share. The said paragraphs are as under:-

> *"4. That father of the defendant No.1 had already expired and the grandfather of the defendant is still alive.*
>
> *5. That in the month of October/November, 2010, the grandfather of the defendant No.1 sold the ancestral property i.e. agriculture land and had given the share to the defendant No.1, plaintiff No. 1 and his minor son Master*

Ansul i.e. plaintiff No.2 as the share, which is about 3,26,00,000/- (Rupees Three Crores Twenty Six Lacs only) approximately and out of the said amount, Rs. 2,78,79,166 was deposited through Cheque/Draft/pay order No. 01917545 on 26.11.2010 with defendant No.2 i.e. Punjab National Bank, Branch Paprawat, Delhi in Joint Account No. 3081000100080922 and remaining cash amount out of Rs. 3,26,00,000/- was kept by the defendant No.1.

7. ….It is pertinent to mention here that the defendant No.1 has got the share of himself as well as of the plaintiffs and thereafter the whereabouts of the defendant is not traceable.

13. ….It is pertinent to mention here that the defendant No.1 has spent his share on womanizing and liquor and now is trying to withdraw the share of the plaintiffs which is lying in the account of defendant No.1, further more the share is from the ancestral property i.e. agricultural land not owned by the defendant No. 1 himself.

19. The defendant No.1, in his written statement pleaded as under:-

"B. That the boot is in other leg. It is submitted that the plaintiff no.1 has cheated the defendant no.1 badly. The plaintiff no.1 hetched a conspiracy with her family members to grab the money of grandfather of the defendant no. 1 who was a mere custodian of the amount handedover by his grandfather.

C. That present suit is not maintainable as the same is hit by provision of section 8 of Hindu Succession Act, as the money given by grandfather during his life time to the answering defendant by selling his self acquired property which is neither ancestral nor self acquired property of *answering defendant. It is submitted that grandfather of defendant no.1 had purchased an agricultural land/self acquired agricultural land in 1971 comprising of half share in land measuring 160 Kanal 5 marla vide zamabandi 2005-06 situated in in the village Harsaru tehsil & Distt. Gurgaon HR. It is submitted that the grandfather of defendant no.1 had sold his said land and out of said sale proceed a amount of Rs.2,78,79,166/- was given in the custody of defendant no.1 for handling the same by grandfather with the help of defendant no.1 as the grandfather was an old person aged about 85 years and he was not so abled to come and go to bank without the help of others and for safety of the money. The defendant no.1 had agreed upon and assured the grandfather that the said amount will be returned back to him as and when the grandfather will require the same from time to time as and when the grandfather would demand and sought withdrawal of the said amount according to his wishes, needs and emergency.*

c. That the grandfather kept/deposited the abovementioned amount of Rs.2,78,79,166 in PNB bank account no.3081000100080922 of answering defendant/grandson under the impression of defendant no.1 individual account only. It is submitted that on 4-12-10 at the instructions of the grandfather Two Crores of Rupees out of the said total amount was deposited in the fixed deposits in five FDRs (three for 50,00,000 each and two for 25,00,000/- each) in the name of defendant no.1 with the facility of releasing of the interest in saving account.

e. That accordingly the grandfather had got withdrawn the money through grandson/defendant from his account from *time to time and the grandfather got withdrawl a sum of Rs.1.5 crore approximately."*

20. The plaintiffs in replication to the aforesaid written statement, again pleaded as under:-

> *"A. ....It is submitted that the deceased grandfather of the defendant No.1 had given the share of Rs. 3,26,00,000/- after selling out the ancestral agricultural property to the defendant No.1 and the plaintiff and her minor son and Rs. 2,78,79,166/- was deposited by DD/Cheque in the joint account of the defendant No.1 and the plaintiff No.1 and remaining was in cash.*
>
> *B. That the contents of para No. (b) of the preliminary objections are wrong and denied. It is denied that the boot is in other leg. It is denied that the plaintiff No.1 has cheated the defendant No.1 badly. It is specifically and vehemently denied that the plaintiff hatched a conspiracy with his family members to grab the money of the grandfather of the defendant No.1 who was a mere custodian of the amount handed over by his grand father. It is submitted that the grandfather of the defendants No. 1 have sold the ancestral agricultural land and given Rs. 3,26,00,000/- as share of the defendant No.1 and the plaintiff No. 1 & 2.*
>
> *C. ....It is submitted that the Section 8 of Hindu Succession Act is not applicable in the instant case. It is submitted that the said properties are ancestral properties and the plaintiff being the legal heir class-I, has every right, title and interest as coparcenary rights._It is submitted that the grandfather of the defendant no.1 sold the ancestral property and had given the share to the defendant No.1, plaintiff No.1 and his minor son as the share, which was*

about Rs. 3,26,00,000/- and out of the said amount Rs.2,78,79,166/- was deposited in the joint account of the defendant No. 1 and the plaintiff No. 1 and thereafter the defendant No. 1 withdrawn/transferred some amount from joint account to his personal accounts bearing Nos. 3081000100923795 and account No. 3073000101341342. The defendant No. 1 has transferred the amount in between the accounts with the defendant No. 2 & 3 i.e. PNB Branch Paprawat and PNB Branch Nangloi, Delhi. The contents of the plaint may kindly be read as reply to this para.

21. Thus, it is evident from the pleadings of the plaintiff that the claim of the plaintiffs to the monies subject matter of this suit was on the basis of the same being the share of the plaintiffs and defendant No.1 in the sale proceeds of ancestral property in which the plaintiffs and the defendant No.1 also had a share. The plaintiffs cannot now in the replication to the written statement of the newly impleaded defendants set up inconsistent plea, of the monies having been gifted by the grandfather of the defendant No.1 to the defendant no.1 and the plaintiffs.

22. In fact, IA No.1039/2019 earlier filed by the plaintiffs for amendment of the plaint to the same effect was withdrawn only for the reason of the said application having been found to be in withdrawal of the admissions earlier made, and the plaintiffs cannot be permitted by way of replication to do what they are not entitled to do by way of amendment of the plaint.

23. Thus, whichsoever way one looks at, the suit, in the nature of partition of proceeds of ancestral property, cannot be entertained specially when another suit for partition is already pending.

24. Moreover, since the plaintiffs now are wanting to assert claim in the money by way of gift and not by way of share in sale proceeds of ancestral property, and asserting which right no claim has been made in the plaint, the suit, for this reason also is liable to be dismissed.

25. The suit is accordingly dismissed.

26. However since interim order in this suit has continued for long, to enable the plaintiffs to either file a fresh suit for partition or amend the plaint in the earlier suit, it is deemed appropriate to, notwithstanding the dismissal of this suit, extend the operation of the said interim arrangement till 30th November, 2019. However if by 30th November, 2019, there is no order from any other Court with respect to the monies lying with the Punjab National Bank, Branch Paprawant and Punjab National Bank, Branch Nangloi, Delhi, the managers of the respective banks shall be entitled to deal with the same as per their norms.

27. No costs.

28. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

OCTOBER 10, 2019

Rhc..

(corrected & released on 24th October, 2019)