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

% **Date of decision: 26th August, 2021**

+ **CM(M) 556/2021**

PRAVESH DHAWAN & ORS.

..... Petitioners

Through: Mr. Peeyoosh Kalra, Mr. Sudhindra
Tripathi, Mr. Garvil Singh and
Mr. Rohan Kapoor, Advocates

versus

JATIN DHAWAN

..... Respondent

Through: Ms. Padma Priya, Advocate

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

[VIA VIDEO CONFERENCING]

AMIT BANSAL, J. (Oral)

CM No. 28120/2021(for exemption)

1. Allowed, subject to all just exceptions.
2. The application is disposed of.

CM(M) 556/2021 and CM No.28119/2021 (for interim relief)

3. The present petition under Article 227 of the Constitution of India impugns the order dated 28th July, 2020 passed by the learned District Judge-03, South East, Saket Courts, New Delhi in CS/210822/2016 whereby the application filed by the petitioners/defendants under Order 7 Rule 11 of the Civil Procedure Code (CPC), 1908 has been dismissed.
4. The case pleaded by the respondent/plaintiff in the suit was that there was a family settlement dated 28th January, 2012 that was executed between the parties to deal with the various properties as mentioned therein and that

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the petitioners/defendants did not abide by the terms of the said family settlement, which resulted in the respondent/plaintiff filing the suit from which the present petition arises. The following reliefs were sought in suit, (i) Declaration of ownership rights in terms of the aforesaid family settlement; (ii). declaration that the gift deeds dated 9th October, 2009 and 29th October, 2009 executed by the petitioner in favour of petitioners No. 2 and 3 are null and void; and (iii) Injunction against petitioners from creating third party interest in respect of the suit property. The said suit was contested by the petitioners/defendants by filing the written statement claiming that the properties in question were self-acquired properties of the petitioner No.1 and accordingly, the gift deeds executed in favour of petitioners No.2 and 3 are valid.

5. An application under Order 7 Rule 11 of the CPC was filed on behalf of the petitioners claiming that the above said suit was not maintainable, by raising the following three grounds:

- (i) The family settlement dated 28th January, 2012 was not registered and therefore, no rights are created under the same. Accordingly, the suit which is entirely based on the said family settlement is not maintainable.
- (ii) The above said suit is barred under Order 2 Rule 2 of the CPC as the plaintiff No. 1 had filed a previous suit of injunction against the petitioners/defendants and the reliefs claimed in the present suit could have been claimed in the said earlier suit.
- (iii) That the above said suit was barred under Section 34 of the Specific Relief Act, 1963, as the respondent/plaintiff was not in

possession of the suit property and the claim of possession has not been made in the above said suit.

6. The above three contentions raised by the petitioners/defendants were rejected by the impugned order dated 28th July, 2020.

7. The same grounds as raised before the Trial Court in support of the Order 7 Rule 11 application, have been made before this Court by the learned counsel appearing on behalf of the petitioners. It is submitted that the Trial Court has misapplied the provisions of law to the facts of the present case and hence, the order of the Trial Court is erroneous and should be set aside. Attention of the Court has been drawn to the terms of the family settlement to contend that the said document indeed creates rights and interest in the property and therefore, is required to be compulsorily registered. Since the suit is based on this unregistered document, the suit was not maintainable. It is further contended that the present suit was barred under Order 2 Rule 2 of the Civil Procedure Code as the reliefs sought in the said suit should have been claimed in the earlier injunction suit filed on behalf of the plaintiff No. 1 against the petitioners.

8. It is contended that earlier the suit property was given on lease and the tenant was paying rent to the respondent/plaintiff and therefore, the respondent/plaintiff could be said to be in constructive possession of the said property. However, after the tenant stopped paying rent, the respondent/plaintiff could not be said to be in possession and therefore, in view of the fact that the relief for possession has not been claimed in the suit, the present suit is barred under Section 34 of the Specific Relief Act.

9. Learned counsel appearing on behalf of the respondent on advance notice submits that the present petition should be dismissed as the petitioners are guilty of gross concealment of facts. It is submitted that on 7th July, 2021 an application filed under Order 39 Rule 10 of the CPC by the respondent/plaintiff has been allowed and in terms of the said order, the petitioners have been directed to deposit a sum of Rs.82,77,612/- in form of an interest bearing FDR in the name of the Court, towards rent collected by them from the tenant. The matter is coming up before the Trial Court on 27th August, 2021 and that is why the present petition has been filed and listed one day before the said date of hearing. It is further contended that the present petition is barred by delay and laches as the impugned order sought to be challenged in the present petition was passed as far back as on 28th July, 2020. It is further submitted that detailed findings have been given by the learned Trial Court in respect of all the grounds raised by the petitioners before the Trial Court as well as in the present petition.

10. In rejoinder, counsel for the petitioner submits that a separate appeal has already been filed by the petitioners against the order dated 7th July, 2021 and therefore, no need was not felt to disclose the said order in the present proceedings. On delay, it is submitted that delay has to be condoned on account of the order passed by the Supreme Court in *Suo Moto Writ Petition (Civil) No. 3/2020* dated 23rd March, 2020 which has been continued on 8th March, 2021 and is still in operation.

11. I have considered the rival submissions. Undoubtedly, there is an inordinate delay in filing the present petition impugning an order that was passed on 28th July, 2020. No reliance can be placed on the orders passed by the Supreme Court in *Suo Moto Writ Petition (Civil) No. 3/2020* as the *CM(M)556/2021*

scope of the said orders was only to save limitation, where time limit has been fixed under various statutes. In the present case, the petitioners were actively contesting the suit before the Trial Court all this while and therefore, it cannot be believed that they were prevented from filing the present petition earlier on account of the pandemic. There is merit in the contention of the respondent that the present petition was only filed on account of the order dated 7th July, 2021 passed by the Trial Court in terms of which the petitioners were directed to deposit a sum of Rs.82,77,612/- towards rent collected by them from the tenant. Since the petitioners failed to deposit the said amount and the matter was coming up before the Trial Court on 27th August, 2021, just a day before the said date, the present petition was got listed before this Court. It is a settled position of law that while invoking jurisdiction of the Court under Article 227 of the Constitution of India the party has to approach the Court with clean hands and without concealment of any facts. In the present case, the petitioners ought to have disclosed in the present petition the order dated 7th July, 2021 passed by the Trial Court, even if petitioners had filed an appeal against the said order. Even in the oral submissions made on behalf of the petitioner, no reference was made to the said order.

12. Even though the present petition deserves to be dismissed on the ground of concealment of facts and delay, I have still considered the petition on merits as well. In respect of each of the grounds raised by the counsel for the petitioners before this Court, detailed findings have been given by the Trial Court. In respect of ground (i) taken above on maintainability of the suit on account of non-registration of the settlement deed, the Trial Court has observed as under:

“10. From the aforesaid observations of Hon'ble Supreme Court of India, it is clear that all the family settlement do not necessarily requires compulsory registration as per Section 17 of the Indian Registration Act and it depends upon the terms and citations of the said settlement. In the instant case, the family settlement dated 28.01.2012 does not create or convey any right in any of the property but rather it is a kind of an agreement between the parties as to how the properties mentioned therein will be dealt with or their interest will be transferred from one to other member of the family. There are various clauses which indicate that further steps are required to be taken by the parties for getting the necessary transfer documents executed and registered and therefore, this court is of the considered opinion that said family settlement does not itself create or convey any right, title or interest in or over the suit properties and rather it is an agreement between the parties to divide the properties as per their joint wish. In this regard, I find substance in the submissions of the plaintiff no.2 that the as per 17 (2) (v) of the Registration Act, 1908 such document does not require registration and an agreement to sell is akin to a memorandum of settlement. The rule of estoppel can also be applied depending upon the overall evidence.”

13. In respect of ground (ii) with regard to objection under Order 2 Rule 2, the Trial Court has observed as under:

“8. As regards the objection of Order 2 Rule 2 CPC this court finds the said argument is meritless in view of the fact that the previous suit was filed by the plaintiff no.1 only and whereas the present suit has been filed by plaintiff no.2 also. Therefore, the parties were/are different in both cases. Secondly, the previous suit was for claiming injunction whereas in the instant case, various other reliefs like declaration of ownership, cancellation of gifts deeds etc. have been prayed which are completely different and based on separate causes of action. Therefore, the said provision is not applicable to the present suit.”

14. In respect of ground (iii) taken above, non-maintainability of the suit under Section 34 of the Specific Relief Act, the Trial Court has observed as under:

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“15. It is next argued that the plaintiffs or plaintiff no.2 were not in the possession of the suit property, therefore, the present suit is barred by Section 34 of the Specific Relief Act without seeking the consequential relief of possession. It is the admitted position that all the parties are the family members and some of them are in possession of one or the other properties whereas the other members are not in possession of other portions. It is a settled proposition of law that when there is more than one property, it is not feasible to possess all the joint owners at one point of time and in law all the family members or joint owners are deemed to be de jure or constructive possession of all. Even the portion of the properties in possession of some tenant cannot be said to be in legal possession of any specific owner only. Therefore, the said objection under Section 34 of the Specific Relief Act is not attracted to the present facts of case, at least at this stage of the case.”

15. In my view, all the contentions raised by the petitioners have been duly considered in the impugned order along with the detailed reasoning in support thereof. The Trial Court has rightly held that the issues raised by the petitioners have to be considered in a trial. The scope of application under Order 7 Rule 11 of the CPC is limited only to the extent whether in terms of averments made in the plaint and the documents filed along with the plaint, the suit is maintainable or not. No reference is to be made to the written statement filed on behalf of the defendant. The Hon'ble Supreme Court in the recent judgment of ***Dahiben Vs. Arvindbhai Kalyaniji Bhanusali (Gajra) 2020 (7) SCC 366*** has detailed the scope of Order 7 Rule 11 of the CPC. Relevant portion of the said judgment is set out below:

“23.2. The remedy under Order 7 Rule 11 is an independent and special remedy, wherein the court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of the evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision.

xxx.

23.5. *The power conferred on the court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order 7 Rule 11 are required to be strictly adhered to.*

23.6. *Under Order 7 Rule 11, a duty is cast on the court to determine whether the plaint discloses a cause of action by scrutinising the averments in the plaint [Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I, (2004) 9 SCC 512], read in conjunction with the documents relied upon, or whether the suit is barred by any law.*

xxx.

23.10. *At this stage, the pleas taken by the defendant in the written statement and application for rejection of the plaint on the merits, would be irrelevant, and cannot be adverted to, or taken into consideration. [Sopan Sukhdeo Sable v. Charity Commr., (2004) 3 SCC 137]”*

16. When considered in light of the above parameters, there is no infirmity in the impugned order that requires interference by this Court in exercise of jurisdiction under Article 227 of the Constitution of India.

17. Dismissed with costs of Rs.20,000/-

AMIT BANSAL, J.

AUGUST 26, 2021

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