



#S-9

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Delivered On: 26.05.2023

FAO (OS) 46/2023

DEEPAK BERI

..... Appellant

Versus

ATUL BERI & ORS.

..... Respondents

Advocates who appeared in this case:

For the Appellant : Mr. Akshay Makhija, Senior Advocate along with Mr. Saurabh Seth, Advocates.

For the Respondents : Mr. Jayant K. Mehta, Senior Advocate along with Mr. Samar Kachwaha, Mr. Raghavendra M. Bajaj, Mr. Agnish Aditya, Ms. Shivangi Nanda, Ms. Kavita Vinayak, Mr. Shagun Agarwal, Mr. Anmol Agarwal and Ms. Rini Mehra, Advocates.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE TALWANT SINGH

J U D G M E N T

SIDDHARTH MRIDUL, J. (OPEN COURT)

CM APPL. 17527/2023 (Exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of accordingly.



FAO(OS) 46/2023, CM APPL. 17525/2023 (Stay), CM APPL. 17526/2023 (Condonation of delay in filing the appeal) & CM APPL. 17528/2023 (for permission to file lengthy list of dates along with the present appeal)

1. The present appeal under Order XLIII Rule 1 of the Code of Civil Procedure (CPC), 1908 [*hereinafter referred as 'CPC'*] read with Section 10 of the Delhi High Court Act, has been instituted on behalf of Mr. Deepak Beri, the appellant *herein*, praying as follows:-

“(a) Set aside the Impugned Judgment dated 09.02.2023 and restore the Order dated 06.04.2022 passed by the Learned Single Judge in CS (OS) No. 162 of 2018.

(b) Any other relief, order or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case may also be passed in favour of the Appellant as against the Respondent.”

2. A conspectus of the facts giving the background of the said dispute between the parties is set out hereinbelow: -

- a) In the year 1950-51, Mr. Baldev Sahai Beri, who is the father of Mr. S.K. Beri and the grandfather of Mr. Deepak Beri (*the appellant herein*) and Mr. Atul Beri (*respondent no. 1 herein*), relocated from Village Jassowal, Ludhiana, Punjab, to Delhi. During his lifetime, Mr. Baldev Sahai Beri established a Hindu Undivided Family (HUF) known as S. K. Beri & Bros. Mr. S.K. Beri served as the (Karta) of the aforementioned HUF, and the



following individuals were members of the HUF: Mr. Baldev Sahai Beri, his wife Mrs. Savitri Devi, and his two sons, Mr. Surinder Kumar Beri and Mr. Ravinder Kumar Beri.

- b) On 29th February, 1952, Mr. Baldev Sahai Beri purchased property bearing No. 81, Jor Bagh, New Delhi (hereinafter referred to as the '**Jor Bagh Property**') from the Land & Development Office utilizing the financial resources of the Hindu Undivided Family (HUF), and subsequently, the construction of the aforementioned property was finalized during the period of 1953-1955. Following its completion, both floors of the property were leased out to tenants. Regrettably, Mr. Baldev Sahai Beri passed away without leaving a valid Will on 28th July 1957, and he was survived by his wife, Mrs. Savitri Devi, and his two sons. Following the demise of Mr. Baldev Sahai Beri, a lease agreement for the Jor Bagh Property was duly executed by the Land and Development Office (L&DO) in collaboration with all the members of the aforementioned Hindu Undivided Family (HUF).
- c) Moreover, in the year 1988, an additional floor was constructed on the Jor Bagh Property, and the same was financed by Mr. Deepak Beri, Mr. Atul Beri, and Mrs. Ramesh Beri. This newly added



floor constituted the Second Floor of the Jor Bagh Property, which was occupied by Mr. S.K. Beri and his family, including the Appellant, his spouse, and their children.

- d) Thereafter, on 18th November 1989, Smt. Savitri Devi passed away intestate and her portion of the Hindu Undivided Family (HUF) property was inherited by the surviving coparceners of S. K. Beri & Bros, namely, Mr. Surinder Kumar Beri and Mr. Ravinder Kumar Beri. Subsequently, these surviving coparceners obtained official mutation of the Jor Bagh Property in their joint names on 26th December, 1996.
- e) Furthermore, on 13th July 1997, Mr. Ravinder Kumar Beri also expired intestate, leaving behind his spouse, Mrs. Sunita Beri, and their two children, Mr. Gaurav Beri and Ms. Anuradha Beri.
- f) Later on, in the year 2002, Mr. SK Beri purchased a property bearing No.E-539, Greater Kailash-II, New Delhi (hereinafter referred to as the '**G.K. Property**'), as the living space at the Jor Bagh Property was becoming restricted and inadequate to accommodate the expanding families of both Mr. Deepak Beri and Mr. Atul Beri. The G.K. Property was purchased with the common funds and the superstructure on the property comprised of



Basement, Ground Floor, First Floor and Second Floor. Mr. SK Beri, by a draw of lots, determined that the appellant along with his family shall shift to the G.K. Property and reside there. Subsequently, due to the differences between the parents of the Appellant and the wife of Mr. Atul Beri (*respondent No.1 herein*), the parents also shifted and started residing with the appellant on the Ground Floor of the G.K. Property.

- g) Thereafter, the legal heirs of late Mr. Ravinder Kumar Beri filed a suit for partition being CS (OS) No. 584/04 titled as “*Sunita Beri & Ors Versus Surinder Kumar Beri*”, *inter-alia*, with respect to the Jor Bagh Property. The aforementioned litigation was resolved and all jointly held assets (including the business) were divided and partitioned between the relatives of Mr. Ravinder Kumar Beri, and Mr. S.K. Beri's family and the terms of settlement were recorded in the memorandum of settlement dated 09th December 2014. The said Memorandum of Family Settlement (MoFS) specifically partitioned the Jor Bagh Property and expressly acknowledged and validated the entitlements of each member of S.K. Beri family therein, including the present Appellant; vide order dated 18th March, 2015, passed in the above captioned suit,



the aforesaid Memorandum of Family Settlement was taken on record and a consent decree was passed by the learned Single Judge of this Court.

- h) Subsequently, in the year 2014-15, conflicts emerged amongst the kin of Mr. S. K. Beri and with the agreement of Deepak Beri, Atul Beri, and S. K. Beri; Mr. Manoj Nagrath, a Chartered Accountant, was appointed as an Arbitrator through an Agreement dated 20th January 2016 to resolve all the disputes amidst the aforementioned parties.
- i) With the help of the said Arbitrator, the parties arrived at a settlement vide Memorandum of Understanding dated 17th February, 2016 and the parties formally documented their mutually agreed-upon terms and conditions regarding the allocation of assets pertaining to the S. K. Beri Family's shared business. The fundamental essence underlying this settlement was the equal division of business assets between Mr. Deepak Beri and Mr. Atul Beri, with each party receiving an equal share of 50%.
- j) Pursuant to the Memorandum of Family Settlement, Minutes of the Meeting were recorded with respect to distribution of assets on 14th March, 2016 and thereafter on 30th April, 2016, and a Deed of



Arrangement was also executed between Mr. S. K. Beri, Mr. Deepak Beri and Mr. Atul Beri. Furthermore, in relation to the residential and personal assets, the parties arrived at an oral settlement within the family, ensuring a fair distribution of the assets belonging to the S.K. Beri Family between the Appellant and Respondent No. 1. This distribution encompassed the two properties, i.e. the G.K. Property and Jor Bagh Property, as well as various other assets held by the Hindu Undivided Family (HUF) and Mrs. Ramesh Beri.

- k) Thereafter, Respondent No. 1 filed CS (OS) No. 161/2018 titled as “*Atul Beri Versus Deepak Beri & Ors.*” seeking a decree of possession of the First floor of the G.K. Property and Mr. S.K. Beri filed CS (OS) No. 162/2018 titled as “*Shri S.K. Beri Versus Deepak Beri & Ors.*” seeking possession of the basement and top floor of the GK Property. The entire foundation of these suits rested upon the fact that the G.K. Property was procured through separate sale deeds in the names of Respondent No. 1 and Mr. S.K. Beri. In addition thereto, the Appellant also filed an independent suit being CS (OS) No. 396/2018 titled as “*Deepak Beri Versus S.K. Beri & Ors*”, seeking a declaration and



permanent injunction and alternatively, a partition decree concerning the assets of the Hindu Undivided Family (HUF), including the Jor Bagh Property.

- 1) During the pendency of the abovementioned suits, Mrs. Ramesh Beri, the mother of the appellant and respondent no. 1 expired intestate on 02.10.2018. Respondent No. 1 thereafter asserted that Late Mrs. Ramesh Beri left behind a registered Will dated 21.04.2017 bequeathing all assets [*including assets not owned by her and those which are subject matter of the oral settlement and Family Settlements*] exclusively to the Respondent No. 1 and his family and the Appellant was purportedly entirely disinherited from the estate of Late Mrs. Ramesh Beri. Furthermore, Respondent No. 1 initiated a probate proceeding of the mother's will by filing Test Case No. 20 of 2019, which is currently pending adjudication before the Learned Single Judge of this Court.
- m) Thereafter, on 20.02.2021, Mr. S.K. Beri, passed away and pursuant to the demise of the latter; Respondent No. 1 filed an application under Order XXII Rule 3(1) of the CPC being IA No. 3602 of 2021 seeking substitution as a '*Legal Representative*' of



Late Mr. S.K. Beri. The Learned Single Judge took up the Substitution Application on 06.04.2022 and by consent of the parties, passed the following order. The relevant portion of the order dated 06.04.2022, is extracted herein below for the sake of facility:-

“I.A. No.5108/2022 in CS(OS)396/2022 & I.A. No.5358/2022 in CS(OS) 396/2022 (for condonation of delay)”

1. *For the reasons stated in the applications, the same are allowed.*

I.A. No.3602/2021 in CS(OS)162/2018, I.A.No.5107/2022 in CS(OS)396/2022, I.A. No.5359/2022 in CS(OS) 396/2022

2. **Counsels for the parties jointly submit that Mr. S.K. Beri has expired on 20th February, 2021 leaving behind Mr. Atul Beri and Mr. Deepak Beri as the only surviving legal representatives of late Mr. S.K. Beri.**

3. **Counsel for Mr. Atul Beri submits that late Mr. S.K. Beri had executed a registered Will, in terms of which, his entire estate has bequeathed upon Mr. Atul Beri.**

4. **Senior counsel appearing on behalf of Mr. Deepak Beri submits that the aforesaid Will has been challenged by Mr. Deepak Beri in CS(OS) 183/2022.**

5. **Without prejudice to the rights and contentions of Mr. Atul Beri and Mr. Deepak Beri , both are impleaded as the legal representatives of late Mr. S.K. Beri in the present suits.**

6. *Amended memo of parties be filed by the plaintiff within one week from today.*



7. List on 19th July, 2022.

I.A. No.10801/2019 (u/O-XII R-6 of CPC) in CS(OS) 161/201, I.A.No.5012/2018 (u/O-XL R-1) in CS(OS) 161/2018, I.A. No.5017/2018 (u/O-XL R-1 of CPC) in CS(OS) 162/2018, I.A. No.10682/2019 (u/O-XII R-6 of CPC) in CS(OS) 396/2018, I.A. No.13272/2019 (u/s 151 of CPC) in CS(OS) 396/2018, I.A. No.5358/2022 (u/O-XXXIX R-4 of CPC) in CS(OS) 396/2018, I.A. No.5359/2022 (for condonation of delay of 190 days in re-filing I.A. No. 5358/2022) in CS(OS) 396/2018

8. The I.A. No. 10801/2019 shall be taken up for hearing before the other pending applications on the next date of hearing.

9. List on 19th July, 2022.”

- n) Consequently, in October 2022, Respondent No. 1 filed a review petition seeking a review of the aforementioned consent order dated 06.04.2022, being Review Petition No. 303/2022. The Learned Single Judge heard the Review Petition and vide the Impugned order dated 09.02.2023 allowed the Review Petition and substituted the Respondent No. 1 as the ‘sole legal representative’ of Late Mr. S.K. Beri.
- o) Hence, the present appeal is filed against the judgment and order dated 09.02.2023, passed by the learned Single Judge in Review Petition No. 303/2022, filed in CS(OS) 162/2018 titled as ‘S.K. Beri vs. Deepak Beri & Ors.’



3. In view of the foregoing, and in the backdrop of the controversy between the parties, it would be appropriate to extract in extenso the observations made by the learned Single Judge in the impugned judgment dated 09.02.2023. The relevant paragraphs of the impugned judgment are extracted hereinbelow:-

“REVIEW PET. 303/2022

3. The present review petition has been filed on behalf of the review petitioner, Atul Beri, seeking review of the order dated 6th April, 2022, wherein this Court impleaded both Atul Beri and Deepak Beri as the legal representatives of the deceased plaintiff, Late Shri S.K Beri. Both Atul Beri and Deepak Beri are the sons of Late Shri S.K. Beri.

4. Notice in the present review petition was issued on 18th November, 2022. Reply has been filed on behalf of the defendant no.1, Deepak Beri.

5. The present suit was filed on behalf of Late Shri S.K. Beri against one of his sons, Deepak Beri, and his wife and children seeking the following reliefs:

a) Pass a Decree of Possession in favour of the Plaintiff and against the Defendants with regard the entire Basement and entire Second Floor consisting of Two Bed Rooms with attached toilets and Dressing Rooms, Family Lounge, Guest Toilet, Drawing Cum Dining Room, One Kitchen and the area above the entire second floor including one Servant quarter with Kitchen and Toilet constructed thereon, with right to construct and own any areas/floors on the said terrace and subsequent terraces thereupon and there above, upto the limits of the sky, and car parking space for one car along with proportionate undivided, indivisible and impartible ownership rights in the plot of land measuring 400 sq. yards, bearing No.E-539,



Greater Kailash Part-II, New Delhi-110048.

b) Pass a Decree of Permanent Injunction against the Defendants and in favour of the Plaintiff, permanently restraining the Defendants, their agents, representatives, legal heirs and any other persons claiming a right through them, from transferring, selling, alienating and creating any third party rights with respect to the entire Basement and entire Second Floor consisting of Two Bed Rooms with attached toilets and Dressing Rooms, Family Lounge, Guest Toilet, Drawing Cum Dining Room, One Kitchen and the area above the entire second floor including one Servant quarter with Kitchen and Toilet constructed thereon, with right to construct and own any areas/floors on the said terrace and subsequent terraces thereupon and there above, upto the limits of the sky, and car parking space for one car along with proportionate undivided, indivisible and impartible ownership rights in the plot of land measuring 400 sq. yards, bearing No. E-539, Greater Kailash Part-II, New Delhi-110048.

c) Pass a Decree of Mandatory Injunction against the Defendants and in favour of the Plaintiff, directing the Defendants to not disturb the peaceful possession of the Plaintiff of the entire Basement and entire Second Floor consisting of Two Bed Rooms with attached toilets and Dressing Rooms, Family Lounge, Guest Toilet, Drawing Cum Dining Room, One Kitchen and the area above the entire second floor including one Servant quarter with Kitchen and Toilet constructed thereon, with right to construct and own any areas/floors on the said terrace and subsequent terraces thereupon and there above, upto the limits of the sky, and car parking space for one car along with proportionate undivided, indivisible and impartible ownership rights in the plot of land measuring 400 sq. yards, bearing No. E-539, Greater Kailash Part-II, New Delhi-110048.

6. Deepak Beri filed a written statement



controverting the averments made in the plaint and seeking dismissal of the suit.

7. During the pendency of the present suit, Shri S.K. Beri expired on 20th February, 2021. Thereafter, an application under Order XXII Rule 3(1) of the Code of Civil Procedure, 1908 (CPC) was filed on behalf of Atul Beri seeking his substitution as the legal representative of Late Shri S.K. Beri in the present suit. This Court vide order dated 6th April, 2022 impleaded both Atul Beri and Deepak Beri, being the two sons of Late Shri S.K. Beri, as the legal representatives of Late Shri S.K. Beri. Atul Beri seeks review of the aforesaid order. Admittedly, Late Shri S.K. Beri did not have any other legal heirs.

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11. At the outset, a reference may be made to Section 2(11) of the CPC, which is set out below:

"2. Definitions (11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;"

12. Now, a reference may also be made to Order XXII Rule 5 of the CPC, which is set out below:

OXXII – Death, Marriage And Insolvency Or Parties 5. Determination of question as to legal representative - Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in



determining the question.

13. In Jaladi Saguna v. Satya Sai Central Trust, (2008) 8 SCC 521, the Supreme Court has observed that when an application for impleadment is filed, the Court shall consider and decide whether the legal representative of the deceased plaintiff should be brought on record before proceeding with the case on merits. Further, the determination as to who is the legal representative under Order XXII Rule 5 of the CPC would only be for the limited purpose of representation of the estate of the deceased for the adjudication of that case and the same would not confer on the said legal representative any right to the property, which is the subject matter of the suit vis-à-vis other rival claimants to the estate of the deceased. Inter se dispute between the rival claimants has to be adjudicated by way of independent legal proceedings.

14. In Chandralekha (supra), Karnataka High Court has observed that the 'right to sue' in relation to a legal representative has to be determined with reference to the claim made by the deceased plaintiff. Only when there is a 'right to sue' in favour of a legal representative, he would have the right to continue the suit filed by the deceased plaintiff as a legal representative.

15. The reliefs claimed in the present suit by Late Shri S.K. Beri were specifically against Deepak Beri and his family members. Deepak Beri has contested the suit by filing a written statement controverting the averments made in the plaint and seeking dismissal of the present suit. Where the interest of the legal representative is in conflict with the interest of the deceased plaintiff and he was a party in the suit as a defendant, he cannot be permitted to represent the estate of the deceased plaintiff. Therefore, in my considered view, the 'right to sue' in the present case cannot accrue in favour of Deepak Beri. The 'right to sue' can only accrue in favour of Atul Beri, who was neither a



party in the suit, nor had any conflict with the interest of Late Shri S.K. Beri.

16. Accordingly, the order dated 6th April, 2022 is reviewed and Atul Beri is impleaded as the sole legal representative of Late Shri S.K. Beri to represent his estate in the present suit. This will be without prejudice to the rights and contentions of Deepak Beri in the present suit as well as in CS(OS) 183/2022.

17. The review petition stands disposed of accordingly.”

4. Mr. Akshay Makhija, learned Senior Counsel appearing on behalf of the appellant assails the impugned judgment whilst submitting that the order under review was a consent order and thus was not amenable to either an appeal or a review. It was further submitted by learned Senior Counsel appearing on behalf of the appellant that it is an established legal principle that a review cannot serve as a disguised appeal, and a party should not be permitted to re-litigate the entire case under the pretense of a review petition, as the Respondent No. 1 has indeed re-argued the entire matter, presenting factual assertions that were not raised at the time the order under review was passed.

5. Learned Senior counsel appearing on behalf of the appellant would further argue that Review Petition itself was filed with an inordinate delay of nearly 6 months, without any explanation whatsoever from Respondent No. 1. Although the Review Petition was accompanied by an



application seeking condonation of delay, however, the said application failed to establish any valid grounds in justifying the condonation of delay, bringing forth a delayed Review Petition before the Learned Single Judge.

6. The Learned Senior Counsel appearing on behalf of the appellant additionally contended that the Review Petition was filed solely with the intention to impede the appellant's case in the ongoing lawsuits and pending applications. It was further submitted that the Learned Single Judge should not have entertained the Review Petition as there was no “*error apparent on the face of the record*” and neither did the Respondent No. 1 pointed out any such error.

7. Per Contra, Mr. Jayant K. Mehta, learned Senior Counsel appearing on behalf of the respondent, whilst opposing the arguments made on behalf of the Appellant has vehemently argued that the Learned Single Judge had rightly passed a well-reasoned order dealing with each and every speculative argument raised by the appellant and at the same time does not suffer from any illegality, so as to merit interference by this Court

8. At this juncture, it would be relevant to observe that, on the previous date of hearing i.e. 22.05.2023, learned Senior Counsel



appearing on behalf of the parties, on instructions from the latter, who were present in person before this Court, prayed for time to arrive at an amicable resolution of all underlying outstanding disputes. However, we have been apprised by the learned senior counsel, appearing on behalf of the parties at the Bar, that the parties have failed to reach at a harmonious settlement concerning all the aforementioned unresolved disputes.

9. In the facts and circumstances antecedent and attendant as elaborated hereinbefore, we are axiomatically of the considered view that there is no ground to interfere with the impugned order, rendered by the learned Single Judge. The present appeal is accordingly dismissed with the clarification that, since Mr. S.K. Beri (*the late father of the appellant and respondent No.1*) had instituted the subject suit against the appellant; consequently, Mr. Deepak Beri, although a legal representative of the late Mr. S.K. Beri, cannot be impleaded as a plaintiff in the subject suit, being the principal defendant against whom the late Plaintiff Mr. S.K. Beri had instituted the suit i.e. CS (OS) No. 162/2018 titled as “*Shri S.K. Beri Versus Deepak Beri & Ors*” seeking possession of the basement and top floor of the G.K. Property.

8. No further relief is prayed for.



9. With the above observations, the present appeal is dismissed and disposed of accordingly. Pending applications also stands disposed of.
10. A copy of this judgment be uploaded on the website of this Court *forthwith*.

**SIDDHARTH MRIDUL
(JUDGE)**

**TALWANT SINGH
(JUDGE)**

MAY 26, 2023
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[Click here to check corrigendum, if any](#)