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

Date of decision: 17.10.2023

+ **CM(M) 371/2022 & CM APPL. 39340/2023**

SARA CARRIERE DUBEY @ SARA MARIE MADELIENE

..... Petitioner

Through: Dr.Aman Hingorani &
Ms.Vasundhara. N, Advs.

versus

ASHISH DUBEY

..... Respondent

Through: Mr.Ramesh Singh, Sr. Adv.
with Mr.Gaurav Kejriwal &
Ms.Yaashna Thakran, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed by the petitioner challenging the order dated 24.03.2022 passed by the learned Principal Judge, Family Courts, South District, Saket Courts, New Delhi in CS No. 21/09 titled *Ashish Dubey v. Sara Carrier Dubey @ Sara Marie Madeleine*, dismissing the application filed under Order VII Rule 11 of the Code of Civil Procedure, 1908 (in short, 'CPC') by the petitioner herein, who is the defendant in the Suit.

2. The respondent has filed the above-mentioned Suit *inter alia* praying for a decree of partition, possession and injunction for the property bearing No. 299, Ganpat Andalkar Block,

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Asian Games Village, Khel Gaon Marg, New Delhi (hereinafter referred to as the 'Suit Property').

3. In the plaint, the respondent asserts that the parties to the Suit are husband and wife. Plaintiff further asserts that the Suit Property has been jointly purchased by the parties on or about 21.08.2008. The plaintiff further asserts that as there are now matrimonial disputes between the parties and the relationship between the parties has worsened, with the respondent filing a petition seeking divorce from the petitioner herein, the respondent seeks partition of the Suit Property. In the plaint, the respondent further asserts as under:-

"17. As the Plaintiff's claim regarding the various other properties cannot conveniently be joined in this suit for partition of joint property and Plaintiff prays for leave under Order II Rule 2 of Civil Procedure Code as and by way of abundant caution."

4. The respondent has also filed an application under Order II Rule 2 of CPC, being IA No. 1569/2021, wherein the respondent asserts as under:-

"2. Other than the aforesaid suit property, which is the subject matter of the present accompanying suit, there are other properties which are standing in the name of the Defendant which is otherwise owned by the Plaintiff, however, the same are not being joined in the present proceedings.

3. It is therefore submitted that this Hon'ble Court may be pleased to grant leave to the Plaintiff under Order II Rule 2 of the Code of Civil Procedure considering that such other properties cannot be conveniently joined in the present suit and the Plaintiff

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may thus be permitted to sue separately, in respect of the same."

Submissions of the Learned Counsel for the Petitioner:

5. The learned counsel for the petitioner submits that neither in the plaint nor in the application filed under Order II Rule 2 of the CPC, the respondent has stated as to why the other properties jointly owned by the parties herein cannot be conveniently joined in the Suit. Placing reliance on the judgments of the Supreme Court in ***Kenchengowda v. Siddegowda***, (1994) 4 SCC 294; ***R. Mahalakshmi v. A V Anantharam***, (2009) 9 SCC 52; and of the High Court of Bombay in ***Govind Rao v. Dadar Rao***, (2005) 25 AIC 415, he submits that a Suit for partial partition of the properties would not be maintainable.

6. He submits that as the respondent has not pleaded any exceptional circumstances for seeking a partial partition of the jointly held properties, the respondent would also not be entitled to lead any evidence on this issue at a later stage. In support, he places reliance on the judgment of the Supreme Court in ***Biraji v. Surya Pratap***, AIR 2020 SC 5483 and of this Court in ***Surender Kumar Khurana v. Tilak Raj Khurana***, 2016 (155) DRJ 71.

7. He submits that in the absence of any such pleadings, the learned Family Court has erred in rejecting the application filed by the petitioner under Order VII Rule 11 of the CPC by observing that it would not have been expedient for the

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respondent to add the other properties in the Suit. He submits that, in fact, there is no pleading by the respondent giving even the detail of the other properties that are jointly owned and possessed by the parties herein.

8. He submits that in ***Radhey Shyam Bagla v. Ratna Devi Kahani***, 2014 SCC OnLine Del 7103, this Court has held that it is only in exceptional circumstances that a Suit for a partial partition shall be maintainable. Such exceptional circumstances can be where the other properties are in dispute. However, in the present case, no such exceptional circumstance has been made out by the respondent.

9. He further submits that this would be a case of ‘tenancy by entirety’ as there is a unity of possession, title, estate, time and person. Placing reliance on the judgment of the District Court of New York in ***Dievendorf v. Dievendorf***, 198 Misc. 807 (N.Y. Dist. Ct. 1950), he submits that in such a case, the law would forbid forced partition of the property; only a voluntary partition is maintainable. He submits that in the present case, the property would devolve on either of the parties by survivorship and, therefore, this would be a case of ‘tenancy by entirety’, which is not entitled to be partitioned.

10. He submits that in the alternative this would be a case of ‘joint tenancy’ as there is unity of possession, title, estate, and of time. He submits that such joint tenancy can also be in case of a husband and wife. He submits that, therefore, the principle against Suit for partial partition would be applicable in such

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cases. In support, he places reliance on the judgment of the Karnataka High Court in *Kanarn Nair v. M M Ratti*, 1996 SCC OnLine Ker 126.

Submissions of the Learned Senior Counsel for the Respondent:

11. On the other hand, the learned senior counsel for the respondent submits that the respondent seeks partition of a property which was jointly purchased by the parties to the Suit. He submits that there is no embargo in law for seeking partition of such a property. He submits that the judgments cited by the learned counsel for the petitioner would have no application to the facts of the present case as they relate to the partition of properties which are inherited by succession and are joint properties. He submits that the Indian Law does not recognize the principle of ‘tenancy by entirety’ and, therefore, the judgment in *Dievendorf* (Supra) can have no application in the facts of the present case.

12. On the application under Order II Rule 2 of the CPC, he submits that the same has been filed as an abundant caution and it is not the case of the respondent that the property in question is a joint family property.

Analysis and Findings:

13. I have considered the submissions made by the learned counsels for the parties.

14. At the outset, one has to remind oneself of the

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principles applicable to an application filed under Order VII Rule 11 of the CPC. For considering such an application, only the averments made in the plaint and documents filed therewith are to be taken note of. The defense of the defendant in the Written Statement is not relevant for determining such an application. (Ref.: *Saleem Bhai v. State of Maharashtra*, (2003) 1 SCC 557; and *Dahiben v. Arvinbhai Kalyanji Bhanusali*, (2020) 7 SCC 366).

15. In the plaint, the plaintiff/the respondent herein has asserted that the property in question was jointly purchased by the parties to the Suit sometime around 21.08.2008. The plaintiff does not assert that this was a 'joint family property' or a property inherited by way of succession. In fact, though not relevant, this does not appear to be the case of the petitioner herein as well.

16. The principle of prohibition of seeking partial partition is applicable in the cases of 'joint family properties'. In *Radhey Shyam Bagla* (Supra), the Division Bench of this Court considered this aspect in detail, and observed as under:-

"26. The short point for consideration is whether the learned Single Judge fell into error, in decreeing the suit for partition in the light of the circumstances. The appellant urges that such a decree could not have been made because the suit did not encompass the whole of the joint HUF assets as such.

27. The rule against maintainability of suits for partial partition was expressed most succinctly in Kenchegowda (supra) as follows:

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“Even otherwise a suit for partial partition in the absence of inclusion of other joint family properties and the impleadment of the other co-sharers was not warranted in law.”

This Court notes that there is no quarrel over the proposition that, subject to exceptional circumstances, a suit instituted for partition should include all the joint family properties. The rule against suits claiming only partial partition had been enforced in other cases too. In Tukaram v. Sambhaji, ILR 1998 Kar 681, the Karnataka High Court noted that:

*“It has been held that normally a suit instituted for partition should be one for partition of the entire joint family properties and all the interested co-sharers should be impleaded. The suit for partition of specified items can only be an exception... The inclusion of all the joint family properties in the instant suit for partition was necessary and without bringing all the joint family properties into the hotchpot, the suit for partition of the shares of the members of the joint family in one property which amounts to partial partition is not maintainable. **This contention in the circumstances of the case, has force and the same has to be upheld.**”*
(emphasis added)

28. The Calcutta High Court likewise held, in *Satchidananda Samanta v. Ranjan Kumar Basu*, AIR 1992 Cal 222:

*“We are of the view that the general principle is that a co-sharer filing a suit for partition against the other co-sharers have to bring all the joint properties into the hotchpot failing which a suit may be dismissed on the ground of partial partition... **proper equity in a suit for partition in that case will not be possible if all joint properties... are not brought into the hotchpot.**”* (emphasis added)



29. *The normal rule governing suits for partition is that it has to incorporate all partible coparcenary property, and should implead all those entitled to a share. However, this rule is not a rigid and an inflexible one, as noticed by the Supreme Court in Mst. Hateshar Kuer v. Sakaldeo Singh 1969 (2) SCWR 414 in the following terms:*

“The rule requiring inclusion of the entire joint estate in a suit for partition is not a rigid and in elastic rule which can admit of no exception. This rule aims at preventing multiplicity of legal proceedings which must result if separate suits were to be instituted in respect of fragments of joint estates. Normally speaking, it is more convenient to institute one suit for partition of all the joint properties and implead all the interested co-sharers so that all questions relating to the share of the various co-owners and the equitable distribution and adjustment of accounts can be finally determined. But, this being a rule dictated by consideration of practical convenience and equity may justifiably be ignored when, in a given case there are cogent grounds for departing from it.”

30. *The above formulation was applied by the Kerala High Court in the decision of V.R. Krishna Iyer, J in Paramesara Menon v. Sachidananda Menon, 1970 KLT 1031.*

31. *Long ago, in Sitaram Vinayak Hasabnis v. Narayan Shankarrao Hasabnis AIR 1943 Bom 216, the exception as to the maintainability of the suits for partition which do not include all the properties was stated in the following terms:*

“.....The ordinary rule applicable to suits for coparcenary property is that when a suit for partition is between coparceners it should embrace the whole family property, and a member of a joint family suing his



coparceners for the partition of joint family property is bound to bring into hotchpot all the property that may be in his own possession in order that there may be a complete and final partition : see Mulla's Hindu Law, 9 edn., page 409. The rule is subject to exceptions arising out of convenience and from other causes. But it applies primarily to coparcenary property. The parties in this case are not coparceners but tenants-in-common; and in our view that may well make a substantial difference in the applicability of the rule. In theory no coparcener has a share in any particular property, because each coparcener; is an owner of all the family property; and this is the real basis for the rule as to the partition of coparcenary property. But there is no such basis for the application of the rule to property which is held in common.....”

32. *The view expressed by the Bombay High Court in Hasabnis (supra) was rooted in an earlier judgment of the Madras High Court i.e., Pakkiri Kanni v. Haji Mohammad Manjoor Saheb by Agent Habibulla Saheb, AIR 1924 Mad. 124. The Madras High Court, on that occasion, made a distinction between jointly or commonly held property and coparcenary property. The High Court, on that occasion, held as follows:*

“We have not been shown any direct authority, that a suit for partition of common property, not joint property, is liable to dismissal on the ground that all the joint property in respect of which might have been brought, has not been included. Shortly, we have not been shown that the objection, founded on what is usually described as the plea of partial partition is available when a suit for division of common property, not joint property is in question.”



33. It is evident from preceding discussion that though the Courts have normally insisted upon inclusion of all the properties in the suit which seeks partition of Hindu Joint Family assets, as a necessary precondition, for full adjudication of the party's rights and apportionment of their shares, the rule is not as inflexible as it is thought out to be. The Supreme Court in Kenchegowda (supra) stated that such rule is "not inelastic ". The judgments of the Madras and Bombay High Courts highlight that if the properties are not established to be joint i.e., HUF or coparcenary assets, but are either disputed or otherwise held commonly, their exclusion would not be vital to the maintainability of the proceedings."

(Emphasis Supplied)

17. From the above, it would be evident that the rule of prohibition against a Suit for partial partition is not applicable where the parties are not claiming their rights as a coparcener but as tenants in common. The Court also made a distinction between jointly and commonly held property and a coparcenary property. It is a 'joint family property' that must all be included in the Suit claiming partition thereto. However, the same insistence cannot be made in cases where two or more properties are commonly purchased.

18. As noted hereinabove, in the plaint it is not the case of the respondent that the property in dispute is a 'joint family property' or a 'coparcenary property'. Therefore, the principle of prohibition against a Suit claiming partial partition would not be applicable to the facts of the present case.



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19. Reliance of the petitioner on the judgment *Dievendorf* (Supra) also cannot lead to any assistance to the petitioner at this stage. The learned counsel for the petitioner has been unable to show any judgment or provision of Indian Law that recognizes the concept of ‘tenancy by entirety’ or which prohibits a joint owner from seeking partition of the Suit Property only because the other joint owner is his or her spouse.

20. In any event, where complicated questions of law are involved, again this Court has held that the provisions of Order VII Rule 11 of the CPC cannot be invoked. Reference in this regard can be made to the judgment of the Division Bench of this Court in *Manjeet Singh Anand v. Sarabit Singh Anand & Ors.*, 2009 SCC OnLine Del 1968, where it was held as under:

“24. To ascertain whether the plaint discloses cause of action or not the averments made in the plaint only have to be seen. A cause of action is a bundle of facts which are required to be pleaded and proved for the purpose of obtaining relief claimed in the suit. For the aforementioned purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is, if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed or not. In ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate

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enquiry into doubtful or complicated questions of law or fact. By the statute the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown. In *Vijai Pratap Singh v. Dukh Haran Nath Singh*, AIR 1962 SC 941 the Supreme Court held:

“By the express terms of Rule 5 Clause (d), the court is concerned to ascertain whether the allegations made in the petition show a cause of action. The court has not to see whether the claim made by the petitioner is likely to succeed : it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting relief no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defenses which the defendant may raise upon the merits; nor is the court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, prima facie, show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him.”

(Emphasis Supplied)

21. Reference in this regard can also be made to the judgment of the Supreme Court in ***Kamala & Ors. v. K.T. Eshwara Sa & Ors.***, (2008) 12 SCC 661, which was reaffirmed



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in *Srihari Hanumandas Totala v. Hemant Vithal Kamat*, (2021) 9 SCC 99. The Supreme Court in *Kamala* (Supra) has held as under:

“21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision.

23. The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say

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that although the same discloses a cause of action, the same is barred by a law.

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained.”

(Emphasis Supplied)

22. The learned counsel for the petitioner further submits that the respondent has also prayed for a decree of injunction against the petitioner. He submits that such a prayer cannot be maintained against a co-owner.

23. In my view, said submission would not be relevant for purposes of the application under Order VII Rule 11 of the CPC, as even if the above plea is to be accepted, the plaint cannot be rejected in part. It would be for the learned Family Court to adjudicate on such prayer at the final stage of the Suit. Reference in this regard may be made to the judgments of the Supreme Court in ***Madhav Prasad Aggarwal & Anr. v. Axis Bank Limited & Anr.*** (2019) 7 SCC 158; and ***D. Ramachandran v. R. V. Janakiraman & Ors.*** (1999) 3 SCC 267. In ***Madhav Prasad Aggarwal*** (Supra), the Supreme Court held as under:

“10. We do not deem it necessary to elaborate on all other arguments as we are inclined to accept the objection of the appellant(s) that

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*the relief of rejection of plaint in exercise of powers under Order 7 Rule 11(d) CPC cannot be pursued only in respect of one of the defendant(s). In other words, the plaint has to be rejected as a whole or not at all, in exercise of power under Order 7 Rule 11(d) CPC. Indeed, the learned Single Judge rejected this objection raised by the appellant(s) by relying on the decision of the Division Bench of the same High Court. However, we find that the decision of this Court in *Sejal Glass Ltd. v. Navilan Merchants (P) Ltd.*, (2018) 11 SCC 780 is directly on the point. In that case, an application was filed by the defendant(s) under Order 7 Rule 11(d) CPC stating that the plaint disclosed no cause of action. The civil court held that the plaint is to be bifurcated as it did not disclose any cause of action against the Director's Defendant(s) 2 to 4 therein. On that basis, the High Court had opined that the suit can continue against Defendant 1 company alone. The question considered by this Court was whether such a course is open to the civil court in exercise of powers under Order 7 Rule 11(d) CPC. The Court answered the said question in the negative by adverting to several decisions on the point which had consistently held that the plaint can either be rejected as a whole or not at all. The Court held that it is not permissible to reject plaint qua any particular portion of a plaint including against some of the defendant(s) and continue the same against the others. In no uncertain terms the Court has held that if the plaint survives against certain defendant(s) and/or properties, Order 7 Rule 11(d) CPC will have no application at all, and the suit as a whole must then proceed to trial."*

(Emphasis Supplied)

24. Learned counsel for the petitioner lastly submits that the Suit has also not been properly valued for the purposes of court fee. He submits that the respondent is admittedly not in



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possession of the Suit Property, inasmuch as by an order dated 19.11.2020 passed by the Supreme Court in SLP (Criminal) No. 5636/2020 titled **Ashish Dubey v. Sara Carriere Dubey**, the Supreme Court had upheld the judgment of this Court directing the respondent herein to remove himself from the Suit Property. He submits that as the Suit has been filed after the respondent has been evicted from the Suit Property, he cannot be deemed to be in possession thereof and, therefore, has to properly value the Suit and pay the *ad valorem* court fee thereon.

25. In my view, the above submission also cannot be accepted, inasmuch as this Court by its judgment dated 10.11.2020 passed in CRL.M.C. 574/2020 titled **Sara Carriere Dubey v. Ashish Dubey** had directed as under:

“30. In view of the facts discussed above the impugned order is set aside and the order dated 06.06.2019 of the learned MM is restored. The respondent is given ten days’ time from today to remove himself from the property in dispute. Needless to say in case of any failure on the part of the respondent, the learned MM shall proceed in accordance with law.

31. The respective right(s) in the subject property and/or disputes inter se qua harassment etc, may be raised before the appropriate forum. The observations made above shall not influence the Courts below and allegations/counter allegations be dealt purely on merits.”

26. The said order was, therefore, only a temporary order of arrangement and is not a legal ouster of the respondent from the possession of the property. In any case, these are disputed

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questions of facts that would require adjudication at the trial of the Suit.

27. In view of the above, I find no merit in the present petition. The same is, accordingly, dismissed. There shall be no order as to costs.

28. Needless to state that any observation made by the learned Family Court in the Impugned Order or by this Court in the present judgment is only for the purposes of deciding the application filed by the petitioner under Order VII Rule 11 of the CPC and shall not bind or influence the learned Family Court in the final adjudication of the Suit or the application filed by the respondent under Order II Rule 2 of the CPC.

29. The next date of hearing fixed as 16.11.2023 shall stand cancelled.

NAVIN CHAWLA, J

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