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

Date of decision: 04.08.2023

+ CM(M) 980/2018 & CM APPL. 34285/2018

PARMESHWARI DEVI (DECEASED)

THR LR & ANR

..... Petitioner

Through: Mr. Anil Panwar and Mr. Tanishq
Panwar, Advocates.

versus

RAM KISHAN & ORS

..... Respondent

Through: Mr. Parveen Kumar, Advocate for
R-1.
Mr. Ashwani Tanwar, Advocate for R-
5.

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. This petition filed under Article 227 of the Constitution of India impugns the order dated 28.04.2018, passed by the ADJ, Tis Hazari Courts, Delhi ('Trial Court') in Civil Suit No. 477/2014 (New No. 9839/2016), titled as *Smt. Parmeshwari Devi & Anr. v. Ram Kishan & Ors.*, whereby the Trial Court dismissed an application filed on behalf of the plaintiffs under Section 151 of the Code of Civil Procedure, 1908 ('CPC') for recalling of the order dated 02.02.2016.

2. The Petitioners herein are the original plaintiffs and the Respondents No. 1 to 5 herein are the original defendants in the civil suit. The civil suit has



been filed for partition, rendition of accounts, recovery of damages and injunction with respect to the estate of the common ancestor late Sh. Sher Singh, duly described in the plaint.

2.1. The Trial Court *vide* impugned order dated 02.02.2016 dismissed the Petitioner's application dated 01.05.2014 filed under Order VI Rule 17 CPC.

2.2. The Trial Court *vide* impugned order dated 28.04.2018 dismissed the Petitioner's application filed under Section 151 of the CPC for seeking recall of the order dated 02.02.2016.

3. The learned counsel for the Petitioner states that plaintiffs filed the application under Order VI Rule 17 CPC in order to address the objections raised by Respondent No.5 (i.e., defendant no.5) herein with respect to non-joinder of necessary parties and the non-inclusion of the other immovable properties owned by the common ancestor late Sh. Sher Singh.

3.1. He refers to the order dated 24.04.2014 passed by the Trial Court to substantiate his averment. He states that the Trial Court in the said order recorded the objections of Respondent No.5 to the effect that the sisters of R-3 and R-4 (i.e., defendant no.3 and 4) have not been impleaded in the suit and partition of the other properties mentioned by Respondent No.5 i.e., DW-5 in his affidavit by way of evidence has not been included in this civil suit.

3.2. He states that the objections with respect to the non-impleadment of necessary party was raised by Respondent no.5 with respect to Ms. Savitri and Ms. Sumitra the sisters of defendants no.3 and 4. He states that to the Petitioner's knowledge the said sisters of defendant No. 3 and 4 have relinquished their shares in favour of defendants nos. 3 and 4 respectively. He states that in fact no such objection was raised by defendant nos. 3 and 4 in



their written statement. He states that it was in this background that the sisters were initially not impleaded.

3.3. He states that further vide order dated 29.03.2014 the Trial Court had itself in exercise of its powers impleaded Ms. Savitri and Ms. Sumitra or their legal heirs as parties to the civil suit. He states that the said order for impleadment was passed on the submission of Respondent No.5. He states that therefore, the sisters or their legal heirs of defendant nos. 3 and 4 already stand impleaded. He states that the amended memo of parties was duly filed on 01.05.2014 impleading Ms. Sumitra Devi as defendant No. 4-A and the legal representative of late Ms. Savitri as defendant No. 4-B. He states that summons were also issued to Ms. Sumitra Devi and the legal heirs of Ms. Savitri; however, none appeared on their behalf. He states that therefore, the proposed amendment was former and only gave effect to the order dated 29.03.2014.

3.4. He states that in view of the objection of Respondent No.5 as recorded in order dated 24.04.2014 with respect to non-inclusion of the other properties of late Sh. Sher Singh, in the application, the plaintiffs had proposed an amendment in the plaint to include other properties i.e., 14 immovable properties enlisted at paragraph 11 of the amendment application.

3.5. He states that the other 14 properties are residential properties and have been occupied by different branches of the family for a very long time. He states that the plaintiffs do not wish to upset the status of the said properties and therefore, they have limited their claim in the plaint to the suit property. He states that the plaintiffs do not wish to claim any rights in the 14 properties and limit their rights to the suit properties.



3.6. He states that plaintiffs are not pressing the amendment application for including the said immoveable properties enlisted at paragraph 11 of the amendment application and it was filed only to address the objections raised by the Respondent No.5. He states that in-fact the objections of non-inclusion was raised by Respondent No.5 only during the final arguments and no such objections was raised in the pleadings by any defendants.

3.7. He states that the plaintiffs have proposed the amendment only to address the objections raised by Respondent No.5; however, the plaintiffs are neither seeking to change the relief sought in the plaint or a cause of action.

4. Mr. Praveen Kumar, Advocate appears on behalf of Respondent No.1. He states that the amendment application has been rightly dismissed by the Trial Court as the plaintiff cannot be permitted to amend the plaint at the stage of final arguments to include 14 additional immoveable properties. He further states that the objection with respect to non-impleadment of the sisters of defendant Nos. 3 and 4 was also justified in the facts of this case.

5. The learned counsel for Respondent No.5 has similarly, reiterated his submissions that the civil suit filed without impleading the sisters of defendants No. 3 and 4 as well as without including the other immoveable properties forming part of the estate of late Sh. Sher Singh is not maintainable.

5.1. He has also raised an objection that defendant No. 2 i.e., Sh. Puran Singh died during the pendency of the suit proceedings and his legal representatives have not been brought on record of the Trial Court. He states that the plaintiffs without seeking permission of the Trial Court filed an amended memo of parties on 01.05.2014 and included the names of the legal heirs of Shri Puran Singh at Serial No. 2(a) to 2(f).



6. This Court has considered the submission of the learned counsel for the parties and perused the record.

7. The learned counsel for the Petitioner has stated that the application for amendment was filed out of caution to avoid dismissal of the suit on account of the objections raised by Respondent No.5 as recorded in the Trial Court's order dated 24.04.2014. He states that the Petitioner herein does not press for the application for amendment so long as it does not subsequently affect the maintainability of the suit. He states that the plaintiffs are only seeking the reliefs claimed in the plaint and only with respect to the suit properties enlisted therein.

8. As noted above, the learned counsel for Respondent No.5 on 24.04.2014 during final arguments before the Trial Court raised an objection that the properties mentioned by DW-5 at paragraph 4 of his affidavit-of-evidence had not been included in the plaint for seeking a partition and the objection of non-impleadment of sisters of defendant nos. 3 and 4.

9. In this regard, this Court has perused the issues framed by the Trial Court *vide* order dated 02.06.2004. The order dated 02.06.2004 reads as under:

"Suit 158/03

2.6.2004

Pr. P-2 in person for self and as attorney of P-1.

Sh. S.D. Singh Adv. counsel for D-1, D-2 and D-5.

Sh. S.K. Pal Adv. counsel for D-3 and D-4. Prayer for pass over by the plaintiff to call her counsel.

Be awaited.

ADJ/DELHI

2.6.2004

2.6.2004

2nd call

Pr. Sh. Anil Chauhan Adv. counsel for the plaintiff.



P-2 present in person.

Sh. S.D. Singh Adv. counsel for D-1, D-2 and D-5.

D-1 and D-5 present in person.

Sh. S.K. Pal Adv. counsel for D-3 and D-4.

D-3 present in person.

Pleadings are complete.

On the pleadings of the parties the following issues are framed:

- 1. Whether the suit is bad for non-joinder or mis-joinder of the party? OPD 3 and 4*
- 2. Whether the suit has not been properly valued for the purposes of jurisdiction and court fees? OPD*
- 3. Whether the suit of the plaintiff is barred by limitation? OPD 1, 2 and 5*
- 4. Whether the suit property is joint. If yes, its effect? OPP*
- 5. Whether the suit property has already been partitioned? OPD 1, 2 and 5*
- 6. Whether the plaintiff is in possession of the suit property? OPP*
- 7. Whether there are tenants in the suit property. If yes, under whom and what rate of rent? OPP*
- 8. Whether Sh. Ramchander has sold a portion of the property vide sale deed dated 24.6.1966 & rectified vide sale deed dated 8.7.1966 in his own right? OPD 1, 2 and 5*
- 9. Whether the plaintiff is entitled to a decree for a sum of Rs. 30,000/- being share in the decretal amount in suit order no. 392/98? OPP*
- partition as prayed for? OPP*
- 11. Whether the plaintiff is entitled to the damages as claimed? OPP*
- 12. Whether the plaintiff is entitled to permanent injunction as prayed for? OPP*
- 13. Relief.*

No other issues arises and pressed for.

Put up on 11.8.2004 for plaintiff evidence by affidavit.

Copy of the affidavit be supplied one week in advance and the witness shall be present for cross examination on that day.

List of witnesses by the parties may also be filed on 11.8.2004.

*ADJ/DELHI
2.6.2004"*

10. No issue was framed by the Trial Court with respect to non-inclusion of any other immovable properties of late Sh. Sher Singh and consequently there was no issue framed with respect to the non-maintainability of the suit on account of the non-inclusion of the said properties.



10.1. In fact, no such objection of non-inclusion was raised by defendant no.5 in his written statement to allege that there was a non-inclusion of immovable properties of late Sh. Sher Singh. The defendant no.5 neither raised a counter claim seeking partition of the said immovable properties.

10.2. This Court is of the opinion that if no plea was raised in the written submission and no issue was framed, Respondent No.5 is precluded from raising such an objection of non-inclusion/non-maintainability at the stage of the final arguments. Merely because DW-5 raised this plea in his affidavit by way of evidence, it would not be a ground for non-suiting the plaintiff since defendant no.5 has not filed any counter claim seeking partition of the said 14 immovable properties.

10.3. Pertinently, Respondent No.5 does not admit that the plaintiffs have any rights in those 14 immovable properties enlisted by him in the affidavit of evidence. Therefore, this objection was raised merely to (successfully) delay the final hearing of the suit. It is, therefore, evident that Respondent No.5 is raising these objections only with a view to delay the adjudication of the civil suit.

10.4. Further, in view of the fact that the Petitioners herein (i.e., the plaintiffs) have stated that they do not wish to seek partition of the said 14 properties pleaded by defendant no.5 and are consciously limiting their rights in the suit properties, this Court is of the opinion that the plaintiffs cannot be non-suited for non-inclusion of the 14 properties. Since, the plaintiffs are limiting their claim to the suit properties, there is no occasion for Petitioners to seek a partition of the said 14 properties. The statement of the plaintiffs that they are



not seeking partition of the said 14 properties is taken on record and they are bound down.

11. Similarly, with respect to the issue of the impleadment of the sisters of defendant Nos. 3 and 4, this Court has perused the order dated 29.03.2014, whereby the Trial Court of its own accord in exercise of its powers under Order I Rule 10 CPC had impleaded Ms. Sumitra Devi and the legal heirs of Ms. Savitri. The said newly impleaded defendants have not appeared or joined the proceedings. In any event, defendant no.3, defendant no.4 and the newly impleaded defendant no.4(a) and 4(b) are all claiming through late Sh. Raja Ram. The plaintiff herein is not claiming adversely to the share of late Sh. Raja Ram. All rights determined of the estate of late Sh. Raja Ram will take care of the inter se rights, if any, of defendant nos. 3, 4 and their sisters.

11.1. In any event, no issue of non-joinder of parties was framed on 02.06.2004 and therefore, the Petitioners cannot be non-suited on an objection raised by defendant no.5 at the time of the final arguments.

11.2. This Court fails to understand the concern of defendant no.5 with the said issue considering that he has no rights in the estate of late Sh. Raja Ram. Respondent No. 5 is claiming through branch of late Shri Ramanand. He has no concern with the inheritance of the rights of the estate of late Sh. Raja Ram.

11.3. It is, therefore, evident that the objection of non-joinder of sisters of defendant nos. 3 and 4 has been taken (successfully) by defendant no.5 to derail the final hearing in the suit.

12. In view of the fact that the Trial Court by its order dated 29.03.2014 had already impleaded the sisters of defendant nos. 3 and 4 in exercise of its powers under Order I Rule 10 CPC, the subsequent order dated 02.02.2016 is



inconsistent and can have no effect on the impleadment of the sisters of defendant nos. 3 and 4.

13. This suit for partition was filed on 02.06.2004. The evidence of the parties was concluded on 18.08.2011 and the matter was at the stage of final arguments when in view of the objections raised by the Respondent No.5 on 24.04.2014, the Petitioner herein filed the application for amendments on 21.05.2014. The matter has remained at the stage of the final arguments now for 10 years due to the quagmire of untenable objections raised by defendant no.5 at the hearing dated 24.04.2014.

14. At this stage, learned counsel for the Petitioner states that in view of the findings of this Court, he does not wish to press his application under Order VI Rule 17 CPC for including the 14 properties in the plaint and seeks permission to withdraw the same. The Petitioner is permitted to withdraw the said application in view of the findings returned by this Court.

15. The impugned order dated 02.02.2016 while dismissing the application under Order VI Rule 17 CPC has not taken note of the proposed amendment to include 14 properties and has therefore, not deal with it. The Trial Court failed to note that defendant no.5 has neither raised the said issue in the written statement nor there was any issue framed. Therefore, the impugned order dated 02.02.2016 is sub silentio on this issue and is therefore, set aside to avoid any reliance on the same.

16. The Petitioners have also clarified that legal heirs of defendant no.2 were duly brought on record before the Trial Court *vide* order dated 02.08.2008. This Court is of the opinion that the objections raised by



Respondent No.5 to this effect during the course of oral arguments before this Court was therefore misleading and mischievous.

17. The Trial Court is requested to take up the matter for hearing of final arguments on the next date of hearing fixed before it and expeditiously dispose of the matter preferably within a period of three (3) months.

18. The Trial Court is requested not to grant any unnecessary adjournments to the parties and exercise its jurisdiction under Order 17 CPC, in case, it is of the opinion that any of the parties is delaying the trial.

19. The order dated 02.02.2016 is set aside. The petition is disposed of with the aforesaid findings. The pending application stands disposed of.

MANMEET PRITAM SINGH ARORA
(JUDGE)

AUGUST 4, 2023/msh/sk

Click here to check corrigendum, if any

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