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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) 17/2024 and CM APPL. 6260/2024, CM APPL. 6261/2024**

URMIL WADHAWAN & ANR. Appellants

Through: Mr. Pramod Sharma, Advocate

versus

SONNY SARNA & ORS. Respondents

Through: Mr. Jai Sahai Endlaw and Mr. Ashish Kumar, Advocates

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Date of Decision: 02nd February, 2024

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ : (ORAL)

1. This appeal has been filed under Order XLIII Rule 1 of Code of Civil Procedure, 1908 ('CPC') read with Section 10 of Delhi High Court Act, 1966 ('Act of 1966') challenging the impugned order dated 3rd January, 2024, passed in CS (OS) No. 1642/2012, whereby the learned Single Judge after reframing the issues in the suit, reiterated the direction issued earlier on 4th November, 2022, as regards the defendant nos. 1 and 2 to lead evidence first. The learned Single Judge observed that since, the possession of



defendant no.1 in the property bearing no. 211, Jor Bagh, New Delhi – 110003 ('suit property') is admitted, it is for defendant no.1 to show that it was in part performance under Section 53-A of Transfer of Property Act, 1882.

2. The Appellant Nos. 1 and 2 are defendant nos. 1 and 2 respectively. The Respondent Nos. 1 and 2 are plaintiff nos. 1 and 2 respectively. The Respondent Nos. 3 to 19 are defendants nos. 3 to 19 respectively; the said Respondents are non-contesting proforma parties in the suit and no relief is claimed against them.

3. The Respondent Nos. 1 and 2 are claiming to be joint owners, along with Respondent Nos. 3 to 19, of the specified (undivided) shares in the suit property.

4. The Respondent Nos. 1 and 2 have instituted the suit against the Appellants herein seeking mesne profits with interest, mandatory injunction and recovery of possession of specified portions on the 1st floor and 2nd floor (besides one garage on the ground floor) of suit property.

5. Learned counsel for the Appellants states that the direction to lead evidence first is contrary to the provisions of Order XVIII Rule 1 CPC, Sections 101 and 110 of the Indian Evidence Act, 1872. He states that the initial onus is always on the plaintiff and it is after the plaintiff discharges that onus entitling him to the relief, the onus shifts to the defendant. He states that it is an admitted position that Appellants are in possession of the suit property since the year 1990 and therefore, it is for the Respondent Nos.



1 and 2 to prove that the nature of possession of the Appellants is not that of the co-owners.

6. This Court has heard the learned counsel for Appellant and perused the record.

7. The Appellants in their written statement have admitted that the suit property has been mutated in the records of the L&DO in the names of Respondent Nos. 1 to 19. It is a matter of record that four registered Relinquishment Deeds ('RDs') were executed by some of the co-owners in favour of Respondent No. 1 transferring their 20/48th (5/12th) share in the suit property. The Appellants have contended that the said RDs were executed upon consideration being advanced by Appellant No. 1's brother, Mr. Kailash Berry; for and on behalf of Appellant No. 1 thereby making Appellant No. 1 as a co-owner of the suit property. The Appellants have relied upon an affidavit affirmed by Respondent No. 1 on 01st October, 1993. Thus, the Appellants herein while admitting the claim of Respondent Nos. 1 and 2 as regards their ownership in the suit property have however, disputed the reliefs in the plaint on the ground that Respondent No. 1 has allegedly sold his ownership rights to the extent of 20/48th (5/12th) share in the suit property in favour of Appellant No. 1.

8. The issues in the suit were framed on 15th January, 2019. Thereafter, on 04th November, 2022, the learned Single Judge directed that the evidence be first led by the defendant nos. 1 and 2 (i.e., Appellants herein). The issue of recording of evidence was considered again at the hearing dated 17th November, 2022 and the Appellants herein confirmed their willingness to



proceed with the same in view of the fact that the suit had been pending consideration since the year 2012. Subsequently, when SLP(C) 8518/2019 came up for hearing on 19th May, 2023, the Supreme Court as well issued directions for expeditious disposal of the suit including recording of evidence in a time bound manner; which were accepted by the Appellants herein. Therefore, in view of the aforementioned facts, the direction issued by the learned Single Judge on 04th November, 2022, directing the Appellants to first lead evidence has attained finality.

9. In the facts of this case, concededly, the ownership of Respondent Nos. 1 and 2 in the suit property is admitted. However, Appellants are resisting the reliefs sought in the plaint on the defence of part performance. If the defence set up by the Appellants is not proved by them, it would entitle the plaintiffs to the relief of possession and limit the scope of evidence to be led by parties to decide the remaining issues. Therefore, the direction issued by the Court on 04th November, 2022 is in consonance with the discretion reserved to a trial court under Order XVIII Rule 1 CPC.

10. The Appellants by not leading evidence have set at naught the directions issued by Supreme Court on 19th May, 2023, for expeditious recording of evidence within nine (9) months. Pertinently, the said period of nine (9) months is due to expire on 19th February, 2024, however, the recording of evidence is yet to commence in the suit. Therefore, the said conduct of the Appellants is an overreach of the directions issued by the Supreme Court and cannot be countenanced.



11. This Court is also of the opinion that the present appeal seeking to challenge the impugned order dated 03rd January, 2024, is not maintainable as it is a mere reiteration of the order dated 04th November, 2022, which has attained finality. Even otherwise, the present appeal challenging the direction of learned Single Judge to first lead evidence as per Order XVIII Rule 1 CPC is not an appealable order either under Order XLIII Rule 1 CPC or under Section 10 of the Act of 1966.

12. To maintain an appeal under Section 10 of the Act of 1966, the impugned order must meet the test of 'judgment' as laid down by Supreme Court in *Shah Babulal Khimji v. Jayaben D. Kania*¹ and Full Bench of this Court in *Jaswinder Singh v. Mrigendra Pritam Vikramsingh steiner*².

13. We are of the considered opinion that a direction to lead evidence first does not work any injustice to the Appellants or affect any valuable rights of the said party.

14. Accordingly, the present appeal along with applications is without any merits and is dismissed.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

FEBRUARY 2, 2024/msh/aa

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

¹ (1981) 4 SCC 8

² 2013 (133) DRJ 1 (FB)