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

+ CS(OS) 126/2022, I.A. 3510/2022, I.A. 6893/2022 & I.A. 6894/2022
Reserved on: 02nd September, 2024
Date of Decision: 17th December, 2024

SHRI SUNIL KUMAR GUPTA & ANR.Plaintiffs
Through: Mr. Vikas Sharma, Advocate.
versus
SMT. PUSHPA JAIN AND ORSDefendants
Through: Mr. Dhruv Chawla, Ms. Yuganshi
Singh and Ms. Parvi Jain, Advocates.

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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:

I.A. 6894/2022 (Application under Order XII Rule 6 read with Order VII Rule 11, Code of Civil Procedure, 1908, filed on behalf of Defendants nos. 1 to 4)

1. The present application has been filed by the Defendants under Order XII Rule 6 read with Order VII Rule 11 of the Code of Civil Procedure, 1908 ('CPC') praying for dismissal of the underlying suit on the basis of admissions made by the Plaintiffs.

Brief Facts

2. The underlying suit is filed by the Plaintiffs for partition and injunction qua the property bearing no. B-10, C.C. Colony, Delhi (i.e., suit property), which was owned by the maternal grandfather of the Plaintiffs i.e., late Sh. Kailash Chand Jain.

2.1. Late Sh. Kailash Chand Jain was married to Smt. Pushpa Jain (Defendant No.1), and had four (4) children namely, Sh. Pawan Kumar Jain



(Defendant No.2), Sh. Rakesh Jain (Defendant No.3), Sh. Ashok Jain (Defendant No.4) and one daughter late Smt. Renu Gupta, who expired on 23.12.2020. The Plaintiffs in the underlying suit are the sons and legal heirs of late Smt. Renu Gupta.

2.2. The Plaintiffs contend that late Sh. Kailash Chand Jain was the sole and absolute owner of the suit property and died intestate on 22.01.2013, leaving behind Smt. Renu Gupta (since deceased) and Defendants as his legal heirs.

2.3. It is the stand of the Plaintiffs that since late Sh. Kailash Chand Jain died intestate, therefore, the suit property would devolve upon his legal heirs as per the Hindu Succession Act, 1956 and 1/5th share in the suit property would devolve upon Smt. Renu Gupta, the deceased mother of the Plaintiffs. The Plaintiffs contend that after the demise of their mother, Smt. Renu Gupta, her 1/5th share in the suit property has devolved upon the Plaintiffs being Class-I Legal Heirs of late Smt. Renu Gupta.

2.4. The Plaintiffs have also made a reference in the captioned plaint to an earlier suit which was filed by the mother of the Plaintiffs along with the Plaintiffs before Senior Civil Judge, District Court Rohini, Delhi in 2017 ('CS 170/2017' & '2017 Partition suit'). It is stated that the said suit was also filed for partition and injunction qua the same property which is the subject matter of the underlying suit. It is stated that 2017 Partition suit was dismissed as withdrawn on 29.07.2017.

2.5. It is stated that the first floor of the suit property has been given on rent and all the rental income is being appropriated by the Defendant no.2 to the exclusion of the Plaintiffs herein, who are entitled to 1/5th share in the said rental income.



2.6. The Suit Property has been valued for the relief of partition at Rs. 2,50,00,000/- and fixed Court Fess is paid on the ground that possession of one of the Co-owners is deemed to be possession of all the Co-owners.

3. The Defendants filed the written statement in the underlying suit on 29.04.2022 contending that the Plaintiffs have concealed material facts and have not come before this Court with clean hands.

3.1. The Defendants contended that late. Sh. Kailash Chand Jain left behind a registered Will dated 30.05.1995, wherein the suit property was to devolve on the Defendant No.1 i.e., wife of late Sh. Kailash Chand Jain with life interest and after her death the property was to devolve absolutely on Sh. Rakesh Kumar Jain Defendant no.3 to the exclusion of all legal heirs.

3.2. As stated in the written statement the mother of the Plaintiffs herein i.e., late Smt. Renu Gupta was given no share in the suit property as per the registered Will dated 30.05.1995 and further as per the said Will she was allowed to live in a house in Gupta Colony as a licensee. It is stated that the said house in Gupta Colony is absolutely owned by Defendant No.1 and Defendant No.4 is named as care taker of the said property in the registered Will dated 30.05.1995.

3.3. The Defendants contended that the Plaintiffs after coercing their deceased mother obtained a Special Power of Attorney ('SPA') in their favour and unauthorizedly filed the 2017 Partition suit. The mother of the Plaintiffs was arrayed as Plaintiff no.1 and Plaintiffs herein were arrayed as Plaintiff no.2 and Plaintiff no.3 respectively in the said suit.

3.4. It is further stated that mother of the Plaintiffs filed an application under Order XXIII Rule 1 CPC before the District Court Rohini stating therein that she has never laid any claim in the property of her father and



that the said earlier suit was filed by her sons i.e., the present Plaintiffs without her consent. It is contended that Plaintiffs herein being party in the said earlier suit did not raise any objection to the withdrawal of the suit by their mother and moreover, made a statement in support of the said withdrawal.

Arguments of the Defendants

4. The learned counsel for the Defendants stated that in the earlier suit filed by the Plaintiffs along with their deceased mother i.e., CS No. 170/2017 before the District Court Rohini, the Defendants herein were arrayed as party Defendants.

4.1. He stated that the said suit was at the very initial stage when the mother of the Plaintiffs i.e., late Smt. Renu Gupta, who was Plaintiff no.1 therein filed an application under Order XXIII Rule 1 CPC for withdrawal of the said suit, making categorical averment that the said suit was not filed with her consent by her sons i.e., the Plaintiffs herein and that she does not claim any right title or interest in the estate of her late father Sh. Kailash Chand Jain. The relevant averment in the said application reads as under:

“....

2 That the said suit has been filed by the plaintiffs no.2 and 3 on the; basis of a SPA **purported** to have been executed on 09.01.2017 by the applicant/plaintiff no.1.

3 That the applicant/plaintiff no. 1 is deaf and dumb by birth and **she never executed any Special Power of Attorney in favour, of hers on Sh. Sunil Kumar Gupta, authorizing him to file any such suit and signature has been obtained fraudulently and she never set up any claim in respect of the suit property against her mother, brothers who are the defendants in the suit.**

....

5 That the applicant/plaintiff no. 1 has cancelled the aforesaid SPA date 09.01.2017 purported to have been executed in favour of Sh.



Sunil Kumar Gupta, plaintiff no.2 through legal notice sent by Speed Post on dated 14.03.2017. A copy whereof is annexed herewith.

6 That the applicant/plaintiff no. 1 is. no more interested to pursue the aforesaid civil suit which has been filed by her sons plaintiffs no.2 and 3 without her consent and as such the applicant/ plaintiff no. 1 want to withdraw the said suit and thereby abandoning the claim qua all the defendants.”

(Emphasis supplied)

4.2. He stated that pursuant to the said application the suit was dismissed as withdrawn qua all the plaintiffs including the Plaintiffs herein vide order dated 29.07.2017. He stated that the neither the said application nor the dismissal order was objected to by the Plaintiffs herein in the said suit.

4.3. He stated that the withdrawal of the 2017 Partition suit by late Smt. Renu Gupta on the ground that she does not claim any right title or interest in the suit property amounts to relinquishment of her share if any in the suit property. He stated that the said withdrawal was pursuant to the knowledge of late Smt. Renu Gupta about the registered Will of late Sh. Kailash Chand Jain.

4.4. He stated that the present suit filed after the death of Smt. Renu Gupta raising the same pleas as already raised in the previous suit i.e., CS No. 170/2017 is nothing but an attempt to reagitate the matter and is an abuse of the process of law as an earlier suit on the same cause of action was already dismissed as withdrawn with no liberty reserved whatsoever.

4.5. He stated that since the predecessor-in-interest of Plaintiffs had herself admitted that she claims no right, title or interest in the suit property, the Plaintiffs cannot now claim what has already been relinquished by their predecessor-in-interest.



4.6. He relied on the Judgments of the Supreme Court **Elumalai alias Venkatesan & Anr. v. M. Kamala & Ors.**¹ and **B.L. Sreedhar v. K.M. Munireddy**² to contend that the effect of ‘estoppel’ cannot be disregarded by persons claiming through the person, whose conduct has created the estoppel or by the person himself.

4.7. He further stated that the Plaintiffs in their affidavit of admission/denial of documents have admitted the documents filed by the Defendants qua the proceedings which happened in the 2017 Partition suit.

Arguments of the Plaintiff

5. In reply, learned Counsel for the Plaintiffs stated that the phrase ‘Subject Matter’ referred to in Order XXIII Rule 1(4) CPC does not only involve the subject property but also includes ‘cause of action’ to file the suit.

5.1. He stated that the Plaintiffs have got the right, title and interest in the suit property only after the death of their mother i.e., late Smt. Renu Gupta. He stated that, therefore, the impleadment or presence of the Plaintiffs in 2017 Partition suit does not prejudice their independent right to file the present suit, which accrued to them as a distinct cause of action after the death of their mother.

5.2. He stated that cause of action in both the suits is different from each other and therefore the bar under Order XXIII Rule 1(4) CPC does not attract and the Plaintiffs are well within their right to maintain the present suit.

¹ 2023 SCC OnLine SC 84.

² 2003 Rajdhani Law Reporter 197 SC.



5.3. He stated that the plea of concealment is not borne out from the record as there is a categorical mention about the 2017 Partition suit filed by the mother of the Plaintiffs in the plaint of the underlying suit.

5.4. He further stated that the application under Order XXIII Rule 1 CPC filed by the mother of the Plaintiffs in the earlier suit was prepared by the Defendants themselves and the signature of the mother of the Plaintiffs on the said application was obtained by coercion.

5.5. He relied upon the judgements titled as **Sri. Kishan v. Ram Kishan & Ors³**. and **Jai Devi v. Jodhi Ram Alias Jyoti Prashad & Ors.⁴** to contend that the withdrawal of previous partition suit under Order XXIII Rule 1 CPC will not bar a subsequent suit for partition of the same properties as the cause of action for filing the suit for partition is recurring in nature and, therefore, the present suit filed by the Plaintiffs for partition of the suit property is not barred under Order XXIII Rule 1(4) CPC.

Analysis and Findings

6. This Court has considered the submissions of the parties and perused the record.

7. In the plaint of the underlying suit, it is stated that late Sh. Kailash Chand Jain was the sole and exclusive owner of the suit property; and, he unfortunately passed away on 22.01.2013.

7.1 It is admitted in the plaint that Plaintiffs are claiming their rights in the suit property through their deceased mother i.e., late Smt. Renu Gupta. The Plaintiffs contend that the alleged rights sought to be enforced through

³ 159 (2009) DLT 470 (DB).

⁴ (1970) DLT 549.



the present suit has devolved upon the demise of their mother. The relevant extract of paragraph nos. '6' and '7' of the plaint reads as under:

“6. That the mother of the plaintiffs has unfortunately expired on 23.12.2020 leaving behind his husband and two sons as her legal heirs. It is submitted that the mother of the plaintiffs was deaf and dumb since her birth. **The plaintiffs submit that as the share in the suit property was inherited by the mother of the plaintiffs from her father, therefore, after the death of mother of the plaintiffs, the plaintiffs (Sons of Smt. Renu Gupta) have inherited the undivided 1/5th share in the suit property jointly...**

7. That **the plaintiff: have inherited the right in the suit property after the death of their mother** as such, the plaintiffs have requested the defendant for partition of the suit property in the month of July 2021.”

(Emphasis supplied)

Filing and Withdrawal of the earlier suit for Partition by Mrs. Renu Gupta

8. Pertinently, in the plaint itself, the Plaintiffs have made a disclosure that a suit for reliefs identical to the underlying suit was filed by Plaintiffs along with their mother before the District Court Rohini in 2017; which suit was dismissed as withdrawn by late Smt. Renu Gupta on 29.07.2017. The disclosure in the plaint in this regard at paragraph '6' reads as under:

“6. It is Important to mention here **that during the lifetime of Smt. Renu Gupta (mother of the plaintiffs), Smt. Renu Gupta alongwith the plaintiffs had filed a suit for partition, mandatory and permanent injunction in respect of the suit property before the Ld. Senior Civil Judge, Rohini Courts, Delhi but the same was withdrawn later on by Smt. Renu Gupta (mother of the plaintiffs) on 29.07.2017 at initial stage.**”

(Emphasis supplied)

8.1. The 2017 Partition suit had three (3) Plaintiffs, Smt. Renu Gupta was arrayed as Plaintiff no. 1, Mr. Sunil Kumar Gupta was arrayed as Plaintiff



no. 2 and Mr. Manish Kumar Gupta was arrayed as Plaintiff no. 3. On behalf of Smt. Renu Gupta, the said suit was filed by her son Mr. Sunil Kumar Gupta holding himself out to be her SPA holder.

8.2. Smt. Renu Gupta upon learning about the filing of the 2017 partition suit addressed a communication to the presiding Judge ('Letter No.1') stating that her signatures have been misused by her sons and she has not authorized the filing of the said suit. In the said letter she stated that she wants her share in the suit property to be given to her mother i.e., Smt. Pushpa Jain. Smt. Renu Gupta addressed another letter to the presiding Judge ('Letter No.2') wherein she once again stated that she has not filed the suit and wishes to withdraw the same.

8.3. Smt. Renu Gupta also filed a written application dated 14.03.2017 under Order XXIII Rule 1 CPC reiterating that she had not executed the SPA in favour of her son Mr. Sunil Kumar Gupta and further sought direction of the said Court to dismiss the said suit as withdrawn against the Defendants therein.

8.4. The said application was taken up by the learned Civil Judge on 16.03.2017 who deemed it appropriate to examine Smt. Renu Gupta under Order X CPC before allowing the said application. Moreover, considering the fact that Smt. Renu Gupta was deaf and dumb, the learned Civil Judge also sought assistance of an expert from the Principal of Deaf and Dumb School, Paharganj, Delhi so as to assist the Court in communicating with Smt. Renu Gupta. The Court fixed the matter for 04.05.2017 and the matter was finally taken up on 15.07.2017 for recording of the statement of Smt. Renu Gupta. Smt. Renu Gupta's statement was recorded on 15.07.2017 in the presence of an Interpreter who was an expert in sign language of deaf



and dumb individuals. In her statement, Smt. Renu Gupta confirmed to the learned Civil Judge that she had indeed signed and filed the application for withdrawal dated 14.03.2017. In her statement she reiterated that she did not want to pursue the said suit and wanted to withdraw the same unconditionally.

8.5. In view of Smt. Renu Gupta's unequivocal statement, the learned Civil Judge vide order dated 20.07.2017 dismissed the suit as withdrawn qua Smt. Renu Gupta.

8.6. Mr. Sunil Kumar Gupta and Mr. Manish Kumar Gupta, sons of Mrs. Renu Gupta who were arrayed as Plaintiff no. 2 and Plaintiff no. 3 in the 2017 partition suit as well withdrew the said suit unconditionally in terms of the application filed by their mother under Order XXIII Rule 1 CPC.

Cause of Action for filing the Present Suit

9. The averments in the 2017 partition suit qua the cause of action and the reliefs sought therein are relevant and are reproduced herein below for consideration:

"7. That the plaintiffs have time and again requested the defendants since December, 2013 to admit the claim of separate 1/5 share of the property to the Plaintiff no. 1 but the defendants with malafide intention have refused to accept the lawful and genuine request of the plaintiff no. 1 and thereafter as well the defendants have several times quarreled with the plaintiffs, the cause of action arose in August, 2014 when the defendants served a false legal notice of vacation of the house and the cause of action also arose in October, 2015 when the defendants illegally tried to stop the plaintiffs from raising construction and furnishing their house and the cause of action also arose in the years 2015 & 2016 when respectables advised the defendants to give the share of plaintiffs in the suit property and not to grab their property with ulterior motives. The defendants threatened the plaintiffs of serious and grievous consequences in September, 2016 and thereafter they got the RTI information about the suit property and even on 28.01.2017 the plaintiffs lastly requested the



defendants to give their rightful share of the suit property but the defendants conclusively refused to exceed to their request and repeated the threatening of serious consequences. and particularly misbehaved and terrorized the plaintiff no. 1 and warned her that if she does not support the defendants and do not surrender fully to the support of defendant no. 1 & 4 particularly they will deprive her from the total share and dispose the suit property to the muscle men. Hence the present suit.”

.....

The Humble plaintiffs most respectfully pray to this Hon'ble Court to be pleased to decree the suit of the Plaintiffs to the effect: -

a) To decree the suit of the Plaintiffs in favour of the Plaintiffs and against the defendants;

b) To **pass a decree of possession in favour of Plaintiffs by way of partition to the extent of 1/5 share of the house no. B-10, C.C. Colony, Delhi;**

c) To pass a decree for Permanent Injunction against the defendants not to sell or alienate the property either way or to create third party interest or to handover possession of the property or any part thereof to any third person;

d) To pass a decree of Mandatory Injunction with consequential mandatory directions to the defendants to restore the suit property which exists at the time of filing of the suit in case the defendants or their legal heirs & successors, agents and attorneys or any person authorized or deriving interest from them succeed in their evil designs to sell, alienate or create third party interest either way;

e) To be pleased to order & direct the defendants to pay the entire costs of the suit to the plaintiffs;

f) To grant any other relief which has not been specifically prayed for but for which this Hon'ble Court finds the Plaintiffs entitled to in peculiar facts & circumstances of the case and in order to meet the ends of justice & equity.”

(Emphasis supplied)

9.1 Mrs. Renu Gupta as noted above died on 23.12.2020 and the underlying suit was filed on 29.01.2022, Though, in the plaint at paragraph no. '6' there is a reference to the filing of the 2017 partition suit and its withdrawal, no documents pertaining to the said suit and its withdrawal were



filed on record by the plaintiffs as is evident from para '7.1' above. After the Defendants entered appearance and filed the captioned application under Order VII Rule 11 CPC pointing out to the non-disclosure of these documents, the Plaintiffs filed additional documents and placed on record the documents executed by Smt. Renu Gupta in 2017 seeking to unconditionally withdraw the 2017 partition suit filed by her sons without her consent and authority.

9.2 The Defendants have also placed on record the registered Will dated 30.05.1995 executed by late Sh. Kailash Chand Jain bequeathing the suit property in favour of his wife Smt. Pushpa Jain i.e., Defendant no. 1 herein.

10. In the aforementioned facts the question that arises for consideration of this Court is that 'whether the plaintiffs herein who claim their rights through Smt. Renu Gupta have cause of action to maintain this underlying suit considering the circumstances surrounding the withdrawal of the 2017 partition suit as noted above?'.

10.1 The Defendants have stated that the underlying suit is barred under Order XXIII Rule 1(4) CPC as it is based on same 'subject matter' which includes a bundle consisting of 'cause of action' and 'right' qua the suit property. It is stated that the said cause of action and right stood already exercised by Smt. Renu Gupta in the 2017 partition suit which was withdrawn by Smt. Renu Gupta unconditionally, making the present Plaintiff barred from filing a fresh suit on the same 'subject matter'.

10.2 The plaintiffs have, however, stated that though it is matter of record that there was an unconditional withdrawal of the 2017 partition suit by Smt. Renu Gupta, however, Order XXIII Rule 1(4) CPC has no application to a suit for partition and the suit for partition can be filed so long as the right of



co-ownership exists. In this regard, the plaintiffs have relied upon the judgment of Coordinate Bench of this Court in **Sri Kishan v. Shri Ram Kishan & Ors.**⁵ and have relied upon paragraphs 1, 2, 3, 5, 16, 17 and 18 therein which read as under:

“1. The plaintiff has filed the above-noted **suit for partition** of the properties mentioned in Annexure A & B to the plaint, a declaration that the sale of the properties mentioned in Annexure C of the plaint is null and void and permanent injunction against defendants No. 1 to 5 restraining them from creating any third party interests in the plaintiffs share of the properties mentioned in Annexure A and from interfering with the peaceful possession of the plaintiff of the properties mentioned in Annexure B....

2. The **plaintiff has contended that he had filed a suit for partition before the Civil Judge against defendant No. 1, Shri Ram Kishan, only** and the Civil Judge by order dated 13th May, 1996 **had dismissed the suit by observing that the suit is barred under the provisions of Delhi Land Reforms Act and that the plaintiff is at liberty to file an appropriate suit before the appropriate court as per the provisions of Delhi Land Reforms Act.** The plaintiff had **preferred an appeal** against the dismissal of suit by order dated 13th May, 1996 which was allowed by the Additional District Judge by order dated 5th September, 2000 and the **matter was remanded back to the trial court to proceed in accordance with law.**

3. The **plaintiff has contended that he had realized that the values of the properties whose partition is being sought was in excess of the pecuniary jurisdiction of the Trial Court and therefore he had moved an application for withdrawal of the suit with liberty to file the matter in the appropriate court,** which was subsequently allowed and thereafter the present suit for partition, possession and permanent injunction has been filed.

...

5. The defendants No. 1 to 5 have contested the suit contending inter alia that the earlier suit bearing No. 64 of 1994 for partition filed by the plaintiff was withdrawn by him on the ground that the suit was in respect of agricultural land and so the Civil court had no jurisdiction to grant the relief. **The defendants have contended that in the present suit the plaintiff is seeking partition of the same properties**

⁵ 2009 (110) DRJ 323.



as in earlier suit bearing No. 64 of 1994 and as those properties are agricultural land the suit is barred under Section 185 of Delhi Land Reforms Act. It was contended that a partition suit in respect of agricultural land can be entertained only by Revenue assistant under Section 55 of the Delhi Land Reforms Act.

6. The plaintiff (sic) defendant has also contended that the earlier suit filed by the plaintiff being No. 64 of 1994 was withdrawn by the plaintiff without seeking liberty of the Court to file a fresh suit on the same subject matter and therefore the present suit seeking the same relief on the same cause of action is barred. The dismissal of the suit is also prayed on the ground that the plaintiff had filed another suit bearing No. 1172 of 1993 for permanent injunction which was also abandoned by the plaintiffs as interim injunction was not granted to the plaintiffs.

.....

16. It is apparent from the record of the proceedings in suit No. 64 of 1994 that the plaintiff had withdrawn the suit without seeking liberty to institute a fresh suit on the same cause of action nor had court given such a liberty while dismissing the matter as withdrawn. Order XXIII Rule 1 of the Code of Civil Procedure lays down that where a party withdraws a suit without seeking permission to bring a fresh suit on the same cause of action or abandons a part of the claim or where the court does not grant such a liberty, he is precluded from claiming the abandoned relief or from bringing a fresh suit on the same cause of action. So, on the face value there appears to be some merit in the contention of the defendants. However it is trite law that the general proposition laid down in Rule 1 of Order XXIII does not apply to a suit for partition and a suit for redemption of mortgage. The right to demand partition and separate possession is a recurring right. Therefore the cause of action in the subsequent suit for partition will be different from cause of action in the earlier suit which was withdrawn or abandoned and consequently Order XXIII Rule 1 sub-rule 4 will have no application.

17. The right to enforce partition is a legal incident of a co-ownership and as long as such co-ownership subsists, the right to seek partition continues. The mere fact that a co-owner files a suit for partition and then abandons or withdraws it will not deprive him of his right to seek partition of the joint property. The substantive right of a co-owner to seek partition of the joint property will not be extinguished by the provisions of Order XXIII Rule 1. If the plaintiff



brings a suit for partition and then, for any reason, **decides not to enforce the right immediately and withdraws the suit, then he would be deemed to have chosen to continue the ownership in common** for some time more till he would find it necessary again to seek its termination. A suit which is barred by withdrawal of the claim under Order XXIII Rule 1(3) is one which is based on the same cause of action but a suit for partition and separate possession of the share which may be brought subsequently **will be on a cause of action arising upon a demand subsequently made and refused** [See Radhe Lal v. Mulchand, AIR (11) 1924 ALL 905].

18. A Division Bench of this Court in *Jai Devi & Ors. v. Jodhi Ram & Ors.*, 6 (1970) DLT 549 has held that the bar of second suit contemplated in Order XXIII, Rule 1(4) is not applicable to a partition suit, **as the cause of action in such a suit is a recurring one.** In the said case the husband of the appellant therein, Mr. Babu Ram had filed a suit in the Court of Subordinate Judge 1st Class, Delhi for partition of the joint family properties. An application was moved in the said suit by the plaintiff stating that he intended to withdraw the suit and did not want to pursue the same. **Liberty was not reserved** by the plaintiff either in his application or in his statement in Court to institute a fresh suit in respect of the subject matter of the suit nor was permission granted by the Court to withdraw with liberty to institute a fresh suit. **Thereafter the wife of the plaintiff and his sons filed a suit for the partition of the same properties.** One of the issues before the Court was whether the subsequent suit was barred by Order XXIII Rule 1 of the Code of Civil Procedure.....”

(Emphasis supplied)

10.3 In the considered opinion of this Court, the facts of the judgment in **Sri Kishan** (supra) are distinguishable. In the facts of the said case, there was no abandonment by the Plaintiff therein and in fact, the Plaintiff had been diligently pursuing his claim for partition of the suit property in various forums, however, unfortunately he was being non-suited in each forum on account of procedural non-compliances/impediments. It is worth mentioning that the Plaintiff therein did not exercise the right of severance of joint status and instead continued with the co-ownership of the suit property therein.



The law as settled in the judgment of **Sri Kishan** (supra) would have no application to the facts of the present case where late Smt. Renu Gupta made a conscious and a deliberate election to withdraw the suit for partition on the specific pleading that she does not lay claim over the estate of her father and her rights if any in the estate of her father, she wishes to relinquish the same in favour of her mother Smt. Pushpa Jain.

10.4 The documents executed by late Smt. Renu Gupta in 2017 and the conscious statement made by her before the learned Civil Judge in 2017 evidence a conscious choice made by her to not pursue any claim in the suit property against her mother, on whom the suit property has devolved as per the registered Will dated 30.05.1995. It is also apparent from the content of the letters written to the learned Civil Judge and the withdrawal application that she accepted the severance of joint status qua her share in the suit property and no longer considered herself to be the co-owner of the said property; thereby relinquishing her share in the favour of her mother i.e., Defendant No.1 herein.

10.5 It is already recorded that the plaintiffs have no right independent of late Smt. Renu Gupta in the suit property as admitted by them at paragraph nos. '6' and '7' of the plaint. The cause of action as stated in the 2017 partition suit mentions that late Smt. Renu Gupta had a right in the suit property and when partition was denied the 'right to sue' accrued in her favour, but considering the averments in withdrawal application Smt. Renu Gupta having exercised the said right in 2017, consciously elected to withdraw the said proceedings with the intent to relinquish share in the suit property in favour of her mother i.e., the Defendant no.1 herein. Therefore, there is no right in the suit property (i.e., the share in the suit property)



which devolved to the plaintiffs through late Smt. Renu Gupta which can be said to have been infringed by the Defendants herein giving Plaintiffs a ‘right to sue’.⁶ The plaintiffs are claiming through late Smt. Renu Gupta and are therefore, bound by her election of relinquishing her claim in the suit property.

10.6 In this regard it is apposite to refer to the judgment of Supreme Court in **Vallabh Das v. Madan Lal (Dr)**⁷, wherein the Court dealing with the definition of ‘Subject Matter’ in relation to Order XXIII Rule 1 CPC observed as under:

“5. Rule 1 of the Order 23, Code of Civil Procedure empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The term imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore, we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous suit. **The expression “subject-matter” is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed...**”

(Emphasis supplied)

10.7 Further the High Court of Bombay in **Rakhmabai v. Mahadeo Narayan Bundre**⁸, held that the word ‘Subject Matter’ is not to be seen in isolation because the same relates to a bundle of facts which are essential to prove that the right has been accrued in favour of the Plaintiff in a suit

⁶ 1930 SCC OnLine PC 62.

⁷ (1970) 1 SCC 761 at para 5.

⁸ 1917 SCC OnLine Bom 24 at page 763.



claiming the relief based on the said right. The relevant part of the said judgment reads as under:

“The question is whether the previous suit was a suit for the same subject-matter as the present suit within the meaning of Order XXIII, Rule 1. We are of opinion that “subject-matter” means, to use the words of Order I, Rule 1, “the series of acts or transactions alleged to exist giving rise to the relief claimed.” Obviously the first series of acts or transactions which formed the basis of the first suit was incomplete, or the plaintiff would have been able to prosecute his suit to decree. It was incomplete because there was no notice to quit. The second series of acts or transactions is complete because the notice to quit has been given, and therefore, the two suits are not in respect of the same subject matter.

The same result arises if “subject matter” is to be taken to be “the cause of action” in the sense in which it is usually understood, namely, the bundle of facts which have to be proved in order to entitle the plaintiff to relief...”

(Emphasis supplied)

10.8 Keeping in view the aforesaid statement of law qua ‘subject matter’, in the facts of this case it is an inescapable conclusion that Smt. Renu Gupta (the mother of the plaintiffs) was left with no right in the suit property after her deliberate unconditional withdrawal of the 2017 Partition suit. Pursuant to the said withdrawal, Smt. Renu Gupta herself could not have maintained a subsequent suit in her lifetime. Thus, the plaintiffs herein who are claiming through late Smt. Renu Gupta cannot claim that they have any right in the suit property and thus, they are not entitled to maintain this suit. Therefore, the present suit would be barred under Order XXIII Rule 1(4) CPC.

10.9 In the State of Delhi, a Will does not require probate. In the facts of this case, where a registered Will dated 30.05.1995 exists and the Testator i.e., late Kailash Chand Jain having passed away on 22.01.2013 and late Smt. Renu Gupta who was the Class-I legal heir of the testator having



elected not to claim any rights in the suit property until her death in the year 2020 and instead having consciously withdrawn the suit for partition filed by the plaintiffs herein in the year 2017 are all facts which show that no ‘right to sue’ survives in favour of the plaintiffs herein upon the death of Smt. Renu Gupta.

Re-litigation by Plaintiffs

11. The Supreme Court in the case of **K.K. Modi v. K.N. Modi**⁹, deliberated upon the issue of ‘re-litigation’ as a tactic being used by the parties to reinvent the wheel by re-agitating the same relief which has already been a subject matter of consideration of by a Court of law. The relevant paragraph ‘44’ of the said judgment reads as under:

“44. One of the examples cited as an abuse of the process of the court is relitigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as res judicata. But if the same issue is sought to be reagitated, it also amounts to an abuse of the process of the court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the court. Frivolous or vexatious proceedings may also amount to an abuse of the process of the court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted.”

(Emphasis supplied)

11.1 It is worth mentioning that in the 2017 partition suit when the application for withdrawal was moved by late Smt. Renu Gupta the same was not summarily allowed by the concerned learned Civil Judge. The

⁹ (1998) 3 SCC 573.



learned Civil Judge undertook the effort of resorting to services of an Interpreter to understand the true intent of what was pleaded in the Order XXIII Rule 1 CPC application moved by late Smt. Renu Gupta. Learned Civil Judge heard the matter on four (4) occasions to satisfy its judicial conscience in order to adjudicate on the withdrawal application of Smt. Renu Gupta. The underlying suit is an attempt to set at naught the judicial time which was invested to dismiss the 2017 partition suit. The present Plaintiffs were party to the said 2017 partition suit and through their counsel made a categorical statement in support of the application of withdrawal filed by late Smt. Renu Gupta. It is admitted that the said order of withdrawal has not been challenged till date and therefore, the present attempt to re-agitate the same subject matter which has already been dealt with by the learned Civil Judge is nothing but an abuse of process of the Court and a feeble attempt to re-litigate the said subject matter.

Registered Will of Kailash Chand Jain

12. The filing of the present suit by the Plaintiffs on the plea that late Shri Kailash Chand Jain died intestate on 22.01.2013 and his estate devolved on all his Class I legal heirs as per Section 8 of Act of 1956 is not admitted.

12.1 The Defendants have placed on record registered Will dated 30.05.1995 stated to have been executed by late Shri Kailash Chand Jain. As per the said registered Will the suit property has devolved on his wife, Smt. Pushpa Jain i.e. Defendant no. 1 herein. It is a matter of record that in the State of Delhi a Will can be acted upon by the legatee without seeking a probate unless there is a challenge to the said Will by the natural legal heirs.

12.2 It is also well settled that there is a presumption under the law that a registered document has been validly executed and it cannot be discarded or



disregarded lightly and in a cursory manner. The Will in the present case was registered on 26.02.2008 which contained a bequest with respect to the suit property in favour of Defendant no. 1 for life time and after her death in the favour of Defendant no.3. The said registered Will contains endorsement of the Sub-Registrar that the testator has admitted the execution of the Will and the contents therein. The Supreme Court in its judgement **Prem Singh & Ors. v. Birbal**¹⁰ has held that there is presumption of genuineness and validity attached to a registered document. The relevant para reads as under:

“27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption.”

(Emphasis supplied)

12.3 In view of these facts, the presumption of genuineness and validity of the registered Will dated 30.05.1995 shall have to be given effect to in favour of Defendant no. 1.

12.4 The mother of the plaintiffs i.e. Smt. Renu Gupta in her application filed under Order XXIII Rule 1 CPC filed on 14.03.2017 categorically stated that she does not wish to stake any claim in the property against her mother.

12.5 In this conspectus of facts Smt. Renu Gupta who was the Class I legal heir appears to have accepted the said bequest made by late Shri Kailash Chand Jain in favour of Smt. Pushpa Jain i.e. Defendant no. 1. In this regard, contents of letter no. 1 addressed by her are relevant.

¹⁰ (2006) 5 SCC 353.



12.6 For this additional reason, this Court finds that the suit of the Plaintiffs is without any cause of action and barred by law and is, therefore, liable to be rejected.

12.7 The letters addressed by Smt. Renu Gupta in the year 2017 to the learned Civil Judge have been placed on record by the Plaintiffs herein under cover of index dated 17.05.2022 and its existence is admitted by the Plaintiffs.

13. Accordingly, the captioned application stands disposed of and suit stands rejected under Order VII Rule 11 CPC.

14. The interim order stands vacated and all future dates stand cancelled.

MANMEET PRITAM SINGH ARORA, J

DECEMBER 17, 2024/sk