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

+ **FAO(OS) 35/2024**

SMT PHOOLWATI (DECEASED) THROUGH LRS AND ORS

..... Appellants

Through: Ms. Kajal Chandra and Ms. Perna
Chopra, Advocates

versus

SHRI DEVINDER SINGH AND ORS

..... Respondents

Through: None

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Date of Decision: 19th March, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ: (ORAL)

CM APPL. 14849/2024 (for exemption)

Allowed, subject to all just exceptions.

Accordingly, the present application stands disposed of.

FAO(OS) 35/2024

1. The present appeal has been filed under Section 10 of the Delhi High Court Act, 1966, ('Act of 1966') challenging the impugned order dated 18th December, 2023, passed in CS (OS) No. 657/2017, whereby the learned Single Judge dismissed the I.A. No. 8954/2023 filed by the Appellants herein under Chapter IX Rule 6 of the Delhi High Court (Original Side)



Rules, 2018 ('DHC Rules') read with section 151 of Code of Civil Procedure, 1908 ('CPC').

Brief facts

2. The Appellants herein are the plaintiffs and the Respondents are the defendants. The civil suit has been filed by the Appellants herein seeking declaration, partition and permanent injunction. The parties herein are the lineal descendants of late Sh. Lo Ram, who died intestate on 14th May, 2001 leaving behind several immoveable properties.

2.1. The reliefs sought in the said suit have been opposed by the Respondents herein on the ground that there was an oral partition in the year 1980, which had been acted upon by the parties and pursuant thereto, Respondents are in possession of their respective portions of immovable properties. The Respondents pleaded that this fact of partition is evidenced from the mutation entry with respect to the land bearing Khasra no. 509 and 462, situated in the Revenue Estate of Village Mahipalpur, National Capital Territory of Delhi, carried out in favor of the Respondents herein *vide* mutation order dated 18th February, 2002, passed by the Tehsildar. The Respondents therefore, asserted their right to lead evidence in the suit to prove the oral partition.

2.2. The issues were framed in the suit on 25th November, 2019 and parties was set down for trial. A specific issue was framed with respect to the plea of partition as issue no. (iv).

2.3. At the stage of recording of evidence of the plaintiffs, the Appellants/plaintiffs filed an application bearing I.A. No. 8118/2020 under Chapter IX Rule 6 of the DHC Rules seeking pronouncement of judgment, on the plea that alleged defence of oral partition has no relevance in the eyes



of law. The said application was dismissed by the learned Single Judge *vide* order dated 27th July, 2022 and the appeal¹ filed against the said order was dismissed by the Division Bench *vide* order dated 31st January, 2023.

2.4. The Appellants state that I.A. No. 8118/2020 was dismissed in view of the existence of the mutation order dated 18th February, 2002. It is stated that the said mutation order has since been set aside by the Financial Commissioner *vide* order dated 6th April, 2023.

2.5. It is stated that in light of this subsequent development, the Appellants have filed a fresh application i.e., I.A. No. 8954/2023 under Chapter IX Rule 6 of the DHC Rules, once again seeking pronouncement of judgment in their favor.

2.6. This new application has been dismissed by the learned Single Judge *vide* impugned order dated 18th December, 2023, inter-alia on the ground that the I.A. No. 8118/2020 filed seeking similar reliefs already stands dismissed.

3. Learned counsel for the Appellants states that the entire basis of the rejection of the earlier I.A. No. 8118/2020 by the learned Single Judge and the Division Bench, was the existence of the mutation order dated 18th February, 2002; and with the setting aside of the said order, the reliance of the Respondents to prove oral partition based on the said mutation order does not survive for consideration. She states that since the ownership of late Sh. Lo Ram of the immoveable properties is admitted, the Appellants herein are entitled to a decree of partition forthwith without awaiting trial. She states that the plea of oral partition set up by the Respondents is not a legally

¹ FAO(OS) No. 109/2022



admissible plea and there is therefore, no justification for holding a full-fledged trial.

4. We have heard the learned counsel for the Appellants and perused the paper book and the suit record.

5. The issues in the suit were framed on 25th November, 2019. In view of the defence of oral partition raised by the Respondents, the issue no. (iv) has been specifically framed in the suit. In pursuance to the framing of issues, the Appellants herein have already filed evidence affidavits of four of their witnesses on 21st January, 2020. However, it appears from the suit record that thereafter, no evidence was recorded as the Appellants herein elected to file I.A. No. 8118/2020 seeking pronouncement of judgment. The said application was dismissed *vide* order dated 27th July, 2022 and upheld in appeal by the Division Bench *vide* judgment dated 31st January, 2023.

6. The Appellants, however, despite the aforesaid dismissal, elected not to proceed with recording of evidence² and instead filed I.A. No. 8954/2023 once again seeking the identical relief of the pronouncement of final judgment in the suit. The learned Single Judge has dismissed the said application on several grounds including inter-alia the ground that the relief already stands rejected in the earlier round of litigation in I.A. No. 8118/2020. The Appellants herein have been directed to proceed with leading evidence and with a direction to Respondents to lead evidence in support of their defense of oral partition.

7. We are of the considered opinion that the present appeal is not maintainable under Section 10 of the Delhi High Court Act, 1966 ('Act of

² Order dated 30th May, 2023 passed in the suit proceedings.



1966'). The impugned order is admittedly not appealable under Order XLIII Rule 1 CPC. In order to maintain an appeal under Section 10 of the Act of 1966, the order assailed must satisfy the tests of a 'judgment' as laid down by Supreme Court in *Shah Babulal Khimji v. Jayaben D. Kania*³. The said test has been made applicable to appeals filed by a party under Section 10 of the Act of 1966 by the Full Bench of this Court in *Jaswinder Singh v. Mrigendra Pritam Vikram Singh Steiner*⁴

8. By the impugned order the learned Single Judge has upon perusal of the pleadings and the record exercised its discretion and opined that the Respondents are entitled to lead evidence in support of their defence on the issues framed in the suit on 25th November, 2019. This decision of the learned Single Judge is not an adjudication on the merits of the case of either of the parties. The learned Single Judge who is monitoring the trial is vested with the discretion to permit the parties to lead evidence in support of their respective stands. The exercise of the said discretion does not merit interference. The impugned order does not affect any vital right of the Appellants and does not decide any matter of the moment; and therefore, the impugned order does not satisfy the test of a judgment. This circumstance is specifically illustrated in the judgment of the Supreme Court in *Shah Babulal Khimji* (supra) to state that such an order would not satisfy the test of a 'judgment' and is only an interlocutory order against which an appeal would not be maintainable. The relevant portion reads as under:

"113. ...

...

³ (1981) 4 SCC 8 (Paras 114 and 115)

⁴ 2012 SCC OnLine Del 5506



(3) Intermediary or interlocutory judgment.—Take the converse case in a similar suit where the Trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an order passed by the Trial Judge would not amount to a judgment within the meaning of clause 15 of the Letters Patent but will be purely an interlocutory order. ... ”

9. Further, the underlying application seeking to invoke the provisions of Chapter IX Rule 6 of the DHC Rules, by the Appellant four years after framing of issues is misconceived. On a plain reading, the said Rule is intended to be invoked by the party at the early stages of the suit such as (i) first hearing of the suit proceeding; or (ii) at the stage of framing of issues. In the present case, parties themselves in the year 2019 understood that the claim and the defense require leading of evidence and proceeded accordingly. The underlying suit has remained at the stage of recording of plaintiff evidence since the year 2020; we find from the perusal of the suit record that the Appellants herein have failed to lead evidence despite the matter being listed for the said purpose before the Court on several dates.

10. The learned Single Judge has rightly observed that the grounds and the reliefs sought in I.A. No. 8954/2023 are identical with the I.A. No. 8118/2020, which also stood dismissed. Infact, we are of the opinion that the filing of I.A. No. 8954/2023 was barred by doctrine of estoppel based on the principle of re-litigation as held by the Supreme Court in **K.K. Modi v. K.N. Modi and Ors.**⁵. The setting aside of the mutation order dated 18th February, 2002, by the Financial Commissioner on 06th April, 2023, as rightly observed by the learned Single Judge, was not on the merits of the matter



but on account of the issue of lack of jurisdiction of the Tehsildar. However, the effect, if any, of the mutation in public record on the rights of the parties would have to be determined by the learned Single Judge at the stage of final adjudication.

11. We accordingly find that the present appeal is not maintainable and the same is accordingly dismissed.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

MARCH 19, 2024/rhc/hp/aa

⁵ (1998) 3SCC 573