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IN THE HIGH COURT OF DELHI AT NEW DELHI*Judgment reserved on: 24.01.2024*

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Judgment pronounced on: 13.02.2024

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RFA(OS) 17/2021**SURENDER KUMAR**

..... Appellant

Through: Mr Sanjeev Kumar Dubey, Senior Advocate with Mr Karan Khanna, Mr Navjot Kumar, Mr Shoaib Haider, Ms Rashmi Sharma, Mr Suyash Gupta and Mr Pushpam Arya, Advocates.

versus

**LATE SH. DHANI RAM THROUGH
LRS AND ORS & ORS.**

..... Respondents

Through: Mr N.S. Dalal, Advocate for respondent no. 1A & 6.
Mr Ashish Dabas, Advocate for respondent no.2.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE AMIT BANSAL****[Physical Hearing/Hybrid Hearing (as per request)]****AMIT BANSAL, J.:**

1. The present appeal has been filed impugning the judgment dated 2nd March, 2020 passed by the learned Single Judge, whereby the civil suit filed by the appellant/plaintiff (hereinafter 'appellant'), being CS(OS) 418/2016, seeking partition, has been dismissed.
2. The details of the properties of which the partition is sought (hereinafter 'suit properties') are as under:
 - i. Plot No.711, measuring 771 square yards, situated in Village Mundka, Delhi.

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KUMAR

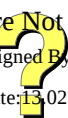
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- ii. Plot No.715, measuring 6365 square yards, situated in extended Abadi of Village Mundka, Delhi also known as Saini Vihar, out of which 1176 square yards is in possession of the appellant.
 - iii. Agricultural land comprised in Khasra No.125/1 (18 Bighas and 16 biswas) and Khasra Nos. 711 and 715 situated in revenue estate of Village Mundka, Delhi.
 - iv. Property No.603 measuring 214 square yards in Khasra No.370 situated in Old Lal Dora, Village Mundka, Delhi.
3. Brief facts leading to the filing of the present appeal are set out below:
- 3.1. The suit properties were ancestral properties belonging to the Hindu Undivided Family (HUF) of the appellant's grandfather, Shri Jage Ram, who died intestate on 30th May, 1980, leaving behind the aforesaid HUF properties. He had three sons, including Dhani Ram, who was the father of the appellant.
 - 3.2. The appellant was born on 18th July, 1967 and therefore, had a right to inherit his share in the HUF properties of his grandfather, Jage Ram, on account of him being one of the co-parceners in the said HUF.
 - 3.3. It is the case of the appellant that there has never been any partition between the family members and the said properties are still lying in the common hotch-potch.
 - 3.4. The appellant filed a civil suit for partition being CS No.330/2010 before the learned District-Judge, Tis-Hazari Courts, Delhi. However, since the valuation of the suit properties was higher than the pecuniary jurisdiction of the District Courts, the appellant withdrew the said suit with liberty to file a fresh suit before this Court.
 - 3.5. Another civil suit being CS 470/2012 seeking partition of three out of



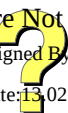


the four suit properties was filed before the District Court, Tis Hazari by the brother of the appellant, Nagender Lakra, who is the respondent no.1(a) herein, which was dismissed *vide* judgment dated 23rd September, 2019. An appeal being RFA No.1031/2019 has been filed against the said judgment which is pending before this Court.

3.6. In the year 2012, the appellant filed a fresh suit being CS(OS) 1737/2012 before this Court seeking partition of the aforesaid suit properties. The said suit was dismissed *vide* judgment dated 18th January, 2016, invoking the provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) on the ground that the appellant had not pleaded the existence of an HUF in the suit and had only made bald averments regarding the same.

3.7. The appellant filed an appeal being RFA(OS) 29/2016 against the said dismissal of the suit, which was dismissed as withdrawn on 30th May, 2016, with liberty to file a review. Subsequent thereto, the appellant filed a Review Petition 313/2016, which was disposed of *vide* order dated 18th July, 2016, granting liberty to the appellant to file a fresh suit on the same cause of action in terms of Order VII Rule 13 of the CPC.

3.8. Accordingly, in August, 2016 the appellant filed a fresh suit being CS(OS)418/2016 seeking partition, possession, permanent and mandatory injunction in respect of the aforesaid suit properties as well as declaration seeking cancellation of the three sale deeds in respect of the suit properties. In the said suit, the appellant filed an application under Order VI Rule 17 of the CPC, seeking amendment of the said suit to make proper pleadings with regard to existence of a coparcenary and HUF, which was allowed by the learned Single Judge *vide* order dated 8th May, 2018.





3.9. Upon entering appearance, the defendants no.1, 8 and 9, being the respondents no.1(a), 6 and 7 herein (hereinafter 'respondents') filed an application under Order VII Rule 11 of the CPC seeking dismissal of the aforesaid suit.

4. By the impugned judgment dated 2nd March, 2020, the learned Single Judge allowed the application filed by the respondents under Order VII Rule 11 of the CPC and the suit filed by the appellant was rejected. The plaint was rejected primarily on the following two grounds:

- I. The earlier plaint filed by the appellant in CS(OS) 1737/2012 has been rejected and the said order has attained finality and;
- II. There cannot be two suits for partition of the same properties. Admittedly, the appellant was a party to the other suit for partition being CS 470/2012 filed by the respondent no.1(a) herein and therefore, the appellant should have got his rights adjudicated in the said suit.

5. Learned Senior counsel appearing for the appellant assails the impugned judgment primarily on the following grounds:

- I. CS(OS)418/2016 was filed in view of the liberty granted to the appellant *vide* order dated 18th July, 2016 passed by the learned Single Judge in the Review Petition 313/2016 filed by the appellant against the judgment rejecting his earlier suit [CS(OS)1737/2012] under Order 7 Rule 11 of the CPC. Therefore, it is wrong to state that the judgment dated 18th January, 2016 had attained finality.
- II. In CS(OS)418/2016, the appellant had filed an amendment application under Order VI Rule 17 of the CPC seeking to make



specific averments with regard to the existence of a coparcenary, which was allowed *vide* order dated 8th May, 2018 and the amended plaint was taken on record.

III. While deciding an application under Order VII Rule 11 of the CPC, the Court only has to look at the averments made in the plaint. In this regard, reliance is placed on ***Saleem Bhai v. State of Maharashtra***, (2003) 1 SCC 557 and ***Texem Engineering v. Texcomash Export***, 2011 (124) DRJ 501 (DB).

IV. The finding in the impugned judgment that there were two suits of partition in respect of the same properties was erroneous. The suit filed by the appellant [CS(OS)418/2016] was for partition, permanent and mandatory injunction and declaration that the three sale deeds in respect of the suit properties were null and void whereas, CS(OS)470/2012 filed by the respondent no.1(a) was only for seeking partition of three of the suit properties.

6. *Per contra*, counsel appearing on behalf of the respondents submits that the impugned judgment has rightly observed that the case of existence of an HUF set up by the appellant was an afterthought as no such plea was taken by the appellant in the earlier suit filed by him, being CS(OS) 1737/2012. It is further submitted that the impugned judgment has rightly observed that there cannot be two suits for partition of the same suit properties. Reliance in this regard is placed on ***Kenchegowda v. Siddegowda @ Motegowda***, (1994) 4 SCC 294 and ***U.N. Bhardwaj v. Y.N. Bhardwaj***, 2015 SCC OnLine Del 13374.

7. We have heard the counsels for the parties and perused the material on record.



8. It is a matter of record that the earlier suit filed by the appellant being CS(OS)1737/2012 was rejected *vide* judgment dated 18th January, 2016 passed by a Single Judge of this Court by invoking provisions of Order VII Rule 11 of the CPC and holding that there was no cause of action pleaded in the suit with respect to existence of an HUF and its properties. The said judgment was challenged by the appellant by way of an appeal which was dismissed as withdrawn with liberty to the appellant to file a review.

9. Pursuant to the said liberty, the appellant filed the Review Petition 313/2016 which was disposed of *vide* order dated 18th July, 2016, passed by the learned Single Judge. For the sake of convenience, the relevant observations of the said order are set out below:

“3. Accordingly, counsel for the plaintiff states that he does not press the review application and the connected applications but prays for and, is granted liberty in terms of Order 7 Rule 13 CPC to file a fresh suit in view of the fact that filing of a fresh suit on the same cause of action is allowed by Order 7 Rule 13 CPC and the judgment dated 18.1.2016 of this Court will not operate as res judicata in view of the judgment of the Supreme Court in the case of Sheodan Singh (supra)”

10. At this stage, it would be apposite to refer to the provisions of Order VII Rule 13 of the CPC, which are set out below:

“13. Where rejection of plaint does not preclude presentation of fresh plaint.—The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.”

11. The appellant filed CS(OS)418/2016 pursuant to the aforesaid liberty granted to him *vide* order dated 18th July, 2016. Therefore, it would not be correct to say that the earlier judgment dated 18th January, 2016, rejecting the plaint under Order VII Rule 11 of CPC had attained finality.



12. In CS(OS)418/2016, the appellant filed an application under Order VI Rule 17 of the CPC seeking amendment of the plaint, which was allowed by order dated 8th May, 2018 by a Single Judge of this Court. Upon the amendment being allowed and the amended plaint being taken on record, summons in the suit were issued to the respondents.

13. At this stage, reference may be made to some of the paragraphs of the amended plaint so taken on record:

“23. That the plaintiff submits, the HUF came into existence before 1956, it is submitted the late Jage (grand-father of the plaintiff), inherited properties from his paternal ancestor prior to 1956, the properties were recorded in revenue records on 26.03.1935 which was prior to 1956, prior to passing of Hindu Succession Act, 1956, the properties in the hand of late Shri Jage were HUF properties. It is submitted after the demise of Late Jage on 03/05/1980, it remained as HUF, the properties were thrown in common hotchpotch, which recorded in the revenue records under serial no.1734, last Jamabandi No.93, Village Mundka, Delhi.

It is further submitted the position of the holding remained as HUF post 1956 too. The plaintiff being coparcener is entitled to claim share from the HUF property.

24. That the plaintiff submits after the demise of late Shri Ram Lal, the property was devolved on his five sons. It is further submitted that as per the revenue records Khewat Jamabandi No.,66 Khatauni recorded in 1908-09 the estate to the tune over 18.3 jointly in the name of legal heirs of Ram Lal was recorded as per Jamabandi in the year 1908-09, Village Mundka Tehsil Delhi in the revenue record.

25. That the plaintiff submits that as per the revenue records, vide Khatuni bearing No.1125/2821, the estate of late Shri Jage Ram land measuring about 24.12 bighas falling in Khasra No.125/1, 10, 21, 22, 711 & 715 was recorded



having the character of HUF. It is pertinent to mention that the land was never partitioned nor any possession of any share was handed over to the defendant Nos.1 to 4. The land was placed in common hotchpotch is HUF property. The land has not been partitioned amount the co-parceners and the land is in common hotchpotch till date.

26. *That the plaintiff submits, being one of the co-parceners is entitled to claim 1/7th share from the HUF ancestral parental property, agricultural as well as residential houses, which were inherited by late Shri Jage, grandfather of the plaintiff prior to 1956 and post 1956 the character of the property is HUF, till date which is in existence and the Defendants No.1, 2, 3 & 4 are the legal heirs of Late Shri Jage and are also co-parceners in the properties.”*

14. A perusal of the aforesaid extracts from the amended plaintiff would show that the appellant made necessary averments with regard to existence of the HUF prior to 1956; continuance of such HUF after 1956 and till the filing of the present suit. Therefore, by making the aforesaid averments, the appellant rectified the deficiencies in his earlier plaintiff which had resulted in its rejection.

15. It is a settled position of law that for the purposes of deciding an application under Order VII Rule 11 of the CPC, only the averments made in the plaintiff have to be looked at and the pleas taken by the defendant in the written statement cannot be considered. Therefore, whether the averments made by the appellant in the amended plaintiff were in the nature of an afterthought or *mala fide* would not be relevant for rejecting a plaintiff under Order VII Rule 11 of the CPC. In this regard, appellant has correctly placed reliance on *Saleem Bhai* (supra) and *Texem Engineering* (supra).



16. As regards the finding in the impugned judgment that there cannot be two suits for partition of the same properties, the appellant has clearly stated that whereas the earlier suit filed by the respondent no.1(a) was only to seek partition of three properties, the suit filed by the appellant [CS(OS)418/2016] was not limited to the relief of partition. There were further reliefs of declaration, possession as well as permanent and mandatory injunction that were sought in CS(OS)418/2016.

17. The judgments in *Kenchegowda* (supra) and *U.N. Bhardwaj* (supra) relied upon by the respondents and referred to in the impugned judgment are not applicable to the facts and circumstances of the present case.

18. In view of the discussion above, in our considered view, CS(OS)418/2016 could not have been rejected under provisions of Order VII Rule 11 of the CPC.

19. Accordingly, the present appeal is allowed and the impugned judgment dated 2nd March, 2020 passed by the learned Single Judge is set aside. The suit filed by the appellant is restored to its original number.

20. The suit will be listed before the Roster Bench on 1st March, 2024.

21. The appeal, along with the pending applications, stands disposed of.

**AMIT BANSAL
(JUDGE)**

**RAJIV SHAKDHER
(JUDGE)**

FEBRUARY 13, 2024/rt

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