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

+ **FAO(OS) 139/2024, CM APPL. 59034/2024, CM APPL. 59035/2024
& CM APPL. 59036/2024**

**SMT. HARPYARI (DECEASED) (THROUGH LR-1B BRIJ
BHUSHAN SHARMA) (IN-PERSON)**

.....Appellant

Through: Mr. Kamlesh Kumar Mishra, Ms.
Snigdha Anand, Ms. Manya Mishra,
Advocates alongwith Mr. Brij
Bhushan Sharma, LR/appellant in
person.

versus

**BADRI BHAGAT JHANDEWALA TEMPLE
SOCIETY & ORS.**

.....Respondents

Through: Mr. Alok Kumar, Senior Advocate
with Ms. Manisha A. Narain, Mr.
Amit Kr. Singh, Mr. Varun
Maheshwari and Mr. Manan Soni,
Advocates for R-1.
Mr. Bharat Bhushan Sharma, R-2 in
person.

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Date of Decision: 7th October, 2024

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

MANMOHAN, CJ : (ORAL)

1. Present appeal has been filed under Section 10 of the Delhi High Court Act, 1966 challenging the order dated 23rd April, 2024 passed by the learned Single Judge in C.S.(OS) 381/2016 titled “*Badri Bhagat*



Jhandewala Temple Society vs. Smt Har Pyari”, whereby the learned Single Judge has dismissed the application filed by the LR of the appellant i.e., Shri. Brij Bhushan Sharma under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short ‘CPC’) on the ground that all the averments made in the application are taken in the written statement and limited the defence of the LR/appellant to those which had already been taken by the late Smt. Harpyari.

2. Shri. Brij Bhushan Sharma, the LR of the appellant predicates his submissions on the doctrine of *res judicata* to assail the impugned order dismissing his application under Order VII Rule 11 CPC. He states that the Court of Sub-Judge 1st Class, Delhi in Suit No.169/1960 by the judgement and decree dated 9th June, 1960 had dismissed the suit seeking possession, permanent injunction, damages and Mesne Profit filed by the respondent no.1. He states that *vide* the said judgement it was held that the plaintiff therein failed to prove that it is the owner of the suit property. He states that the learned Trial Court in fact, observed that it appears that the defendants therein are the owners of the suit property. He states that the said judgement was never challenged by the respondent no.1 and became final and binding between the parties. The appellant also states that late Smt. Harpyari asserts her right over the said property by virtue of a gift deed/donation. He states that he is asserting his ownership rights through late Smt. Harpyari. He thus states that once a civil court has rendered a binding judgement after full trial, the respondent no.1 cannot assert its right of ownership by way of the underlying suit. He states that the underlying suit is barred by *res judicata*.

3. The appellant also states that the above judgement in Suit No.169/1960 has been concealed/suppressed by the respondent no.1 in its



suit plaint. He states that in view of the above, the learned Single Judge could not have dismissed the application under Order VII rule 11 CPC. He also states that the respondent no.1 has not filed any title document establishing its ownership rights in the underlying suit. Even on that score, he states that the suit is not maintainable.

4. This Court has heard the arguments of Shri. Brij Bhushan Sharma, the LR/appellant in person.

5. The principles governing the contours of deciding an application under Order VII Rule 11 CPC is well settled. At the time of considering such applications, the Court is only to examine the plaint and, if required, the documents annexed thereto. The examination of the stand the defendant has taken in its written statement etc., would not be relevant. Merely on this aspect the appeal is without merits. This Court is fortified in its view taken by the Supreme Court in *Kamala & Ors., vs. K.T. Eshwara SA & Ors., (2008) 12 SCC 661*. The relevant paragraphs of the same are reproduced hereunder:-

“22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision.”

23. The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.



25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained.”

(emphasis supplied)

6. This Court has also perused the record and finds that the respondent no.1 (plaintiff in the underlying suit) asserts its ownership rights and title to the subject property on the strength of the judgement in C.S. (OS) No.1679/1982 decided by this Court on 22nd January, 1990. This contention itself indicates that the appellant as well as the respondent no.1 are claiming title over the subject property by virtue of two separate judgements. In the considered opinion of this Court, this by itself is an issue requiring trial and evidence.

7. Besides, the learned Single Judge in paragraphs 24 and 25 of the impugned order has held as under:

“24. Both the plaintiff as well as the defendant, are claiming the location of the suit property to be beyond the Jhandewalan Estate. It is a matter of evidence whether the plaintiff is the owner of the suit property and whether the defendant had acquired this property by way of gift/donation or that she was in its possession for last more than 60 years or had acquired ownership by way of adverse possession.

25. There are various disputed facts which have been raised by both the parties, which cannot be considered under Order VII Rule 11 nor it can be said that the suit is without any cause of action. Pertinently, all the averments made in this application under Order VII Rule 11 CPC are the objections which had been taken originally by the defendant (since deceased) in the Written Statement. The LR/defendant Brij Bhushan Sharma has merely stepped into the shoes of the deceased defendant Harpyari



Sharma and his defence are essentially limited to those which had been taken by the defendant.”

8. It is clear from the observations in paragraph 24 above, that there are factual disputes in respect of the very location of the subject property, which aspect, would definitely entail leading evidence on behalf of both the parties. Thus, looked at any which way, the application under Order VII Rule 11 CPC cannot be allowed.

9. There being contrary stands on the assertion of ownership and title, the doctrine of *res judicata* may not strictly apply since the judgement dated 22nd January, 1990 claimed to be granting title to the respondent no.1 also has to be appreciated by the learned Single Judge.

10. In view of the above, there is no merit in this appeal and the same is dismissed along with the pending applications.

CHIEF JUSTICE

TUSHAR RAO GEDELA, J

OCTOBER 7, 2024/rl