

Varun Thakore Vs. D.P. Thakore

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Court : Delhi

Decided On : Dec-02-1996

Reported in : 1997IAD(Delhi)57; 1996(39)DRJ752; (1997)117PLR62

Judge : M.K. Sharma, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 11, Rule 1 - Order 39, Rule 1;
[Evidence Act, 1872](#) - Sections 165

Appeal No. : Interim Application Nos. 1527, 3144, 3145, 3146 and 3169 of 1996
and Suit No. 388 of 1996

Appellant : Varun Thakore

Respondent : D.P. Thakore

Advocate for Pet/Ap. : M.R. Chawla and; J.R. Midha, Advs

Judgement :

M.K. Sharma, J.

(1) The present suit has been instituted by the plaintiff against the defendants seeking for a decree for partition and permanent injunction in respect of the property bearing No-269, Daya Nand Vihar, Vikas Marg, Delhi.

(2) The case pleaded in the plaint is that the defendant No. 1 inherited some ancestral property and the sale proceeds of the said ancestral property were invested by the defendant No.1 in acquiring a plot bearing No.269 in the name of defendant No.2, the wife of the defendant No.1 and the mother of the plaintiffs in or about the year 1980. It has been further pleaded that construction on the said plot was started in the year 1989 and out of the joint efforts and contribution of the parties construction was raised on the said plot and a two storeyed building was constructed. thereforee, the case pleaded in the plaint is that the suit property is a joint family property and that the plaintiffs have shares in the aforesaid suit property.

(3) The defendant No.2 has filed a written statement wherein she has stated that the suit property is her self acquired property from her own funds from the salary, and that the plaintiff as well as the defendant No.1 have no right, title and. interest therein in respect of the suit property which admittedly stands in the name of defendant No.2.

(4) The defendant No.1 has also filed the written statement contending inter alias that the funds in raising the construction of the suit property were invested out of the sale proceeds of the ancestral property and that the suit property is a joint family property.

(5) The plaintiffs at the time of filing of the suit also preferred an application under Order 39 Rules 1 & 2 of the Code of Civil Procedure. On 13.12.1996, this court directed that the plaintiffs as well as the defendants would maintain status quo qua transfer, alienation and possession of the suit property till the next date. The said application under Order 39 Rules 1 & 2 Civil Procedure Code was registered as I.A.No-1527 of 1996. Subsequently the defendant No.1, apart .from filing his reply to the aforesaid application filed an application under Order 39 Rule 4 Civil Procedure Code praying for vacation of the interim order passed by this court on 13.2.1996. The said application was registered as I.A. No.3144/1996. The defendant No.1 also filed an application under Order 7 Rule 1i Civil Procedure Code praying for rejection of the plaint which was registered as I.A. No-3145/1996 and two other applications namely I.A. No-3146/1996 under Order 10 Rule 2 Civil

Procedure Code and I.A. No. 3169/1996 under Order II Rules I & 2 CPC.

(6) I have heard the learned counsel appearing for the parties and by this common order I propose to dispose of all the aforesaid applications. I.A.s 1527, 3144/1996:

(7) As these two applications relate to grant and/or vacation of the interim injunction granted by this court the said two applications are taken up together and disposed of by this common order. The suit has been instituted by the plaintiffs against the defendants seeking for partition of the suit property on the ground that the same is ancestral property/joint property belonging to a Hindu undivided family. The plaintiffs are the sons of defendants No.1 & 2. According to the plaintiffs the ancestral property fund was invested in acquiring the suit property and for constructing a two storeyed building thereon. Apart from the aforesaid joint family fund the plaintiffs of their own have also invested about Rs.50,000.00 , which amount was alleged to have been paid to the builder/contractor by borrowing the same as a loan. Since the claim in the plaint to the suit property is that the same is ancestral property/joint property of the Hindu Undivided family, in my considered opinion there is a prima facie arguable case on behalf of the plaintiffs. On consideration of facts and circumstances of the case I am satisfied that if the order of ad interim injunction is vacated it might give rise to multiplicity of proceedings. I am also of the view that the order of injunction passed by this court on 13.2.1996 directing the plaintiffs and the defendants to maintain status quo qua transfer, alienation, possession of the suit property is reasonable and justified. The aforesaid order protects the interests of both the plaintiffs and the defendants in respect of the suit property during the pendency of the suit. Accordingly, I confirm the interim injunction passed by this court on 13.2.1996 and reject the application filed by defendant No.1 under Order 39 Rule 4 CPC. I.A.3145/1996:

(8) This is an application under Order 7 Rule II Civil Procedure Code filed by defendant No.1 seeking for rejection of the plaint. The counsel for defendant No.1 mainly raised three issues, in connection with the aforesaid application. The first submission was that the suit being barred under the provisions of the Benami Transactions (Prohibition) Act, 1988, the plaint is liable to be rejected. Section 4 of the Benami Transactions (Prohibition) Act, 1988 bars the suits to enforce any right

to hold any property benami against the person in whose name the property is held. However, Section 4(3) of the said Act carves out exceptions to the above rule in cases where the person in whose name the property is held is a coparcener or a trustee.

(9) The Supreme Court in the case of Nand Kishore Mehm Vs . Sushila Mehra; : [1995]215ITR218(SC) has held that neither filing of a suit nor taking of a defense in respect of either the present or past benami transaction involving the purchase of property by a person in the name of his wife or unmarried daughter is prohibited under sub-sections (1) and (2) of Section 4 of the Act The Supreme Court further observed that when a suit is filed or defense is taken in respect of such benami transaction involving purchase of property by any person in the name of his wife or unmarried daughter he cannot succeed in such a defense unless the property although purchased in the name of his wife or unmarried daughter, as the case may be because of the statutory presumption contained in sub-section (2) of Section 3, unless a contrary is proved that the purchase of property by the person in the name of his wife or his unmarried daughter, as the case may be, was for her benefit. In the present suit also it has been pleaded that the suit property was purchased from out of the sale proceeds of ancestral property in the name of the defendant No.2.

(10) Under the aforesaid circumstances, the plea regarding bar of the suit under the provisions of Benami Transactions (Prohibition) Act, 1988 could be considered only after the parties lead their evidence and at this stage it cannot be held that the filing of the suit itself is prohibited under sub-sections (1) & (2) of Section 4 of the Act.

(11) The next submission of the learned counsel for defendant No.1 is that the suit of the plaintiff for partition is not maintainable without seeking the relief of declaration of title and payment of ad valorem court fee on the market value of the suit property. According to the learned counsel a suit for partition is maintainable where the property is jointly held by the coparcener. However, where the suit property is not in the name of Huf or in the name of coparcener then a suit for partition is not maintainable without seeking a declaration of title without paying

court fee on the market value of the suit property.

(12) In support of his submission the learned counsel relied upon a decision of the Patna High Court in Rameshwar Mistry & another v. Babulal Mistry; reported in 1991 Patna page 53. The objection in respect of non-payment of proper court fee has been raised in the written statement and naturally an issue would be struck on the said objection at the time of framing of issues by the Court. If however, it is found that proper court fee has not been paid then under the provisions of the Code of Civil Procedure the plaintiffs could be given an opportunity by the court to correct the valuation and to pay the proper court fee within a time to be fixed by the court and only when the plaintiff fails to do so the plaint would be rejected. Whether the reliefs claimed by the plaintiff are under-valued or not has to be examined with reference to the claims made in the plaint, objections taken thereon, and evidence, if any, produced by the parties.

(13) It has been held by the Supreme Court in T.Arivandandam Vs . T.V.Satyapal & another; reported in : [1978]1SCR742 that the provisions of Order 7 Rule 11 Civil Procedure Code would be attracted if the trial court is satisfied that the litigation was inspired by vexatious motives and altogether groundless. It is held in that case that if on a meaningful - not formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the trial court should exercise its power under Order 7 Rule 11 Cpc taking care to see that the ground mentioned therein is fulfilled.

(14) In my considered opinion, only on the basis of the pleas that the suit is not properly valued and that the relief of the declaration of title has not been sought a plaint cannot be rejected immediately under Order 7 Rule 11 of the Code of Civil Procedure for if the pleas raised by the defendant No. 1 are upheld, the plaintiff could avail of the opportunity to apply for amendment of plaint also.

(15) The further submission of the learned counsel for defendant No.1 was that the plaint does not disclose any cause of action against the defendant No.2 and therefore, the suit is required to be dismissed. According to the learned counsel the particulars of the property alleged to have been inherited by defendant No.1, the nature of the alleged property and as to whether the same was ancestral or

not, the particulars of the said alleged property have not been given in the plaint. According to the learned counsel, in view of lack of material particulars the plaint itself is liable to be rejected.

(16) On a careful reading of the plaint and the written statement filed by the parties it cannot be held that the present suit is either vexatious or absolutely meritless or that it does not contain any particular. It has to be considered during the hearing of the suit as to whether the particulars provided by the plaintiffs are sufficient or not to give a decree in their favour. Under the circumstances, I do not consider it to be a valid ground to reject the plaint.

(17) In view of the aforesaid discussion the application filed by defendant No.1 under Order 7 Rule 11 Civil Procedure Code stands rejected. I.A.3146/1996:

(18) This is an application filed by the defendant No.1 under Order 10 Rule 2 Civil Procedure Code read with Section 165 of the Indian Evidence Act. It is stated in the aforesaid application by defendant No.2 that the statements made in the plaint are vague and also contradictory inasmuch as at one place the plaintiff has alleged that the suit property is ancestral whereas at another place the same is stated to be Hup property. According to the defendant No.2 it is necessary to examine the plaintiffs and the defendant No.1 on oath in order to elucidate the matter on controversy. This application is not opposed by either the plaintiff or defendant No.1. Accordingly, I feel satisfied to issue a direction to the plaintiffs as well as to defendant No.1 to be present in court at the time of framing of issues so that they could be examined on oath to elucidate and examine the controversy in the suit. The application is disposed of accordingly. I.A.3169/196:

(19) This is an application filed by defendant No.2 seeking for an order granting leave to defendant No.2 to deliver the interrogatories to the plaintiffs and defendant No. 1 and also for a direction to the said plaintiff and defendant No. 1 to reply to the same, and also to direct the plaintiffs and defendant No. 1 to make discovery on oath of all the documents detailed in para 8 of the application and also to direct them to file the original documents mentioned above. This application is also not opposed by either the plaintiffs or by the defendant No.1. Accordingly, I grant leave to the defendant No.2 to deliver the interrogatories to the plaintiffs

and defendant No.1 and issue a direction to them to reply to the same within four weeks from such delivery of the interrogatories. I also issue direction to the plaintiffs and defendant No.1 to make discovery on oath of all the documents detailed in para 8 of the application and to file the original documents mentioned therein. With the aforesaid directions and observations all the five applications stand disposed of.

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