

**IN THE COURT OF MS. PURVA SAREEN,
ADDITIONAL DISTRICT JUDGE-01,
SOUTH, SAKET COURT, NEW DELHI**

CS DJ No.27/23

Naresh Kumar

Plaintiff

Vs

Suresh Kumar

Defendant

03.02.2024

ORDER

Present: Ms. Rajeshwari, proxy counsel for plaintiff.
Sh. Vinod Kumar, counsel for defendant no.1 **through**
VC.

Vide this order I shall decide the application under Order VII Rule 11 CPC filed by the defendant for rejection of the plaint filed by the plaintiff.

1. It is submitted that the plaintiff has filed a suit for partition, possession, declaration and permanent injunction.
2. As per the facts of the plaint, plaintiffs and defendants belong to Hindu undivided family and are real brothers and sisters and co-owners of the residential house situated in Old Laal Dora Abadi (1908-09) at Village Chhatarpur, New Delhi measuring 75 sq yards. Plaintiff no.1 was in possession of two rooms and ground floor and defendant no.1 is in possession of one room on ground floor. Defendant no.2 and 3 are in matrimonial houses and plaintiff no.2 and 3 are in possession of two rooms at first floor. There is another ancestral property measuring 108

sq feet bearing no.D-276 in the same area in Khasra No.619/21. In 1983, father of the plaintiff and defendants expired intestate and after that both the suit properties were constructed by mother of the parties with the help of plaintiff no.1 in 1986. Plaintiff no.1 took physical possession of suit property no.2 and started running a tailoring shop in the same by the name of M/s M. Apex Tailors and he used to support his family with the earnings of the said property.

3. Thereafter, in 1990 plaintiff no.1 took possession of the same property and started running the same in the name of M/s Maheshwar Video Library till 1993. After that the property is lying vacant and plaintiff no.3 started occupying the same for sleeping purpose only but request of defendant no.1, the suit property no.2 started being used for selling readymade garments but defendant no.1 never supported the family with the earnings. Hence, the suit property was got vacated by the mother and was given on monthly rent of Rs.2,000/- which was coming directly to the mother of the parties. After the death of the mother, the defendant no.1 tried to take over the possession of the room where the mother of the parties was residing on the ground floor of the suit property no.1. Further, defendant no.1 also started receiving the rent of suit property no.2 and started to distributing it between defendant no.1 and plaintiffs equally. On 05.02.2017, all the plaintiffs decided to get construct the suit property no.1 and they approached defendant no.1 who was the eldest brother to discuss the same. The defendant no.1 starting yelling upon the plaintiffs stating that he had purchased the property from their mother and when they asked about the documents, he abused them and scuffled with them. A panchayat was organized to resolve the matter but defendant no.1 misbehaved there also and left the

said panchayat. On 11.02.2017, when a bank official visited the suit property to conduct verification for mortgage of a loan, the plaintiff came to know that defendant no.1 had taken loan from the bank upon the said property.

4. A written complaint was made in PS Mehrauli against defendant no.1. On 19.02.2017, some local property dealers visited the suit property with intent to purchase the same which is actually an ancestral property. The plaintiff claims that the mother of the parties was patient of psychopathic disorder and was under treatment when she expired. There was no question that she could transfer the property in the name of defendant no.1. Moreover, the property was never in her name and it was the plaintiff no.1 who used to take care of the mother and bore all her medical expenses. Defendant no.1 had never spent a single penny on the maintenance of the mother ever. Plaintiff immediately filed injunction and declaration case against the defendant and an order was also passed under Order XXXIX Rule 1 & 2 CPC against the defendant no.1. Plaintiffs have now filed the present suit for declaring the documents of the defendant no.1 null and void and also for seeking partition of suit property by metes and bounds.
5. After filing the written statement, defendant moved the present application under Order VII Rule 11 CPC for rejection of the plaint on the ground that suit of the plaintiff is false, frivolous and vexatious. He further stated that plaintiff had also filed an earlier suit for permanent injunction and declaration with respect to suit property no.1 in the year 2017 and meanwhile the instant suit was filed against defendant no.1 and 2 and other defendants. It is submitted that as the cause of action in

both the suits is identical, therefore, the present suit is barred under Order II Rule 2 CPC as the earlier suit should have included the whole claim as the prayer sought in the subsequent suit was available to the plaintiff in the first suit also. Since the plaintiff omitted to seek such reliefs and did not obtain the leave of the court to file a subsequent suit, it amounts to relinquishment of relief, therefore, plaint cannot be sustained and should be rejected.

6. No reply was filed by the plaintiffs to the application under Order VII Rule 11 CPC. However, arguments were addressed by counsel for plaintiff stating that there was no bar in filing the separate suit later on for seeking a fresh relief with a fresh prayer.

7. Arguments heard and record perused.

8. It is a settled position in law that at the stage of application under Order 7 Rule 11 of the CPC, the plaint and the plaint alone is looked into.

9. In case titled as ***Saleem Bhai & Ors. Vs. State of Maharashtra Ors., (2003) 1 SCC 557***, in which, while considering Order VII Rule 11 of the Code, it was held as under :

“9. A perusal of Order VII Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 CPC at any stage of the suit – before registering the plaint or after issuing summons to the defendant at any time before the conclusion of

the trial. For the purposes of deciding any application under clauses (a) and (d) of Rule 11 of Order VII CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at this stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court” It is clear that in order to consider Order VII Rule 11, the Court has to look into the averments in the plaint and the same can be exercised by the trial Court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments / pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At this stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in *Raptakos Brett & Co. Ltd. vs. Ganesh Property (1998) 7 SCC 184* and *Mayar (H.K.) Ltd. and Others vs. Owners & Parties, Vessel M.V.Fortune Express and Others(2006) 3 SCC 100*.

10. The case of the plaintiff is that he was in possession of part of the ancestral property being a joint owner with the defendant no.1, he earlier sought only injunction in the first suit as there was apprehension

that defendant no.1 might sell of the ancestral property or might create third party interest in the suit property, which belongs to all brothers and sisters. At that point of time, the plaintiff probably had no intention to seek partition. If later on, the plaintiff intends to add the relief of partition, there is no specific bar to the same as it is a separate relief, although arising from the same facts.

11. As the Court has to only look into the plaint for deciding the application under Order VII Rule 11 CPC, the court cannot go into the written statement or the defence of the defendant while judging the said application. The court is of the view that the averments made by the defendant in the application do not bar the claim of the plaintiff on the ground that there is no cause of action. The plaint further cannot be stated to devoid of cause of action also from the facts stated by the plaintiff. Hence, the application under **Order 7 Rule 11 does not hold any merit and the same stands dismissed without any cost.**

12. To come up for evidence with connected case on 22.04.2024.

Announced in the open court
on 3rd February 2024

(PURVA SAREEN)
ADJ-01, SOUTH, SAKET COURT,
NEW DELHI

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