Vakil Chand Jain Vs Prakash Chand Jain

Court: Delhi High Court

Date of Decision: Sept. 7, 2009

Acts Referred: Benami Transactions (Prohibition) Act, 1988 â€" Section 4, 4(1), 4(3)
Civil Procedure Code, 1908 (CPC) â€" Order 2 Rule 2, Order 2 Rule 2(2), Order 23 Rule 1, Order 39 Rule 1, Order 39 Rule 2
Court Fees Act, 1870 â€" Article 17
Specific Relief Act, 1963 â€" Section 34, 41

Hon'ble Judges: Dr. S. Muralidhar, J

Bench: Single Bench

Advocate: J.N. Aggarwal, for the Appellant; Sanjay Jain Keshav Ranjan, Sarfaraz Ahmed and Ruchi Jain, for the Respondent

Judgement

S. Muralidhar, J.
By this judgment some of the preliminary issues framed in the present suit are dealt with.

2. The plaintiff and the Defendant are brothers. Their father late Shri Badri Nath Jain, along with their eldest brother Shri Tilak Chand Jain migrated

to Delhi from Rawalpindi in 1947. It is stated that late Shri Badri Nath Jain deposited the valuables brought by him in a bank locker in the Charter

Bank situated below Jain Sthanak in Chandni Chowk, Delhi in the name of the eldest brother Tilak Chand Jain. Thereafter the other members of

the family, including the mother of the plaintiff and the Defendant, the other brother Shri Nathu Ram Jain and their sister Satya Jain came to Delhi.

According to the plaintiff, he was the first member of the family to start earning. Subsequently, Tilak Chand Jain and Nathu Ram Jain also started

earning. According to the plaintiff, all the sons handed over to their respective incomes to their father because the family was a joint Hindu family.

3. The father of the parties established a hosiery factory to begin with, in the residence and later shifted the factory to a residential flat in Kamla

Nagar, Delhi. The plaintiff states that while still pursuing his studies he helped his father part-time in the business. Later the plaintiff took up

employment with the National Physical Laboratory.

4. It is stated that in 1953 the eldest brother Tilak Chand Jain was made a member of the Vardhman Co-Operative House Building Society

(''Society'') by the father of the parties for the purposes of obtaining a residential plot. The father late Shri Badri Nath Jain also paid for another

plot in the Society. This amount was credited to the account of Tilak Chand Jain. It is stated that Badri Nath Jain died of heart attack in February

1957 and till then the payments for the two plots in the Society were made by him. The family of the plaintiff remained a joint one till the year 1962

when the plaintiffs only sister got married. By then all the brothers were married. Since a three-room rented flat in which they were living was not

considered adequate for all of them, a part of the family decided to move to a government flat and the mother of the parties i.e. wife of late Shri

Badri Nath Jain, decided to effect an oral partition of the family properties. It is stated that she divided the household goods amongst the four sons

and permitted them to keep their incomes with themselves after starting their separate kitchens. While Nathu Ram Jain along with Prakash Chand

Jain (Defendant) moved to a government flat, Shri Tilak Chand Jain and Shri Vakil Chand Jain (plaintiff) along with their mother remained in the

old rented flat and started two kitchens. It is claimed that the sister Satya Jain did not wish to take any share from the family assets. It is stated that

in September 1963, the mother distributed the joint family assets except jewellery, among her four sons and also paid cash to the Defendant for his

marriage expenditures.

5. According to the plaintiff, in the above distribution of the assets, the two memberships in the Society were partitioned with the consent of all the

brothers. The first membership in the name of Tilak Chand Jain was agreed to be shared and owned equally by him and Nathu Ram Jain. The

second membership was to be shared and owned equally by the plaintiff and the Defendant. The mother passed away in November 1963. It is

stated that initially the relationship among the brothers were very good. On his part the plaintiff who got a government accommodation in 1966

handed over the possession of the room in the rented flat vacated by him to the Defendant. It is stated that till her death it was the mother who was

paying the Society for the two flats from the joint family funds. At one point of time, the Society pointed out that one member could not have two

plots. In terms of the joint decision of the family, an application signed by all the four brothers was submitted in the Society to enroll the Defendant

as a second member against payments already made to the Society in the name of Tilak Chand Jain for the second plot.

6. The plaintiff claims that he kept paying to the Defendant his share of payments due to the Society in respect of the membership in the name of

the Defendant. Para 9 of the plaint details the payments made by the plaintiff to the Defendant from 1st January 1979 to 10th April 1992 towards

membership of the Society. It is claimed that the plaintiff thus contributed more than the Defendant in making payment for the Society plot. The

Society allotted a plot bearing No. 11, Arihant Nagar, Delhi-110026. According to the plaintiff, both he and the Defendant decided to jointly build

a house thereon. The building plan submitted to the Delhi Development Authority (""DDA"") was for two equal and vertically symmetrical portions in

the anticipation that both the plaintiff and the Defendant would be living in their respective portions. The DDA, however, did not sanction this plan

and made changes in it in order to make the building asymmetrical. According to the plaintiff, the building was nevertheless constructed in a

symmetrical manner in violation of the approved plan.

7. It is stated that the plaintiff took active part in the construction, contacted the building contractors, material suppliers, the Delhi Vidyut Board,

and made most of the payments to the chowkidars, contractors and casual labourers. It is stated that the plaintiff on getting his retirement dues,

made further payments to the Defendant by means of four cheques dated 17th August 1993, 7th September 1993, 26th October 1993 and 24th

January 1994 in the aggregate sum of Rs. 3 lakhs. It is claimed that in order to decide the portions to be owned by the plaintiff and the Defendant,

an informal draw of lots was held on 18th February 1994 in the house and the presence of Tilak Chand Jain. The plaintiff got the right portion,

marked in red in the site plan and the Defendant, the left portion shown in blue.

8. The plaintiff has also placed on record, the entire details of the expenditure incurred by him in the construction of the building as the suit

property. According to the plaintiff, the Defendant is liable to pay him a sum of Rs. 1,20,000/- ""if the account of the expenditure of the building is

settled on equal basis."" According to the plaintiff, he celebrated the house warming (Grah Pravesh) ceremony of his portion on 19th February

1994 and the Defendant of his portion on 19th April 1995. The plaintiff claims that he and the Defendant have ever since been residing in their

respective portions. It is claimed by the plaintiff that they shared the house tax payable for the property equally and he has given the details of the

payments made by him on that score for the years 1996, 1997 and 1998.

9. The plaintiff states that in view of the joint ownership of the property he and other members of the family approached the Defendant to get the

name of the plaintiff included as co-sub-lessee in the DDA records to avoid any dispute in future between the legal heirs of the plaintiff and the

Defendant. It is stated that as per the DDA Rules, the formality of a gift deed from the donor was required. In order to comply with this

requirement, the Defendant applied to the President of India as lessor through the DDA on 10th August 1998 seeking permission to gift half of the

sub-lease hold rights in the plot to the plaintiff. The DDA, by a letter dated 16th November 1998, asked the Defendant to fulfill the formalities for

including the name of the plaintiff in the ownership of the property. It is stated that even while the plaintiff got papers organised, the Defendant in

December 1998 suddenly changed his mind and refused to complete the formalities for inclusion of the name of the plaintiff as a co-sub-lessee in

the DDA records.

10. After the notice sent by the plaintiff to the Defendant on 24th July 2000 asking him to complete the formalities was replied by the Defendant on

30th July 2000 with a refusal, the plaintiff filed a suit bearing Suit No. 204 of 2000 in the court of the learned District Judge, Delhi. In that suit, the

plaintiff filed an application for withdrawal with permission to file a fresh suit before an appropriate court on the same cause of action. This was on

the ground that the said court did not have the pecuniary jurisdiction to try the case. By an order dated 18th May 2001, the learned Additional

District Judge (""ADJ"") dismissed the suit as withdrawn with the liberty as prayed for. The plaintiff was asked to pay the Defendant the costs of Rs.

1500. Thereafter the present suit was filed on 15th September 2001 seeking:

(a) a decree of declaration that the plaintiff is a joint owner of the property at 11, Arihant Nagar, Delhi-110026 (suit property) with equal share of

the membership of the Society as the absolute owner of the right portion of the suit property as depicted in the site plan enclosed with the plaint

measuring 87 sq. yards as well as a joint owner in common use and enjoyment of the green colour portion measuring 26 sq. yards.

(b) for a permanent decree of partition by metes and bounds of the joint portion shown in green colour and for a final decree of partition for the

separate allotment and enjoyment of the half portion of the suit property shown in green colour in the site plan and in the alternative a decree of

permanent injunction restraining the Defendant from alienating, transferring or creating third party interest in the suit property in the portions shown

in red and green colour in the site plan.

(c) a decree against the Defendant for recovery of Rs. 1,20,000 together with interest at the rate of 18% pendente lite.

11. By an interim order dated 18th September 2001 while directing summons to issue in the suit, this Court directed in the IA No. 8708 of 2001

under Order XXXIX Rules 1 & 2 CPC that no third party interest shall be created in the suit property. The Defendant has filed, inter alia, IA No.

9248 of 2001 under Order VII Rule 11 CPC seeking dismissal of the suit. In the written statement, the Defendant pointed out that the plaintiff had

paid a fixed court fee of Rs. 19.50 for the relief of declaration under Article 17 Schedule 2 of the Court Fees Act despite the fact that this was not

a mere suit for declaration but also for a consequential relief. It is, accordingly, pointed out that since the valuation of suit property is shown as Rs.

25 lakhs in para 3 of the plaint, on account of the Court Fee being deficient, this suit is liable to be dismissed under Order VII Rule 11 CPC.

12. It is thereafter submitted that u/s 4 of the Benami Transactions (Prohibition) Act, 1988 (""Benami Act"") the suit is barred. The relief of injunction

is also barred u/s 41(j) of the Specific Relief Act, 1963 (""SRA""). The claim for the sum of Rs. 1,20,000/- was barred by limitation. It is then

submitted that in Suit No. 204 of 2000, the plaintiff had only claimed the relief of partition and therefore had impliedly given up other reliefs.

Therefore, the present suit praying for reliefs in addition to the relief for partition was barred under Order II Rule 2 CPC. It is submitted that since

the cause of action in both suits is identical and is shown to have arisen on 10th August 1998, and since the plaintiff was permitted to withdraw the

earlier suit only to the extent of filing a fresh suit on the same cause of action, the plaintiff was precluded from filing a suit praying for additional

reliefs.

13. On merits, it is denied that the property was a joint family property as alleged. The money received by the Defendant from the plaintiff as

detailed in para 9 of the plaint is stated to be in the nature of reimbursement of the expenses incurred by the Defendant in buying household goods.

As regards the payment of Rs. 4 lakhs, while the Defendant states that the plaintiff helped him as his elder brother in the construction of the

building, and gave the said sum of Rs. 3 lakhs in the form of a loan which stood repaid by the Defendant subsequently. As regards the plaintiff

staying in one half portion of the suit property, the Defendant contends that the plaintiff who was in dire need of shelter had assured the Defendant

that he would be residing the property for a short period and would shift therefrom although he had been paid back the entire amount which he had

lent to the Defendant towards the completion of the construction. As regards the draft gift deed submitted on 10th August 1998 to the DDA, the

Defendant claims that he had signed it hastily in an emotional state of mind and he had no intention of gifting half of the property to the plaintiff. He

maintains that he cannot be compelled to execute a gift deed in favour of the plaintiff.

14. In the replication, the averments in the plaint are reiterated. It is denied that the suit is not maintainable, as alleged by the Defendant.

15. On the basis of the pleadings the following issues were framed by this Court on 15th April 2005:

1. Whether the suit pertaining to prayers 1 and 2 is barred under the Benami Transactions (Prohibition) Act, 1988? OPD

2. Whether the suit is barred under Order II Rule 2 in view of the plaintiff having filed Suit No. 204/2000? OPD

3. Whether the plaint has been affixed with deficient court fee and whether the plaintiff is obliged to pay ad valorem court fee? OPD

4. Whether the suit pertaining to prayer 3 is barred by limitation? OPD

5. To what relief is the plaintiff entitled?

6. If plaintiff is entitled to the reliefs prayed for what consequential directions would be required to be issued?

7. Relief.

16. It was further directed by this Court that issues 1 to 4 were agreed to be treated as preliminary issues.

17. The submissions of Mr. J.N. Aggarwal, learned Counsel for the plaintiff and Mr. Sanjay Jain, learned Senior Counsel for the Defendant have

been heard on the preliminary issues.

18. Mr. Jain submits that the suit is barred under Order II Rule 2 CPC for the reasons already mentioned hereinbefore. According to him, the

permission granted to the plaintiff in terms of Order XXIII Rule 1 CPC was to file a fresh suit on the same cause of action. The only relief sought in

Suit No. 204 of 2000 was for partition and it was on the same cause of action i.e. the event of 10th August 1998 when a draft gift deed was

submitted to the DDA by the Defendant. Since liberty was granted to the plaintiff only to this extent, any attempt at seeking any further relief, as

has been done in the present suit, would be barred by the principle of constructive res judicata. It is even urged that the relief of a bare declaration

of title without a consequential relief, was impermissible in terms of Section 34 SRA. Even if the plaintiff were to now amend the plaint to seek a

consequential relief, then the requisite Court fee would not have been paid and therefore the suit would in any way be barred in law.

19. According to Mr. Jain, the plaintiff ought to have sought a decree of mandatory injunction directing the Defendant to execute a gift deed in

terms of the draft gift deed submitted to DDA on 10th August 1998. However, since in any event the Defendant could not be compelled to

execute a gift deed in respect of the property which was self-acquired, such a relief could not be granted. According to Mr. Jain, since the plaintiff

himself states that the partition of the family took place during the life time of the mother in September 1963 itself, the question of the plaintiff and

Defendant thereafter being the joint owner of the plot in the Society thereafter cannot and did not arise.

20. It is further submitted that the Benami Act precludes the filing of a suit by a person who claims that although the title documents to the property

are not in his name, he should be recognized as a joint owner since the person in whose name the property stands was holding it on behalf of the

claimant as well. As regards the prayer for recovery of money, it is submitted that since even according to the plaintiff the last of the payments was

made in 1995 by the plaintiff, the suit filed in 2001 was barred by limitation. Mr. Aggarwal submits that the earlier Suit No. 204 of 2000 did not

run its full course and was permitted to be withdrawn at an earlier stage long before it went to trial. Therefore the question for the relief sought in

the present suit being barred by the principle of constructive res judicata does not arise. He submits that a suit for partition would, in any way, lead

to the determination of an issue whether the property is capable of being partitioned and whether the plaintiff is entitled to any share. This is, in fact,

what would be determined vis-a-vis the prayer for a declaration of title. Therefore, the prayer for a decree of declaration as made in the present

suit is not inconsistent with the prayer for the partition of the suit property. As regards the Court fees, it is submitted that since the plaintiff is in

possession of the portion to which he is laying a claim, there is no need for him to pay the complete Court fees at this stage when partition is yet to

take place.

21. Mr. Aggarwal maintains that the question whether the property is a joint family property or purchased out of joint family funds is an issue that

would have to await the conclusion of the trial. Such questions cannot possibly be examined at the present stage as a preliminary issue. He places

reliance on the decision of this Court in Mahinder Singh v. Pardaman Singh AIR 1992 Delhi 357 and Sarabjit Singh Anand v. Manjit Singh Anand

2008 IV AD (Delhi) 89. Mr. Aggarwal adds that in terms of the proviso to Section 4 of the Benami Act, the plaintiff had a valid defence that the

suit property was either a family property belonging to a Hindu undivided family or a property held by the Defendant on account of the fiduciary

capacity. This again according to him can be determined only at the stage of trial.

22. As regards the claim for recovery of money, it is submitted that the prayer should in fact be construed as a prayer for rendition of accounts in

which event it would not be barred by limitation.

23. The submissions of learned Counsel have been considered.

24. The earlier Suit No. 204 of 2000 had only one prayer. It was a suit for partition and the prayer was for a decree ""directing partition by metes

and bounds of half share of the plaintiff in the property."" The decision of the joint family in 1963 that the two memberships of the property of the

Society would be shared equally by the four brothers was mentioned. The fact that the plaintiff took active part in the constructions, made

payments to the contractors and that the Defendant took money from the plaintiff by cheques during construction time, was paying for construction

work, was also mentioned.

25. The grounds on which the plaintiff sought to withdraw that suit was that the Court of the learned ADJ did not have pecuniary jurisdiction to try

it. By an order dated 18th May 2001 the suit was dismissed as withdrawn ""with permission to the plaintiff to file a fresh suit in an appropriate court

of law on the same cause of action."" The cause of action paragraph in both plaints indicates that the cause of action arose on 10th August 1998

when the Defendant sent a request to the DDA to permit him to gift half of the sublessee rights to the plaintiff and thereafter but did not complete

the formalities as required by the DDA.

26. Order II Rule 2 CPC requires, however, the earlier suit to include ""the whole of the claim which the plaintiff is entitled to make in respect of the

cause of action"". The plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. Under Order II

Rule 2(2) CPC where a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted

or relinquished. In other words, the earlier suit filed had to have run its full course. In such a suit the plaintiff is expected to make all the claims in

respect of a cause of action. It does not envisage a situation like the present one where the suit filed stands withdrawn without the suit running its

full course.

27. In terms of Order 23 Rule 1 CPC it is possible for a plaintiff to withdraw a suit reserving to himself liberty to file a fresh suit on the same cause

of action. That is what has happened in the present case. Therefore, the filing of a fresh suit on the same cause of action in the present case cannot

be said to be impermissible in law. The question is whether the plaintiff here was precluded from seeking any further relief in respect of the same

cause of action i.e. the one which arose on 10th August 1998. There is nothing in the order dated 10th February 2001 passed by the learned ADJ

that precludes the plaintiff from seeking any other relief in respect of the same cause of action in the fresh suit. It is possible that several reliefs can

be sought from a cause of action. It is only when the suit which is filed at the first instance has run its full course that it can be said that the plaintiff

will thereafter stand precluded from filing a fresh suit seeking any further relief. That, however, is not the position here.

28. The rationale behind Order II Rule 2 CPC also appears to have an apparent linkage with the principles on which Section 11 CPC operates.

The principles could be either of res judicata itself or of constructive res judicata. For both these principles to be attracted, the issue that arises

substantially in a suit will have to be heard finally and decided by a court. Even if one were to accept the submissions of Mr. Jain, learned Senior

Counsel for the Defendant, that it is not necessary that the Court should frame an issue which is ""directly or substantially an issue"", the requirement

of Section 11 CPC is that such issue should have ""been heard and finally decided by such court."" A suit which has been permitted to be withdrawn

at a stage much before any issue is framed, can hardly be said to be a suit finally heard and decided by a court. Even factually in the present case a

perusal of the order dated 18th May 2001 in Suit No. 204 of 2000 shows that the suit has hardly progressed. Soon after the written statement

was filed, the plaintiff realised that the court of the learned ADJ lacked the jurisdiction to try the suit. In those circumstances, the plaintiff applied to

withdraw the suit reserving the liberty to file a fresh suit. In the considered view of this Court, neither the principle of constructive res judicata nor

res judicata is attracted to the present case. The principles governing Order II Rule 2 CPC would also not bar the plaintiff in the present case from

claiming the relief of declaration or injunction in addition to the relief of partition.

29. Viewed from another angle, the relief of declaration as sought for by the plaintiff is actually superfluous. Even if one were to omit this relief from

the prayers in the suit, in order to succeed in the prayer for partition, the plaintiff would nevertheless have to prove:

(a) that the property is capable of being partitioned;

(b) that the plaintiff has a share in the property;

(c) that such share can be ascertained and granted either by metes and bounds or by sale of the property.

30. Therefore, in effect, the Court will have to decide whether the plaintiff has any right, title or interest to a share in the property as claimed by

him. This Court, therefore, does not find any inconsistency in the pleas for a decree of declaration and a decree for partition sought for by the

plaintiff in the instant case.

31. For the aforementioned reasons, preliminary Issue No. 2 i.e. ""Whether the suit is barred under Order II Rule 2 in view of the plaintiff having

filed Suit No. 204/2000?"" is decided in favour of the plaintiff and against the Defendant. It is held that the suit is not barred under Order II Rule 2

CPC.

32. Issue No. 4 is whether the prayer for recovery of money in the sum of Rs. 1,20,000 against the Defendant is barred by time. The plaint when

read as a whole shows that even according to the plaintiff the last of the payments made by the Defendant was sometime in 1995. There can be no

manner of doubt that the claim for money in the present suit filed on 12th September 2001 is barred by time. It is not possible to accept the

submissions of learned Counsel for the plaintiff that the prayer for recovery of money should in fact be read as a prayer for rendition of accounts.

Accordingly, this issue is decided in favour of the Defendant and against the plaintiff.

33. In that view of the matter, the prayer in the suit for recovery of money will stand rejected on the ground that it is barred by limitation.

34. There are two other issues that arise to be considered as preliminary issues. One is whether the prayers in the suit for declaration and partition

are barred u/s 4 of the Benami Act (Issue No. 1). The other is whether the plaint has been correctly valued for the purposes of Court fee. (Issue

No. 3)

35. Section 4(3) of the Benami Act is an exception to Section 4(1) which prohibits a suit, claim or action to enforce any right in respect of any

property held benami against the person in whose name the property is held. The first exception as provided in Sub-section (3) is that the property

should be held by a coparcener in a Hindu undivided family for the benefit of the coparceners in the family. It is possible that on the basis of the

pleadings in the present case, the plaintiff has not specifically pleaded the continued existence of any Hindu undivided family of which he and the

Defendant are coparceners. He, however, has pleaded that payments in respect of the suit property were made to the Society out of the joint

family funds. He has further pleaded that the property was held for his benefit in the name of the Defendant. u/s 4(3)(b), a second exception has

been carved out. Where the person in whose name the property is held is a trustee for another person standing in a fiduciary capacity, and the

property is held on behalf of the claimant for whom he is such a trustee or towards whom he stands in such capacity, then Section 4(1) would not

constitute a bar to seeking a declaration as to title.

36. In order that the plaintiff is able to show that any of the exceptions to Section 4 as contained in Section 4(3) are attracted, he will have to lead

evidence. For instance, the plaintiff claims that the payments made by him to the Defendant were part payments to the Society for the membership

which was to be in their joint names. The Defendant pleads that the money paid to him by the plaintiff for the construction of the house was for

reimbursement of the expenditure incurred by him. There is no documentary evidence placed on record by either party to substantiate these

submissions. Therefore, in order to prove either case, both parties would have to lead evidence.

37. The position that emerges is that in order to decide Issue No. 1, evidence will necessarily have to be led at the trial. This is also the tenor of the

judgments of this Court in Mahinder Singh and Sarabjit Singh. In the considered view of this Court, Issue No. 1 although may be seen as a

preliminary issue, cannot be decided without evidence being led.

38. Likewise, Issue No. 3 regarding valuation of the suit for the purposes of court fees will also hinge upon the evidence led. If the plaintiff is able

to show that he is in possession of a portion of the suit property shown in red in the site plan, then the court fee would have to be calculated

accordingly.

This, of course, will further hinge upon the plaintiff being able to prove that the suit property was jointly owned by him and the Defendant. Looked

at from any angle without evidence being led, issue No. 3 also cannot be decided.

39. In conclusion, this Court holds that:

(i) Issue No. 2 is decided against the Defendant and in favour of the plaintiff and it is held that the suit is not barred under Order II Rule 2 CPC.

(ii) The prayer for recovery of money against the Defendant is barred by limitation and is therefore rejected.

(iii) Issue Nos. 1 and 3, although preliminary issues, cannot be decided at this stage without evidence being led. These issues will accordingly be

decided along with other issues at the final stage.

40. For the aforementioned reasons, the case now be listed before the learned Joint Registrar on 10th November 2009 on which date the plaintiff

will file the affidavit by way of examination of chief of its witnesses. The learned Joint Registrar is requested to fix a schedule for the completion of

the recording of the evidence.

41. List before the Court thereafter for arguments.