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

Reserved on: 28.10.2013
Decided on: 21.11.2013

\+ **RFA (OS) 133/2013, C.M. NO. 16935/2013 & 16936/2013**

SHRI VIRENDER KUMAR GARG ..... Appellant
Through: Sh. S.C. Singhal, Advocate.

versus

SHRI RAVINDER KUMAR GARG ..... Respondents
Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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C.M. NO. 16935/2013 (for exemption)

Allowed, subject to all just exceptions.

RFA (OS) 133/2013, C.M. NO. 16936/2013 (for stay)

1. This appeal is directed against an order dated 29.08.2013 by the learned Single Judge dismissing the appellant's suit.

2. The appellant/plaintiff had sought declaration, partition, mandatory injunction and cancellation of documents. The plaintiff and the first four defendants are the sons of late Mr. J.N. Garg. The

fifth defendant is their mother and sixth defendant, the wife of the first defendant.

3. The Plaintiff had contended that the late Mr. Ghamandi Lal, his great-grandfather acquired a number of properties during his lifetime. He was survived by two sons, Prem Narain and Laxmi Narain, and three daughters. The plaint alleged that an oral family partition took place and that four properties – described in the plaint, in village Tihar – fell to the share of late Laxmi Narain Garg. It was stated that he then sold those properties at different points of time and out of those funds bought on lease F-83, Naraina Vihar, New Delhi (hereafter the 'suit property') from the Delhi Development Authority (DDA). Thereafter, the ground floor and one room on the first floor was constructed out of the joint family funds. It is stated that the late Mr. J.N. Garg (plaintiff's father, as well as that of the first four defendants) lived in the suit property till his death on 12th January, 1986. It is stated that on the death of Laxmi Narain, the plaintiff's grandfather, the suit property and all other assets fell to the share of the Plaintiff's father, late J.N. Garg, who was a Government employee, having no other source of income. It is stated that the Plaintiff got married in 1984. As such, there was shortage of accommodation and the entire first floor was covered by additional construction and two rooms were constructed on the second floor in 1985-86.

4. It was stated that the Plaintiff started his business and was contributing to the joint family funds which was used for the above additional construction as well as for the marriage of Defendant Nos.

1 to 4. Thus, the case of the Plaintiff is that the suit property was acquired out of the family funds by their father, late J.N. Garg who held it in his name only in trust for use of the joint family and that the Plaintiff invested his own funds for the construction of the house only on this understanding. The Plaintiff states that he got married in 1984 and the cash received at that time was utilised for the joint family's needs for raising the construction.

5. The plaintiff also alleged that after the marriage of the first defendant with sixth defendant in 1994, *"9.……..……..Defendant No.1 and Defendant No.6 started poisoning Late Shri Jagdish Narain Garg and Defendant No.5."* On this averment, a complaint was filed for criminal defamation, which is stated to be pending. This led to the Plaintiff filing I.A. No. 10574 of 2010, seeking to amend the above averment to read *"Defendant No.1 and Defendant No.6 started poisoning the mind of late Jagdish Narain Garg and Defendant No.5 against the Plaintiff."*. The plaintiff also stated that he was surprised to receive a notice dated 17th July 2000 on behalf of his father, which contained false allegations that he had sold the Tihar village properties that he had acquired from late Laxmi Narain Garg. The Plaintiff alleges that no amounts were given him for raising construction and his business. He also replied to the said notice on 20thDecember 2000. He further claimed that in a family meeting, it had been reiterated that the property was a joint family property and that late J.N. Garg was holding it in trust. It was agreed – in that meeting, that the ground floor would be utilised by the parties' parents, the first floor by Defendant Nos. 1 and 6 and the entire

second floor by the Plaintiff. It was stated that the Plaintiff completed the construction of the entire second floor in 2001-2002, shifted there and continues to remain in possession of the entire second floor.

6. J.N. Garg expired on 17th May 2005. The Plaintiff states that despite his request, the defendants deferred the issue of dividing the suit property. He was surprised to receive the notice dated 22nd August 2007 from the Advocate on behalf of sixth Defendant asking him to vacate the second floor of the suit property. Thereafter, he received summons in Suit No. 329 of 2007 where the sixth defendant had claimed that the entire first and second floor belonged to her on the basis of the registered Gift Deed dated 30.05.2001 executed by late J. N. Garg. The Plaintiff claimed that the said Gift Deed was never brought to his notice and on examining it, found it to be a sham document. The value of the gifted property is also alleged to be falsely given. It was also submitted that the plaintiff became aware that the ground floor portion had been gifted by late J.N. Garg to the first defendant by Gift Deed dated 20th February 2004, and that too was undervalued. Both the Gift Deeds dated 30th May 2001 and 20th February 2004 in favour of Defendant No. 1 were sham and void documents.

7. The defendants filed their written statement claiming that late J.N. Garg purchased the suit property from his own funds on 20th December 1964 in an open auction much prior to the sale of the Tihar Village properties. The details of payments made by Mr. J.N. Garg for the suit property on 20th December 1964 (₹3,030/-), on 27th April 1965 (₹6,045/-) and that the balance before 16th November 1966

were also set out. Mr. J.N. Garg, according to the defendants, had set-up the business of the Plaintiff. He also got his daughter married from out of his own funds. The entire payment in 1985-86 for the suit property was covered by J.N. Garg from his own funds. Since the suit property was self-acquired property of late J.N. Garg, he was free to deal with it in any manner he liked and, therefore, the validly executed Gift Deeds are challenged in the suit. It is stated that the mutation in respect of the ground floor is in respect of first defendant. It was further stated that the suit filed in September 2008 for cancellation of the Gift Deeds was time-barred. Similar pleas have been taken by sixth defendant and the other defendants as well. The Defendants also filed I.A. No. 361/2010 and I.A. No. 4419 of 2010, both under Order VII Rule 11 of the Code of Civil Procedure, 1908 ('CPC').

8. The learned Single Judge, after noticing the contentions of the plaintiff, and considering the document placed by him on the record, concluded that the plaint did not reveal any cause of action. The impugned order was premised on certain inferences which the learned Judge drew. The first was that as far back as in 2000, the plaintiff was aware that his father alleged that the suit property belonged to him and was his self-acquired property. Therefore, the relief of declaration could not be claimed, since the suit was time-barred, the cause of action for it – i.e. refusal of the plaintiff's claim to be owner of the property on the basis of his being a coparcener, accrued in 2000. The suit was instituted beyond the period of three years prescribed by law. It was also held that the plaint and the documents, read as a whole

could not disclose a cause of action because once the plaintiff could not in law approach the Court for declaration as to his status as coparcener, he could not also claim that his father could not have gifted the property during his life time. The Court held that:

> *"16.……A perusal of the said notice dated 17th July 2000 shows that it was asserted even then that it is the Plaintiff who has sold the Tihar village property. It was stated in para 3 of the said notice that late Mr. J.N. Garg constructed the suit property "by purchasing the land with of his own funds. The said house is three storeyed house and is exclusively owned and possessed by my aforesaid client as his own self acquired property." In reply to the said notice, the lawyer for the Plaintiff stated as under:*
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> > *"3. Para No.3 of your notice is admitted to the extent that your client was in government service, but rest of the para is denied as being incorrect. The property No. F-83, Naraina Vihar, New Delhi was acquired and built out of the funds of the ancestral properties and it was not constructed or acquired with the funds of your client, and my client has a right and share in the said property. It is denied that the said property is exclusively owned and possessed by your client as his self acquired property. The said property is in joint ownership."*
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> *17. Despite knowing the claim raised by the father, way back in 2000, that the suit property was a self-acquired property, no attempt was made by the Plaintiff to seek any declaration in respect thereof, for at least eight years thereafter. The present suit appears to have been filed as a counterblast to the suit for*

possession filed against the Plaintiff by Defendants 1and 6. Consequently, this Court is of the view that the suit is barred by limitation since it is filed more than seven years after the Plaintiff became aware of the stand of the late father that the suit property was in fact a self-acquired property of his father late Mr. J.N. Garg.

18. The Court enquired of Mr. S.C. Singhal, learned counsel for the Plaintiff if there was any document whatsoever which would go to show that the suit property was not the self-acquired property of late Mr. J.N. Garg. Mr. Singhal was unable to point to any such document other than the Plaintiff's own self-serving statement made either in the reply to notices or the notice issued by him or in the plaint. The mere repetition of a statement in support of a claim will not give rise to a triable cause of action. The plaint, when read as a whole, does not give rise to any cause of action as regards the Plaintiff's claim to partition.

19. If, indeed, the suit property was not purchased out of the joint family funds and had no character of an ancestral property, then late Mr. J.N. Garg was free to deal with the suit property, which was a self acquired property, in any manner he pleased. He was entitled in law, therefore, to execute the Gift Deeds in favour of Defendants 1 and 6, without any bar in law.

20. In that view of the matter, the Court holds that the plaint does not disclose a cause of action for the Plaintiff to challenge the two Gift Deeds or seek partition. The Court is satisfied that the plaint does not disclose any cause of action for grant of reliefs prayed for by the Plaintiff. Consequently, these two applications are allowed and the plaint is rejected. The Suit and all the pending applications are dismissed. The interim order dated 1st October 2008 is vacated."

9. The Appellant now challenges the dismissal of his suit, contending that the Single Judge did not give proper weightage to the pleadings and material on record. Mr. Singhal, learned counsel argued that the impugned judgment unjustifiably took into consideration the written statement and importantly, went into the merits of the suit claim, which was clearly impermissible. It was submitted that the tenability or otherwise of the challenge to the two Gift deeds could not have been gone into. Counsel also sought to highlight that the two Gift deeds were executed under suspicious circumstances, and the learned Single Judge ought to have allowed the matter to proceed to trial, instead of presuming that the plaintiff could not have challenged it.

10. It was submitted that the scope of the Court's power, under Order VII Rule 11 (d) CPC, is only to satisfy itself as to whether the plaint discloses any cause of action and whether it is barred by law. Once the Court finds that there are averments in the plaint, and it is not barred, the correctness or veracity of the claims in the suit cannot be gone into. It was argued that the plaintiff had clearly mentioned that a family settlement in the form of an oral partition had been arrived at after his father had issued a notice to him, to which he had replied. In the circumstances, the Court was obliged to assume that the plaintiff was entitled to prove that fact and could not on the basis of pleadings, have concluded that there was no cause of action revealed in the suit. It is also argued that so far as the material on record go, the plaintiff had produced copies of electricity receipts on

the basis of bills paid by him. These clearly supported his argument of being in possession consequent to the oral partition pleaded by him in the suit.

11. *Raptakos Brett & Co. Ltd. v. Ganesh Property,* 1998 (7) SCC 184, is an authority for the proposition that the averments in the plaint as a whole have to be seen to see whether Clause (d) of Rule 11 of Order VII is applicable. It has also been held that to consider whether the proceeding discloses a cause of action, the Court should not scrutinize only the plaint, but also the documents filed along with it; -(See *Liverpool & London S.P. & I Asson. Ltd. v. M.V. Sea Success I and Anr.*, 2004 (9) SCC 512. Having given due consideration to these aspects if the Court concludes that taken as a whole, the pleadings and evidence do not disclose a cause of action, the plaint must be rejected. The public policy compulsion underlying this course of action was spelt out by the Supreme Court in *T. Arivandandam v. T.V. Satyapal and Anr.*, (1977) 4 SCC 467 where it was held, 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 Court should exercise its power under Order VII Rule 11, CPC.

12. A careful reading of the impugned order, particularly the reasoning, reveals that even though the Court outlined the contents of the defence earlier, the rejection of the plaint was solely on an overall consideration of the averments contained in it. This Court had the benefit of considering the Suit records, which contained the plaint and the documents filed along with it. Despite the lapse of over five years, the plaintiff did not bring on record anything to support his plea about

the oral partition or family settlement, said to have occurred after the exchange of notice and the reply between him and his father in 2000. The plaint too, this Court notices, is completely bereft of any particulars relating to the family settlement or oral partition. The picture which emerges on an overall reading of the plaint and the documents presented with it is a sketchy and vague assertion about the parties having orally settled something, on an unknown date.

13. The learned Single Judge had noticed that once late J.N. Garg had asserted his absolute ownership of the suit property, which was denied by the plaintiff through his reply that he had *"acquired and built out of the funds of the ancestral properties and it was not constructed or acquired with the funds of your client."* Apart from that assertion, and the further claim that J.N. Garg, being a public servant, could not have had sufficient means to acquire the property, the plaint was silent regarding particulars of the properties that were sold by J.N. Garg's father or uncle, the proceeds of which were allegedly utilized by him to acquire the suit property. This omission, in the opinion of the Court, is fatal to the entire claim of the plaintiff regarding the joint nature of the suit property. Once having admitted that J.N. Garg was possessed of income in the form of salary, the plaintiff had to at least state particulars relating to the properties which were sold, leading to acquisition of the suit property. No such averment or materials exist on the record. The absence of pleadings and material, therefore, rendered the plaintiff's claim that the suit property was joint, suspect. It is axiomatic that a plaintiff who approaches the Court has to prove the allegations by positive

evidence. In this case, the pleadings were silent about how the suit property was joint; concededly the property stood in the name of the late father – J.N. Garg, who had an independent source of income, i.e. his salary. Furthermore, the plaintiff had brought on record the notice issued by his father in 2000, clearly stating that he (the plaintiff) had no title to it. The plaintiff took no action within the period of three years, claiming declaration that the suit property was joint. He chose to do it over seven years later. The decision in *Anathula Sudhakar v. P. Buchi Reddy (Dead) by LRs and Ors* 2008 (4) SCC 594 is an authority on the point that where there is a cloud on the title of a claimant as to property, he has to seek declaration:

> *"12……..a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient……"*

14. There can be no dispute that a suit for declaration was the appropriate remedy; the cause for it arose with the assertion of the right by the father, denying that the plaintiff had any right to the

property. The plaintiff took no steps to assert his right. Article 58 of the First Schedule to the Limitation Act prescribes a period of three years for suits claiming declaration; the starting point of limitation is when the right to sue accrues. In *Mt. Bolo* v.*Mt. Koklan and Ors.*, AIR 1930 PC 270, the Privy Council observed as follows:

> *"13. There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted……."*

The test of *"clear and unequivocal threat to infringe"* the plaintiff being the determinative one for seeing whether cause of action arises in a given case, has been subsequently adopted by the Supreme Court [Ref. *C. Mohammed Yunus v. Syed Unissa and Ors.* AIR 1961 SC 808 and *Daya Singh & Anr. v. Gurdev Singh (dead) by LRs. & Ors* .(2010) 2 SCC 194]. Applying that test, the clear and unequivocal threat to the plaintiff's claim of being owner on the basis of the suit property being HUF property, arose when his father issued a notice. The plaintiff did nothing to assert that right. Therefore, he could not legitimately claim a declaration.

15. This Court observes that from the point of time of filing the original plaint on 24.09.2008 till date, the Appellant has failed to provide material on record to substantiate any of his claims with regards to the nature of the property. This would include the absence of any manner of specific pleadings as to how the plaintiff's father bought the suit property out of ancestral property funds; the

description of such property, the approximate date, or even year of sale of such property and some particulars of such property. Further, likewise, the pleadings are bereft of any particulars as to how and when the oral partition took place after 2000, who were parties to it, and even the approximate month and year when it occurred. Surely for one who claimed to be a party to the agreement, furnishing those details could not have presented an insurmountable difficulty. No supporting material is forthcoming in that regard. Seen from this context, the plaintiff's allegations about the Gift Deeds being void because they were procured from his father under undue influence, ring hollow. To say that undue influence or coercion was exercised to vitiate the document, again some modicum of material, in the form of medical documents supporting infirmity of the late J.N. Garg had to be placed on record. He had in fact expired well over a year after the execution of the said Gift deeds.

16. When the nature of the property as coparcenary or HUF property cannot be proved, the Court must proceed with the understanding that the Late J.N. Garg could exercise his right to distribute his self-acquired property in whichever manner he deemed fit. The Court comes to this conclusion on the absence of substantial material backing from the side of the plaintiff to show reasonably that the said property was anything but self-acquired; the plaint could be said not to disclose any cause of action. The impugned order has given due consideration to the claims and material brought out by the averments in the plaint as a whole and held that Clause (d) of Rule 11 of Order VII, CPC was applicable. This Court is, therefore, satisfied

that the impugned judgment and order does not call for interference. The appeal and pending application are consequently dismissed, but without order as to costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

NOVEMBER 21, 2013