

IN THE BOARD OF REVENUE FOR RAJASTHAN, AJMER

Revision No.4245/2014/TA/Bhilwara :

Bhanwar Singh S/o Shri Gajendra Singh, by caste Rajput,
resident of Village Saransh, Tehsil Shahpura, District Bhilwara.

... Petitioner.

Versus

1. Bhagwan Singh S/o Shri Mohan Singh
2. Madan Kanwar W/o Shri Samundra Singh
(Deleted vide order dated 09.10.2015)
3. Shivraj Singh S/o Shri Samundra Singh
All are by caste Rajput, residents of Village Saransh,
Tehsil Shahpura, District Bhilwara.
4. Bhanwar Kanwar D/o Shri Samundra Singh W/o Shri Maan
Singh, by caste Rajput, R/o Village Kachriya, Tehsil Kekri,
District Ajmer.
5. Samajh Kanwar D/o Shri Samundra Singh W/o Shri Bharat
Singh, by caste Rajput, R/o Village Sankriya, Tehsil Kekri,
District Ajmer.
6. State of Rajasthan, through Tehsildar Shahpura, District Bhilwara.

... Non-petitioners.

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S.B.

Shri Satish Chand Kaushik, Member

Present :

Shri Jagdamba Prasad Mathur : counsel for the petitioner.

Shri Raghvendra Singh Ranawat : counsel for the non-petitioner no.1.

Shri Sunil Pareek : Dy.Govt.Advocate for non-petitioner no.6.

None present : on behalf of non-petitioners no. 3, 4 and 5.

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Dated : 07.9.2016

J U D G M E N T

This revision petition has been preferred under section 230 of the Rajasthan Tenancy Act, 1955 (in short to be referred "the Act") against the order of learned Sub Divisional Officer, Shahpura dated 14.7.2014.

2. In this case, an application under Order 7 Rule 11 read with Section 151 of the Code of Civil Procedure was moved on the ground that earlier a suit for partition was filed in 1989 bearing revenue suit no. 12/89 which was dismissed in default on 13.1.1992. The certified copy of the partial weeding register was also filed along with the application. The learned lower court dismissed the application under Order 7 Rule 11 on the ground that the earlier suit was partition suit while the present suit is for partition, declaration of tenancy rights and correction of entries. The earlier suit was not decided on merits, it was dismissed for default. This case is pending since 2005 and the application under Order 7 Rule 11 was filed only on 11.6.2014. Being aggrieved with the order of learned Sub Divisional Officer, Shahpura dated 14.7.2014, this revision has been preferred.

3. I have heard learned counsel for the parties and perused the record.

4. The learned counsel for the petitioner argued that Order 7 Rule 11 application can be moved at any stage and at any point of time. The court cannot dismiss the application on the ground of delay as has been dismissed by the learned lower court. The learned counsel cited the judgment 2012 DNJ (SC) 734 Church of Christ Charitable Trust and Educational Charitable Society Vs. M/s Ponniamman Educational Trust wherein Hon'ble Supreme Court has decided that the power under Order 7 Rule 11 for rejection of plaint can be exercised at any stage of the suit. The other judicial pronouncement 2011(3) DNJ Rajasthan page 1376 Parshwanath Jain Mandir Trust Vs. Avatar Singh was cited and argued that the power under Order 7 Rule 11 can be exercised at any stage of the suit before conclusion of the trial. Judicial pronouncement 1989 RRD 358 Pooran Vs. Mahaveer Singh was cited and argued that defendant has nothing to do in connection with the suit. If the suit has been dismissed under order 9 Rule 3 of the CPC because of non-appearance of the plaintiff or his advocate, then the fresh suit is barred. By referring 1993 RRD page 575 Ramu Vs. Buddha, it was argued that it is not necessary that the dismissal should have been on merit. The plea that previous suit was

dismissed on account of the mistake of the counsel is of no avail. Where a suit has been wholly or partly dismissed under Order 9 Rule 8, the fresh suit is barred under Order 9 Rule 9. The proper remedy in such a case is to seek an order for setting aside the dismissal. By referring the judgment 2010(3) DNJ Rajasthan 1197 Devi Food Products Vs. Kewal Products, it was argued that the application moved under Order 7 Rule 11 was rejected without considering the plea taken by the applicant and the application was dismissed by unreasoned order, then the order is not sustainable and was set aside and the matter was remanded back for fresh consideration. The learned counsel further argued that in present case as well, the earlier suit was pending between the same parties. The suit was filed by Bhagwan Singh against Gajendra Singh, father of the petitioner. Along with the suit, an application under section 212 Rajasthan Tenancy Act was also moved. The suit for partition as well as the application for injunction under section 212 both were dismissed in default (अदम हाजरी अदम पैरवी में खारिज की गयी); as such, new suit is barred under Order 9 Rule 9. It was also argued that under Order 2 Rule 2 of CPC when the relief called should have been called in the first suit as well and not asked for, then it cannot be asked in the subsequent suit. Order 2 Rule 2 CPC bars the second suit on the same cause of action. The learned counsel referred the judicial pronouncement AIR 2014 SC 2301 Coffee Board Vs. Ramesh Exports Pvt. Ltd.

5. On the other hand, learned counsel for non-petitioners argued that the judicial pronouncements cited by the learned counsel for the petitioner are not applicable to the present scenario of the matter because Hon'ble Supreme Court in its pronouncement 2012 DNJ (SC) 734 which has been cited by the learned counsel for the petitioner specifically held that only averments made in the plaint can be considered while considering the application under Order 7 Rule 11 for rejecting the plaint and there is no such averment made in the plaint. The learned counsel also argued that the other judicial pronouncement as cited by the learned counsel for the petitioner AIR 2014 SC 2301 also says that for applying the Order 2 Rule 2 CPC, the court has to be specifically gone through both the suits to see that both cause of actions are the same and it cannot be decided without going into plaint of both the suits. In this case, no document has been filed by the

plaintiff except the partial photostat certified copy of the weeding register. No other document was filed that what type of suit was filed earlier and why it was dismissed. The learned counsel referred the judicial pronouncement 2015(1) RRT 655 Nathu Ram Vs. Panchi and argued that question of res judicata is mixed question of fact and law and no written statement was filed. Framing of issues and evidence was necessary for deciding the question. Courts below have committed error in dismissing the suit. The Board in another matter 1992 RRD page 207 Ganga Singh & ors. Vs. Smt. Shayar Kanwar & ors. specifically held that the earlier suit was dismissed for non-appearance of plaintiff, does not attract principle of res judicata. The same view has been taken by the Hon'ble Board in 1992 RRD page 212 Dana Ram Vs. Jarnail Singh. As such, the learned counsel argued that the order of the learned lower court is valid. Apart from this, it was also argued that the earlier suit was suit for partition and partition was not effected by the court. If a suit for partition has been filed, then all the parties are treated as plaintiff whether they have been inserted in the capacity of plaintiff or defendant. The suit for partition cannot be dismissed for default. It is the duty of the court to decide the matter on merit and if the matter has not been decided on merit, then again suit for partition can be filed by any of the party, there is no bar to it. The learned counsel also argued that the earlier suit was only for partition under section 53 of the Rajasthan Tenancy Act, but the present suit has been filed for partition, declaration and correction of entries. The cause of action which arose earlier was exhausted because in earlier suit, there was a compromise entered in between the parties, but after the death of Gajendra Singh, father of the petitioner, they created the problem and declined to comply with the compromise made out of court. The suit was got dismissed in default because of the compromise of the parties, but when the present petitioner declined to comply with the compromise, then fresh cause of action arose and as such, the suit was filed. As such, there is no illegality in the impugned order and this petition is only misuse of process of law, which is liable to be dismissed.

6. I have gone through the arguments advanced by learned counsel for both the parties and scanned the matter carefully.

7. The question for consideration before this court is "whether a suit for partition dismissed in default bar the fresh suit?" Admittedly, the earlier suit was suit for partition and it was not decided on merit. What claim was made in the earlier suit and what is the situation of the earlier suit at the time of dismissal of suit is not clear because the file of the learned lower court has been weeded out and no certified copy of the plaint and written statement is available. It is also the settled principle of law that the partition suit must be decided on merit, it should not be dismissed for default. If the suit for partition has been dismissed in default and the rights of parties have not been decided earlier, then fresh suit is not barred under the law. If a compromise has been entered between the parties out of court and any party declining to it and again fresh dispute arises, then the filing of new suit is not barred. It is also pertinent to mention that this case is pending since 2005 and the application under Order 7 Rule 11 was filed only on 11.6.2014

8. As discussed above, I am of the considered opinion that a suit for partition dismissed in default does not bar the filing of fresh suit. In the facts and circumstances of the matter, the present revision petition is not maintainable, it is liable to be dismissed; hence dismissed. The impugned order of learned Sub Divisional Officer, Shahpura dated 14.7.2014 is hereby upheld. Let the matter be decided on merit.

Pronounced in open court.

(SATISH CHAND KAUSHIK)
Member

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