

**IN THE COURT OF SUSHANT CHANGOTRA  
SENIOR CIVIL JUDGE, SOUTH DISTRICT  
SAKET COURTS, NEW DELHI**

23/5/18  
CS No. 4678

**Naveen Kumar Aggarwal Vs. Madhu Dewan & Ors**

28.05.2020

**ORDER ON MAINTAINABILITY OF SUIT**

1. Vide this order, I will decide the question of maintainability of suit as raised in the application under Order 7 Rule 11 of CPC filed by the defendant no. 1 as well as with respect to questions raised by the court vide order dated 30.11.2019.
2. I have already heard the oral arguments of the counsels for the parties. I have also gone through the written arguments (& additional notes along with judgments so filed by the ld. Counsel for the plaintiff), the pleadings and the documents on record.
3. The brief facts of the case of plaintiffs as set out in plaint, necessary for the adjudication of the controversy / questions involved are that a perpetual sub-lease dated 16.01.1971 was executed by defendant no. 2 in favour of mother of plaintiffs no. 1 & 2 and defendant no. 1 namely Smt. Vimla Aggarwal. Smt. Vimla Aggarwal died on 02.01.2002. Her husband Sh. K. M. Aggarwal had pre deceased her as he passed away on 05.10.2001. Smt. Vimla Aggarwal was survived by plaintiffs and defendant no. 1.
4. Both the plaintiffs are in possession of the suit property. Defendant no.1 had also kept some articles in the suit property which was not objected to. Defendant no. 1 is settled abroad. There was

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harmony in between all the three legal heirs and the suit property continued to remain as joint property, but the plaintiff no. 1 only took care of the entire suit property. On 16.01.2018, defendant no. 1 came to India and decided to stay with plaintiff no. 2. Thereafter, she resided with her paternal uncle namely Sh. V. M. Aggarwal in his house in Faridabad. During her visit to India, strange people started moving around in the suit property.

5. The plaintiffs are apprehending that defendant no. 1 is attempting to dispose off or alienate the suit property to third persons. The plaintiff no.1 also gave public notice that if anyone attempts to buy the suit property, then that person will be committing an offence. The plaintiffs also gave police complaints.

6. Thus, the plaintiffs have prayed for decree of permanent injunction for restraining defendant no. 1 from selling/ alienating or creating any third party interest in the suit property. The plaintiffs have also prayed for decree of permanent injunction against defendant no. 3 & 4 for restraining from alienating/ selling the suit property on behalf of defendant no. 1.

7. Briefly stating in her written statement, defendant no. 1 took objection that the defendant no. 1 is the sole owner of the suit property. The earlier owner Smt. Vimla Aggarwal had bequeathed the entire suit property in favour of defendant no. 1 by virtue of a will. The said will also recorded the existence of family settlement. The plaintiffs are well aware about the existence of will and it was the plaintiff who had read out the contents of will, when it was handed over by their neighbour Smt. Usha Gupta in whose custody the testator had left the will.

8. The defendant no. 1 also took preliminary objection that plaintiffs are claiming to be owners of 2/3rd share in the suit property, but they have not sought declaration nor filed suit for partition. Therefore, the present suit is not maintainable in view of the law laid down in Anathula Sudhakar Vs. P. Buchi Reddy & Ors (2008) 4 SCC 594.

9. Subsequently, defendant no. 1 filed an application under Order 7 Rule 11 of CPC for rejection of plaint on the ground that there is no cause of action as the defendant no. 1 has never attempted to dispose off the suit property. The present suit is not maintainable as the plaintiffs have not sought declaration of will so executed in favour of defendant no. 1 nor they have sought partition.

10. At this stage, it is pertinent to mention that a query was also raised by the court qua maintainability of suit as the plaintiffs are seeking a decree for permanently restraining/ alienation of the share by one of the co-sharers without seeking to enforce their presumptive right by way of suit to that extent.

11. Thus, vide this order, I will deal with the question of maintainability of the suit on two aspects i.e:

- (i) Vis-a vis query of the court as mentioned above;&
- (ii) Maintainability of the suit for injunction without seeking declaration.

12. First of all, I will decide the question as to whether the simpliciter suit for injunction for restraining a co-sharer from alienating the suit property permanently is maintainable without taking recourse to



enforcement of the presumptive rights as pleaded by plaintiffs.

13. As per averments of plaint, both the plaintiffs are the co-sharers in the suit property and they are apprehending that defendant no. 1 will alienate the suit property to third person. The case of plaintiffs is that since they are the co-sharers, therefore, they have presumptive rights to purchase the suit property. By way of present suit, the plaintiffs are seeking decree that defendant no. 1 be restrained from alienating the suit property to any person.

14. It is the settled proposition of law that there cannot be a permanent clog over the sale of the property for an indefinite period of time. From the pleadings, it is apparent that the plaintiffs want to injunct the sale of suit property by defendant no. 1 without seeking to exercise their right to presumption over the alleged share of defendant no. 1

15. The Id. Counsel for plaintiffs had vehemently argued that the presumptive right is with respect to right to offer. He has placed reliance on the following judgments:-

(i) *Bishan Singh Vs. Khazan Singh AIR 1958 SC 838;*

(ii) *Sachindra Nath Banerjee Vs. Hari Bhusan Banerjee (1962-63) 67 CWN 792;*

(iii) *Nagammal & Ors Vs. Nanjammal & Anr (1970) 1 MLJ 358;*

(iv) *P. Sriniasamurthy Vs. P. Leelavathy & Ors (2002) 2L-W 238; &*

(v) *N. Manickam Vs. Kanagaraj & Ors (2012) 2 L. W. 739.*

The gist of all the abovementioned judgments is that co-sharers have the following rights: (i) the primary or substantive rights to have an offer made and (ii) secondary right of the co-heirs- if the



property is sold without being first offered to them to take it from the purchaser.

16. The complete perusal of all these judgments so relied upon by the ld. Counsel for plaintiffs show that in none of these judgments it was held that co-sharers can seek permanent injunction for restraining alienation of property by the co-sharer without seeking to enforce their presumptive right. The ratio of all these judgments is not applicable to the facts of the present case as these judgments do not hold that by filing the simpliciter suit for injunction a co-sharer can permanently restrain the other co-sharer from selling his/her share in the property.

17. As per averments of plaint, the cause of action for seeking enforcement of their presumptive right had arisen. Now instead of seeking enforcement of the right the plaintiffs have come up with a suit for injunction only. The enforcement of right to offer has to be exercised when the cause of action has arisen. The plaintiffs cannot be allowed to claim that since the offer has not been made by the plaintiff, therefore they can seek permanent injunction for restraining sale till eternity. The fact that the plaintiffs have not chosen to seek enforcement of rights in their favour prima facie shows that they want to keep the suit property in status quo. This is neither the intention of the legislature nor such litigation is permissible under the law. Therefore, to say that the simpliciter suit for injunction without seeking enforcement of presumptive right is maintainable cannot be accepted.

18. It cannot be forgotten that even as per averments of plaint, the right of presumption is available to plaintiffs only and not to defendant no. 1. Therefore, if decree as prayed for is passed, defendant no. 1 will

be remediless and she will never be able to alienate her share in the suit property. The passing of such a decree as prayed will result into restraining the defendants from selling the suit property for eternity or she will be at the mercy of plaintiffs.

19. The Id. Counsel for plaintiff had also argued that as per Section 44 of The Transfer of Property Act, the plaintiffs being members of undivided family of a dwelling house can protect their exclusive possession against an invasion of a stranger. He placed reliance on law laid down in **Dorab Cawasji Warden vs Coomi Sorab Warden & Ors (1990) 2 SCC 117**.

20. I have given my thoughtful consideration to the aforementioned argument as well. Section 44 (2) of The Transfer of Property Act is reproduced below:-

*Section 44: Transfer by one co-owner: Where one of two or more co-owners of immoveable property legally competent in that behalf transfer his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred. Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.*

21. The aforementioned section/ provision relates to remedy

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against a stranger who has gained title of the residential property in contravention of the presumptive right of the co-sharers. In the present case admittedly defendant no. 1 has still not alienated the suit property. There is no such pleading in the entire plaint. Therefore, the question of enforcement of rights as per Section 44 (which is available against the stranger) does not arise.

22. It is necessary to note that even such a stranger has a remedy by way of filing the suit for partition under section 4 of The Partition Act. Therefore, the aforementioned provision as well as laws laid down by counsel for plaintiffs do not aid the case of plaintiffs.

23. Thus, in my considered opinion the plaintiffs have a remedy by way of filing an application/ petition for enforcement of their presumptive right and without seeking such remedy a permanent clog on the sale of suit property cannot be created.

24. At the cost of repetition, it is once again reiterated that the aforementioned findings do not hold that plaintiffs do not have presumptive rights w.r.t sale of property by defendant no. 1. The issue being addressed herein is that the plaintiffs cannot seek simpliciter injunction without enforcing their presumptive rights for which cause of action has already arisen.

25. Therefore, even as per averments of the plaint, the present suit is barred by Section 41() of the Specific Relief Act.

26. Secondly, I will deal with ground taken by defendant no. 1 for rejection of plaint. As mentioned above, the plaintiffs are claiming to be the co-sharers of 2/3rd share of the suit property, whereas, the defendant no. 1 is claiming to be the owner of the entire suit property by virtue of



a will allegedly executed by Smt. Vimla Aggarwal in her favour.

27. The present suit of plaintiffs is for restraining defendant no. 1 from alienating the suit property on the basis that they are the co-sharers and the suit property cannot be sold to third person in contradiction to their rights provided under section 22 of the Hindu Succession Act r/w section 4 of The Partition Act. In order to determine their rights, as per the case of the plaintiffs as well, the court will have to go into the question of deciding the title of the plaintiffs because the defendant no. 1 has denied the title of plaintiffs by setting up a will. Therefore, it is apparent that possession is not the only question which will be required to be determined, but the question of title of plaintiffs will also have to be determined.

28. It is a settled proposition of law that in injunction suit, the complicated question of title cannot be adjudicated. In **Anathula Sudhakar Vs. P. Buchi Reddy & Ors (2008) 4 SCC 594**, the Hon'ble Supreme Court held that, "*(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.*"





*(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."*

29. In my considered opinion, the complicated question of title cannot be decided by way of present suit and since the plaintiffs have not sought declaration qua the alleged will as pleaded by defendant no. 1, therefore, the present suit is not maintainable on this ground as well.

30. In **Maria Margadia Sequeria vs Erasmo Jack De Sequeria (D)** AIR 2012 SC 1727, the hon'ble Supreme Court had also held that, "*This Court in a recent judgment in Ramrameshwari Devi and Others (supra) aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation.*"

31. Hence, in view of the aforementioned discussion, I am of the considered opinion that the present suit is not maintainable in the present form. Accordingly, the plaint is rejected under Order 7 Rule 11



of CPC.

32. File be consigned to record room after due compliance.

(Announced in the open court)  
28<sup>th</sup> May, 2020

(SUSHANT CHANGOTRA)  
SCJ (SOUTH)/ SAKET COURTS  
NEW DELHI

**CS No. 235/18**

**Naveen Kumar Aggarwal other Vs. Madhu Dewan & Ors**

28.05.2020

Present: Sh. Abhimanyu Shrestha, ld. Counsel for plaintiffs.  
Sh. Sidharth Aggarwal, ld. Counsel for defendant no.1.

The matter was fixed for 18.04.2020 for clarifications/ order on maintainability of the present suit. Thereafter, it was automatically adjourned for 03.06.2020 vide various circulars. As per circular bearing no. Judl.II/F.7/South/Saket/2020/LKD-11 New Delhi dated 04/05/2020, it was preponed for 28.05.2018 i.e. for today. In pursuance thereof, as per directions of the undersigned the hearing was scheduled for today at 12.00 noon via Cisco Webex platform.

I have already heard the oral arguments of the counsels. I have also gone through the written arguments, pleadings and documents very carefully.

Vide separate order of even date, the plaint is rejected under Order 7 Rule 11 of CPC.

The proceeding has been conducted through video conferencing as per circulars. The scanned copy of the detailed order and this order be sent to the coordinator of Computer Branch for uploading it on the website as per procedure. Reader to the needful.

File be consigned to record room after due compliance.



**(SUSHANT CHANGOTRA)**  
**SCJ (SOUTH)/SAKET COURTS**