

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

% **Date of decision: 11<sup>th</sup> February, 2016.**

+ **RFA 288/2015 & CM No.8108/2015 (for stay)**

**CHANDER MOHAN SHARMA** ..... **Appellant**

Through: Mr. Hameed S. Shaikh, Adv.

Versus

**JAGDISH PRASAD SHARMA** ..... **Respondent**

Through: Mohd. Shariq, Adv.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. The appeal impugns the judgment and decree dated 21<sup>st</sup> January, 2015 of the Court of Additional District Judge (ADJ)-02 (Central), Tis Hazari Courts, Delhi decreeing the suit (CS No.39/2013 bearing Unique ID No.02401C0444072012) filed by the respondent / plaintiff against the appellant / defendant for recovery of possession of immovable property and for *mesne profits* / damages for use and occupation at the rate of Rs.3,000/- per month from the date of judgment and decree till delivery of possession.
2. Notice of the appeal was issued and thereafter the parties were referred to the Mediation Cell of this Court. Mediation remained unsuccessful and vide order dated 5<sup>th</sup> November, 2015 the appellant / defendant was directed to deposit / pay *mesne profits* in terms of judgment and decree. The Trial Court record was also requisitioned.
3. Admit.

4. Considering that the appellant / defendant is the son of the respondent / plaintiff and the respondent / plaintiff is aged about 84 years and there are allegations of harassment of the respondent / plaintiff by the appellant / defendant owing to residence in the same premises, it is deemed appropriate to take up this appeal for final hearing at this stage itself.

5. The counsel for the appellant / defendant has been heard and the trial Court record perused. The need for calling upon the counsel for the respondent / plaintiff to address argument has not arisen.

6. The respondent / plaintiff on 20<sup>th</sup> September, 2012 instituted the suit from which this appeal arises pleading:

- (i) that the respondent / plaintiff is the sole and absolute owner of two and a half storied property bearing Municipal No.1371-73 and 1375-77 situated at Krishna Gali, Bazar Guliyan, near Dariba Kalan, Delhi and that it is the self acquired property of the respondent / plaintiff;
- (ii) that the said property was purchased by the respondent / plaintiff in public auction held on 28<sup>th</sup> October, 1961 vide Certificate of Sale dated 3<sup>rd</sup> September, 1962;
- (iii) that the appellant / defendant being the eldest son of the

respondent / plaintiff had been residing in the premises along with the respondent / plaintiff and occupying one room, one store, one kitchen and common courtyard on the first floor of the property no.1375-77 and the remaining property is in occupation of the respondent / plaintiff, his wife and other children;

- (iv) that there have been differences between the appellant / defendant, his wife and children and the respondent / plaintiff and the remaining family leading to constant bickering in the residential house;
- (v) that since January, 2012, the conduct of the appellant / defendant and his wife and sons had become very harsh and insulting towards the respondent / plaintiff and of which complaints were also lodged with the police but to no avail;
- (vi) that in the circumstances, the respondent / plaintiff vide legal notice dated 28<sup>th</sup> January, 2012 terminated the licence of the appellant / defendant to reside in the premises and called upon the appellant / defendant to vacate the premises;
- (vii) that the appellant / defendant failed to comply with the legal

notice and hence the suit.

7. The appellant / defendant contested the suit by filing a written statement pleading:

- (a) that the subject property was purchased in auction held by the Rehabilitation Department on 28<sup>th</sup> October, 1961 by the respondent / plaintiff and one Sh. Ram Parshad Sharma but in the name of the respondent / plaintiff; the auction value was paid by both in equal share;
- (b) that the respondent / plaintiff upon migration from Pakistan was staying along with his mother (grandmother of the appellant / defendant) who was employed in a hospital at Delhi and the mother of the respondent / plaintiff had given the money to the respondent / plaintiff to purchase the property in his name, being the son;
- (c) that the respondent / plaintiff at that time i.e. in the year 1961 was not in a financial position to himself pay the purchase consideration;
- (d) that Sh. Ram Parshad Sharma in or about the year 1963 filed a suit for partition of the subject property and in which suit a

preliminary decree for partition was passed on 14<sup>th</sup> January, 1966 and the first appeal and the second appeal preferred thereagainst dismissed on 3<sup>rd</sup> October, 1966 and 10<sup>th</sup> July, 1972 respectively; ultimately in accordance with the final decree for partition, a mutual auction was held in the year 1976 and in which the value of the entire property was ascertained at Rs.52,000/-, half of which had to be paid by the respondent / plaintiff to Sh. Ram Parshad Sharma; again the mother of the respondent / plaintiff (i.e. grandmother of the appellant / defendant) contributed in making the said payment to Sh. Ram Parshad Sharma;

- (e) that thus the nature of the property is ancestral as the payment therefor had been made by the mother of the respondent / plaintiff i.e. the grandmother of the appellant / defendant and the respondent / plaintiff is thus not the absolute owner of the property and the appellant / defendant is in occupation of the property in his own right;
- (f) that the property in the year 1961 was auctioned under Section 20 of the Displaced Persons (Compensation and Rehabilitation)

Act, 1954 and was for the benefit of the family of the respondent / plaintiff including the appellant / defendant;

- (g) that the respondent / plaintiff for family arrangement had orally partitioned the property and in which partition, the portion of the property in occupation of the appellant / defendant had fallen to the share of the appellant / defendant;
- (h) that the appellant / defendant had also made contribution towards litigation expenses for evicting the tenants earlier in occupation of part of the property;
- (i) that the suit is bad for non-joinder of the other sons of the respondent / plaintiff i.e. the brothers of the appellant / defendant.

8. Needless to state that the respondent / plaintiff filed a replication denying the defences of the appellant / defendant.

9. On the pleadings aforesaid of the parties, the learned ADJ on 22<sup>nd</sup> May, 2013 framed the following issues:

- “1. Whether the suit of the plaintiff is bad for mis-joinder and non-joinder of necessary parties? OPD
- 2. Whether the suit property had already been partitioned pursuant to an oral agreement arrived at between the plaintiff, defendant and other sons of the plaintiff? OPD

3. Whether the plaintiff is entitled to a decree of possession in respect of the suit property comprising of one room, one store, one kitchen and common courtyard on the first floor of property bearing no.1375, Krishna Gali, Bazar Guliyan, Delhi? OPP
4. Whether the plaintiff is entitled to a decree of damages / *mesne profits* against the defendant @ Rs.6,000/- per month w.e.f. February, 2012 till actual handing over of the possession of the suit property to the plaintiff by the defendant? OPP
5. Relief.”

and on the basis of the pleadings and the evidence led by the parties including oral evidence has decided all the issues in favour of the respondent / plaintiff and decreed the suit as aforesaid.

10. On an analysis of the written statement of the appellant / defendant to the suit, I am of the view that the suit should have been decreed under Order XII Rule 6 CPC i.e. on admissions or under Order XV i.e. the written statement of the appellant / defendant not disclosing any triable issue, and there was no need even for going through the rigmarole of framing of Issues and recording of evidence.

11. The counsel for the appellant / defendant before me has argued on the same lines as pleaded in the written statement.

12. The counsel for the appellant / defendant though has reiterated the

plea as taken in the written statement, of Section 20 of the Displaced Persons Act, but has been unable to support the same.

13. From a analysis of the aforesaid written statement of the appellant / defendant, the appellant / defendant by pleading that the property has been purchased in auction in the year 1961 in the name of the respondent / plaintiff, though the purchase consideration thereof was contributed equally by the respondent / plaintiff and Sh. Ram Parshad Sharma and by further pleading that in a suit for partition between Sh. Ram Parshad Sharma and the respondent / plaintiff, the respondent / plaintiff had acquired the share of Sh. Ram Parshad Sharma, has admitted the absolute ownership of the respondent / plaintiff of the property on the date of institution of the suit.

14. As far as the plea of the appellant / defendant, of the grandmother of the appellant / defendant i.e. the mother of the respondent / plaintiff having contributed the purchase consideration for the property at both times i.e. at the time of purchase in auction in the year 1961 as well as at the time of purchasing the share of Sh. Ram Parshad Sharma in the year 1976, is concerned, the same would not make the grandmother of the appellant / defendant i.e. the mother of the respondent / plaintiff the owner of the property. Such a plea is contrary to Section 4 of the Benami Transactions



(Prohibition) Act, 1988 and was / is barred. Even otherwise, a person from whom the purchaser may have received the purchase consideration, does not acquire any right in the property which is only of the person in whose name the property is purchased / registered. I have in *K.L. Garg Vs. Rajesh Garg* MANU/DE/0321/2013 held that the contributor of the purchase consideration does not become the owner of the property.

15. The only other defence of the appellant / defendant was of the property being ancestral owing to the purchase consideration having been contributed by the mother of the respondent / plaintiff and the grandmother of the appellant / defendant. Though I have hereinabove held that thereby the grandmother of the appellant / defendant did not become the owner of the property and it cannot be said that the respondent / plaintiff has succeeded to the property from his mother but I may state that even if the same were to be believed, the same also does not vest any right in the property in favour of the appellant / defendant. The settled position under the Hindu Succession Act, 1956 (it is not in dispute that the parties are Hindus) is that succession, after the coming into force the said Act on 17<sup>th</sup> June, 1956 is in accordance therewith and not otherwise. This Court recently in a judgment dated 18<sup>th</sup> January, 2016 in CS(OS) No.1737/2012 titled

*Surender Kumar Vs. Dhani Ram & Ors.* and relying on *Commissioner of Wealth Tax, Kanpur Vs. Chander Sen* (1986) 3 SCC 567, *Yudhishter Vs. Ashok Kumar* (1987) 1 SCC 204 and a host of other judgments has reiterated the said position.

16. Though Section 6 of the Hindu Succession Act carves out an exception qua a Joint Hindu family governed by the Mitakshara law but it is not the pleaded case of the appellant / defendant that there was any Joint Hindu family or a coparcenary governed by the Mitakshara law. Moreover, for a property to be ancestral within the meaning of the said provision the succession thereof has to be through male lineage i.e. from the father of the respondent / plaintiff and not from the mother as was / is the pleaded case of the appellant / defendant. Reference in this regard can be made to *Saraswathi Ammal Vs. Anantha Shenai* AIR 1966 Kerala 66 and to *Sellamam Ammal Vs. Thillai Ammal* AIR 1946 PC 185.

17. I must state that the defence of the appellant / defendant and the argument even today before this Court is as a result of common misconception which seems to prevail qua ancestral property with umpteen number of suits being filed on the premise that since the father had inherited the property from the grandfather, the plaintiff therein would have a share.

18. It is for the reasons aforesaid that I say that the written statement of the appellant / defendant on a perusal thereof did not show any triable issue and the suit ought to have been decreed without being required to be put to trial.

19. At this stage, the counsel for the appellant / defendant reminds that it was also the plea of the appellant / defendant that there had been an oral partition of the property.

20. The question of oral partition arises only between persons having a pre-existing right / share in the property. In the present case, the appellant / defendant is not found to be having any pre-existing right or a share whatsoever in the property which could have been partitioned. The plea of oral partition also was thus misconceived.

21. Supreme Court, in *Bhoop Singh Vs. Ram Singh Major* (1995) 5 SCC 709 held that if a decree were to create for the first time, right, title or interest in immovable property in favour of any party to the suit, the decree or order would require registration. Subsequently, in *Som Dev Vs. Rati Ram* (2006) 10 SCC 788 it was held that it is the duty of the Court in each case to examine whether the parties had a pre-existing right in the immovable property or whether under the order or decree of the Court, one party having right, title or

interest in the immovable property is agreeing to suffer or to extinguish the same and create a right in *praesenti* in an immovable property in favour of another for the first time by compromise or admission. Recently, a Division Bench of the High Court of Hyderabad also in ***K. Bhoom Reddy Vs. The Land Acquisition Officer*** MANU/AP/0150/2015 held that admissions of ownership of immovable property are of no avail as merely on admissions title in immovable property does not stand conferred. Reliance in this regard can also be placed on ***Ammini Tharakan Vs. Lillyjacob*** MANU/KE/1038/2013 (DB), ***Kripa Shanker Pandey Vs. Baij Nath Pandey*** MANU/UP/4048/2010, ***Chandi Prasad Vs. D.D.C., Kanpur*** MANU/UP/2974/2011, ***Pritam Singh Vs. Bohti*** MANU/PH/2480/2014, ***Sukhdevi Vs. Ram Piari*** MANU/PH/0005/2014, ***Sukrit Sahani Vs. Fuchai Sahani*** MANU/BH/1033/2009 (DB) & ***Bachi Devi Vs. Shakuntala Kuer*** MANU/BH/1109/2015.

22. There is thus no merit in the appeal.

Dismissed.

No costs.

Decree sheet be drawn up.

**RAJIV SAHAI ENDLAW, J.**

**FEBRUARY 11, 2016**

‘gsr’..