

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

Date of Reserve: 11th November 2009

Date of Order: November 26, 2009

CS(OS) No. 1940/2008

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.26.11.2009

Mrs. Sushma Thadani

... Plaintiff

Through: Mr. Deepender Hooda, Advocate

Versus

Mr. Inder Pal Singh & Ors.

... Defendants

Through:

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

The present suit has been filed by the plaintiff seeking possession from the defendants of ground floor of property no. B-44, Defence Colony and seeking an injunction against defendants restraining defendants from exercising any act of joint possession in respect of ground floor of the property and a perpetual injunction is sought against defendants restraining them from selling transferring or creating any third party interest.

2. The parties have been litigating in respect of this property earlier also and an issue was raised by the defendant that the present suit was barred by *res judicata* and was not maintainable because it was misuse of the judicial process in view of the fact that in other litigation between the parties the matter already stood adjudicated.

3. Brief facts relevant for the purpose of considering the maintainability of this suit are that one Shri R.K.Satija was owner of property no. B-44, Defence Colony. The Plaintiff is daughter and defendant no.2 is son of

Late Shri R.K.Satija. Shri R.K.Satija died on 25.2.1991. Shri R.K.Satija left behind a Will bequeathing ground floor of the property in favour of defendant no.2 and first floor and barsati floor in favour of plaintiff. The relevant portion of Will reads as under:

“That the effect of this Will be that after my death my said two children i.e. my son Shri Yatish Kumar Satija and daughter Smt. Sushma Thadani would become the co-owners of the house bearing No.B-44, Defence Colony, New Delhi. The ownership rights of the entire ground floor consisting of garage, passage, front lawn, rear set back and one servant quarter upon the garage will devolve, after my death, to my son Shri Yatish Kumar Satija, whereas the ownership rights of the entire first floor and Barsati and two servant quarters shall devolve upon my daughter Smt. Sushma Thadani. But my said children shall have no right to dispose of the property without the permission of my wife Smt. Bimla Satija who will take possession of the entire house after my death and will be entitled to recover the entire rental income of the house.”

4. Smt. Bimla Satija, in whose lifetime the property could not have been disposed of, died on 15.2.1995 and thereafter defendant no.2 (son) sold his share to defendant no.3. After this, the plaintiff filed a suit against defendants being suit no. 1130/2006 seeking injunction against defendant no.1 against selling the property or creating third party interest and also seeking direction to handover keys of back door of ground floor and injunction against defendants from carrying out any alterations/additions. The Court during pendency of that suit recorded statement of defendant no.1 who gave an undertaking to the Court that structural repairs of the property at ground floor would be carried out only in accordance with law after obtaining necessary approval/permission from the relevant authorities. He also gave an undertaking that reasonable access to the plaintiff for use of the property viz. first floor and barsati would be granted and neither defendant nor anyone else on behalf of defendant would cause any obstruction nor permit any obstruction to be caused in that area. In view of this statement the suit was disposed in terms of this statement.

5. The defendant no.3 herein had also filed a suit being CS(OS) No. 2089/2007 against the plaintiff and the suit was disposed of by an order passed on an application under Order 12 Rule 6 CPC in the following terms:

26. Since in the case in hand, the defendant agreed to pass a decree in CS(OS) No. 1130/2006 in terms of the orders passed on 24th July, 2007 where she was held to be the owner of her respective portion as elucidated in the Will, she cannot in the present suit deny the title of Mr. Yatish Kumar Satija. Mr. Yatish Kumar Satija being the owner of the suit property can certainly sell his land to anyone he wishes.

27. The plaintiff admittedly purchased the suit property from Mr. Yatish Kumar Satija by virtue of sale deed dated 17th May, 2006 and is in actual physical possession of the suit property. The defendant is unauthorizedly occupying the garage on the ground floor i.e. the suit premises.

28. In view of the abovementioned facts, this Court is of the view that there is no requirement for the parties to go for the trial and the decree as prayed for can be passed without any further orders under the provisions of the Order XII Rule 6 of the Code.

29. Therefore, in these circumstances, the plaintiff is entitled for the relief claimed in IA No. 12852/2008 and the same is allowed. Consequently, the plaintiff is entitled to the relief of possession in respect of suit premises on admissions and is entitled for a decree in his favour.

30. As regard the relief of damages, there is no admission in the written statement nor the case in this regard is proved, hence the said relief is rejected in view of the facts and circumstances in the present case. The defendant is directed to hand over the vacant physical possession of the suit premises (garage measuring about 200 sq. ft on the ground floor of the suit property) to the plaintiff within two weeks from today. The plaintiff is also entitled for the cost.

6. The plaintiff has now filed the present suit seeking possession of the property relying on Section 44 of the Transfer of Property Act alleging that the property in question was a dwelling unit belonging to an undivided family and defendants no.1 & 3 were not members of the family and they were therefore not entitled to joint possession.

7. I consider that the present suit is not maintainable at all and was a gross misuse of the judicial process. The plaintiff's reliance on Section 44 of the Transfer of Property Act in order to seek re-possession of the property already sold by her brother is not tenable. The property no. B-44, Defence Colony is not a dwelling house belonging to an undivided family. In fact the property in question has been divided by late Shri R.K.Satija by the Will and he categorically stated in the Will that entire ground floor along with garage and one servant quarter shall go to defendant no.2 and rights in first floor along with barsati and two servant quarters and use of common facilities shall go to plaintiff. It was never the intention of the Testator that the plaintiff and defendant no.2 cannot sell their shares in the property or the unit would remain a joint family house. The Testator made it clear that if any of the two wanted to sell his/her share after his death, but before the death of his wife, consent of the wife would be needed. However, after the death of wife even this consent was not needed and both plaintiff and defendant no.2 had absolute right over their respective share in the property. Ground floor is an independent dwelling unit and the portion of plaintiff is another dwelling unit having independent passage from stairs, it cannot be under any circumstance called a dwelling house belonging to an undivided family. I, therefore consider that Section 44 is of no help to the plaintiff nor could have been the basis of a suit in order to re-claim possession from the third party who had been sold ground floor of the property. The plaintiff has been making all efforts to see that the defendants did not enjoy their rights in the property.

8. The present suit is a gross misuse of judicial process and is liable to be dismissed at the preliminary stage itself with exemplary cost. I, therefore, dismiss this suit with costs of Rs.1 lac to be paid to the contesting defendants.

November 26, 2009

SHIV NARAYAN DHINGRA, J.

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