

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

Decided on: 28.07.2010

+ **CS (OS) 353/2009**

MS. TANYA SHARMA & ORS

..... Plaintiffs

Through: Mr. S.K. Sharma with
Mr. Mayank Bansal, Advocates.

versus

SH. JUDGE CHAWLA & ORS

..... Defendants

Through: Mr. Vijay Kr. Gupta, Advocate for D-1.
Mr. Hari and Mr. Sanjay Tyagi, Advocates for Intervener.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

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

MR. JUSTICE S.RAVINDRA BHAT

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I.A. Nos.2449/2009 (Under Order XXXIX Rule 1 & 2), 8285/2009 (Under Order I Rule 10), 10885/2009 (Under Order XII Rule 6) & 4372/2010 (Under Order IX Rule 7) in CS (OS) 353/2009

1. This will dispose of the first defendant's applications under Order XII Rule 6 CPC and under Order IX Rule 7 in the suit, which seeks permanent injunction to restrain the defendants from dispossessing the plaintiffs from the suit property, i.e. No. 204, Kailash Hills, East of Kailash, New Delhi, measuring 255.12 sq. yards and from creating interest in favour of any third party in respect of the suit property. I.A. No. 8285/2009 of the applicant under Order I Rule 10 seeking impleadment in the array of parties is also being decided.

2. A brief background of the suit is required for adjudication of this application. The suit avers that at the time of institution the first plaintiff was aged about 19 years and the second plaintiff (first plaintiff's younger brother) was aged about 8 years. Being a minor, the second plaintiff sues through his elder sister (first plaintiff and next friend). The plaintiffs' mother, i.e. Niti (second defendant and only daughter of the S.S. Marwah) is stated to be in police custody in connection with the alleged murder of her father (the plaintiffs' maternal grandfather, hereafter referred to as "Sh. Marwah"), in FIR No. 20/2009. The plaintiffs submit that the suit property was owned by Sh. Marwah, which consists of a duplex apartment, a basement and ground floor, first and second floor, whereas the third floor is incomplete.

3. The suit property, say the plaintiffs, was allotted to Shri Marwah, by the DDA under a registered Sub-Lease deed, dated 06.09.1984, which was later converted into freehold by Conveyance deed dated 04.05.2000, duly registered before the Sub-Registrar, Delhi.

4. It is alleged that due to poor financial condition of her husband, Niti continued to live with her father even after her marriage, in the suit property. The plaintiffs' father, Sunil Sharma, disappeared in the month of May, 2004 and his whereabouts are not known till date. It is stated that in the month of May, 2006 Sh. Marwah too went missing, when their mother informed them that he had gone to Chandni Chowk, but he never returned. The plaintiffs were informed by their mother that she had assigned the job of reconstruction of the suit property to the first defendant, a builder. On 07.02.2009, the plaintiffs' mother was taken in custody along-with one Gulfam and another person for the alleged murder of Sh. Marwah (her father). It is stated that the motive behind the alleged murder was to grab the suit property, for which purpose they had fabricated and forged certain documents.

5. The suit alleges that on 17.02.2009, some people visited the suit property claiming to be its owners alleging they were sent by the first defendant. They attempted to dispossess the plaintiffs, when the timely intervention by the neighbours prevented it. The plaintiffs claim that they receive no support, whatsoever, from their family or friends, as they have moved away due to the criminal case against their mother. The plaintiffs are left to fend for themselves. They say that on advice of the neighbours, who helped them collect money for the court fee, they have

filed the present suit. The plaintiffs, in addition, rely on news reports, and the copy of a first information report, to say that the first defendant is allegedly implicated in several criminal cases, where allegations of property grabbing are leveled against him. It is also alleged that he has been arrested, in connection with the suit property also, and further that he is booked under provisions of the Maharashtra Control of Organized Crime Act (MCOCA).

6. The plaintiffs rely upon Sections 25 and 27 of the Hindu Succession Act, 1956, which read as under:

“Section 25 - Murderer disqualified

A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

Section 27 - Succession when heir disqualified

If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.”

to say that, now that their mother, the sole heir to the property of Sh. Marwah, is suspected of and is being tried for murdering Sh. Marwah, she is disqualified under the provision of Section 25 of the HSA, which brings Section 27 into play entitling the plaintiffs to the suit property.

7. The first defendant contends that the suit is not maintainable having regard to the plaint averments and the text of Sections 25 and 27 of the HSA. They rely upon the decision of the Supreme Court, reported as *Vallikannu v. Singaperumal & Anr.*, AIR 2005 SC 2587, to say that in such circumstances the murderer should be treated as never having existed and not as one who forms the stock for a fresh line of descent. In other words, says the first defendant, the effect of these provisions is to exclude the legal and beneficial estate disentitling the murderer from succeeding to it or anyone claiming through her in doing so. It is therefore, contended that assuming the suit averments to be correct, the plaint has to be rejected. The first defendant also submits that a construction was raised upon the suit property and further that title to it has since changed hands. It is also argued that the suit averments nowhere disclose that the plaintiffs

resided at any material point in the suit property and consequently they are not entitled to the injunctive relief, sought.

8. The plaintiffs in their reply, contend that whether they are not entitled to the suit property is a matter of enquiry, and that for the purposes of deciding their applications and the suit, the Court cannot, at this stage, conclude that they have no legal rights, particularly when the second defendant, their mother, has not yet been convicted of murder. It is submitted that the application by the first defendant is based on a narrow premise of lack of *locus standi*, and a very restricted interpretation of Section 27, which the Court should not accept. It is urged that the Court should, having regard to the state of pleadings, lack of documents by the first defendant, and other attendant circumstances, reject the application for dismissal of the suit, and also protect the suit property, through an appropriate order.

9. The above discussion would reveal that the plaintiffs' claim to injunctive relief is based on their assertion about possession of the suit property, as grandchildren of its late owner, Sh. Marwah. The second defendant is their mother, accused of having killed the said Sh. Marwah. One of the plaintiffs is undeniably a minor. The first defendant contends to having lawfully sold the suit property, which the applicant in I.A. No. 8285/2009 claims to have purchased. Neither the first defendant, nor the applicant, who seeks to be impleaded deny title of Sh. Marwah over the suit property, or that the second defendant, is his daughter, and the plaintiffs' mother, being accused of his (Shri. Marwah's) murder, etc. They, however submit that the plaintiffs were never in possession of the suit property.

10. A plain reading of Section 25 would read that a murderer's right to claim a share in the murdered man's property is extinguished; Section 27 deems that in such case, the murderer is disqualified "*from inheriting any property under this Act, it shall devolve as if such person had died before the intestate*", i.e. it creates a fiction about his having died before the intestate's (i.e. the murdered man's) death. No doubt, in *Vallikannu* (supra), the Supreme Court did indicate that the line of the murderer cannot claim any beneficial interest in the intestate's property. However, this Court is of the opinion that such decision is inapplicable, to reject the suit claim. First, facially, Section 27 deems that the murderer died before the intestate's death. However, the fiction is not carried further; this would imply that if such "deemed" or civil death were to be

given effect to, the heirs of such person, if entitled to any part of the estate, in their independent right, under Section 8 read with the appropriate entry to the schedule to the Act, are not in turn disqualified. The disqualification of only one kind of heir, i.e. the murderer, (by a fiction of his death before that of the intestate) cannot, in other words be extended to oust the rights of others who might, in the event of such death (actual or deemed) be entitled to inherit, in his stead. Second, in this case, the plaintiffs' mother has not been convicted; she is only accused of having murdered the late Sh. Marwah, her father. For these reasons, it is held that the first defendant's claim for rejection of the plaint, on the ground that it is not maintainable or barred in law, has to be rejected.

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11. The Court has, today, pronounced upon the application for rejection of the suit. Having regard to the nature of the pleadings and materials, it would be necessary to consider at this stage, since the first defendant has not filed the written statement, as to its effect, and whether the suit can be dealt with under provisions of Order VIII, Rule 10, CPC.

12. The suit allegations pertaining to ownership of the property by Sh. Marwah, are not controverted. The defendants have not filed their written statement; the second defendant's relationship as the plaintiffs' mother, and the daughter of late Sh. Marwah, and that her husband has been missing, are also not disputed. What the first defendant urges is that he sold the suit property, to someone, and ultimately it was purchased by the intervenor. It is also urged that the plaintiffs are not residing in the suit property.

13. The applicant in IA 8285/2010 claims to have purchased the suit property, from one Smt. G.D. Narang, who in turn traces title through a chain of documents, the trail allegedly leading to the first defendant. The latter's title, according to a copy of the sale deed (which is undated) was on account of the power of attorney executed by late Sh. Marwah, in favour of the second defendant, who in turn is stated to have sold it to one Gulfam Ahmed, through a Sale deed dated, 25.08.2006. No certified copy of the sale deed has been produced; the intervenor, Ms. Sonia Agarwal, also does not produce any copy or certified copy of any previous document, in support of the chain of title leading up to Sh. Marwah. Curiously, the documents nowhere reveal that the original owner, Shri. Marwah, had ever executed any registered power of attorney, empowering

the second defendant or anyone else to sell the property. What is more, in page 10 of the document (i.e. alleged copy of the sale deed) the vendor is alleged to have received a cheque, which has been described, but the date is left blank.

14. On 11.05.2009, the Court had noted that the defendants, despite service, were unrepresented; accordingly, they were set down *ex-parte*. On that day itself, the Court noted the plaintiffs contention that someone on behalf of the first defendant was present in Court, and Shri Hari, learned counsel disclosed that he was appearing on behalf of Ms. Sonia Agarwal, who, it transpired is the wife of Avnish Agarwal, the brother in law of one Deepak Chopra (who was then present in Court). The said Deepak Chopra is the brother-in-law of the first defendant.

15. In view of the nature of the documents, the plea of the intervenor, that she is entitled to a portion of the suit property, or that its possession was ever handed over to her, is not tenable. In the absence of any registered document entitling the first defendant, or even the second defendant to sell or transfer the suit property, the reliance placed on any document, even if it is assumed to be a registered one is of no avail. In the circumstances, the application for intervention, i.e. IA No. 8285/2000 has to fail, and is dismissed.

16. As noted earlier, the defendants had been set down *ex-parte*, after it was noted that the A/D card was received duly served. The first defendant filed an application (IA No. 4372/2010) explaining that he had no knowledge about the suit, and that later an attempt to amicably settle the disputes were made. It is also alleged that the first defendant became aware of the suit through his brother-in-law. Interestingly, this application was filed on 17th August, 2010, even though the said party's brother-in-law was present in Court on 11th May, 2010. The applicant also is absolutely vague as to who had been approached by him for an amicable settlement, and what were the terms, if any. He has not furnished any explanation why the application was moved beyond the period prescribed. Having regard to the totality of circumstances, particularly the office report, which led to the defendant being set down *ex-parte*, this Court is satisfied that no cause has been made to set aside the order setting down the first defendant *ex-parte*. IA 4372/2009 is, therefore, dismissed.

17. The plaintiffs, besides averments made in the suit, have also filed the affidavit evidence of the first plaintiff, which mentions about lodging of a first information report about the murder

of their maternal grandfather Sh. Marwah, on 08.02.2009; a copy of the same has been exhibited as Ex. PW-1/1. The evidence also states that Shri Marwah was owner of the suit property, and its having been allotted to him on 06.09.1984, the execution of a Conveyance Deed, on 04.05.2000 (Ex. PW-1/2) disappearance of the plaintiffs' father, Sunil Sharma, in 2004, arrest of the second defendant, on 07.2.2009 in connection with her father's murder, attempt by Gulfam to grab the property, along with their mother, the second defendant, alleged collusion with the first defendant in the attempt to grab the suit property, etc. It is also apparent that the second defendant was remanded, and is facing trial. In Para 25 the first plaintiff deposes about the first defendant's attempt to take advantage of her young age, and his "goondas" or anti social elements, threatening to dispossess them from the suit property. The affidavit also mentions about an incident when one Veena Chopra along with others, entered the property, and thrashed the plaintiffs, leading to the lodging of another first information report, i.e. FIR 107/2009. The deponent submits that she and her brother have virtually nothing to look after themselves, and are not being taken care of, by her paternal grandparents, in view of the allegations of murder leveled against their mother, the first defendant.

18. There can be no dispute that the plaintiffs' mother, the second defendant, was the legal heir of Mr. Marwah; she stands accused of his murder. She is also in detention. The first defendant claims to have acquired rights to transfer the suit property, and that in the course of one such transaction, Ms. Sonia Agarwal allegedly purchased it. However, he has not supported his contention, with any document, or shown how, in the absence of any registered document, he could have conveyed title to the property, as is alleged by him. As regards the contention that the plaintiffs should not be granted any injunctive relief is concerned, the averments in the suit are clearly to the effect that the plaintiffs were in possession, of the suit property and that it was threatened at the behest of the first defendant. The first defendant's application under Order IX Rule 7 has been rejected.

19. The Court cannot be oblivious to the plaintiffs' plight; the second plaintiff is a minor; the first plaintiff, though a major, is barely out of her teens. The second defendant, their mother is accused of having murdered her father. The first defendant's *locus* over the plaintiffs' property, is not only unclear, but in fact not established at all. The copy of lease deed filed by him along-with the application for rejection of the suit is (to establish that the plaintiffs' mother HAD taken

premises on rent) uncertified; neither has he ever produced the original of the same. In reply to the first defendant's application under Order XXII Rule 6, CPC, the plaintiffs have placed copy of FIR no. 153/2009 dated 06.11.2009 where the first defendant is charged under Sec. 3 of MCOCA, 1999. Besides, the following are also a matter of the record:

(1) As per order dated 11.05.2009, it is clear that Sonia Agarwal is related to first defendant and that there is nexus between the two.

(2) The Sale deed placed on record by Sonia Agarwal in respect of the suit property is uncertified and original was not produced.

20. The plaintiffs have filed their affidavit in evidence and exhibited the conveyance deed, of 2000 inuring in favour of the late Shri Marwah. The plaintiffs have said in the suit, as well as their evidence that the first defendant, as well as others have threatened to dispossess them (the plaintiffs) from the suit property, which could be thwarted due to intervention of neighbours. The Court is also of the opinion that the first defendant has not established or made a reasonable averment in respect of his entitlement to sell or transfer the suit property, through a valid or enforceable document, such as registered power of attorney. Besides relying on the copy of a lease deed (which is unregistered) the first defendant has nowhere established that they are in possession. There is no objective material on record to suggest that they came upon possession, of the suit property, lawfully. In any event, if his contention about having transferred the property to someone, is assumed to be correct, he has, in such event, no interest left in the property.

21. The documentary material placed by the first defendant, such as the copy of the lease deed, said to have been entered into, by the plaintiff's mother and more importantly, the copy of the Sale Deed through which Ms. Sonia Agarwal, the intervenor (who is a relative of the first defendant) says she acquired title, do not inspire any confidence, and in fact raise suspicions about foul play. The chain of documents, establishing title, through previous sale deeds, has not been filed; what is filed is an uncertified photocopy. As noticed earlier, the said photocopy of a registered document contains blank spaces. The transactions to which the first defendant has been a party are subject to criminal investigation; a first information report has been lodged against him. These put together, in the Court's views, fortify the plaintiff's apprehension about the likelihood of their dispossession.

22. On an overall conspectus of the circumstances, it is evident that the plaintiffs are of tender age; the second plaintiff is barely ten years. They have lost their father; it is not known whether he is alive. Their mother, the second defendant is accused of murder of her own father, who was the owner of the suit property. She was arrested; ever since, the plaintiffs have found it hard to live in peace, in the suit property. Though the first defendant contests the suit, he did not file the written statement; he was set down *ex-parte*. His application for recall of the order, has not been accepted. Though he disputes that the plaintiffs were in possession, the suit averments state at more than one place that the plaintiffs' possession was sought to be threatened by the defendants, or their henchmen.

23. The plaintiffs' right to the suit property has undoubtedly not been yet settled, since who are or is Shri Marwah's true heir or heirs is yet to be established. At this stage, whether and if so to what effect Sections 25 and 27 of the Hindu Succession Act would apply, is uncertain, to say the least. One thing is certain, and that is if the Court does not extend its protective arm to the plaintiffs, they would be prey to nefarious interests such as land grabbers, which their grandfather wished to avoid. Also, having regard to the fact that the second plaintiff is of tender age, being a minor, and the first plaintiff, has no apparent means of looking after herself, it would be the duty of the Court having regard to the equities of the case, to make appropriate orders.

24. Now as to the plaintiffs' right to secure a decree for perpetual injunction, Section 38 of the Specific Relief Act, 1963 prescribes that where a person apprehends the breach of his legal entitlement, or foresees injury to it, he can approach the Court for such relief. As between a person in possession, who seeks such relief against another, who is not in possession, the Supreme Court ruled, in *Nair Service Society Ltd. v. Rev. Father K. C. Alexander*, AIR 1968 SC 1165 that:

"It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner..."

This was affirmed and followed in several subsequent judgments. Here, as between the plaintiffs, and the first defendant, the plaintiffs' right to possession stands on an unimpeachable footing. Therefore, having regard to the likelihood of harm, the claim for perpetual injunction has to succeed. However, as between the plaintiffs and their mother, i.e. the second defendant, the considerations could be different; the Court is unsure whether the said defendant has, as yet any

adversarial interest. However, having regard to the circumstances whereby she is accused of a heinous crime, the equities have to be suitably balanced.

Having regard to the overall circumstances the claim against the second defendant mother also succeeds, subject to a condition that the question of title as between her and the plaintiffs is kept open, and in the event she brings an action to assert it, or claim possession, the plaintiffs cannot claim that the present judgment is *res judicata*, or that such suit is hit by Order II, Rule 2, CPC.

25. The factual elements in this case, which include the materials on record and the allegations contained in the First Information Reports (FIRs) provide a startling enough picture. The Court's anxiety, however, is to ensure that the obvious cry for justice which the plaintiffs are approaching it with, is not limited to the reliefs it is granting. The malady which has visited and is threatening them would continue to haunt and spell insecurity for times to come. The Court in such circumstances should not consider itself helpless and bound by the reliefs which have been sought but attempt to transcend them in order to redress the injustice which stares it at the face. This Court is not unmindful of the fact that the State has over the years enacted several benevolent statutes such as *The Legal Services Authorities Act, 1987*; *Hindu Minority and Guardianship Act, 1956*. *The Guardian and Wards Act, 1890*; *The National Commission for Women Act, 1990*; *The National Commission for Protection of Child Rights (NCPCR) Act, 2005*, which have created various authorities and agencies and entrusted them with diverse duties and powers. It would be the endeavor of this Court to ensure that the safety, security and well-being of the plaintiffs, particularly the minor plaintiff, is protected, and ensured in the times to come.

26. Dealing with the obligations of states, the Supreme Court, in the decision reported as *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480, observed that:

"Parens patriae jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term parens patriae differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability. Conceptually, the parens patriae theory is the obligation of the State to protect and takes into custody the rights and the privileges of its citizens for discharging its obligations. Our Constitution makes it

imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and where the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the rights of the citizens. The Preamble to the Constitution, read with the Directive Principles, Articles 38, 39 and 39-A enjoin the State to take up these responsibilities. It is the protective measure to which the social welfare state is committed.”

Guruvayur Devaswom Managing Committee & Anr v. C. K. Rajan, AIR 2004 SC 561 saw the Court clarifying that the *parens patriae* principle extended to the Courts, in the discharge of their obligations to public charities and trusts. The provisions of the Guardians and Wards Act, and the *Hindu Minority and Guardianship Act, 1956* underpin the role of Courts, in ensuring minors’ welfare, in relation to diverse aspects, including securing their property rights. Even under normal circumstances, if a minor holds or inherits property, any proposal for its transfer, or encumbrance has to receive the seal of approval by the competent Court. Therefore, it is recognized in India that the welfare of minors and those laboring under disabilities of any kind, is of paramount importance. This Court too is alive to that responsibility, and proposes to make appropriate orders, to secure the ends of justice. Accordingly, the Delhi Legal Services Authority is directed to get in touch with the plaintiffs, and having regard to their views, approach the suitable executive or statutory agencies to ensure their continued protection and safety. It is open to the DLSA, to seek the assistance of the National Commission for Women, the National or State Commission for Children, or any other agency, including police authorities. In such event the agency concerned shall render all assistance as it is empowered to extend, to achieve the desired purpose.

27. The suit is, accordingly decreed; a decree for perpetual injunction restraining the defendants from interfering or threatening to interfere with the plaintiffs’ possession of the suit property, is issued, subject to the reservation expressed (only in respect of the second defendant’s future claims, if any, if asserted in accordance with law) in Para 24. A direction is also issued to the Delhi Legal Services Authority, in terms of Para 26 above, with a further order to file a status report, indicating the action taken, within three months. The matter shall be listed thereafter, on 28th October, 2010.

28. A decree in the above terms shall be drawn. In the circumstances, the first defendant shall bear the costs; and, pay additional costs of ₹ 50,000/- to the plaintiffs, within four weeks.

(S.RAVINDRA BHAT)
JUDGE

JULY 28, 2010