

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

% DATE OF RESERVE: January 07, 2010

DATE OF DECISION: January 21, 2010

+ **RFA 441/2009 and CM No.16818/2009 (stay)**

MOHAN SINGH Appellant
Through: Mr. J.P. Sengh, Sr. Advocate with
Mr. Aniz Ur Rehman and
Mr. Sumeet Batra, Advocates

versus

UDAI PAL & ORS Respondents
Through: Mr. S.L. Chaudhary, Advocate for
the respondent No.1.
Respondent No.7, Smt. Kailash,
Respondent No.8, Smt. Sheela,
Respondent No.9, Smt. Daropati
and Respondent No.10,
Smt. Ganga Devi in person.

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

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?

: REVA KHETRAPAL, J.

1. This appeal has been preferred against the order dated 16.12.2008 passed by the Additional District Judge, Delhi in a suit for partition and

permanent injunction bearing Suit No.503/2008 titled **Shri Udai Pal vs. Shri Mohan Singh and Ors.** as well as against the order dated 06.10.2009 dismissing the review application filed by the appellant under Order 47 Rule 1 read with Section 114 CPC for review of the order dated 16.12.2008.

2. This appeal was admitted on 7th January, 2010 and with the consent of the parties taken up for final hearing.

3. The facts leading to the filing of the appeal are that the respondent No.1 herein had filed a suit for partition and permanent injunction in respect of a property bearing No.96, Hauz Rani, Malviya Nagar, New Delhi against the appellant and other legal heirs of one Shri Ram Chander. The respondent No.1 alleged in the plaint that the suit property was ancestral property and Shri Ram Chander (who was the father of the appellant and the respondents No.1 and 2, and the husband of the respondent No.3) was the owner of the suit property. Shri Ram Chander died on 30th December, 2000 intestate and left behind five sons who were entitled to equal shares in the said property, all being the legal heirs of late Shri Ram Chander. It was further alleged in the plaint that all the legal heirs of late Shri Ram Chander in the year 2004-05 had decided to give the suit property to the appellant Shri Mohan Singh and

Shri Uttam Kumar (the respondent No.6 herein), who would be the owners of the suit property in equal shares. It was also alleged that the appellant and the aforesaid Shri Uttam Kumar were put in exclusive possession of the suit property, but the appellant started demolishing the pillars of the building to construct a new building. This led to the filing of the suit alleging that the appellant had no right, title or interest in the suit property and had only 1/9th share in the suit property and thus could not raise construction thereon.

4. Summons of the suit were served upon the appellant and the respondents No.2 to 10. On 11.02.2008 the learned trial court granted time to the parties, who were present in person for filing their written statements and adjourned the case for 04.03.2008. On the said date, i.e. on 04.03.2008, the respondents No.7 to 10 (the defendants No.5 to 8 in the suit) made statements on oath in the Court that they had no relation with the suit property nor they claimed any share therein and further that they would not be filing any written statement. The defendants No.1 to 4 were accordingly ordered to file their respective written statements as also reply to the injunction application within two weeks, with an advance copy to the learned counsel for the plaintiff/respondent No.1. The case was thereafter ordered to be listed on 23rd April, 2008, on

which date it was again adjourned to 22nd May, 2008 on account of the transfer of the Presiding Officer on the said date. On the following two dates, i.e. on 22nd May, 2008 and again on 22nd July, 2008, the transferee Court was on leave and the case was accordingly ordered to be listed on 22.08.2008, on which date the following order was passed:-

“22.08.2008

Fresh case received on transfer. Be checked and registered.

sd/-

ADJ

Pr: Counsel for plaintiff.

Counsel for D1. WS with docs. filed on behalf of D1. Copies supplied.

None for D2 – D8.

As per orders dated 4.3.08, D5 – D8 are not filing WS. D2 – 4 have not filed WS even today. 15 days' further time is granted to them from today to file their WS after serving advance copies on the Ptf through counsel.

To come up for replication and issues on 20-10-08. Args on the pending application u/o 39 r 1 & 2 CPC will also be heard on that day.

sd/-

ADJ

22-8-08”

5. Thereafter, the case was posted on 20.10.2008 on which date replication was filed by the plaintiff/respondent No.1 to the written statement filed by the appellant. Apparently, on the same day, i.e. on 20.10.2008, an application under Order VIII Rule 1 read with Section 151 CPC was filed by the plaintiff/respondent No.1 with the prayer that

the written statement of the defendant No.1 be taken off the record and the defence of the defendant No.1 be closed as the defendant No.1 had not filed the written statement within 90 days of the service of summons. A reply to the said application was filed by the appellant, the relevant part of which reads as under:-

“1. That the plaintiff handed over the papers late and therefore reply could not be filed. It is not the intentional act of the defendant but due to the fact that the defendant was ignorant regarding the procedure.

2. That on 23.04.2008, we were to submit the W.S. but the Hon'ble Court was on leave and case was transferred to another court, hence the W.S. could not be submitted. On subsequent dates also i.e. 22.5.2008 and 22.07.2008 the Hon'ble Court was on leave. Therefore, there was no malafide in submission of the Written Statement.

3. That Para 3 of the application is matter of record.

4. That the contents of para 4 of the application are wrong and denied. It is submitted that due to transfer of case to another court and Presiding Officer being on leave, the Written Statement could not be submitted. There was no malafide intention to delay in filing of the Written Statement.”

6. On 16.12.2008, the impugned order was passed, which reads as follows:-

“Present: Counsel for parties.

An application U/O 8 Rule 1 CPC has been moved by the Plaintiff against the Defendant that he failed to file WS within three (sic. thirty) days

from the service of the summons and has filed the WS on 22.8.2008. It is submitted by the Plaintiff that the Defence of Defendant no.1 is to be struck off.

Reply to the application has been filed by the Defendant who submitted that the Written Statement was to be filed on 23.4.2008, the Court was on leave and the case was transferred to another court, hence the WS could not be filed. Even on subsequent dates i.e. 22.5.2008 and 22.7.2008, Hon'ble Court was on leave. It is further submitted that due to transfer of case to another court and Presiding Officer being on leave, the WS could not be filed.

Heard. No cogent reason has been given by the Defendant for not filing the WS. There is no merit in the submission made by the Defendant. The application of the Plaintiff U/O 8 Rule 1 is allowed. The Defence of Defendant No.1 is struck off and following issues are framed:

- 1. Whether the plaintiff has come to the Court with clean hands? OPP*
- 2. Whether the Suit is bad of mis-joinder of the parties? OPD*
- 3. Whether the Plaintiff is entitled to a decree for partition of one-ninth share of property in 96, Hauz Rani, Malviya Nagar, New Delhi? OPP*
- 4. Whether the Plaintiff is entitled to a decree of permanent injunction restraining Defendant No.1 Sh. Mohan Singh from raising pillars and new construction on property No.96, Hauz Rani, Malviya Nagar, New Delhi? OPP*
- 5. Any other relief.*

No other issue arises nor is pressed. List of witnesses be filed within 15 days with advance copy. Case is now fixed for plaintiff evidence on 20.03.2009. Affidavit be filed within a week with advance copy.”

7. Aggrieved by the aforesaid order, the appellant preferred an application under Order 47 Rule 1 read with Section 114 CPC for review thereof. The respondent No.1 filed reply to the said application, to which rejoinder was filed by the appellant, explaining certain relevant facts which were not pleaded by the previous counsel of the appellant. The learned trial court after considering the review application passed the impugned judgment dated 06.10.2009 holding that there was no merit in the application for review of the order dated 16.12.2008 and the same was accordingly dismissed. On the same day, i.e. on 06.10.2009, the learned trial court proceeded to pass the following order:-

“06.10.2009

Present: Counsel for the parties.

Vide my separate order of even date I dispose of the application U/o 47 Rule 1 r/w Section 114 and 151 CPC filed on behalf of the defendant is dismissed.

Plaintiff has filed an suit for Partition and Permanent Injunction, wherein plaintiff has prayed for a decree for partition of 1/9th share of the Property No.96, Hauz Rani, Malviya Nagar, New Delhi against the defendants and also for a decree for permanent injunction restraining the defendant No.1 Shri Mohan Singh from raising pillars and new construction on property No.96, Hauz Rani, Malviya Nagar, New Delhi.

The defence of the defendant has already been stuck off vide order dated 16.12.2008.

At this stage ,the preliminary decree in favour of the plaintiff for 1/9th share of the

Property No.96, Hauz Rani, Malviya Nagar, New Delhi is being passed. Decree be prepared.

Shri Girish Gaur, Advocate office at 773, Western Wingh, Tis Hazari Courts, Delhi Mobile No.9811109763 is appointed as local commissioner to visit the spot and suggest the mode of partition by metes and bounds. The local commissioner shall complete the proceedings within 10 days from the date of order. The local commissioner shall be paid Rs.8,000/- by the plaintiff and copy of the order be given dasti to all concerned. Now to come up on 23.11.09 for report.”

8. The present appeal is directed against the aforesaid judgment and preliminary decree dated 06.10.2009. It is submitted by Mr. J.P. Sengh, the learned senior counsel appearing on behalf of the appellant that the learned trial court failed to appreciate that the provisions of Order VIII Rule 1 CPC are directory and not mandatory, and further that the said provisions are to be construed in a manner so as to advance the cause of justice and not to defeat the same. The learned trial court also failed to apply the law settled by the judicial pronouncements of this Court and the Supreme Court and instead has allowed itself to be guided by extraneous considerations. The learned senior counsel for the appellant invited the attention of this Court to the fact that the written statement had been prepared, signed, verified and attested on 23.04.2008 itself and that along with the vakalatnama and the entire set of documents had

been handed over to the counsel for filing the same on the date fixed, i.e. on 23.04.2008. However, on 23.04.2008, the same could not be filed as the Presiding Officer was transferred and the matter was adjourned to come up on 22nd May, 2008 for proper orders, i.e., for directions, by the Ahlmad of the Court. On the adjourned date, i.e. on 22nd May, 2008, the Presiding Officer of the transferee court to which the matter had been transferred was on leave, and accordingly the matter was again put up for directions on 22.07.2008. On 22.07.2008, yet again the Presiding Officer was on leave and the matter was directed to be listed on 22nd August, 2008, on which date written statement with the documents was filed on behalf of the defendant No.1.

9. Mr. S.L. Chaudhary, the learned counsel for the respondent No.1, contested the appeal. Interestingly, however, none of the aforesaid facts relied upon by the appellant were disputed by the learned counsel for the respondent, as indeed they could not have been, being part of the record. All that was submitted by the learned counsel for the respondent No.1 was that there was no cogent reason given by the appellant for non-filing of the written statement on 23.04.2008, and the defence of the appellant having been struck off vide order dated 16.12.2008, the preliminary decree in favour of the respondent No.1 was not liable to be

challenged. He also submitted that no application had been filed by the appellant for extension of time for filing written statement.

10. Having heard the learned counsel for the parties, this Court on consideration of the entire facts is of the view that the contentions of the learned counsel for the respondent No.1 are wholly untenable and, in particular, the contention which found favour with the trial court that since the appellant did not apply for extension of time for submission of his written statement beyond the stipulated period of 30 days, the written statement could not be taken on record, and the further contention which resulted in the finding that the period of 30 days “can be enlarged for reasons to be recorded in writing, but not beyond 90 days from the date of service”. The learned trial court failed to notice that the appellant could not be made to suffer for no fault of his. The written statement of the appellant was admittedly prepared, signed, verified and ready for filing on 23rd April, 2008, on which date it could not be filed as the Presiding Officer had been transferred and the matter had yet to be assigned to another Court. The Ahlmad of the Court accordingly fixed the matter for 22nd May, 2008 for directions before the transferee court. On 22nd May, 2008, the transferee court was on leave and as such the matter was adjourned to 22.07.2008. On 22/07/2008,

again the transferee court was on leave and as per directions, the matter was put up on 22nd August, 2008. On 22nd August, 2008, it was recorded by the transferee court that a fresh case had been received which had been checked and registered, and that written statement with documents had been filed on behalf of the defendant No.1. Significantly, at this juncture, no objection was raised by the respondent No.1 to the filing of the written statement, quite obviously for the reason that no such objection could have been raised since there was no Presiding Officer in the concerned Court between 23rd April, 2008 till 22nd August, 2008. Accordingly the written statement of the defendant No.1 was taken on the record with the direction to the plaintiff to file replication on 20th October, 2008. In such a scenario, to my mind, it would have been absurd for the appellant to seek extension of time for filing written statement which was ready with him on 23rd April, 2008 or for the trial Judge to pass an order recording reasons for enlarging the time for filing written statement, when the record itself showed that the matter was not put up before any Presiding Officer between 23rd April, 2008 and 22nd August, 2008. Evidently, as an after thought and that too subsequent to the filing of the replication, the respondent No.1 chose to file an application under Order VIII Rule 1 CPC for closing the defence

of the defendant No.1.

11. Apart from the fact that there was no objection raised by the respondent No.1 to the filing of the written statement by the defendant No.1 on 22nd August, 2008 and the respondent No.1 proceeded to file replication thereto, it cannot be lost sight of that in the meanwhile, i.e., subsequent to the filing of the replication on 20.10.2008 and prior to the striking off of the defence of the appellant, the application of the respondent No.1 under Order XXXIX Rules 1 and 2 CPC for temporary injunction was dismissed on 21.10.2008 relying on the averments made in the written statement of the defendant No.1. The said order, being apposite, is reproduced hereunder:-

“This order will dispose of the application under Order 39 Rule 1 and 2 CPC read with Section 151 CPC filed by the plaintiff Shri Udai Pal against the defendant Shri Mohan Singh and Others.

The plaintiff has filed the present suit for partition and permanent injunction on the facts that late Shri Ram Chander was the owner of the property bearing no.96, Hauz Rani, Malviya Nagar, New Delhi and the same is ancestral property. Shri Ram Chander died on 30.12.2000 intestate and left behind 5 sons who are entitled to equal share being the Legal heirs. It is submitted by the plaintiff that in the year 2004-2005 all the legal heirs decided amicably and peacefully to give the property to Shri Mohan Singh defendant no.1 and Shri Uttam Kumar who would be the owner of the property in equal share and now Mohan Singh and Uttam Kumar are in exclusive

possession of the property but Mohan Singh defendant no.1 had started demolishing pillars to construct a new building. It is further submitted that Shri Mohan Singh has no right title interest in the property and has only 1/9th share in property and can raise construction only his share. It is further submitted that the defendant Mohan Singh was requested not to demolish the property in question or raise any new construction.

Shri Mohan Singh filed the written statement and submitted that after the death of Shri Ram Chander i.e. father of the plaintiff, the property was sold to one Shri Ajay Pal Singh vide agreement dated 23.12.03 and another agreement to sell was executed by Shri Ajay Pal Singh in favour of Shri Mohan Singh who has now become the full and absolute owner of the property in dispute.

In background of the facts narrated above, plaintiff has submitted that he has a prima-facie case in his favour. The balance of convenience is also in his favour and he would suffer irreparable injury if temporary injunction is not granted.

Law of injunction is well settled that granting or refusing temporary injunction is governed by three well established principles (a) whether prima facie case has been made out (b) whether balance of convenience is in their favour (c) whether petitioner will suffer irreparable injury if the temporary injunction is not granted.

The prima-facie does not mean a case to succeed but which fairly needs enquiry.

In the present case, documents have been placed on record to show that the property was sold off by all brothers to Ajai Pal Singh an outsider. Mohan Singh one of the sons of deceased Ram Chander purchased the property at a later stage from Ajai Pal Singh in the open market.

Once having sold the property, Udai Pal

Singh has no right to raise any objection. He has no right whatsoever in property and thus failed to show that if injunction is not granted in his favour his right would be violated or he would suffer any loss.

In view of the above, the application U/O 39 Rule 1 & 2 for temporary injunction must fail and the same is accordingly dismissed.”

12. Having dismissed the application under Order XXXIX Rules 1 and 2 CPC filed by the respondent No.1 on 21st October, 2008 on the basis of the averments made in the written statement of the appellant, the learned trial court on 16.12.2008 proceeded to strike off the defence of the appellant for non-filing of the written statement and at the same time to frame the issues. Thus, on the one hand, the application of the respondent No.1 under Order XXXIX Rules 1 and 2 CPC seeking interim relief was dismissed by the Court relying on the averments made in the written statement and the documents filed by the appellant and, on the other hand, the defence of the appellant was struck off for not filing the written statement in time. Simultaneously, on the same day, issues were framed by the learned trial court with the direction for filing list of witnesses and affidavits and the case fixed for the plaintiff's evidence on 20th March, 2009, but instead of recording the evidence of the plaintiff/respondent No.1 (who was to prove his case in accordance with law, more so, as the application for injunction was dismissed by the trial

court on the ground that the respondent No.1 had no right, title or interest in the suit property), the learned trial court proceeded to pass a preliminary decree without recording evidence in the case and merely by recording that the defence of the appellant had been struck off. Thus, the preliminary decree was passed on the review application filed by the appellant/defendant No.1. This is extremely strange to say the least, more so, as the previous order dated 16.12.2008 reflects that after the striking off of the defence of the appellant, the Court had framed issues and set down the case for evidence. Subsequently, merely because the appellant filed a review application, the learned trial court while dismissing the same proceeded to pass a preliminary decree on the same day and that too without recording of evidence. In the instant case, the provisions Order VIII Rule 1 & 10 of the Code have been applied by the trial Court in a hypertechnical manner, without at all taking note of the prevalent circumstances, which were apparent from the record itself. In doing so, justice has been sacrificed at the altar of speedy disposal. The appellant has been punished for no fault of his and made to bear the additional expenditure of approaching this Court, quite apart from the inconvenience suffered by him. The maxim 'Actus Curiae Neminem Gravabit' – an act of the Court shall prejudice no one (assuming an act

to include omission) fully applies in the instant case as it was the absence of the Court which was the real cause of delay in filing the written statement by the appellant.

13. In view of the aforesaid , in my view, the orders of the learned trial court dated 16.12.2008 and 06.10.2009 striking off the defence of the appellant and decreeing the suit are wholly unsustainable and are accordingly set aside. The matter is remanded to the learned trial court with the direction to record the evidence of both the parties and to decide the case on its merits. Since the issues were framed after striking off the defence of the appellant, it shall be open to the appellant to pray for framing of any additional issues, if deemed necessary.

RFA 441/2009 and CM No.16818/2009 stand disposed of accordingly.

REVA KHETRAPAL, J

JANUARY 21, 2010
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